SECTION 4.
MONELL DOCTRINE
& ITS PROGENY

Presented By MCLE Sponsor:

DNRBS Z

Denton Navarro Rodriguez Bernal Santee & Zech, P.C.

attorneys & counselors at law • rampagelaw.com

- ✓This Section is academic. It provides and overview and summary of key caselaw developments pertaining to the Section 1983 claims against local government entities.
- ✓Will cover baseline governing principles
- ✓Application will be addressed in nuts and bolts portions of the presentation

OVERVIEW AND SUMMARY OF KEY CASELAW DEVELOPMENTS

- ✓Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42. U.S.C. §1983 [17 Stat. 13][KKK Act of 1871 Sec. 1]

- ✓ Police action involving 13 Chicago police officers who ransacked home while investigating crime.
- ✓ Addresses the KKK Act of 1871 as applied to police officers in an official capacity.
- ✓ Incorporated the reach of the 4th Amendment to States via the Due Process Clause of the 14th Amendment
- ✓ Individual acting under “color of law” may be sued in a Section 1983 action
- ✓ However, a municipality is not a “person” under Section 1983. There was a concern about the reach of the constitutional authority to a municipality.

MONROE V PAPE
365 U.S. 167 (1961)

- ✓ Prosecuting attorney sued to close down a bookstore as a public nuisance as per Florida law. State court granted preliminary relief. Store owner sued in federal court alleging 1st and 14th Amendment violations. U.S. District court enjoined state court proceedings.
- ✓ Issue had been raised in Younger v Harris, 401 U.S. 230 (abstention doctrine), but not been specifically addressed.
- ✓ A Section 1983 federal injunction action to redress the deprivation under color of law constitutional rights is within the "expressly authorized" exception of the federal anti-injunction statute, codified at 28 U.S.C. §2283.
- ✓ Significance, authority of federal court to exercise equitable jurisdiction to enforce a Section 1983 based claim.

MITCHUM V. FOSTER, 407 U.S. 225 (1972)

- ✓Female employees of CONY sued challenging practice requiring pregnant employees to take unpaid leaves of absence before leaves otherwise required for medical reasons.
- ✓ Local governing bodies are “persons” for purposes of Section 1983 liability.
- ✓ Overruled contrary ruling in Monroe v Pape.
- ✓ Customs and practices of local government that cause constitutional deprivations are actionable, even if no formal approval has been given to the action or practice.
- ✓ The holding does not include tortious actions, nor does it include vicarious liability.

MONELL V CITY OF NEW YORK, 436 U.S. 65 (1978)

- ✓ Factual Background: Termination of Chief of Police by City Council
- ✓ Claim: Violation of procedural due process rights.
- ✓ Holding: A municipality has no immunity from liability under Section 1983 for constitutional violations and good faith of individual official is not a valid defense against such a claim.

OWEN V INDEPENDENCE, 445 U.S. 622 (1980)

- ✓Factual Background: Cancellation of a license to present a musical concert – presumably a property interest.
- ✓P’s sued individuals and the city for damages and punitive damages. Without defense objection, DC submitted issues to the jury, which awarded both compensatory damages and punitive damages against defendants, including city.
- ✓•Holding: SCOTUS did not let the waiver issue under FRCP 51 get in its way. Finding that contours of municipal liability under Section 1983 are currently in a state of evolving definition, the Court reached the issue.
- ✓Final holding – a municipality is immune from punitive damages under Section 1983.

NEWPORT V FACT CONCERTS, 453 U.S. 247 (1981)

- ✓ Underlying Fact. Assault by unstable and violent Memphis police officer.
- ✓ Issue: Is damages judgment against individual sued officially payable by employer city or is employee individually liable but shielded by qualified immunity.
- ✓ Elaborates on distinction between suits against individual defendants in their individual capacity vs. official capacity and allocates defenses and liabilities.
- ✓ See also *Owen v City of Independence*, 445 U.S. 622 (1980)(also addressing distinction between official capacity vs individual capacity suit). Also held that municipality is not entitled to qualified immunity based on good faith of city official actions

BRANDON V HOLT, 469 U.S. 464 (1985)

- ✓ Underlying Facts. Fatal shooting incident by police.
- ✓ Issue: Adequacy of training of police..
- ✓ Address whether a single instance of unconstitutional activity by an actor qualifies as a policy of the entity.
- ✓ A single instance of an unconstitutional action involving training is insufficient to satisfy the pattern, policy, custom requirement to impose Monell liability on the city.

OKLAHOMA CITY V TUTLE, 471 U.S. 808 (1985)

- ✓ Arrest based on warrantless search by state police seeking a murder suspect.
- ✓ Issue presented is allowability of fee award against local government entity. Discussion of distinction between personal capacity and official capacity claims.
- ✓ Holding: Section 1988 attorney fee awards against municipality not allowable in suits against individual defendants in personal capacity.
- ✓ Fee awards must be directed to the losing party, and a judgment against an individual defendant is not a judgment against the local government employer.

KENTUCKY V GRAHAM 473 U.S. 159 (1985)

- ✓Police action resulting in death in response to report of robbery.
- ✓Appeal Issue: Whether a jury could infer from a single incident that a municipal policy or practice involving lack of training satisfied the standard of causation and culpability to hold the municipality liable.
- ✓Full contours of Monell liability not established by Monell. These left for another day. *Tuttle* takes a small but necessary step towards defining the Monell contours.
- ✓Holding: There must be an affirmative link between a municipal policy and the constitutional violation alleged. Here a vague submission of inadequate training was legally inadequate to sustain liability of the municipality.

OKLAHOMA CITY V TUTTLE, 471 U.S. 808 (1985)

- ✓ Injuries sustained by prisoners in custody. *Daniels* involved injuries received from fall caused by condition of property. Davidson involved injuries received from 3rd party.
- ✓ Legal claim was deprivation of a 14th Amendment liberty or property interest by the State for violation of duty of care owed to persons in custodial status
- ✓ Holding: Due Process is not implicated by a state official's negligent act causing unintended injury. 14th Amendment protection does not extend to negligent actions, only to abuses of power.
- ✓ Court walked by holding in *Parrott v Taylor*, 451 U.S. 527 (1981) stating the negligent action resulting in Due Process violations can be actionable.

DANIELS V WILLIAMS, 474 U.S. 327 (1986) & DAVIDSON V CANNON, 474 U.S. 344 (1986)

- ✓Factual Background: Issuance of grand jury capias for third party witnesses. Assistant prosecutor instructed deputies to enter premises and get the witnesses.
- ✓Issue: Can local government be liable for a single decision by policy makers under appropriate circumstances as per *Monell*
- ✓Holding: Local governments can be triggered by a single decision by a policymaker under appropriate circumstances.

PEMBAUER V CINCINNATI, 475 U.S. 469 (1986)

- ✓Factual Background: Civil service employee who prevailed on an appeal from a temporary suspension and who was later transferred and fired sued for violation of a First Amendment right.
- ✓Issue: Can municipality be held liable under Section 1983 for an adverse personnel decision by supervisory personnel.
- ✓Holding: An adverse personnel decision that violates constitutional rights can state a claim if an official with “final policymaking authority” acting for the entity takes the action.
- ✓The issue of who has final policymaking authority looks to state law for an answer.

CITY OF ST. LOUIS V PRAPROTNICK, 485 U.S. 112 (1988)*

- ✓ Factual Background: Detainee alleged violation of constitutional right to receive necessary medical attention while in custody.
- ✓ Holding: Inadequacy of training of law enforcement personnel may serve as grounds to Section 1983 liability where failure to train evidence supports deliberate indifference to rights of inhabitants and underlying unconstitutional actions forms a custom or policy of the local government entity.
- ✓ Case remanded for application of appropriate legal standard to the proofs.

CITY OF CANTON V HARRIS, 489 U.S. 378 (1989)

- ✓ Factual Background: Reassigned athletic director sued for discrimination and due process violation
- ✓ Holding: Local government may be responsible for constitutional torts that are the product of a long-standing custom, policy or procedure. This includes affirmative actions as well as omissions.
- ✓ Discussion of who constitutes a final policy maker

JETT V DALLAS ISD, 491 U.S. 701 (1989)

- ✓ Factual Background: Excessive force / false arrest case brought against county sheriff, reserve deputy, and employer county.
- ✓ Appeal Issue: Adverse jury verdict against county based on hiring decision made by county sheriff, who hired a questionable employee.
- ✓ Holding: Judgment based on adverse jury verdict overturned based on failure of evidence supporting causation between hiring decision of sheriff and civil rights violation of reserve deputy.
- ✓ Note reference in dissent to issue of whether sheriff knew the record of his nephew's violent propensity but hired him anyway. See 520 U.S. at 419 (deliberate indifference to known propensity of deputy to commit acts of violence.

BRYAN COUNTY, OKLAHOMA V BROWN, 520 U.S. 397 (1997)

- ✓Factual Background: Suit by parents exonerated of child abuse against state and county officials.
- ✓Claim sought legal and equitable relief for failure to a procedural mechanism to contest unjust charges.
- ✓Held: County is liable only for its own an affirmative policy or custom that caused constitutional deprivation. Also, Monell requirements applied to both equitable as well as legal relief for damages.

LA COUNTY V HUMPHRIES, 562 U.S. 29 (2010)

- ✓ Appeal Issue: Failure to train prosecutors regarding the constitutional duty to disclose exonerating evidence.
- ✓ Holding: Prior unrelated Brady violation by ADA's was insufficient to put district attorney on notice of need for further training and need for training was not so obvious that DA's office could be liable on a failure to train theory. No evidence of deliberate indifference by district attorney.
- ✓ Comment. Willingness of SCOTUS to set aside jury verdicts based on assessment that "causation" component was too attenuated

CONNICK V THOMPSON, 563 U.S. 51 (2011) (2)

- ✓Appeal Issues: Bivens Action; Collateral Order and Pleading Sufficiency
- ✓Discusses pleading requirements to plead a Monell claim.
- Discussion of pleading rules. To survive Rule 12 dismissal, a compliant must contain sufficient factual matter, accepted as true, to state a claim to relief plausible on its face. 566 U.S. at 678.

ASHCROFT V IQBAL, 556 U.S. 662 (2009)

- ✓ *Bonilla v Orange County, Texas*, 982 F.3d 298 (5th Cir. 12-2020)(jail detainee; outlining unconstitutional conditions of confinement and addressing various claims)
- ✓ *Robinson v. Hunt County, Texas*, 921 F.3d 440 (C.A.5 (Tex.), 2019) citing *Piotrowski v City of Houston*, 237 F.3d 567 (5th Cir. 2001)(reciting pleading and proof elements of municipal liability)
- ✓ *Saenz v. City of El Paso*, 637 Fed.Appx. 828 (C.A.5 (Tex.),2016) (failure to train claim is actionable; however, pleading standard requires that allegations of failures to train must raise the right to relief [against the entity] beyond a speculative level).

RECENT FIFTH CIRCUIT APPLICATIONS (1)

- ✓ *Trammell v. Fruge*, 868 F.3d 332 (C.A.5 (Tex.), 2017) (plaintiff "… fails to identify any specific inadequacies in [the city's] training materials or procedures which give rise to his claim")
- ✓ *Pierre v. Oginni*, 2018 WL 4220848 (S.D.Tex., 2018) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "… [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient to state a claim)
- ✓ *Speck v. Wiginton*, 606 Fed.Appx. 733 (C.A.5 (Tex.),2015) (addressing whether district court erred in dismissal of failure to train claim against the municipality.

RECENT FIFTH CIRCUIT APPLICATIONS

- ✓ Local government entities can be sued and can be liable for their own constitutional violation under 42 U.S.C. §1983
- ✓ No vicarious liability for actions of individual employees. Each party is responsible for his / her / its own actions
- ✓ Negligence is not actionable;
- ✓ Punitive damages not allowable against entity
- ✓ Failure to train claims are possible, but the underlying constitutional violation must be caused by a policy, practice, or custom attributable to the entity or which are the result of deliberate indifference by the entity.

WRAP-UP SUMMARY

END

QUESTIONS COMMENTS?

DNRBS Z
Denton Navarro Rodriguez Bernal Santee & Zech, P.C.
attorneys & counselors at law • rampagelaw.com

SECTION 5
Pleadings & Motion Practice

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DNRBS Z
Denton Navarro Rodriguez Bernal Santee & Zech, P.C.
attorneys & counselors at law • rampagelaw.com

- ✓Removability (if filed in state court)
- ✓Pre-answer pleadings
- ✓Answer
- ✓Motion Practice

TOPICS COVERED

REMOVAL (1)

- ✓ Refer to 28 U.S.C. §1441 thru §1449 – Removal of Cases. See hyperlinks in Session 2 Outline [Handouts].
- ✓ 30-day from service of first defendant served original petition or amended petition
- ✓ All served defendants must join in the removal; evaluate whether other law enforcement agencies or personnel are also named in the lawsuit
- ✓ Determine whether to file state court answer before removal (discuss FRCP 81 deadlines)

- ✓ Gathering of documents and information available and accessible to you without formal discovery process.
- ✓ Begin requesting and pulling in all documentary content related to the underlying incident;
- ✓ Begin conflicts check of named defendants; determine whether you can represent the City and the individual defendant(s). Ensure you obtain consent letter.
- ✓ Begin identifying all persons with knowledge of facts related to the underlying incident;
- ✓ After conflicts check, begin interview of defendants to be represented by you;

Prepared by R.J. Nevares | DNRB&Z, P.C.

IV. INFORMAL DISCOVERY

- ✓Be aware of attorney fee exposure if you lose a remand challenge.
- ✓Adverse ruling on remand not appealable as of right.
- ✓Evaluate filing of a Rule 12 motion after removal and include any state law claims.
- ✓Touchstone is whether federal jurisdiction has been invoked. See Handout Exhibit – Order Denying Remand

REMOVAL (2)

✓Overview of current caselaw and legal standards for pleading

1. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Bell Atlantic Corp. v Twombly*, 550 U.S. 544 (2007), the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. 550 U.S at 555 (*citing* *Papasan v. Allain*, 478 U.S. 265 (1986)).

2. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555.

3. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

PLEADING REQUIREMENTS FOR A SECTION 1983 CLAIM AGAINST A MUNICIPALITY (1)

4. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." 550 U.S. at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. 550 U.S. at 556.

5. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' 550 U.S. at 557.

6. *See also, Ashcroft v. Iqbal, 556 U.S. 662 677–78 (2009).*

✓Evaluate whether to challenge pleadings for pleading insufficiency via a Rule 12 motion

1. Use of Force Example: Fourth Amendment vs. Fourteenth Amendment

VI. PLEADING REQUIREMENTS FOR A SECTION 1983 CLAIM AGAINST A MUNICIPALITY (2)

- ✓ Rule 12 Motions- Which one to use?
- ✓ Rule 12(b) – How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading is one if required. But a part may assert the following defenses by motion: (#1-7). A Motion asserting any of these defenses (#1-7) must be made before pleading if a responsive pleading is allowed.

1. 12(b)(1) – Lack of subject matter jurisdiction

a. Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case. Fed. R. Civ. P. 12(b)(1). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera–Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir.1996). *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)

RULE 12, FRCP MOTIONS AND HEIGHTENED PLEADING REQUIREMENTS (1)

2. 12(b)(6) – Failure to state a claim upon which relief can be granted

a. To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); FED. R. CIV. P. 12(b)(6).

b. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

c. A plaintiff's complaint need not contain detailed factual allegations, but it must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555. These allegations, assuming they are true, "must be enough to raise a right to relief above the speculative level." *Id.*

VII. RULE 12, FRCP MOTIONS AND HEIGHTENED PLEADING REQUIREMENTS (2)

3. 12(c) – Motion for judgment on the pleadings. After the pleadings are closed- but early enough not to delay trial- a party may move for judgment on the pleadings.

a. Rule 12(c) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "A motion brought pursuant to Fed.R.Civ.P. 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." Hebert Abstract Co. v. Touchstone Props., Ltd., 914 F.2d 74, 76 (5th Cir.1990) (per curiam) (citing 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1367, at 509–10 (1990)).

RULE 12, FRCP MOTIONS AND HEIGHTENED PLEADING REQUIREMENTS (3)

2(e)- Motion for More Definite Statement-more definite statement for which responsive pleading is allowed, but is so vague or ambiguous, the defendant cannot prepare a response.

- ✓ Use of Evidence for Rule 12 Motions
- ✓ Risks of Using Evidence
- ✓ Practice Pointers
- ✓ Denial of Rule 12 – Must file Answer
- ✓ No Appeal if denied

RULE 12, FRCP MOTIONS AND HEIGHTENED PLEADING REQUIREMENTS (4)

Brief review Schultea Motions again for claims against individuals. *Schultea v Wood*, 47 F.3d 1427 (5th Cir. 1995).

Discuss *Spears hearing* in pro se cases. *Spears v McCotter*, 766 F.2d 179 (5th Cir. 1985).

SCHULTEA MOTIONS & SPEARS HEARINGS

Use of Exhibits Appended to Rule 12 Motions to Rebut factual assertions.

See Sligh v Conroe, 87 F.4th 290, 297 (5th Cir 2023)(citing Villarreal v Wells Fargo, 814 F3d 763, 766 (5th Cir. 2016)

"Documents attached to a MTD can be considered by the Court if they are referred to in plaintiff's complaint and are central to the claim" … "If an allegation is qualified by the contents of an exhibit attached to the pleadings, but the exhibit instead contradicts the allegation, the exhibit and not the allegation controls. … Id. At 297-298.

See also *Collins v Morgan Stanley*, 224 F.3d 496, 498-99 (5th Cir. 2000)

This apparently does not convert the Rule 12 into an MSJ. See its use in a County case.

APPENDING RULE 12 EXHIBITS TO REBUT FACTUAL ASSSERTIONS

- Admissions and Denials; discuss techniques. Turn these to your advantage to establish facts
- Use “zipper denial” to close up the pleadings
- Sample Answer:

RULE 8, FRCP ANSWERS

- ✓Timing and strategy behind filing a Rule 56 motion;
- ✓Use of Evidence in the MSJ: Depos; Videos; Affidavits; Experts
- ✓Summary judgment is appropriate if the pleadings and affidavits and discovery on file, "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Rule 56(a) FRCP; *see also, Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
- ✓"The nonmoving party's burden is no affected by the type of case; summary judgment is appropriate in any case, 'where the critical evidence is so weak or tenuous on an essential fact that is could not support a judgment in favor of the nonmovant." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)(*quoting Armstrong v. City of Dallas*, 997 F. 2d 62 (5th Cir. 1993)).

VIII. RULE 56 FRCP MOTIONS (1)

- ✓ Rule 56 mandates the entry of summary judgment against a party who fails to, in response to a motion for summary judgment, establish the existence of an essential element of that party's case. *Beard v. Banks*, 548 U.S. 521 (2006). But "[s]ummary judgment may not be thwarted by conclusional allegations, unsupported assertions, or presentation of only a scintilla of evidence." *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012) (*citing Hathaway v. Bazany*, 507 F.3d312, 319 (5th Cir. 2007))

- ✓ Because of video and audio recordings of the event, Courts are not required to accept factual allegations that are "blatantly contradicted by the record." *Tucker v. City of Shreveport,* No. 19-30247. (5th Cir. 2021) (*citing, Scott v. Harris*, 550 U.S. 372, 380 (2007)).

RULE 56 FRCP MOTIONS (2)

- ✓ Rather, the Court should “view[ ] the facts in the light depicted by the videotape.” Id. at 381. As shown in Defendant’s Motion for Summary Judgment, Plaintiffs’ alleged facts leading up to the shooting incident are “blatantly contradicted by the record.” Id.
- ✓ Although courts view evidence in the light most favorable to the nonmoving party in a typical summary judgment proceeding, they give greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene. *Valderas v. City of Lubbock*, 937 F. 3d 384, 388 (5th Cir. 2019), reissued 774 Fed. Appx. 173, 176 (citing, *Griggs v. Brewer*, 841 F.3d 308, 312 (5th Cir. 2016); *citing, Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011)).

RULE 56 FRCP MOTIONS (3)

- ✓ *Robinson v. Hunt County, Texas*, 921 F.3d 440 (5th Cir. 2019) citing Piotrowski v City of Houston, 237 F.3d 567 (5th Cir. 2001)(reciting pleading and proof elements of municipal liability)

- ✓ *Saenz v. City of El Paso*, 637 Fed.Appx. 828 (5th Cir. 2016) (failure to train claim is actionable; however, failure pleading standard requires that allegations of failures to train must raise the right to relief [against the entity] beyond a speculative level).

- ✓ *Trammell v. Fruge*, 868 F.3d 332 (5th Cir. 2017) (plaintiff "… fails to identify any specific inadequacies in [the city's] training materials or procedures which give rise to his claim")

IX. FIFTH CIRCUIT CASELAW RE PLEADINGS AND PROOF (1)

- ✓ *Pierre v. Oginni*, 2018 WL 4220848 (S.D.Tex., 2018) (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "… [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient to state a claim)

- ✓ *Hutcheson v. Dallas City, Texas*, 994 F.3d 477, 481 (5th Cir. 2021). To establish municipal liability under Section 1983, a plaintiff must show the deprivation of a federally protected right caused by an action taken pursuant to an official municipal policy. Elements: 1. Official policy or custom; 2) policy maker charged with actual or constructive knowledge; and 3) a constitutional violation who moving force is that policy or custom.

- ✓ Failure to Train: 1) city failed to train or supervise; 2) causal connection between failure to train and the alleged violation; and 3) failure to train or supervise constituted deliberate indifference to plaintiff's constitutional rights.

- ✓ Deliberate Indifference: 1) pattern of similar violations by untrained employees or 2) "single incident exception" is extremely narrow – single violation must have been highly predictable – generally reserved for cases where there is indifference to training.

IX. FIFTH CIRCUIT CASELAW PLEADINGS AND PROOF (2)

- ✓Follow a deliberate intake checklist;
- ✓Resolve conflicts in representation;
- ✓Establish an internal calendar as well as court deadline calendar;
- ✓Make strategic decision on what initial answer / response should be;
- ✓Establish both a short term plan and a long-range plan; each step should build on the previous step
- ✓Every case is different, evaluate facts and claims for what type of pleading and timing.

CONCLUSION & SUMMARY

SECTION VI
DISCOVERY PRACTICE IN SECTION 1983 DEFENSIVE CASES

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DNRBS Z
Denton Navarro Rodriguez Bernal Santee & Zech, P.C.
attorneys & counselors at law • rampagelaw.com

- ✓Pre-Litigation Discovery – by Plaintiffs using TPIA Request, Rule 202 Petitions; 3rd Party Subpoenas; other investigation
- ✓Informal Discovery – conducted by defense counsel
- ✓Initial Dislosures – required by Rules
- ✓Motion Practice Discovery – disclosure of evidence in response to motion practice
- ✓Written Discovery – RFP's, ROGS, RFAs
- ✓Deposition Discovery
- ✓Mediation Discovery
- ✓Experts

TOPICS COVERED

PRE-LITIGATION DISCOVERY

- ✓Texas Public Information Act Requests a/k/a TPIAs, PIRs, FOIA
- ✓Rule 202, TRCP Discovery Petitions
- ✓Third Party Subpoenas; DWQs

- ✓As employers counsel, you have greater access to:
- ✓Documents;
- ✓Witnesses and Witness Affidavits
- ✓Capture information and data. Begin to organize it for later use.
- ✓Interview key witnesses

INFORMAL DISCOVERY

- ✓Required by the Rules
- ✓First formal exchange of data and information
- ✓Documents
- ✓Witnesses

INITIAL DISCLOSURES

- ✓Use Rule 12 challenges strategically to force disclosures via pleadings
- ✓Use Rule 56 MSJ, especially a No Evidence MSJ, to force disclosure of strongest available proof
- ✓Use mandatory mediation to learn facts about the case

MOTION PRACTICE DISCOVERY

- ✓Requests for Production (RFPs)
- ✓Requests for Admissions (RFAs)
- ✓Interrogatories (ROGs)
- ✓Deposition on Written Questions (DWQs)
- ✓Depositions of Parties and Witnesses
- ✓Corporate Depositions

WRITTEN DISCOVERY

- ✓ROGS – make distinction between Objection by the lawyer and testimony of the witness. Do not make your witness sound like the lawyer. Separate these two things.
- ✓RFP's – Same distinction as with ROGS, but not as critical since there is no sworn testimony. But keeping objection separate from response is helpful to court in a dispute over discovery
- ✓RFA's – Objections should be rare. Ability to admit, deny, or claim insufficient knowledge is broad. Admit only portion that is clear and deny any adverse characterization of a fact by plaintiffs.

PRESERVING OBJECTIONS

- ✓Deposition on Written Questions (DWQs)
  - ✓Used mainly for production of records from 3rd parties
- ✓Depositions of Parties and Witnesses
  - ✓To capture testimony of key witnesses
  - ✓To pin down Party testimony
- ✓Corporate Depositions
  - ✓Force plaintiff to specify subject matter areas
  - ✓Pay attention to selection of persons with knowledge

DEPOSITION DISCOVERY

- ✓Volume of cases in the courts has created pressure to settle
- ✓Most mediations are now mandatory. Even if not mandatory, outright declination of mediation can be seen as intransigence. But insisting on timing of mediation is always valid
- ✓Preparation of party's position at mediation helps focus issues
- ✓Do not appear at mediation empty-handed; but it is always understood that any deal is always conditional and must be ratified by an appropriate authority outside of the mediation process
- ✓Invite Mediator's proposals. These help sharpen issues.
- ✓Possibility of a negotiated resolution should always be on the table depending on facts and depending on risk assessment

MEDIATION DISCOVERY

- ✓Evaluate early possible need for expert testimony
- ✓Discussion of Consulting vs Testifying Experts
  - ✓Assess technical abilities
  - ✓Assess testifying abilities
- ✓Discussion of Documents experts review and rely on for their opinion
- ✓Witnesses with expertise should be disclosed as persons with knowledge of facts as well as disclosed as experts

EXPERTS: CONSULTING & TESTIFYING

- ✓Volume of cases in the courts has created pressure to settle
- ✓Most mediations are now mandatory. Even if not mandatory, outright declination of mediation can be seen as intransigence. But insisting on timing of mediation is always valid
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- ✓Possibility of a negotiated resolution should always be on the table depending on facts and depending on risk assessment

PRETRIAL ORDER DISCOVERY

- ✓ Estate of McClain v. City of Aurora, 2021 WL 307505 (USDC D. Colo.)(1/29/2021)

  (Analysis of factors weighs against stay of discovery pending qualified immunity; analysis of factors weighs against stay of discovery pending criminal matters).

  This Court denied the motion to bifurcate the Monell claims, and to stay discovery. It recognizes that a stay will often be granted for qualified immunity claims but finds that not justified here. The Court notes, "It makes no sense to have the individual Defendants be deposed as witnesses now, only to be re-deposed as parties later in the event their qualified immunity defenses are unsuccessful." The Court also considered a requested stay connected to pending criminal investigation, but since no defendants had been indicted this was also denied.

CASELAW EXAMPLES OF DISCOVERY SCOPE

- ✓ Groark v. Timek Atlantic, 989 F.Supp 378 (USDC D. New Jersey)

  This case is from Atlantic City. Plaintiffs sought production of all IA files back to 2003, based on claim that the IA process is a sham. The Court finds that producing all files is too much and orders random samples of the 2,000+ files. It rejects the City's argument to limit to defendant officers, rejects a restriction limited to substantially similar cases. Even though all IA cases are not comparable, the procedures are the same. The Court recognizes that development of statistics is a possible objective. The Court relies upon a preliminary expert report that supports the attack on the IA process as a part of the conclusion that this broad scope of discovery is justified.

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES

- ✓ Harper v. City of Dallas, 2018 WL 11408879 (USDC N.D. Texas Dallas Div)

  Officer party/witness testified in depo about documents he thought he had, later only found some of them, creating confusion and problems. In addition, the City did not have the full autopsy report in its IA files. Other than the request during the depo, Plaintiffs never served a Rule 34 request for Rowden's records. Plaintiff alleges spoliation in several contexts. On the request for sanctions, the Court explained that responding to interrogatories and document requests 'subject to' and/or 'without waiving' objections is confusing or worse. This practice is not consistent with the FED. R. CIV. P. "… the responding party should stand on an objection so far as it goes"; and, "as a general matter, if an objection does not preclude or prevent a response or answer, at least in part, the objection is improper and should not be made." Carr v. State Farm Mutual Automobile Insurance Company, 312 F.R.D. 459, 470 (N.D. Tex. 2015) (quoting Heller, 303 F.R.D. at 487-88 (internal quotation marks omitted)).

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES (1)

✓Harper v. City of Dallas (continued)

A party resisting discovery under the proportionality portion of the rule must make a specific objection and bears the burden of coming forward with specific factual information about why the request does not comply with the rule. Duty of the party seeking discovery to engage on the points made and show need and proportionality. This case enforces certification obligations under Rule 26(g)(1) when filing a motion for relief.

This Court says that the parties' duty to confer and resolve prior to seeking court intervention should take at least as much time as the court would require to resolve the issues. Exchange of emails is not sufficient. The Certificate of Conference was not adequate. Plaintiffs could not supply missing requirements not included in their original motion in their reply.

Rule 1 does not create a new basis for sanctions. The Court rejected the Motion to Compel or Sanctions, but orders both parties to meet their continuing supplementation obligations as to any documents found or not produced before. Each must bear their own expenses and fees.

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES (2)

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES (1)

- ✓ McCowan v. City of Philadelphia, 603 F.Supp. 171 (USDC E.D. Penn.)

  This case is a discrimination and hostile work environment case by former corporal in the police department. It involves documents created by a law firm, Montgomery McCracken, hired to conduct an investigation. Plaintiffs served a subpoena for the documents. The Court denied the City's motion to quash, finding that the City had not met the burden of showing attorney client privilege. On a motion to reconsider or clarify, the Court permitted assertion of attorney client privilege on specific documents provided with a privilege log.

✓ McCowan v. City of Philadelphia (continued)

The party seeking a protective order over material must demonstrate that good cause exists for the order. In re Avandia, 924 F.3d at 671. “Good cause means that disclosure will work a clearly defined and serious injury to the party seeking closure,” and the injury “must be shown with specificity.” Id. “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning do not support a good cause showing.”

This Court notes that Rule 33 for interrogatories and Rule 34 for production are different, and waiver is not automatic under Rule 34. The Court then finds that a protective order is justified, primarily based on the privacy interests of third parties and not these individuals. The Opinion discusses the First amendment issues involved with materials filed in court proceedings, as opposed to materials provided in discovery but not filed. The Court declines to impose a requirement for filing under seal.

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES (2)

- ✓ Monterrosa v. City of Vallejo, 2023 WL 8113523 (USDC E.D. Cal.)

  This Opinion by Judge Nunley starts with “Plaintiffs are a grieving family who allege Tonn, a Vallejo Police Department officer, shot and killed Sean Monterrosa on June 2, 2020, at about 12:37 a.m., and explains that no warnings for deadly force were given. The Police Chief changes his story about what happens. Plaintiff alleges that this was to line up with the Police Union’s version. The City does not win. There is no video body camera footage, but there is audio after they exit the police vehicles. It does not help. Motion for Change of venue was denied in spite of assertions about national media including comments by Nancy Pelosi. The City sought sanctions against Plaintiff’s counsel to control pre-trial statements. This was denied on procedural basis, but the City was allowed to re-file as proper TRO.

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES (1)

- ✓ Roque v. City of Austin, 2018 WO 5848988 (USDC W.D. Tex Austin Div).

  Roque was killed while pointing a BB gun at his own head. Allegations are that APD uses deadly force against people of color, and officers have not received required training concerning bias in policing. Addressing eight categories of disputed documents.

  Objections under § 143.089(g) rejected, federal law controls issues of privilege and discovery. The City asserts work product and attorney client privilege as to investigative materials. The party asserting any privilege has the burden.

  The Court rejected the asserted privilege because investigation materials were prepared in the ordinary course of business. They were not conducted or obtained for purposes of litigation. Plus, the requested documents primarily factual material is not covered by either privilege.

✓ Roque v. City of Austin (continued)

Video and audio are not protected under the same principles. Nothing in the City's materials show that impressions, evaluations, and legal theories would be revealed by material sought. Generic assertion of other "privilege" was also denied. The Court calls this a law enforcement privilege for ongoing criminal investigation. Other cases refer to this as the official information privilege. The Court refers to the Frankenhauser principles from that case. If applicable at all, the principles justify release in discovery. The court notes that Plaintiffs can only meet the Monell standards if they have access to that prior investigative information. Once again, the City fails to make any argument beyond a "boilerplate" claim. The City claimed it did not have cases filed or grouped by "discrimination," so the Court ordered a listing of cases by allegation, with a copy of the complaint or pleading filed. It required production of the claims sought for firearms discharge back to 2005. (13 years)

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES (2)

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES (1)

- ✓ Shorter v. Samuels, 2021 WL 1017375 (USDC M.D. Penn.)(Jail Case)

  This is a 39-page discovery opinion. The opinion starts with: “The Plaintiff’s Motion to Compel and competing briefs fill three hundred and seventy-six (376) pages, including twenty-seven (27) exhibits. The Court has held eight (8) separate telephone conferences attempting to resolve these issues informally.”

  Sayles was a black inmate severely beaten by white inmate who had told prison staff he would not be celled with a black inmate. Sayles’ injury resulted in permanent vegetative mental/psychological state.

- ✓ Shorter v. Samuels (continued)

  This case deals with materials sought that can't be found or no longer exist. An example is the "Green Monster Logbook" replaced by technology. It has examples of detailed and extensive declarations that show the search for the materials, challenges, missing information, efforts to find alternatives for the same information, and accomplishment of what is possible. The Court denies relief because the Defendants proved they didn't have it. The requested spoliation hearing is denied. There was an additional fight over what was taught and materials at Lieutenants meetings. What they are looking for does not exist, because the informal presentations were not documented.

  Defendants also opposed production of the Inmate System Manual because of confidential information. The Court concludes that its contents are generally relevant, and that the Defendants have not met the burden of executive privilege which requires evidence from the head of the agency. The court will review any provisions in camera if Defendants seek specific review prior to production. Personnel files and employee reviews of the named defendants are ordered, subject to in camera review for limits or redaction if not agreed. Plaintiff failed to provide search terms for email production, so the Defendants proposal wins. The Court found the submissions inadequate on the three remaining issues and ordered the parties to start over and resubmit.

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES (2)

- ✓ Villa v. County of San Diego, 2021 WL 242981 (USDC S.D. Cal.)

  This case involves an alleged gratuitous beating while in restraints at the San Diego central jail. The Court denies the official information privilege. It finds that supporting affidavits are too generic. They discussed the need for openness and candor within the department between officers and supervisors, and about need to retain secrets. This did not meet the standard for specific harm from disclosure.

  The affidavits did not address why a protective order cannot prevent the claimed harm.

  This case has a good discussion of the 2015 amendments to 26(b)(1) that impose and require proportionality. The Court finds that all other IA complaints against the same officer are not covered by the scope of the complaint, because they do not involve excessive force allegations. Plaintiff's Monell complaint is limited to this context; but the deputy's general personnel file is relevant to his supervision and must be produced.

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES

- ✓ Whitt v. City of St. Louis, 2020 WL 7122615 (USCD E.D. Missouri – E. Div. 12/4/2020)

  Plaintiff was riding bicycle with a camcorder, and is a member of Cop Watch. He was eventually arrested. His camcorder was taken, the content was damaged or missing. Defendants seek to quash a 30(b)(6) deposition notice because he has info recorded from the incident—Monell claim was asserted to justify the deposition notice. The Court notes that the City cannot avoid the deposition by having an unsworn attorney arguments that there is no policy defining when First Amendment rights are permitted to be violated. These are semantic disputes about what types of policies and wording chosen by Plaintiff in their requests. The City has to have a witness answer and explain. The Defendants also claim that the policy was overlapping and burdensome. The Court does not buy into nuances for this argument, and rejects it because the City fails to show actual burden and only makes a generic claim without facts. The Court also disagrees on the topic of Plaintiff seeking incident reports after Plaintiff's arrest but amends the request by Plaintiff with limits, but allows production of other incidents with arrests of people filming. The City has to have a witness explain its denials on requests.

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES (17)

- ✓ Williams v. Connick, 2014 WL 172520 (USDC E.D. La. 1/15/2014)

  Connick was a prosecutor in wrongful conviction case and was sued for due process violations as to conduct not covered by absolute immunity. He failed to produce documents after qualified immunity was denied by the Court. He now asserts that only judicially determined Brady issues are relevant. He argues that the cases that say otherwise are law enforcement officers and not prosecutors. The Court disagrees. But it only applies to similar Brady violations, and the order requires those produced for five years before and five years after. The Court requires the personnel files within ten years but allows redaction of all personal and financial info. Court considers law enforcement privilege under Frankenhauser principles and only applies to cases before investigation and prosecution are complete.

ADDITIONAL LESSONS FROM RECENT DISCOVERY CASES (18)

END OF SECTION 6

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DNRBS Z
Denton Navarro Rodriguez Bernal Santee & Zech, P.C.
attorneys & counselors at law • rampagelaw.com

SECTION 7
PRETRIAL AND TRIAL

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DNRBS Z
Denton Navarro Rodriguez Bernal Santee & Zech, P.C.
attorneys & counselors at law • rampagelaw.com

- ✓The Proposed Pretrial Order
- ✓Review Elements of the Proposed Order
- ✓Review Exhibits Pertaining to Pretrial Order

THE PROPOSED PRETRIAL ORDER - OVERVIEW

- ✓Review Elements of the Proposed Order
- ✓Established Issues of Fact and Law
- ✓Contested Issues of Fact and Law
- ✓Review Proposed PTO in Sample Case

ELEMENTS OF THE PROPOSED PRETRIAL ORDER

- ✓Voir Dire Questions: Plaintiff and Defendant
- ✓Witness Lists: Plaintiff and Defendant
- ✓Exhibit List: Plaintiff and Defendant
- ✓Proposed Jury Charge: Plaintiff and Defendant
- ✓Proposed Jury Interrogatories: Plaintiff and Defendant

EXHIBITS TO THE PROPOSED PRETRIAL ORDER

✓Review of a Sample Jury Charge

THE JURY CHARGE AND JURY INTEROGATORIES

- ✓Discussion of the Jury Pool; See 28 USC §§1861 - 1866
- ✓Jury Pool drawn from Counties that Comprise the Division
- ✓Jury Pool drawn from voting registration lists; not from driver's license lists; see 28 USC §1863(d).
- ✓Draft voir dire questions with the foregoing in mind and with an eye towards nature of the case

JURY POOLS; VOIR DIRE IN FEDERAL COURT

- ✓Close of Plaintiff’s Case
- ✓Close of Defendant’s Case
- ✓Post-Verdict
- ✓Motion for Judgment NOV
- ✓Motion for New Trial

RULE 50 MOTION PRACTICE

END

QUESTIONS COMMENTS?

DNRBS Z

Denton Navarro Rodriguez Bernal Santee & Zech, P.C.

attorneys & counselors at law • rampagelaw.com