

GOVERNMENTAL IMMUNITY

Individual Rights & Responsibilities Section Program

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Table of Contents

I.	INTRODUCTION.....	1
II.	FEDERAL CLAIMS – SECTION 1983.....	1
A.	Elements of Section 1983 Claims.....	1
1.	A Violation of a Federal Right.....	1
2.	Proximate Cause.....	2
3.	By the Conduct of a “Person”.....	2
a.	Individual Persons.....	2
b.	Entities As Persons.....	3
4.	Under Color of Law.....	4
B.	Damages and Limitations in Section 1983 Claims.....	5
III.	FEDERAL QUALIFIED IMMUNITY FOR PUBLIC OFFICIALS.....	6
A.	Qualified Immunity in General.....	6
B.	The Development of Qualified Immunity.....	6
C.	The Current Analytical Framework for Qualified Immunity.....	7
1.	The First Prong: Violation of a Constitutional Right.....	8
2.	The Second Prong “Clearly Established Law” or “Objective Reasonableness”.....	8
a.	“Clearly Established Law”.....	8
b.	“Objective Legal Reasonableness”.....	10
3.	The Extraordinary Circumstances Exception.....	10
D.	Procedural Aspects of Qualified Immunity.....	10
1.	Burdens of Pleading and Persuasion.....	10
2.	Immunity from Suit As Well As Damages.....	11
3.	Appealing Denials of Qualified Immunity.....	12
IV.	STATE LAW CLAIMS.....	12
A.	Claims Under the Texas Constitution.....	12
B.	Tort Claims and Governmental Immunity.....	13
1.	Tort Claims Against Governmental Entities.....	13
a.	Motor Driven Vehicle Exception.....	14
b.	Condition or Use or Personal Property.....	14
c.	Condition or Use of Real Property.....	14
d.	Damages Under the Tort Claims Act.....	15
2.	Governmental Immunity and Pleas to the Jurisdiction.....	15
3.	Suits Against Public Officials and the Election of Remedies.....	15
V.	OFFICIAL IMMUNITY FROM STATE LAW CLAIMS.....	17
A.	Introduction to Official Immunity.....	17
B.	A Brief History of Official Immunity; Roots in Federal Law.....	18
C.	Official Immunity Generally.....	18
1.	A Common Law Affirmative Defense and the Burden of Proof.....	18
2.	The Purpose and the Public Policy Rationale for the Official Immunity Doctrine.....	18
a.	Additional Rationale Regarding High-Speed Driving.....	19
b.	Rationale in Arrest Cases.....	20
3.	Official Immunity Protects Even Negligent Officers.....	20
4.	Focus on the Facts First.....	20
D.	The Elements of Official Immunity.....	21
1.	Performance of a Discretionary Duty.....	21
2.	Within The Scope of the Employee’s Authority.....	22
3.	Actions Taken in Good Faith.....	22
a.	<i>City of Lancaster v. Chambers</i>	23
b.	<i>Wadewitz v. Montgomery</i>	23
c.	<i>University of Houston v. Clark</i>	23
d.	<i>Telthorster v. Tennell</i>	24
E.	Summary Judgment: Establishing and Controverting Official Immunity.....	24
1.	What An Official Must Prove to Establish the Defense of Official Immunity.....	24
2.	What a Plaintiff Must Do To Controvert an Assertion of Official Immunity.....	24
3.	An Elevated Standard of Proof Is Required to Defeat Official Immunity.....	25
4.	Official vs Qualified Immunity.....	25

- 5. Summary Judgment Evidence For Official Immunity..... 25
- F. The Relationship Between Official Immunity and Sovereign Immunity: Using Official Immunity to Aid Entities..... 26
- G. Interlocutory Appeals from Denials of Official Immunity..... 26
- H. Issues and Questions 27
 - 1. Does Official Immunity Protect Government Officials from Discovery?..... 27
 - 2. Should a Court Review an Officer’s Every Step? 27
- VI. OTHER STATE LAW QUALIFIED IMMUNITIES 27
 - A. Educator Immunity..... 27
 - B. Emergency Response Immunity..... 28

Table of Authorities

Cases

<i>Adickes v. S.H. Kress & Co.</i> , 398 U.S. 144, 90 S. Ct. 1598; 26 L. Ed. 2d 142 (1970)	4, 5
<i>Albright v. Oliver</i> , 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 510 (1994)	6
<i>Anderson v. City of San Antonio</i> , 2008 Tex. App. Lexis 3642 (Tex. App. – San Antonio 2008, no pet.)	23
<i>Anderson v. Creighton</i> , 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)	passim
<i>Anderson v. Snider</i> , 808 S.W.2d 54 (Tex.1991) (per curiam).....	25
<i>Anthony v. Tex. Dep’t of Crim. Justice</i> , 2009 Tex. App. Lexis 1482 (Tex. App. – Houston [1 st Dist] 2009, no pet.).....	27
<i>Ashcroft v. Iqbal</i> , ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).....	12
<i>Atteberry v. Nocona Gen. Hosp.</i> , 430 F.3d 245 (5 th Cir. 2005).....	8
<i>Austin v. Hale</i> , 711 S.W.2d 64 (Tex. App. – Waco 1986, no writ).....	19
<i>Baker v. McCollan</i> , 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979)	1
<i>Baker v. Story</i> , 621 S.W.2d 639 (Tex. Civ. App. – San Antonio 1981, writ ref’d n.r.e.)	19
<i>Ballantyne v. Champion Builders, Inc.</i> , 144 S.W.3d 417 (Tex. 2004).....	passim
<i>Baranowski v. Hart</i> , 486 F.3d 112 (5 th Cir. 2007)	2
<i>Barr v. Bernhard</i> , 562 S.W.2d 844 (Tex. 1978)	28
<i>Barr v. Matteo</i> , 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959).....	18, 19
<i>Barr v. Resolution Trust Corp.</i> , 837 S.W.2d 627 (Tex. 1992).....	16
<i>Barrow v. Greenville Indep. Sch. Dist.</i> , 480 F.3d 377 (5 th Cir. 2007).....	4
<i>Bates v. Dallas Indep. Sch. Dist.</i> , 952 S.W.2d 543 (Tex. App. – Dallas 1997, writ denied)	13
<i>Battin v. Samaniego</i> , 23 S.W.3d 183 (Tex. App. – El Paso 2000, pet. denied)	18
<i>Bd. of County Comm’rs of Bryan County v. Brown</i> , 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).....	3
<i>Behrens v. Pelletier</i> , 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996).....	7, 11, 12
<i>Beltran v. City of El Paso</i> , 367 F.3d 299 (5 th Cir. 2004).....	5
<i>Berryman v. Rieger</i> , 150 F.3d 561 (6 th Cir. 1998)	12
<i>Blum v. Yaretsky</i> , 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982)	5
<i>Bogan v. Scott-Harris</i> , 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998).....	6
<i>Bolton v. City of Dallas</i> , 541 F.3d 545 (5 th Cir. 2008), cert. denied, ___ U.S. ___, 129 S. Ct. 1669, 173 L. Ed. 2d 1036 (2009).....	4
<i>Boozier v. Hambrick</i> , 846 S.W.2d 593 (Tex.App. – Houston [1 st Dist.] 1993, no writ)	22
<i>Breen v. Tex. A&M Univ.</i> , 2007 U.S. App. Lexis 18181 (5 th Cir. 2007).....	5
<i>Breen v. Tex. A&M Univ.</i> , 485 F.3d 325 (5 th Cir. 2007)	5
<i>Briscoe v. LaHue</i> , 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983)	6
<i>Brosseau v. Haugen</i> , 543 U.S. 194, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004).....	7, 9
<i>Brown v. City of Houston</i> , 8 S.W.3d 331 (Tex. App. – Waco 1999, pet. denied).....	13
<i>Brown v. Miller</i> , 519 F.3d 231 (5 th Cir. 2008)	1, 8, 9
<i>Burns-Toole v. Byrne</i> , 11 F.3d 1270 (5 th Cir. 1994).....	11
<i>Butz v. Economou</i> , 438 U.S. 478, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978)	17
<i>Campbell v. Jones</i> , 264 S.W.2d 425 (Tex.1954).....	22
<i>Champan v. Gonzales</i> , 824 S.W.2d 685 (Tex. App. – Houston [14 th Dist.] 1992, writ denied)	19
<i>Chavez v. Martinez</i> , 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003)	7
<i>Choctaw Props., L.L.C. v. Aledo Indep. Sch. Dist.</i> , 127 S.W.3d 235 (Tex. App. – Waco 2003, no pet.), overruled in part by <i>Thomas v. Long</i> , 207 S.W.3d 334 (Tex. 2006)	28
<i>City of Amarillo v. Martin</i> , 971 S.W.2d 426 (Tex. 1998)	28, 29
<i>City of Arlington v. Whitaker</i> , 977 S.W.2d 742 (Tex. App. – Fort Worth 1998, pet. denied)	28
<i>City of Beaumont v. Bouillion</i> , 896 S.W.2d 143 (Tex. 1995)	12
<i>City of Beverly Hills, Texas v. Guevara</i> , 904 S.W.2d 655 (Tex. 1995)	17, 26
<i>City of Dallas v. Half Price Books, Records, Magazines, Inc.</i> , 883 S.W.2d 374 (Tex. App. – Dallas 1994, no writ).....	24
<i>City of Elsa v. M.A.L.</i> , 226 S.W.3d 390 (Tex. 2007)	12
<i>City of Fort Worth v. Robinson</i> , 300 S.W.3d 892 (Tex. App. – Fort Worth 2009, no pet.).....	26
<i>City of Grapevine v. Roberts</i> , 946 S.W.2d 841 (Tex. 1997).....	15
<i>City of Harlingen v. Vega</i> , 951 S.W.2d 25 (Tex. App. – Corpus Christi 1997, no writ)	26

<i>City of Houston v. Clear Creek Basin Auth.</i> , 589 S.W.2d 671 (Tex. 1979).....	24
<i>City of Houston v. Kilburn</i> , 849 S.W.2d 810 (Tex. 1993)	14
<i>City of Houston v. Swindall</i> , 960 S.W.2d 413 (Tex. App. – Houston [1 st Dist.] 1998, no pet.).....	22
<i>City of Lancaster v. Chambers</i> , 883 S.W.2d 650 (Tex. 1994).....	passim
<i>City of Monterrey v. Del Monte Dunes</i> , 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).....	1
<i>City of Newport v. Fact Concerts</i> , 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981)	6
<i>City of San Antonio v. Garcia</i> , 974 S.W.2d 756 (Tex. App. – San Antonio 1998, no pet.).....	24
<i>City of San Juan v. Gonzalez</i> , 22 S.W.3d 69 (Tex. App. – Corpus Christi 2000, no pet.).....	26
<i>City of St. Louis v. Praprotnik</i> , 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988)	3, 4
<i>City of Sugarland v. Ballard</i> , 174 S.W.3d 259 (Tex. App. – Houston [1 st Dist.] 2005, no pet.)	14
<i>City of Waco v. Kirwan</i> , 298 S.W.3d 618 (Tex. 2009)	15
<i>City of Waco v. Williams</i> , 209 S.W.3d 216 (Tex. App. – Waco 2006, pet. denied).....	14
<i>Closs v. Goose Creek Consol. Indep. Sch. Dist.</i> , 874 S.W.2d 859 (Tex. App. – Texarkana 1994, no writ).....	28
<i>Coleman v. Houston Indep. Sch. Dist.</i> , 113 F.3d 528 (5 th Cir. 1997).....	12
<i>Collins v. City of Harker Heights</i> , 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)	3
<i>Colston v. Barnhart</i> , 146 F.3d 282 (5 th Cir. 2000).....	12
<i>Coronado v. Milam</i> , 2004 Tex. App. Lexis 4908 (Tex. App. – San Antonio 2004, pet. denied)	17
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).....	8
<i>Crawford-El v. Britton</i> , 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998).....	10, 11, 18, 22
<i>Dallas County Flood Control Dist. v. Fowler</i> , 280 S.W.2d 336 (Tex. Civ. App. – Dallas 1955, writ ref'd n.r.e.)	22
<i>Dallas County Mental Health & Mental Retardation v. Bossley</i> , 968 S.W.2d 339 (Tex. 1998)	13, 14, 17
<i>Dallas County v. Halsey</i> , 87 S.W.3d 552 (Tex. 2002).....	17
<i>Dallas County v. Posey</i> , 290 S.W.3d 869 (Tex. 2009)	14
<i>Davis v. McKinney</i> , 518 F.3d 304 (5 th Cir. 2008)	12
<i>Davis v. Scherer</i> , 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984).....	10
<i>Davis v. Zirkelbach</i> , 149 F.3d 614 (7 th Cir. 1998)	10
<i>Dearmore v. City of Garland</i> , 519 F.3d 517 (5 th Cir. 2008)	2
<i>DeShaney v. Winnebago County Dep't of Soc. Servs.</i> , 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).....	4, 5
<i>DeWitt v. Harris County</i> , 904 S.W.2d 650 (Tex. 1995).....	14, 17, 21, 26
<i>Doe v. Rains Indep. Sch. Dist.</i> , 66 F.3d 1402 (5 th Cir. 1995).....	4
<i>Downing v. Brown</i> , 935 S.W.2d 112 (Tex. 1996).....	21
<i>Dudley v. Angel</i> , 209 F.3d 460 (5 th Cir. 2000)	12
<i>Eakle v. Tex. Dep't of Human Servs.</i> , 815 S.W.2d 869 (Tex. App. – Austin 1991, writ denied)	21
<i>Eastland County Cooperative Dispatch, et al. v. Poyner</i> , 64 S.W.3d 182 (Tex. App. – Eastland 2001, pet. denied).....	25
<i>Elder v. Holloway</i> , 510 U.S. 510, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994).....	6, 7
<i>Employment Div. v. Smith</i> , 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).....	2
<i>Enlow v. Tishomingo County</i> , 962 F.2d 501 (5 th Cir. 1992)	10
<i>Estate of Davis v. City of N. Richland Hills</i> , 406 F.3d 375 (5 th Cir. 2005).....	3
<i>Fantasy Ranch, Inc. v. City of Arlington</i> , 459 F.3d 546 (5 th Cir. 2006).....	2
<i>Farias v. Bexar County Bd. of Trs.</i> , 925 F.2d 866 (5 th Cir. 1991)	11
<i>Farmer v. Brennan</i> , 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).....	1
<i>Fed. Sign v. Tex. S. Univ.</i> , 951 S.W.2d 401 (Tex. 1997)	13
<i>Fee v. Herndon</i> , 900 F.2d 804 (5 th Cir. 1990).....	28
<i>Forrester v. White</i> , 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).....	6
<i>Freeman v. Wirecut E.D.M., Inc.</i> , 159 S.W.3d 721 (Tex. App. – Dallas 2005, no pet.).....	25
<i>Gagne v. City of Galveston</i> , 805 F.2d 558 (5 th Cir. 1986)	10
<i>Gallia v. Schreiber</i> , 907 S.W.2d 864 (Tex. App. – Houston [1 st Dist.] 1995, no writ).....	24
<i>Garris v. Rowland</i> , 678 F.2d 1264 (5 th Cir. 1982)	11
<i>Garza v. Salvatierra</i> , 846 S.W.2d 17 (Tex. App. – San Antonio 1992, writ dism'd w.o.j.).....	21
<i>Gerhart v. Hayes</i> , 201 F.3d 646 (5 th Cir. 2000)	12
<i>Goldsmith v. Bagby Elevator Co.</i> , 513 F.3d 1261 (11 th Cir. 2008).....	2
<i>Gomez v. Toledo</i> , 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980)	1, 10
<i>Gonzales v. Dallas County</i> , 249 F.3d 406 (5 th Cir. 2001).....	12
<i>Gonzalez v. Avalos</i> , 907 S.W.2d 443 (Tex. 1995)	17

<i>Graham v. Connor</i> , 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)	20
<i>Green v. Alford</i> , 274 S.W.3d 5 (Tex. App. – Houston [14 th Dist.] 2008, pet. denied)	29
<i>Green v. City of Friendswood</i> , 22 S.W.3d 588 (Tex. App. – Houston [1 st Dist.] 2000, pet. denied)	28
<i>Groh v. Ramirez</i> , 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004)	7
<i>Gross v. Innes</i> , 988 S.W.2d 727 (Tex. 1998)	17, 26, 27
<i>Haggerty v. Tex. S. Univ.</i> , 391 F.3d 653 (5 th Cir. 2004)	9
<i>Hampton v. Oktibbeha County Sheriff Dept.</i> , 480 F.3d 358 (5 th Cir. 2007)	11
<i>Hanlon v. Berger</i> , 526 U.S. 808, 119 S. Ct. 1706, 143 L. Ed. 2d 978 (1999)	7
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)	passim
<i>Harris County v. Gibbons</i> , 150 S.W.3d 877 (Tex. App. – Houston [14 th Dist.] 2004, no pet.)	21
<i>Harris County v. Ochoa</i> , 881 S.W.2d 884 (Tex. App. – Houston [14 th Dist.] 1994, writ denied)	22
<i>Harris County v. Sykes</i> , 136 S.W.3d 635 (Tex. 2004)	13, 15
<i>Hernandez v. Tex. Dep't of Protective and Regulatory Svcs.</i> , 380 F.3d 872 (5 th Cir. 2004)	5
<i>Heyer v. North East Indep. Sch. Dist.</i> , 730 S.W.2d 130 (Tex. App. – San Antonio 1987, writ ref'd n.r.e.)	14
<i>Hill v. Anderson</i> , 381 F. Supp. 906 (E.D. Okla. 1974)	3
<i>Hope v. Pelzer</i> , 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)	7
<i>Hunter v. Bryant</i> , 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991)	7
<i>Husley v. Owens</i> , 63 F.3d 354 (5 th Cir. 1995)	7, 11
<i>Indest v. Freeman Decorating</i> , 164 F.3d 258 (5 th Cir. 1999)	2
<i>Jackson v. Metro. Edison Co.</i> , 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974)	5
<i>Jacquez v. Procuier</i> , 801 F.2d 789 (5 th Cir. 1986)	3
<i>Jett v. Dallas Indep. Sch. Dist.</i> , 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989)	1, 3
<i>Joe v. Two Thirty Nine Joint Venture</i> , 145 S.W.3d 150 (Tex. 2004)	17, 22, 23
<i>Johnson v. Baylor Univ.</i> , 188 S.W.3d 296 (Tex. App. – Waco 2006, pet. denied)	24
<i>Johnson v. City of Houston</i> , 14 F.3d 1056 (5 th Cir. 1994)	10
<i>Johnson v. Dallas Indep. Sch. Dist.</i> , 38 F.3d 198 (5 th Cir. 1994)	5
<i>Johnson v. Jones</i> , 515 U.S. 177, 115 S. Ct. 2151, 132 L. Ed. 2d 136 (1995)	7
<i>Johnson v. Sandel</i> , 920 S.W.2d 751 (Tex. App. – Houston [1 st Dist.] 1996, writ filed)	27
<i>Johnson v. Tex. Dep't of Transp.</i> , 905 S.W.2d 394 (Tex. App. – Austin 1995, no pet.)	21
<i>Jordan v. Ector County</i> , 515 F.3d 290 (5 th Cir. 2008)	2
<i>Juneman v. Harris County</i> , 84 S.W.3d 689 (Tex. App. – Houston [1 st Dist.] 2002, pet. denied)	20
<i>K.D.F. v. Rex</i> , 878 S.W.2d 589 (Tex. 1994)	14, 21
<i>Kassen v. Hatley</i> , 887 S.W.2d 4 (Tex. 1994)	passim
<i>Kerrville State Hosp. v. Clark</i> , 923 S.W.2d 582 (Tex. 1996)	13
<i>Kline v. N. Tex. State Univ.</i> , 782 F.2d 1229 (5 th Cir. 1986)	6
<i>Koerselman v. Rhynard</i> , 875 S.W.2d 347 (Tex. App. – Corpus Christi 1994, no writ)	22
<i>Lamar Univ. v. Doe</i> , 971 S.W.2d 191 (Tex. App. – Beaumont 1998, no pet.)	13
<i>Lampkin v. City of Nacogdoches</i> , 7 F.3d 430 (5 th Cir. 1993)	10
<i>Lane v. Young</i> , 2007 Tex. App. Lexis 144, 25 I.E.R. Cas. (BNA) 1069 (Tex. App. – Beaumont 2007, no pet.)	28
<i>Lauderdale v. Tex. Dep't of Crim. Justice</i> , 512 F.3d 157 (5 th Cir. 2007)	2
<i>Leffall v. Dallas Indep. Sch. Dist.</i> , 28 F.3d 521 (5 th Cir. 1994)	11
<i>LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.</i> , 835 S.W.2d 49 (Tex. 1992)	13, 28
<i>Lemoine v. New Horizons Ranch & Center, Inc.</i> , 174 F.3d 629 (5 th Cir. 1999)	12
<i>Lester v. City of College Station</i> , 103 Fed. Appx. 814 (5 th Cir. 2004)	5
<i>Longoria v. Texas</i> , 473 F.3d 586 (5 th Cir. 2006)	5
<i>Looper v. Houston Comty. College Sys.</i> , 2007 Tex. App. Lexis 9291 (Tex. App. – Houston [14 th Dist.] 2007, pet. denied)	21
<i>Los Angeles County v. Rettele</i> , 550 U.S. 609, 127 S. Ct. 1989, 167 L. Ed. 2d 974 (2007)	8
<i>Lytle v. Bexar County</i> , 560 F.3d 404 (5 th Cir. 2009), cert. denied, __ U.S. __, 2010 U.S. Lexis 2683 (2010)	8
<i>Malley v. Briggs</i> , 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)	passim
<i>Mangieri v. Clifton</i> , 29 F.3d 1012 (5 th Cir. 1994)	10
<i>Martinez v. California</i> , 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980)	2
<i>Martinez v. City of Abilene</i> , 963 S.W.2d 559 (Tex. App. – Eastland 1998, no pet.)	14
<i>Matherne v. Wilson</i> , 851 F.2d 752 (5 th Cir. 1988)	10
<i>McCartney, M.D. v. May, M.D.</i> , 50 S.W.3d 599 (Tex. App. – Amarillo 2001, no pet.)	26

<i>McClendon v. City of Columbia</i> , 305 F.3d 314 (5 th Cir. 2002) (en banc).....	4, 5, 9
<i>McGowen v. Huang</i> , 120 S.W.3d 452 (Tex. App. – Texarkana 2003, pet. denied).....	16
<i>Meadours v. Ermel</i> , 483 F.3d 417 (5 th Cir. 2007).....	12
<i>Memphis Cmty. Sch. Dist. v. Stachura</i> , 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986).....	6
<i>Mendenhall v. Riser</i> , 213 F.3d 226 (5 th Cir. 2000).....	12
<i>Meroney v. City of Colleyville</i> , 200 S.W.3d 707 (Tex. App. – Fort Worth 2006, pet. granted, judgment vacated w.r.m.).....	17
<i>Meyer v. Austin Indep. Sch. Dist.</i> , 161 F.3d 271 (5 th Cir. 1998).....	12
<i>Mission Consol. Indep. Sch. Dist. v. Garcia</i> , 253 S.W.3d 653 (Tex. 2008).....	17
<i>Mission Consol. Indep. Sch. Dist. v. Sotuyo</i> , 166 S.W.3d 902 (Tex. App. – Corpus Christi 2005) <i>aff'd in part, rev. in part</i> , <i>Mission Consol. Indep. Sch. Dist. v. Garcia</i> , 253 S.W.3d 653 (Tex. 2008).....	17
<i>Mitchell v. City of Dallas</i> , 855 S.W.2d 741 (Tex. App. – Dallas 1993), <i>aff'd</i> , 870 S.W.2d 21 (Tex. 1994).....	21
<i>Mitchell v. Forsyth</i> , 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).....	7, 11, 12
<i>Mogayzel v. Tex. Dep't of Transp.</i> , 66 S.W.3d 459 (Tex. App. – Fort Worth 2001, pet. denied).....	15
<i>Monell v. Dep't of Social Svcs.</i> , 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).....	1, 3
<i>Monroe v. Paper</i> , 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).....	2, 3
<i>Montgomery v. Kennedy</i> , 669 S.W.2d 309 (Tex. 1984).....	24
<i>Moon v. Lesikar</i> , 230 S.W.3d 800 (Tex. App. – Houston [14 th Dist.] 2007, pet. denied).....	24
<i>Morrone v. Prestonwood Christian Acad.</i> , 215 S.W.3d 575 (Tex. App. – Eastland 2007, pet. denied).....	28
<i>Murray v. Earle</i> , 405 F.3d 278 (5 th Cir. 2005).....	2
<i>Myart v. City of San Antonio</i> , 2007 U.S. Dist. Lexis 105 (W.D. Tex. 2007).....	17
<i>Myers v. Doe</i> , 52 S.W.3d 391 (Tex. App. – Fort Worth 2001, pet. denied).....	21
<i>Natural Res. & Conservation Comm'n v. White</i> , 13 S.W.3d 819 (Tex. App. – Fort Worth 2000), <i>rev'd on other grounds</i> , 46 S.W.3d 864 (Tex. 2001).....	15
<i>Neimes v. Ta</i> , 985 S.W.2d 132 (Tex. App. – San Antonio 1998, pet. dismissed).....	22
<i>Nettles v. Griffith</i> , 883 F. Supp. 136 (E.D. Tex. 1995).....	2
<i>Newman v. Obersteller</i> , 960 S.W.2d 621 (Tex. 1997).....	17
<i>Norrell v. Gardendale Volunteer Fire Dep't</i> , 115 S.W.3d 114 (Tex. App. – San Antonio 2003, no pet.).....	14
<i>Norville v. Phelan</i> , 2008 Tex. App. Lexis 499 (Tex. App. – Amarillo 2008, pet. denied).....	24
<i>Oklahoma City v. Tuttle</i> , 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985).....	2, 3
<i>Owen v. City of Independence</i> , 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980).....	6
<i>Owens v. Okure</i> , 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989).....	6
<i>Pasco v. Knoblauch</i> , 566 F.3d 572 (5 th Cir. 2009).....	11
<i>Pearson v. Callahan</i> , ___ U.S. ___, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).....	8, 9, 11
<i>Pembaur v. City of Cincinnati</i> , 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).....	3, 4
<i>Perry v. Greanias</i> , 95 S.W.3d 683 (Tex. App. – Houston [1 st Dist.] 2002, pet. denied).....	22
<i>Perry v. Tex. A & I Univ.</i> , 737 S.W.2d 106 (Tex. App. – Corpus Christi 1987, writ refused n.r.e.).....	18
<i>Pfannstiel v. City of Marion</i> , 918 F.2d 1178 (5 th Cir. 1990).....	5, 10
<i>Pierce v. Smith</i> , 117 F.3d 866 (5 th Cir. 1997).....	9, 10, 11
<i>Pierson v. Houston Indep. Sch. Dist.</i> , 698 S.W.2d 377 (Tex. App. – Houston [14 th Dist.] 1985, writ refused n.r.e.).....	13
<i>Pierson v. Ray</i> , 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).....	9, 19
<i>Piotrowski v. City of Houston</i> , 237 F.3d 567 (5 th Cir. 2001).....	5
<i>Poland v. Willerson</i> , 2008 Tex. App. Lexis 1805 (Tex. App. – Houston [1 st Dist.] 2008, no pet.).....	15, 16
<i>Post v. City of Fort Lauderdale</i> , 7 F.3d 1552 (11 th Cir. 1993).....	23
<i>Presley v. City of Benbrook</i> , 4 F.3d 405 (5 th Cir. 1993).....	10
<i>Priester v. City of Lowndes</i> , 354 F.3d 414 (5 th Cir. 2004).....	5
<i>Pruett v. Harris County Bail Bond Bd.</i> , 499 F.3d 403 (5 th Cir. 2007).....	2
<i>Ramirez v. Knoulton</i> , 542 F.3d 124 (5 th Cir. 2008).....	8
<i>Ramos v. Tex. Dep't of Public Safety</i> , 35 S.W.3d 723 (Tex. App. – Houston [1 st Dist.] 2000, pet. denied).....	21
<i>Rendell-Baker v. Kohn</i> , 457 U.S. 830, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982).....	5
<i>Rhodes v. Torres</i> , 901 S.W.2d 794 (Tex. App. – Houston [14 th Dist.] 1995, no writ).....	24
<i>Richardson v. Thompson</i> , 390 S.W.2d 30 (Tex. Civ. App. – Dallas 1965, writ dismissed).....	22
<i>Rios v. City of Del Rio</i> , 444 F.3d 417 (5 th Cir. 2006).....	5
<i>Rivera v. Houston Indep. Sch. Dist.</i> , 349 F.3d 244 (5 th Cir. 2003).....	5

<i>Rizzo v. Goode</i> , 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976)	2
<i>Rosencrans v. Altschuler</i> , 161 S.W.3d 517 (Tex. App. – Eastland 2004, no pet.)	28
<i>Rowland v. Perry</i> , 41 F.3d 167 (4 th Cir. 1994)	19, 20
<i>Royal v. Harris County</i> , __ S.W.3d __, 2010 Tex. App. LEXIS 1217 (Tex. App. – Houston [14 th Dist.] 2010, no pet.)	26
<i>Salazar v. Collins</i> , 255 S.W.3d 191 (Tex. App. – Waco 2008, no pet.)	21, 24
<i>Saldana v. Garza</i> , 684 F.2d 1159 (5 th Cir. 1982)	11
<i>Saucier v. Katz</i> , 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)	7, 8, 9
<i>Scanlan v. Tex. A&M Univ.</i> , 343 F.3d 533 (5 th Cir. 2003)	5
<i>Scheuer v. Rhodes</i> , 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)	6, 18, 20, 23
<i>Schultea v. Wood</i> , 47 F.3d 1427 (5 th Cir. 1995) (en banc)	11
<i>Schumate v. Thompson</i> , 580 S.W.2d 47 (Tex. Civ. App. – Houston [1 st Dist.] 1979, writ ref'd n.r.e.)	28
<i>Scott v. Harris</i> , 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)	7, 11
<i>Siegert v. Gilley</i> , 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991)	10
<i>Smith v. State</i> , 70 S.W.3d 848 (Tex. Crim. App. 2002)	17
<i>Smith v. Wade</i> , 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983)	6
<i>Souder v. Cannon</i> , 235 S.W.3d 841 (Tex. App. – Fort Worth 2007, no pet.)	18, 20, 21, 22
<i>Southard v. Tex. Bd. of Crim. Justice</i> , 114 F.3d 539 (5 th Cir. 1997)	2
<i>State v. McGeorge</i> , 925 S.W.2d 105 (Tex. App. – Houston [14 th Dist.] 1996, writ denied)	25
<i>Stem v. Ahearn</i> , 908 F.2d 1 (5 th Cir. 1990)	10
<i>Stout v. Grand Prairie Indep. Sch. Dist.</i> , 733 S.W.2d 290 (Tex. Civ. App. – Dallas 1987, writ ref'd n.r.e.)	28
<i>Swint v. Chambers County Comm'n</i> , 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)	7
<i>Telthorster v. Tennell</i> , 92 S.W.3d 457 (Tex. 2002)	passim
<i>Tex. A&M Univ. v. Koseoglu</i> , 233 S.W.3d 835 (Tex. 2007)	17, 26
<i>Tex. Ass'n of Bus. v. Tex. Air Control Bd.</i> , 852 S.W.2d 440 (Tex. 1993)	15
<i>Tex. Dep't of Family & Protective Servs. v. E.R.</i> , 2009 Tex. App. Lexis 1135 (Tex. App. – Corpus Christi 2009, no pet.)	22
<i>Tex. Dep't of Public Safety v. Petta</i> , 44 S.W.3d 557 (Tex. 2001)	14
<i>Tex. Dep't of Transp. v. Jones</i> , 8 S.W.3d 636 (Tex. 1999) (per curiam)	13, 15
<i>Tex. Dep't. of Pub. Safety v. Tanner</i> , 928 S.W.2d 731 (Tex. App. – San Antonio 1996, no writ)	22
<i>Tex. Parks & Wildlife Dep't v. Garrett Place, Inc.</i> , 972 S.W.2d 140 (Tex. App. – Dallas 1998, no pet.)	15
<i>Tex. State Tech. College v. Cressman</i> , 172 S.W.3d 61 (Tex. App. – Waco 2005, pet. denied)	22
<i>Thomas-Smith v. Mackin</i> , 238 S.W.3d 503 (Tex. App. – Houston [14 th Dist.] 2007, no pet.)	22
<i>Thompkins v. Belt</i> , 828 F.2d 298 (5 th Cir. 1987)	3
<i>Thompson v. Steele</i> , 709 F.2d 381 (5 th Cir. 1983)	2
<i>Titus Reg'l Med. Ctr. v. Tretta</i> , 180 S.W.3d 271 (Tex. App. – Texarkana 2005, no pet.)	21, 22
<i>Tooke v. City of Mexia</i> , 197 S.W.3d 325 (Tex. 2006)	13
<i>Travis v. City of Mesquite</i> , 830 S.W.2d 94 (Tex. 1992)	17, 19, 26
<i>United States v. Lanier</i> , 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)	8
<i>United States v. Merritt</i> , 695 F.2d 1263 (10 th Cir. 1982)	20
<i>Univ. of Houston v. Clark</i> , 38 S.W.3d 578 (Tex. 2000)	passim
<i>Univ. of Tex. at El Paso v. Moreno</i> , 172 S.W.3d 281 (Tex. App. – El Paso 2005, no pet.)	14
<i>Univ. of Tex. Med. Branch at Galveston v. York</i> , 871 S.W.2d 175 (Tex. 1994)	13, 14
<i>Univ. of Tex. Sys. v. Courtenay</i> , 946 S.W.2d 464 (Tex. App. – Fort Worth 1997, no pet.)	12
<i>Univ. of Tex.-Pan Am. v. Aguilar</i> , 251 S.W.3d 511 (Tex. 2008)	15
<i>Van de Kamp v. Goldstein</i> , __ U.S. __, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009)	6
<i>Vela v. Rocha</i> , 52 S.W.3d 398 (Tex. App. – Corpus Christi, 2001, pet. denied)	26
<i>Victory v. Bills</i> , 897 S.W.2d 506 (Tex. App. – El Paso 1995, no writ)	26
<i>Wadewitz v. Montgomery</i> , 951 S.W.2d 464 (Tex. 1997)	passim
<i>Walker v. Epps</i> , 550 F.3d 407 (5 th Cir. 2008)	2
<i>Walker v. Harris</i> , 924 S.W.2d 375 (Tex. 1996)	24
<i>Watson v. Interstate Fire & Casualty Company</i> , 611 F.2d 120 (5 th Cir. 1980)	2
<i>Watson v. Newman</i> , 299 S.W.3d 129 (Tex. 2009)	17
<i>Welch v. Milton</i> , 185 S.W.3d 586 (Tex. App. – Dallas 2006, pet. denied)	16
<i>West v. Atkins</i> , 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)	1
<i>Westfall v. Erwin</i> , 484 U.S. 292, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988)	18, 19

<i>Wethington v. Mann</i> , 172 S.W.3d 146 (Tex. App. – Beaumont 2005, no pet.)	22
<i>Whatley v. Philo</i> , 817 F.2d 19 (5 th Cir. 1987)	11
<i>White v. Annis</i> , 864 S.W.2d 127 (Tex. App. – Dallas 1993, writ denied)	16
<i>White v. Taylor</i> , 959 F.2d 539 (5 th Cir. 1992)	10
<i>William Marsh Rice Univ. v. Coleman</i> , 291 S.W.3d 43 (Tex. App. – Houston [14 th Dist.] 2009, pet. filed)	26
<i>Williams v. Ballard</i> , 466 F.3d 330 (5 th Cir. 2006)	9
<i>Williams v. Conroe Indep. Sch. Dist.</i> , 809 S.W.2d 954 (Tex. Civ. App. – Beaumont 1991, no writ)	13, 28
<i>Williams v. Luna</i> , 909 F.2d 121 (5 th Cir. 1990)	3
<i>Williams v. Nealon</i> , 199 S.W.3d 462 (Tex. App. – Houston [1 st Dist.] 2006, pet. filed)	15
<i>Wilson v. Garcia</i> , 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985)	6
<i>Wilson v. Layne</i> , 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)	9
<i>Wood v. Strickland</i> , 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975)	6, 18, 19
<i>Wooley v. City of Baton Rouge</i> , 211 F.3d 913 (5 th Cir. 2000)	9, 10
<i>Wyatt v. Cole</i> , 504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992)	7
<i>Zarnow v. City of Wichita Falls</i> , 500 F.3d 401 (5 th Cir. 2007)	8, 12

Statutes

42 U.S.C. § 1981a	2
42 U.S.C. § 1983	1, 5, 6
42 U.S.C. § 1988	6
42 U.S.C. § 2000cc <i>et seq.</i>	2
TEX. CIV. PRAC. & REM. CODE § 101.001	13
TEX. CIV. PRAC. & REM. CODE § 101.001 <i>et seq.</i>	13
TEX. CIV. PRAC. & REM. CODE § 101.021	13, 14, 15, 28
TEX. CIV. PRAC. & REM. CODE § 101.021	26
TEX. CIV. PRAC. & REM. CODE § 101.022	15, 28
TEX. CIV. PRAC. & REM. CODE § 101.023	15
TEX. CIV. PRAC. & REM. CODE § 101.024	15
TEX. CIV. PRAC. & REM. CODE § 101.026	18, 20
TEX. CIV. PRAC. & REM. CODE § 101.051	13
TEX. CIV. PRAC. & REM. CODE § 101.055	28
TEX. CIV. PRAC. & REM. CODE § 101.057	13
TEX. CIV. PRAC. & REM. CODE § 101.106 (2002)	15, 17
TEX. CIV. PRAC. & REM. CODE § 101.106 (2003)	16, 17
TEX. CIV. PRAC. & REM. CODE § 110.001 <i>et seq.</i>	2
TEX. CIV. PRAC. & REM. CODE § 51.014	26
TEX. EDUC. CODE § 22.0511	27
TEX. GOV'T CODE § 22.001	26
TEX. GOV'T CODE § 22.225	26, 27
TEX. GOV'T CODE § 554.003	13
TEX. LABOR CODE § 21.002	13
TEX. LABOR CODE § 451.001	13
TEX. LOCAL GOV'T CODE § 271.152	13
TEX. TRANSP. CODE § 546.001	29
TEX. TRANSP. CODE § 546.005	29

Rules

TEX. R. CIV. P. 166a	22, 24, 25
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Treatises

MARTIN A. SCHWARTZ AND JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES (3d ed. 1999)	7
MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES (4th ed. 2007)	6

Constitutional Provisions

TEX. CONST. art. 1 § 17	13
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I. INTRODUCTION

The purpose of this paper is to provide an overview of common lawsuits against local governmental entities and public officials, as well as likely defenses. The paper begins with a discussion of federal claims and defenses and continues with a discussion of state claims and defenses.

The portion of the paper relating to federal claims and defenses is generally limited to claims brought pursuant to 42 U.S.C. § 1983, which provides the most common vehicle for bringing constitutional claims against local governments and public officials. The portion of the paper relating to state claims and defenses discusses state constitutional claims, as well as the limitations on common law and statutory claims resulting from governmental and individual immunity.

II. FEDERAL CLAIMS – SECTION 1983

What is now called Section 1983 was enacted as Section 1 of the Civil Rights Act of 1871, “An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and For other Purposes.” See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 722, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989). “The immediate impetus for the bill was evidence of widespread acts of violence perpetrated against the freedman and loyal white citizens by groups such as the Ku Klux Klan.” *Id.* While most of the Civil Rights Act of 1871 was designed to combat the actions of groups like the Klan, Section 1 sought to remedy “the failure of the state courts to enforce federal law designed for the protection of the freedman.” *Id.* at 725. Section 1 of the Civil Rights Act of 1871, generally called Section 1983, creates a private cause of action for damages against state and local governments and officials for violations of the United States Constitution and laws. Cf. *Monell v. Dep’t of Social Svcs.*, 436 U.S. 658, 683-90, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Section 1983 currently states,

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.

A. Elements of Section 1983 Claims

To prevail on a claim under Section 1983, “a plaintiff must first show a violation of the Constitution or of federal law, and then show that the violation was committed by someone acting under color of state law.” *Brown v. Miller*, 519 F.3d 231, 236 (5th Cir. 2008); see also *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980); *West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). One commentator has noted, though, that “[i]t is more accurate . . . to view a § 1983 claim for relief as comprising four separate requirements: (1) a violation of rights protected by the federal Constitution or created by federal statute or regulation, (2) proximately caused, (3) by the conduct of a person (4) who acted under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.” MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, § 1.04[A] (4th ed. 2007) (internal quotation marks omitted).

1. A Violation of a Federal Right

Section 1983 does not create any substantive rights; rather, it provides a method of protecting federal rights secured elsewhere. *Albright v. Oliver*, 510 U.S. 266, 269-71, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). Moreover, not every alleged tort or wrong constitutes a violation of a civil right. *Id.* at 269-71; *Baker v. McCollan*, 443 U.S. 137, 142, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979). For example, not every injury suffered by one prisoner at the hands of another translates into constitutional liability for prison officials responsible for the victim's safety. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). As Justice Scalia noted in *City of Monterrey v. Del Monte Dunes*, 526 U.S. 687, 724, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), “Section 1983 establishes a unique, or at least distinctive, cause of action, in that the legal duty which is the basis for relief is ultimately defined not by the claim creating the statute itself, but by an extrinsic body of law to which the statute refers. In this respect, Section 1983 is . . . a prism through which many different lights may pass.”

The range of cases involving Section 1983 is remarkable. Below is a small selection of decisions from the Fifth Circuit within the past few years involving Section 1983 claims:

- *Dearmore v. City of Garland*, 519 F.3d 517

- (5th Cir. 2008) (Fourth and Fourteenth Amendment challenge to ordinance relating to the maintenance of rental properties);
- *Walker v. Epps*, 550 F.3d 407 (5th Cir. 2008) (Eighth Amendment challenge to method of executing prisoners sentenced to death);
 - *Jordan v. Ector County*, 515 F.3d 290 (5th Cir. 2008) (First Amendment claim by former employee alleging retaliation based on protected speech);
 - *Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403 (5th Cir. 2007) (First Amendment challenge to state law restricting solicitation of clients by bail bond companies);
 - *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007) (First Amendment free exercise challenge by prisoner to prison regulation that impacted his ability to exercise his religious faith);
 - *Lauderdale v. Tex. Dep't of Crim. Justice*, 512 F.3d 157 (5th Cir. 2007) (Fourteenth Amendment sexual harassment claim by employee against supervisor); and
 - *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006) (First Amendment free speech challenge to municipal regulation of sexually-oriented businesses).

While many types of claims can be brought pursuant to Section 1983, certain types of claims can be brought pursuant to Section 1983 as well as more recently enacted statutory remedies, such as Title VII. This dual-remedy structure permits a plaintiff to choose the more favorable remedy. For instance, if a plaintiff believes that he or she was discriminated against in employment based on race, the plaintiff may bring suit under Title VII and/or Section 1983. *Lauderdale v. Tex. Dep't of Crim. Justice*, 512 F.3d 157, 166 (5th Cir. 2007) (“parallel causes of action”); *Southard v. Tex. Bd. of Crim. Justice*, 114 F.3d 539, 549 (5th Cir. 1997) (“supplemental remedies”). Under Title VII, unlike Section 1983, a local government entity can be held liable under a theory of *respondeat superior*. *Indest v. Freeman Decorating*, 164 F.3d 258, 262 (5th Cir. 1999). However, Title VII, unlike Section 1983, imposes caps on the available damages. See 42 U.S.C. § 1981a(b)(3); see also *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1284 (11th Cir. 2008) (declining to consider Title VII caps on punitive damages in considering reasonableness of punitive damage award under Section 1983).

Within the past decade, cases alleging a violation of an individual’s free exercise of religion have been steadily shifting away from the First Amendment and

toward federal and state statutes. This shift is largely attributable to the legislative reaction to the Supreme Court’s free exercise decision in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), in which the Supreme Court held that the “rational basis” test applies to general laws of neutral applicability which impinge on religious beliefs and practices. For land use claims and claims involving institutionalized persons, the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) provides a much more plaintiff-oriented standard than exists under the First Amendment. See 42 U.S.C. § 2000cc *et seq.* Similarly, at the state level, Texas has enacted the Religious Freedom Restoration Act (RFRA), which applies more generally to claims based on the exercise of religion. See TEX. CIV. PRAC. & REM. CODE § 110.001 *et seq.*

2. Proximate Cause

A defendant in a § 1983 cause of action cannot be held liable if the deprivation alleged is “too remote a consequence” of the defendant’s acts. *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980). The defendant must have actively participated in, or been a “moving force” behind, the alleged deprivation. *Oklahoma City v. Tuttle*, 471 U.S. 808, 819-20, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985). Courts should look to common law tort causation principles in evaluating causation under Section 1983. *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005). As the Supreme Court has pointed out, Section 1983 liability “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” *Monroe v. Pape*, 365 U.S. 167, 187, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

3. By the Conduct of a “Person”

This element invokes at least two different connotations. The first and most straightforward connotation involves the conduct of individual flesh and blood persons. The second and less obvious connotation involves the conduct of entities as persons.

a. Individual Persons

Personal involvement is an essential element of a civil rights cause of action under §1983. *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983) (citing *Rizzo v. Goode*, 423 U.S. 362, 371-372, 377, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976)). Liability may be found only if there is personal involvement of the officer being sued. *Watson v. Interstate Fire & Casualty Company*, 611 F.2d 120, 123 (5th Cir. 1980); *Nettles v. Griffith*, 883 F. Supp. 136 (E.D. Tex. 1995). An individual official cannot be liable in a civil rights action unless he directly and personally participates in the conduct

which deprives the plaintiff of the rights, privileges and immunities secured to him by the United States Constitution. *Hill v. Anderson*, 381 F. Supp. 906 (E.D. Okla. 1974). In order to successfully plead a cause of action in a civil rights case, a plaintiff must enunciate a set of facts that illustrate the defendants' participation in the alleged wrong. *Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986).

Lawsuits against supervisory personnel based on their position of authority are claims for liability based on the doctrine of *respondeat superior*. *Respondeat superior* liability does not apply in Section 1983 actions. *Williams v. Luna*, 909 F.2d 121 (5th Cir. 1990). Supervisory officials are not liable for the acts of subordinates based on a theory of vicarious liability. *Id.* A supervisor may be liable if there is: (1) personal involvement in a Constitutional deprivation; (2) a causal connection between the supervisor's wrongful conduct and a Constitutional deprivation; or (3) if supervisory officials institute a policy so deficient that the policy itself is a repudiation of rights and is the moving force behind a Constitutional deprivation. *Thompkins v. Belt*, 828 F.2d 298 (5th Cir. 1987). In the context of a failure to supervise or train, a plaintiff must show that: (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference. *Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375 (5th Cir. 2005). Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. *Id.* (citing *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 410, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)).

b. Entities As Persons

"[P]roper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins v. City of Harker Heights*, 503 U.S. 115, 120, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992).

In *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), the Supreme Court concluded that local governments are not "persons" under the Civil Rights Act of 1871 and, therefore, cannot be sued for violations of the Fourteenth Amendment. *Id.* at 187. The Court reconsidered this opinion in 1978, reversed *Monroe*, and held that local governments are "persons" under Section 1983, and therefore subject to suit, but only if "the action alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and

promulgated by that body's officers." *Monell v. Dep't of Social Svcs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). In addition, local governments can be held liable for "constitutional deprivations visited pursuant to government 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 691. However, local governments cannot "be held liable unless action pursuant to official municipal policy of some sort caused a constitutional tort." *Id.* "In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* (emphasis original).

We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694. Similarly, an official policy or custom cannot be inferred from the single unconstitutional action of a government employee unless that individual employee is an official authorized to establish government policy. *Oklahoma City v. Tuttle*, 471 U.S. 808, 830-31, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985) (evidence of excessive and unusual actions of individual police officer is insufficient to prove that the injuries were caused by an official policy or custom); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (County Prosecutor acted as policymaker when he ordered Deputy Sheriffs to make arrest in violation of Fourth Amendment). The identification of policymaking officials is a question of state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988). "The identification of policymaking officials is not a question of federal law and it is not a question of fact in the usual sense. The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms." *Id.* A federal court may not assume that local government policymaking authority "lies somewhere other than where the applicable law purports to put it." *Id.* at 126. This legal issue should be "resolved by the trial judge *before* the case is submitted to the jury." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989) (emphasis original).

Reviewing the relevant legal materials, including state and local positive law, as well as custom and usage having the force of law, the trial judge must

identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. *Id.* Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the “standard operating procedure” of the local governmental entity. *Id.*

“[S]pecial difficulties can arise when it is contended that a municipal policymaker has delegated his policymaking authority to another official.” *Praprotnik*, 485 U.S. at 126. In considering such situations, the Supreme Court has provided certain principles for guidance: First, egregious attempts by a local government to insulate itself from liability for unconstitutional policies is precluded by proving the existence of a widespread practice that, although not authorized by written law or express municipal policy, is so permanently and well settled as to constitute a custom or usage with the force of law. *Id.* at 127 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)). Second, the authority to make municipal policy is necessarily the authority to make final policy. *Praprotnik*, 485 U.S. at 127 (citing *Pembaur*, 475 U.S. at 481-84).

When an official’s discretionary decisions are constrained by policies not of that official’s making, those policies, rather than the subordinate’s departures from them, are the act of the municipality. Similarly, when a subordinate’s decision is subject to review by the municipality’s authorized policymakers, they have retained the authority to measure the official’s conduct for conformance with their policies. If the authorized policymakers approve a subordinate’s decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

Praprotnik, 487 U.S. at 127.

In analyzing the question of whether a public official has policymaking authority, the Fifth Circuit has distinguished between “final decisionmaking authority and final policymaking authority.” *Bolton v. City of Dallas*, 541 F.3d 545, 548 (5th Cir. 2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 1669, 173 L. Ed. 2d 1036 (2009). “[A]n official whose discretionary decisions on a particular matter are final and unreviewable, meaning they can’t be overturned, is constrained if another entity has ultimate power to guide that discretion, at least prescriptively, whether or

not that power is exercised.” *Barrow v. Greenville Indep. Sch. Dist.*, 480 F.3d 377, 382 (5th Cir. 2007). “The finality of an official’s action does not therefore automatically lend it to the character of a policy.” *Bolton*, 541 F.3d at 550. Thus, in *Barrow*, the Fifth Circuit rejected the plaintiff’s claim that a public school superintendent had policymaking authority because he had unreviewable authority to recommend individuals for administrative positions. 480 F.3d at 381-82. Instead, “the power of the board to fire the superintendent highlights that it is the board, not the superintendent, which has policymaking authority.” *Id.* at 382. Similarly, the Fifth Circuit rejected Police Chief Bolton’s claim that the City of Dallas had delegated policymaking authority to the City Manager in regard to personnel decisions because those decisions were unreviewable by the City Council. *Bolton*, 541 F.3d at 551. Since the City Manager was bound to abide by the City Charter and the Charter specifically prohibited the City Manager’s termination of Chief Bolton’s employment, the City Manager could not be a policymaker for the City in regard to this type of personnel decision. *Id.*

4. Under Color of Law

For a detailed discussion of the “color of law” and “state action” requirement, see *Doe v. Rains Indep. Sch. Dist.*, 66 F.3d 1402 (5th Cir. 1995). In *Doe v. Rains* the Fifth Circuit held that a teacher’s violation of a Texas statute, requiring that sexual abuse of children be reported within 48 hours, did not constitute action “under color of state law” required to sustain a § 1983 action. The court in *Doe* ruled that in order for “state action” to be involved, the teacher would have to possess authority to exercise control over the alleged abuser, a fellow teacher. Since the teacher had no such authority, there was no “state action” and, thus, no § 1983 claim. Stated simply, the mere fact that a person is employed by the government does not determine that they are a “state actor” in every situation.

“Ordinarily, a state official has no constitutional duty to protect an individual from private violence.” *McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002) (en banc) (citing *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 197, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)). This general rule is not absolute, however, and “in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.” *DeShaney*, 489 U.S. at 198.

First, “[w]hen the state, through the affirmative exercise of its powers, acts to restrain an individual’s freedom to act on his own behalf ‘through incarceration, institutionalization, or other similar restraint of personal liberty,’ the state creates a ‘special

relationship' between the individual and the state which imposes upon the state a constitutional duty to protect that individual from dangers, including, in certain circumstances, private violence." *McClendon*, 305 F.3d at 324 (citing *DeShaney*, 489 U.S. at 200).

Second, the Supreme Court in *DeShaney* rejected the claim that there was a special relationship between the child and the state, but noted that "while the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *DeShaney*, 489 U.S. at 201. Based on this language in *DeShaney* about creation or enhancement of danger, a majority of the federal courts of appeals have recognized a second exception to the general rule that the State is not obligated to protect individuals from private harm. This second exception is generally called the "state-created danger" theory. *McClendon*, 305 F.3d at 324-325.

The basic requirements of the state-created danger theory are: First, a plaintiff must show that the state actors increased the danger to him. Second, a plaintiff must show that the state actors acted with deliberate indifference. *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249 (5th Cir. 2003) (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 584 (5th Cir. 2001)). The "key to the state-created danger cases is the state actors' culpable knowledge and conduct in affirmatively placing the individual in a position of danger, effectively stripping the person of his ability to defend himself, or cutting off potential sources of private aid." *Rivera*, 349 F.3d at 249 (citing *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994)). "To be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Johnson*, 38 F.3d at 201. In addition, the state actor must have created or increased the danger to a "known victim." *Rios v. City of Del Rio*, 444 F.3d 417, 423-425 (5th Cir. 2006). The state actor must be aware of an immediate danger facing a known victim; liability does not extend to "all foreseeable victims." *Rios*, 444 F.3d at 424 n.7 (citing *Lester v. City of College Station*, 103 Fed. Appx. 814 (5th Cir. 2004)).

It is unclear whether the Fifth Circuit has recognized or will recognize the "state-created danger" theory of liability. Before 2003, there was no doubt that the Fifth Circuit had yet to recognize the "state-created danger" theory of liability. See, e.g., *McClendon*, 305 F.3d at 325 ("we have not yet determined whether a state official has a similar duty to protect individuals from state-created dangers"). In *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533 (5th Cir. 2003), the Fifth Circuit reversed dismissal of a state-created danger claim against Texas A&M University, holding that the facts as alleged by the plaintiffs "stated a section 1983 claim under the state-created danger

theory." *Id.* at 538.

Subsequent plaintiffs argued that *Scanlan*, by remanding the state-created danger to the district court, necessarily recognized the state-created danger theory of liability. The Fifth Circuit, in a series of opinions, however, held that *Scanlan* did not recognize the theory. See *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249 n.5 (5th Cir. 2003) (mentioning *Scanlan*); *Priester v. City of Lowndes*, 354 F.3d 414, 422 (5th Cir. 2004) (not mentioning *Scanlan*); *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) (mentioning *Scanlan*); *Hernandez v. Tex. Dep't of Protective and Regulatory Svcs.*, 380 F.3d 872, 880 n.1 (5th Cir. 2004) (not mentioning *Scanlan*); *Rios*, 444 F.3d at 422-23 (mentioning *Scanlan*); *Longoria v. Texas*, 473 F.3d 586, 593 n.8 (5th Cir. 2006) (mentioning *Scanlan*).

In 2007, *Scanlan* was on appeal again before the Fifth Circuit under a different name: *Breen v. Tex. A&M Univ.*, 485 F.3d 325 (5th Cir. 2007). In *Breen*, the Fifth Circuit panel held that *Scanlan* necessarily did recognize the state-created danger theory of liability, but that the defendant was entitled to qualified immunity because it was not clearly established. *Id.* at 335-337 and 340. *Breen* was issued on April 24, 2007. On July 26, 2007, the *Breen* panel issued an opinion amending *Breen* to withdraw and delete the portions of the opinion that state *Scanlan* recognized the state-created danger theory of liability. *Breen v. Tex. A&M Univ.*, 2007 U.S. App. Lexis 18181 (5th Cir. 2007). No explanation was provided for the amended opinion.

It would seem that the reasoning of *Scanlan* does require that it recognized the state-created theory of liability. Repeated panels of the Fifth Circuit, however, maintain that it did not. As a result, it is unclear whether a later panel will conclude that *Scanlan* recognized the theory.

A private person may only be found to be a state actor if one of four rigorous tests is met. These tests are: (1) the symbiotic relationship test *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982); (2) the public function test *Jackson*, 419 U.S. at 353; *Blum v. Yaretsky*, 457 U.S. 991, 1011, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982); (3) the close nexus test *Blum*, 457 U.S. at 1004-05; and (4) the joint participation test *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598; 26 L. Ed. 2d 142 (1970); *Pfannstiel v. City of Marion*, 918 F.2d 1178 (5th Cir. 1990).

B. Damages and Limitations in Section 1983 Claims

Plaintiffs bringing Section 1983 claims may be able to receive relief including injunctions, declaratory judgments, and compensatory or nominal damages. See 42 U.S.C. § 1983 (permitting suits in equity and at

law); *Owen v. City of Independence*, 445 U.S. 622, 651, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986).

Punitive damages are permitted against public officials, but not against governmental entities. See *City of Newport v. Fact Concerts*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). In order to receive punitive damages against a public official, a plaintiff must prove that the official acted with “evil motive or intent” or with “reckless or callous indifference” to the plaintiff’s federally protected rights. *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983).

Reasonable attorney’s fees are available as part of costs to the prevailing party in suits under Section 1983. See 42 U.S.C. § 1988.

Claims brought under the United States Constitution, and therefore pursuant to 42 U.S.C. § 1983, are governed by a two year statute of limitations. *Owens v. Okure*, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989) (federal courts borrow the forum state’s general personal injury limitation period); *Wilson v. Garcia*, 471 U.S. 261, 279-280, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985); *Kline v. N. Tex. State Univ.*, 782 F.2d 1229, 1232 (5th Cir. 1986).

III. FEDERAL QUALIFIED IMMUNITY FOR PUBLIC OFFICIALS

Even if a plaintiff can establish a Section 1983 claim against an individual public official, the public official may be entitled to either absolute or qualified immunity. Common forms of absolute immunity include judicial immunity, prosecutorial immunity, witness immunity and legislative immunity. See, e.g., *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988) (judicial immunity); *Van de Kamp v. Goldstein*, ___ U.S. ___, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009) (prosecutorial immunity); *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983) (witness immunity); *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998) (legislative immunity). In most Section 1983 cases and for most public officials, however, the immunity at issue is qualified immunity.

A. Qualified Immunity in General

While Section 1983 does not create any substantive rights, it provides a method of protecting federal rights secured elsewhere. *Albright v. Oliver*, 510 U.S. 266, 269-71, 114 S. Ct. 807, 127 L. Ed. 2d 114 510 (1994). The essence of qualified immunity is that state and local officials who carry out their executive and administrative functions without violating clearly established federal law will be protected against personal liability under 42 U.S.C. § 1983, even if their actions did violate federally

protected rights. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 9A.02[A] (4th ed. 2007).

The United States Supreme Court has consistently held that government officials are entitled to some form of immunity from suits for damages. *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). “As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.” *Id.*

While absolute immunity is provided to legislators and judges, qualified immunity is the norm for public officials performing executive or administrative functions. *Id.* at 807. The Supreme Court has explained the application of qualified immunity as aimed at reconciling two important competing considerations. First, “[w]hen government officials abuse their offices, ‘action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.’” *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (citing *Harlow*, 457 U.S. at 814). “On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.” *Anderson*, 483 U.S. at 638.

The Supreme Court has “accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.” *Id.* Without the protection afforded by qualified immunity, public officials might be unwilling to carry out their public responsibilities “with the decisiveness and the judgment required by the public good.” *Scheuer v. Rhodes*, 416 U.S. 232, 240, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); see also *Elder v. Holloway*, 510 U.S. 510, 514, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994).

B. The Development of Qualified Immunity

Prior to the Supreme Court’s 1983 decision in *Harlow*, qualified immunity required “good faith,” which contained both an “objective” and a “subjective” aspect. *Harlow*, 457 U.S. at 815. The objective element involved a presumptive knowledge of and respect for “basic, unquestioned constitutional rights.” *Id.* (citing *Wood v. Strickland*, 420 U.S. 308, 322, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975)). The subjective component, however, referred to “permissible intentions.” *Harlow*, 457 U.S. at 815. The Court explained that an official is not entitled to qualified immunity if the official “knew or reasonably should

have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.” *Id.* (emphasis removed).

The subjective element of the good-faith qualified immunity defense, however, frequently proved incompatible with the Supreme Court’s assumption that the standard would permit insubstantial lawsuits to be quickly terminated. *Id.* at 814-816. Qualified immunity is intended to protect public officials from both liability and the burdens of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Protection from the burdens of litigation (such as discovery and trial), however, is effectively lost if a case is erroneously permitted to go to trial. *Id.*; see also *Scott v. Harris*, 550 U.S. 372, 376 n.2, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (citing *Mitchell*); *Husley v. Owens*, 63 F.3d 354 (5th Cir. 1995). Since disputed questions of fact may not be decided on motions for summary judgment, “an official’s subjective good faith [was] considered to be a question of fact that ... inherently require[ed] resolution by a jury.” *Harlow*, 457 U.S. at 816.

In order to resolve the problems imbedded in the subject requirement for qualified immunity, the Supreme Court held “that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow*, 457 U.S. at 818. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time the incident occurred. *Id.* If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to “know” that the law forbade conduct not previously identified as unlawful. *Id.* If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. *Id.* at 818-19. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, he is entitled to qualified immunity. *Id.* at 819. But even then, the defense turns primarily on objective factors. *Id.*

Harlow was intended to simplify qualified immunity, but it has been generally unsuccessful. Besides the voluminous quantity of case law in the courts of appeals, the qualified immunity defense has been the subject of numerous Supreme Court decisions attempting to clarify and resolve the scope of this new

standard for qualified immunity.¹ As one commentator has noted, “The *Harlow* immunity standard represents a clear case of good intentions gone awry. It is hard to view the uncertainties, intricacies, and voluminous decisional law generated by *Harlow* as being anything other than a legal nightmare.” MARTIN A. SCHWARTZ AND JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 338 (3d ed. 1999).

C. The Current Analytical Framework for Qualified Immunity

The analytical framework for qualified immunity has varied through the years and is still inconsistently applied. For almost a decade, lower courts were required to first resolve the following threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show that the public official’s conduct violated a constitutional right? *Scott v. Harris*, 550 U.S. 372, 377, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). “If, and only if, the court finds a violation of a constitutional right, ‘the next, sequential step is to ask whether the right was clearly established ... in light of the specific context of the case.’” *Scott*, 550 U.S. at 377.

Supreme Court decisions prior to *Saucier* “held that ‘the better approach to resolving cases in which

¹ *Safford Unified Sch. Dist. #1 v. Redding*, ___ U.S. ___, 129 S. Ct. 2633, 2644, 174 L. Ed. 2d 354 (2009); *Pearson v. Callahan*, ___ U.S. ___, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009); *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007); *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004); *Groh v. Ramirez*, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004); *Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003); *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001); *Hanlon v. Berger*, 526 U.S. 808, 119 S. Ct. 1706, 143 L. Ed. 2d 978 (1999); *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999); *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997); *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996); *Johnson v. Jones*, 515 U.S. 177, 115 S. Ct. 2151, 132 L. Ed. 2d 136 (1995); *Swint v. Chambers County Comm’n*, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995); *Elder v. Holloway*, 510 U.S. 510, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994); *Wyatt v. Cole*, 504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992); *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991); *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986); *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); *Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984).

the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.” *Pearson v. Callahan*, ___ U.S. ___, 129 S. Ct. 808, 816, 172 L. Ed. 2d 565 (2009) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). In *Saucier*, the Supreme Court made that suggestion a mandate. *Pearson*, 129 S. Ct. at 816. This year, in *Pearson*, the Supreme Court reversed *Saucier* and restored discretion to lower courts to decide whether or not a ruling on the constitutional question should precede consideration of whether the law was clearly established. *Id.* at 818. Both parts of the qualified immunity test still exist, but lower courts may “exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Id.* In making this change in the qualified immunity procedure, the Supreme Court noted that the *Saucier* rule “sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case.” *Id.* “There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.” *Id.*

The only time that lower courts must consider both prongs is if they are going to deny qualified immunity to a public official. *Lytle v. Bexar County*, 560 F.3d 404, 409 (5th Cir. 2009).

1. The First Prong: Violation of a Constitutional Right

In the first part of the qualified immunity test, the district court determines whether the plaintiff has alleged the deprivation of a constitutional right at all. If no constitutional violation has occurred, then no further inquiries concerning qualified immunity are necessary. *Los Angeles County v. Rettele*, 550 U.S. 609, 616, 127 S. Ct. 1989, 167 L. Ed. 2d 974 (2007) (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). In order for the district court to make this determination, the court should begin with the basic elements of every Section 1983 claim and examine the plaintiff’s claim to see if the plaintiff has stated a claim that satisfies those basic elements.

2. The Second Prong “Clearly Established Law” or “Objective Reasonableness”

The Supreme Court has stated that the qualified immunity “clearly established” federal law standard “is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.” *United States v. Lanier*, 520 U.S. 259, 270-

271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). The objective reasonableness standard “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

a. “Clearly Established Law”

Exactly how to describe the second prong of the qualified immunity analysis, however, is not always clear. Probably the most complete description is in *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987), where the Supreme Court stated that “[w]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful action generally turns on the ‘objective legal reasonableness’ of the action . . . assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.” *Id.* at 639. The two key phrases are “objective legal reasonableness” and “clearly established.”

The Fifth Circuit has noted that the questions of “objective legal reasonableness” and “clearly established” are different, albeit related, inquiries. *See Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 256 (5th Cir. 2005); *Ramirez v. Knoulton*, 542 F.3d 124, 128-29 (5th Cir. 2008) (emphasizing objective reasonableness component in fact specific context of an excessive force case). Descriptions of the second prong of the qualified immunity test become confusing, however, because the courts sometimes provide a different definition in keeping with the importance of the two categories. *Compare Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407-8 (5th Cir. 2007) (second prong is “objective reasonableness”) *with Brown v. Miller*, 519 F.3d 231, 236-37 (5th Cir. 2008) (second prong is “clearly established”). Adding to this confusion, recent Supreme Court decisions on qualified immunity before *Pearson* had dropped any mention of “objective legal reasonableness.” *See, e.g., Saucier*, 533 U.S. at 201; *but see Pearson*, 129 S. Ct. at 822 (“This inquiry turns on the ‘objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.’”).

If the question of qualified immunity is heavily driven by an interpretation of the case law, using the “clearly established” aspect of the second prong is probably the most useful. In other cases, however, there are specific facts that highlight the objective reasonableness of the public official’s actions and using the “objective reasonableness” language reminds the Court that it is not concerned solely with the state of the law, but also with the understanding of the facts that the public official had at the time of the incident.

In order for a constitutional right to be clearly established for purposes of qualified immunity, the

contours of the right must have been sufficiently clear at the time of the alleged constitutional violation. “For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances.*” *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997) (emphasis in original). A public official will not be held liable unless “it is obvious that no reasonably competent [official] would have concluded that” the conduct at issue would not violate the Constitution. *Malley*, 475 U.S. at 341; *see also Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 655 (5th Cir. 2004). If public officials “of reasonable competence could disagree on this issue, immunity should be recognized.” *Malley*, 475 U.S. at 341; *see also Haggerty*, 391 F.3d at 655.

“It is important to emphasize that [the clearly established] inquiry ‘must be undertaken in light of the specific context of the case, not as a broad general proposition.’” *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (quoting *Saucier*, 533 U.S. at 201). Public officials are “not charged with predicting the future course of constitutional law.” *Pierson v. Ray*, 386 U.S. 547, 557, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967). A right is “clearly established” if its “contours . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Wooley v. City of Baton Rouge*, 211 F.3d 913, 919 (5th Cir. 2000) (citing *Anderson*, 483 U.S. 635). “This is not to say that official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.” *Id.*; *see also Brown v. Miller*, 519 F.3d 231, 237 (5th Cir. 2008) (While it is not necessary that there be a “commanding precedent” that holds that the “very action in question” is unlawful, the unlawfulness must be “readily apparent from relevant precedent in sufficiently similar situations.”).

Prior to *Pearson*, the Fifth Circuit held that decisions from outside the controlling jurisdiction do not clearly establish the law unless there is “a consensus of cases of persuasive authority such that a reasonable officer could not have believed his actions were lawful.” *See Williams v. Ballard*, 466 F.3d 330, 333 (5th Cir. 2006) (“Because at the time there was no binding precedent clearly establishing the right, we must determine if other decisions at the time showed ‘consensus of cases of persuasive authority such that a reasonable officer could not have believed his actions were law’”) (citing *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (en banc)).

In *Pearson*, the Supreme Court held that courts *must* consider the decisions of other judges, even when

they are from some other circuits, when deciding whether the law was clearly established. Public officials “are entitled to rely on existing lower court cases without facing personal liability for their actions.” *Pearson*, 129 S. Ct. at 823. In addition, the law was not clearly established when a “Circuit split on the relevant issue had developed *after* the events that gave rise to the suit.” *Id.* (emphasis added). “If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.” *Wilson v. Layne*, 526 U.S. 603, 618, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999); *see also Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997). The Supreme Court held that if judges disagree on whether the precise conduct at issue is unlawful, it is unfair to hold public officials personally liable merely because the judges were in another circuit or state or because the judges issued their decisions after the events at issue.

To the extent that it may not have been clear before, the Supreme Court’s decision in *Pearson* makes clear that public officials should not be held to a higher standard than judges. To that end, the Supreme Court held that public officials “are *entitled* to rely on existing lower court cases without facing personal liability for their actions.” 129 S. Ct. at 823 (emphasis added). Public officials are “entitled to rely” on cases from other circuits as well as from State Supreme Courts. *Id.* at 822-23. However, “disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear” if the Supreme Court has been clear. *Safford Unified Sch. Dist. #1 v. Redding*, ___ U.S. ___, 129 S. Ct. 2633, 2644, 174 L. Ed. 2d 354 (2009). Nevertheless, if there are sufficiently numerous lower court cases interpreting a Supreme Court precedent different than the Supreme Court would interpret it and those opinions include “well-reasoned majority and dissenting opinions,” the state of the law “counsel[s] doubt that [the Supreme Court was] sufficiently clear in the prior statement of law.” *Id.*

Cases decided after the events at issue can prove that the law was not clearly established. The *Pearson* Court mentioned that two of the cases from other circuits were decided after the events at issue. 129 S. Ct. at 822-23. Moreover, the Court noted that in *Wilson* the circuit split on the relevant issue had developed after the events that gave rise to the lawsuit and that “[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.” *Id.* at 823 (citing *Wilson*, 526 U.S. at 618).

“Further, the applicable law that binds the conduct of officeholders must be clearly established at the very

moment that the allegedly actionable conduct was taken.” *Wooley*, 211 F.3d at 919 (citing *Stem v. Ahearn*, 908 F.2d 1, 5 (5th Cir. 1990)). The issue typically is a question of law. *Wooley*, 211 F.3d at 919 (citing *Pierce*, 117 F.3d 866).

Where there is no clearly settled Constitutional law violated by a defendant, there is no liability for compensatory damages even if clearly settled state law was violated. *Davis v. Scherer*, 468 U.S. 183, 194 and n.12, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1987). A violation of a clear governmental regulation, standing alone, does not mean that clearly settled Constitutional law was violated, even though the plaintiff may argue that the defendant’s conduct was purely ministerial, not discretionary, and thus not protected by qualified immunity. *Gagne v. City of Galveston*, 805 F.2d 558 (5th Cir. 1986).² Also, a holding that the law is “settled” does not bind a court to determine that the law was clearly established. *Matherne v. Wilson*, 851 F.2d 752, 758 (5th Cir. 1988).

b. “Objective Legal Reasonableness”

In determining the objective reasonableness of the defendant’s behavior, the court must judge the behavior against the clearly established law at the time of the alleged incident. *Johnson v. City of Houston*, 14 F.3d 1056, 1060 (5th Cir. 1994); *Wooley*, 211 F.3d at 919 (citing *Mangieri v. Clifton*, 29 F.3d 1012 (5th Cir. 1994)). However, even if the defendant-officer’s conduct actually violates the plaintiff’s constitutional rights, the officer is entitled to qualified immunity if the conduct was objectively reasonable. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990). Thus, the ultimate question regarding the issue of qualified immunity is whether a reasonable public officer could have believed that the actions of the defendant official were lawful in light of clearly established law and the information the public official possessed at the time. See *Anderson*, 483 U.S. at 641.

² The “ministerial duty” exception to qualified immunity “is extremely narrow in scope.” *Gagne v. Galveston*, 805 F.2d 558, 560 (5th Cir. 1986). The Fifth Circuit has interpreted the Supreme Court as having firmly rejected any claim that the qualified immunity defense “is lost when an official is engaged in routine tasks.” *Id.* “A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused.” *Davis v. Scherer*, 468 U.S. 183, 196 n.14, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). “Thus, if an official is required to exercise his judgment, even if rarely or to a small degree, the Court would apparently not find the official’s duty to be ministerial in nature.” *Gagne*, 805 F.2d at 560. In addition, *Davis* stressed that the breach of a ministerial duty would forfeit qualified immunity only if that breach itself gave rise to the cause of action for damages. *Id.* (citing *Davis*, 468 U.S. at 196 n.14).

An officer’s conduct is not objectively reasonable when “all reasonable officials would have realized the particular challenged conduct violated the constitutional provisions sued on.” *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997). This issue, too, generally is a question of law, but denial of summary judgment based on a material factual dispute would be appropriate if there are underlying historical facts in dispute that are material to resolution of the question whether the defendant acted in an objectively reasonable manner. *Mangieri*, 29 F.3d 1012.

The plaintiff has the burden of coming forward with competent summary judgment evidence sufficient to create a fact issue as to whether the defendant’s conduct was not objectively reasonable. *Malley*, 475 U.S. at 341; *White v. Taylor*, 959 F.2d 539, 544 (5th Cir. 1992). In some cases, a hearing or trial may be required to determine the issue. See *Enlow v. Tishomingo County*, 962 F.2d 501, 513 (5th Cir. 1992); *Lampkin v. City of Nacogdoches*, 7 F.3d 430 (5th Cir. 1993); *Presley v. City of Benbrook*, 4 F.3d 405, 409-10 (5th Cir. 1993). When factual issues are still in dispute at the time of trial, a court may not be able to make a decision as to whether officers are entitled to qualified immunity until the factual issues are resolved by a jury. See *Lampkin v. City of Nacogdoches*, 7 F.3d 430 (5th Cir. 1993). In such cases, the jury will have to decide “the underlying historical facts in dispute that are material to the resolution of the questions whether the defendants acted in an objectively reasonable manner in view of existing law and facts available to them.” *Id.* at 435; see also *Presley*, 4 F.3d at 409-10.

3. The Extraordinary Circumstances Exception

Even when the federal law is clearly established, the official may be able to prove “extraordinary circumstances,” showing that he “neither knew nor should have known of the relevant legal standard,” in which case the immunity defense should be sustained. *Harlow*, 457 U.S. at 819. This “extraordinary circumstances” exception has been most often addressed when the defendant official has relied on advice of counsel. See *Davis v. Zirkelbach*, 149 F.3d 614, 620 (7th Cir. 1998).

D. Procedural Aspects of Qualified Immunity

1. Burdens of Pleading and Persuasion

Qualified immunity is an affirmative defense that the defendant official has the burden of pleading. *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980); *Crawford-El v. Britton*, 523 U.S. 574, 586-587, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998). In *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991), the Supreme Court reaffirmed the ruling in *Gomez* that qualified immunity

is a defense that must be pleaded by a defendant official. Generally, affirmative defenses (including qualified immunity) must be raised in the first responsive pleading. *Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009). However, the Fifth Circuit has permitted a late assertion of qualified immunity where the plaintiff's theory of the case had changed and there was an intervening Supreme Court decision on point. *Id.* at 578.

The Supreme Court in *Siegert v. Gilley* went on to rule that a plaintiff must allege a violation of a clearly established constitutional right. Consistent with the Supreme Court's decision in *Siegert*, numerous court decisions have held that when the defendant properly raises the defense of qualified immunity, the plaintiff has the burden of showing the violation of a clearly established right. *Farias v. Bexar County Bd. of Trs.*, 925 F.2d 866, 875 (5th Cir. 1991); *Whatley v. Philo*, 817 F.2d 19 (5th Cir. 1987); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir. 1994); *Garris v. Rowland*, 678 F.2d 1264, 1271 (5th Cir. 1982); *Saldana v. Garza*, 684 F.2d 1159, 1163 (5th Cir. 1982); *Hampton v. Oktibbeha County Sheriff Dept.*, 480 F.3d 358 (5th Cir. 2007) (citing *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997)).

The plaintiff's burden is different depending on the stage in the litigation. As the Supreme Court has emphasized, a public official has the right to assert qualified immunity at both the pleading (motion to dismiss) stage and based on the evidence (usually in a motion for summary judgment). See *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). In determining whether the plaintiff has met the required burden, "a court must decide whether the facts that a plaintiff has alleged (see *Fed. Rules Civ. Proc. 12(b)(6), (c)*) or shown (see *Rules 50, 56*) make out a violation of a constitutional right." *Pearson*, 129 S. Ct. at 815-16.

For a plaintiff to succeed on a civil rights claim against a public official, he must show more than just that his civil rights were violated. He must overcome the defense of qualified immunity. The defense of qualified immunity shields government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established rights which a reasonable person would have known. *Harlow*, 457 U.S. at 818.

In regards to claims of "deliberate indifference", the proper method of approaching these claims is not whether the individual defendant did not take care of some problems that he could have, but whether the individual defendant did **anything** to improve the plaintiff's situation. See, e.g., *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 531-32 (5th Cir. 1994) (in affirming a judgment granting a Rule 12(b)(6) motion to dismiss on the basis of qualified immunity, Fifth Circuit held that the single act of a school official's

hiring of security guards for school dance where student was fatally shot conclusively established that the school official did not act with deliberate indifference, even though school official had actual knowledge that firearm violence was likely at dance).

2. Immunity from Suit As Well As Damages

Qualified immunity embodies not only an immunity against the threat of liability, but also an entitlement not to stand trial or face the other burdens of litigation, so long as the official did not violate clearly established federal law. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Such entitlement is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. *Id.*; see also *Scott v. Harris*, 55 U.S. 372, 376 n.2, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (citing *Mitchell*); *Husley v. Owens*, 63 F.3d 354 (5th Cir. 1995).

In *Crawford-El*, 523 U.S. at 593 n.14, the Supreme Court stated that *Harlow* did not create "an immunity from *all* discovery . . . limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity." District courts have discretion to protect officials from "unnecessary and burdensome discovery." *Id.* The Court also outlined several tools available to the district courts to protect public officials from overbroad discovery including: (1) requiring a rule 7 reply; (2) granting a motion for a more definite statement under rule 12(a); (3) before permitting discovery, the district court can determine whether, assuming the truth of the plaintiff's allegations, the Defendant's conduct violated clearly established federal law; and (4) allowing only "focused depositions." *Id.* at 597-600

In *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (en banc), the Fifth Circuit, en banc, articulated the following pleading and discovery rules for § 1983 claims subject to the defense of qualified immunity: (1) Rule 9(b)'s "short and plain" statement requirement means that the plaintiff must allege more than mere conclusions in the complaint; (2) when qualified immunity is asserted as a defense, the district court, under Rule 7, on a defendant's motion or sua sponte, in its discretion may order the plaintiff to submit a reply tailored to the immunity defense - - - "vindicating the immunity doctrine will ordinarily require such a reply, and a district court's discretion not to do so is narrow indeed when greater detail might assist" *Schultea*, 97 F.3d at 1434; and (3) the district court may ban discovery until the plaintiff's specific factual assertions show that there are material issues of fact pertinent to immunity defense. The Fifth Circuit ruled in *Schultea* that although "narrowly tailored" discovery may be

allowed on factual issues relevant to qualified immunity, discovery should not be allowed until the district court finds that the plaintiff's heightened pleading asserts facts which, if true, would overcome the defense of qualified immunity. "The district court should thus rule on a motion to dismiss before allowing discovery. The allowance of discovery without this threshold showing is immediately appealable as a denial of the true measure of protection of qualified immunity."

The Supreme Court clarified in *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1953, 173 L. Ed. 2d 868 (2009), that no discovery in a case should proceed until the qualified immunity issue is resolved. Many courts would permit discovery to proceed against defendants who did not or could not (e.g., governmental entities) assert qualified immunity. The Supreme Court has rejected this method, explaining that it is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for the party asserting qualified immunity to participate in the process to ensure that the case "does not develop in a misleading or slanted way that causes prejudice to their position." *Id.* Even if not subject to discovery orders, the official asserting qualified immunity "would not be free from the burdens of discovery." *Id.*

3. Appealing Denials of Qualified Immunity

A federal district court's denial of qualified immunity is immediately appealable to the Court of Appeals as long as the immunity issue may be resolved as a matter of law. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). On appeal from a denial of a motion for summary judgment based on qualified immunity, the court of appeals has jurisdiction to determine whether the disputed facts are material to the claim of qualified immunity and whether the district court otherwise applied the proper legal standards. *Dudley v. Angel*, 209 F.3d 460, 461 (5th Cir. 2000) (citing *Gerhart v. Hayes*, 201 F.3d 646, 648-49 (5th Cir. 2000)); *Meyer v. Austin Indep. Sch. Dist.*, 161 F.3d 271, 273-274 (5th Cir. 1998); *Meadours v. Ermel*, 483 F.3d 417 (5th Cir. 2007). In an appeal from a denial of an assertion of qualified immunity, an appellate court is free to review a district court's determination that the issues of fact in question are material. *Gerhart*, 201 F.3d at 648; *see also Meadours*.

When a district court denies a motion for summary judgment on the ground that "genuine issues of material fact remain," the district court has made two distinct legal conclusions. First, the court has concluded that the issues of fact in question are *genuine*. *Gerhart*, 201 F.3d at 648. And more significantly, the district court has concluded that the issues of fact are *material*, i.e., resolution of the issues might affect the outcome of the suit under governing

law. *Id.* While the first issue, genuineness, is not reviewable in an interlocutory appeal, the second issue, materiality, is reviewable. Stated simply, in an appeal from a denial of an assertion of qualified immunity, an appellate court is free to review a district court's determination that the issues of fact in question are material. *Id.* at 648; *see also Colston v. Barnhart*, 146 F.3d 282 (5th Cir. 2000) (on petition for rehearing en banc); *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996); *see also Zarnow v. City of Wichita Falls*, 500 F.3d 401, 409 n.2 (5th Cir. 2007).

When a public official seeks interlocutory review of an order denying qualified immunity, the appellate court has jurisdiction to review the order "to the extent that it turns on an issue of law." *Gonzales v. Dallas County*, 249 F.3d 406, 411 (5th Cir. 2001) (citing *Lemoine v. New Horizons Ranch & Center, Inc.*, 174 F.3d 629, 633-34 (5th Cir. 1999)); *see also Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008). The Court of Appeals may, therefore, determine whether all of the conduct that the district court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of objective legal reasonableness. *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 531 (5th Cir. 1997). Consequently, on appeal the public official must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal. *Gonzales*, 249 F.3d at 411 (citing *Berryman v. Rieger*, 150 F.3d 561, 562-63 (6th Cir. 1998)).

The mere existence of some factual dispute is not enough to defeat appellate jurisdiction over an interlocutory appeal: If the disputed facts are not material to the legal question, "the denial of summary judgment is reviewable as a question of law." *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000).

IV. STATE LAW CLAIMS

A. Claims Under the Texas Constitution

There is no implied private right of action for damages under the Texas Constitution. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149-50 (Tex. 1995); *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 393 (Tex. 2007); *Univ. of Tex. Sys. v. Courtenay*, 946 S.W.2d 464, 469 (Tex. App. – Fort Worth 1997, no pet.). The Texas Constitution affords no more than equitable protection (e.g., injunctive relief) from a violation of its provisions. *Bouillion*, 896 S.W.2d at 149. Similarly, violations of the Texas Constitution do not provide the basis for a common law cause of action for damages to enforce constitutional rights. *Id.* at 150.

Article 1, section 17 of the Texas Constitution provides a partial exception to this general rule. Section 17 provides that no person's property shall be taken, damaged or destroyed or applied to public use

without adequate compensation. *Id.* at 149; TEX. CONST. art. 1 § 17. The Texas Supreme Court has held that Section 17 provides a textual entitlement to compensation in its limited context. *Bouillion*, 896 S.W.2d at 149.

The text of section 17 waives immunity only when one seeks adequate compensation for property lost to the State. We are not persuaded that a right to damages for injuries to constitutional interests can be implied solely from a limited explicit entitlement for compensation for the loss of property.

Id.

B. Tort Claims and Governmental Immunity

The doctrine of governmental immunity prohibits suits against a governmental entity unless there has been a clear and unambiguous constitutional or statutory waiver of that immunity. *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997); *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994). Absent such a waiver, a trial court does not have subject matter jurisdiction over a suit against a governmental body. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam) (“The party suing the governmental entity must establish the state’s consent, which may be alleged either by reference to a statute or to express legislative permission.”); *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Fed. Sign*, 951 S.W.2d at 403; *Lamar Univ. v. Doe*, 971 S.W.2d 191, 194 (Tex. App. – Beaumont 1998, no pet.).

1. Tort Claims Against Governmental Entities

In Texas, governmental entities are entitled to governmental immunity from tort³ causes of action except to the extent that governmental immunity is waived by the Texas Tort Claims Act. *See Brown v. City of Houston*, 8 S.W.3d 331, 333-34 (Tex. App. – Waco 1999, pet. denied) (holding that the State and its political subdivisions enjoy full immunity from tort claims, except to the extent that their immunity is waived by the Texas Tort Claims Act); TEX. CIV. PRAC. & REM. CODE §§ 101.001(3)(b) and 101.051; *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835

³ A limited waiver of immunity has been enacted as to certain breach of contract claims. *See Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006); TEX. LOCAL GOV'T CODE § 271.152. Various other statutes have waived governmental immunity, including the Texas Commission on Human Rights Act (TEX. LABOR CODE § 21.002(8)), the Anti-Retaliation Act (TEX. LABOR CODE § 451.001), and the Whistleblower Act (TEX. GOV'T CODE § 554.003(a)).

S.W.2d 49, 51 (Tex. 1992); *Bates v. Dallas Indep. Sch. Dist.*, 952 S.W.2d 543, 551 (Tex. App. – Dallas 1997, writ denied); *Pierson v. Houston Indep. Sch. Dist.*, 698 S.W.2d 377, 380 (Tex. App. – Houston [14th Dist.] 1985, writ ref'd n.r.e.).

The Texas Tort Claims Act, Texas Civil Practice & Remedies Code § 101.001 *et. seq.*, is a statutory waiver of governmental immunity in certain situations. It is important to remember that the waiver of governmental immunity provided by the Tort Claims Act is a limited waiver, not a general one. *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998). The Act does not abolish governmental immunity completely, but instead waives it only in the certain circumstances defined in the Act. *Id.*; *see also Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994); *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996).

The requirements that a cause of action must meet in order to come within the Texas Tort Claims Act’s limited waiver of governmental immunity are as follows:

A governmental unit in the state is liable for:

- (1) property damage, personal injury and death proximately caused by the wrongful acts or omissions or the negligence of an employee acting within the scope of employment if:
 - (A) the property damage, personal injury or death arises from the operation or use of a motor driven vehicle or motor driven equipment; and
 - (B) the employee would be personally liable to the claimant according to Texas law; and
- (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE § 101.021. There is no waiver of governmental immunity for intentional torts. TEX. CIV. PRAC. & REM. CODE § 101.057(2).

The Texas Tort Claims Act only waives governmental immunity against school districts and junior college districts for negligence claims arising out of the operations of motor vehicles. TEX. CIV. PRAC. & REM. CODE §§ 101.021 and 101.051; *LeLeaux v. Hamshire-Fannett School District*, 835 S.W.2d at 49, 51 (Tex. 1992); *Williams v. Conroe Indep. Sch. Dist.*, 809 S.W.2d 954, 957 (Tex. App. – Beaumont 1991, no writ); *Pierson*, 698 S.W.2d at 380; *Heyer v. North East Indep. Sch. Dist.*, 730 S.W.2d 130, 131 (Tex. App. –

San Antonio 1987, writ ref'd n.r.e.) (“[S]chool and junior college districts are excluded from liability under the Texas Tort Claims Act except as to the operation and use of motor vehicles.”).

Governmental immunity is not waived for negligent supervision and training. *City of Waco v. Williams*, 209 S.W.3d 216, 232 (Tex. App. – Waco 2006, pet. denied) (allegations of negligent supervision do not satisfy the limited waiver of immunity contained within the Tort Claims Act); *City of Sugarland v. Ballard*, 174 S.W.3d 259, 265 (Tex. App. – Houston [1st Dist.] 2005, no pet.) (no waiver of immunity for failure to train or supervise claims); *Norrell v. Gardendale Volunteer Fire Dep’t*, 115 S.W.3d 114, 118 (Tex. App. – San Antonio 2003, no pet.); *Tex. Dep’t of Public Safety v. Petta*, 44 S.W.3d 557, 581 (Tex. 2001) (failure to furnish proper training, instruction, training manual and documents to officer who injured plaintiff; failure to provide adequate test for that officer; and failure to discipline that officer fell outside the Act’s property waiver).

In addition, governmental immunity is not waived merely because government property furnished the condition that made the injury possible. *Bossley*, 968 S.W.2d at 343; *see also Univ. of Tex. at El Paso v. Moreno*, 172 S.W.3d 281, 285-286 (Tex. App. – El Paso 2005, no pet.) (rejecting claim that failure to protect from unruly crowd could fit within statutory waiver of immunity). Similarly, Immunity not waived when the governmental unit merely “allow[s] someone else to use the property and nothing more.” *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 246 (Tex. 2004) (the government did not waive immunity by providing suspenders and a walker to a patient who later used them to hang himself because it was the patient--not the government--who used the property.); *see also Dallas County v. Posey*, 290 S.W.3d 869, 871 (Tex. 2009).

a. Motor Driven Vehicle Exception

The elements of a Tort Claims Act claim under the motor vehicle exception are: (1) property damage, personal injury or death; (2) proximately caused by; (3) the wrongful acts or omissions or the negligence of an employee of the governmental entity; and (4) acting within the scope of his or her employment; if (a) the property damage, personal injury or death arises from the operation or use of a motor driven vehicle or motor driven equipment; and (b) the employee would be personally liable to the claimant under Texas law. TEX. CIV. PRAC. & REM. CODE § 101.021(1).

Under the motor-driven vehicle exception, a governmental entity may be liable for the torts of its employee arising from the operation or use of motor-driven vehicles or equipment if, among other things, the “employee would be personally liable to the

claimant according to Texas law.” TEX. CIV. PRAC. & REM. CODE § 101.021(1)(B); *see also DeWitt v. Harris County*, 904 S.W.2d 650, 653 (Tex. 1995). “If the employee is protected from liability by official immunity, the employee is not personally liable to the claimant and the government retains its sovereign immunity.” *DeWitt*, 904 S.W.2d at 653 (citing *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994), and *City of Houston v. Kilburn*, 849 S.W.2d 810, 812 (Tex. 1993).

b. Condition or Use of Personal Property

The elements of a Tort Claims Act claim for injuries arising from the condition or use of tangible personal property are: (1) the defendant is a governmental unit; (2) defendant’s employee was negligent while acting in the scope of employment; (3) when the employee was negligent, he (a) used or misused tangible personal property, or (b) furnished the plaintiff with inadequate or defective tangible property; (4) the employee’s actions proximately caused plaintiff’s injury; and (5) defendant’s employee would have been personally liable under Texas law. TEX. CIV. PRAC. & REM. CODE § 101.021(2); *DeWitt v. Harris County*, 904 S.W.2d 650, 653-54 (Tex. 1995).

“Information” does not constitute tangible personal property under Section 101.021(2) of the Texas Tort Claims Act. *York*, 871 S.W.2d at 178-79. In *York*, the plaintiff alleged that the University of Texas Medical Branch “misused tangible personal property by failing to record the events of August 14 and the observations of Richard’s parents.” *Id.* at 178. In rejecting the plaintiff’s argument, the Texas Supreme Court explained,

While the paper on which doctors and nurses may record information about a patient’s condition is tangible in that paper can be seen and touched, information itself is an abstract concept, lacking corporeal, physical, or palpable qualities. Information thus, is intangible; the fact that information is recorded in writing does not render the information tangible property.

Id. at 178-79; *see also Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994) (governmental unit does not waive sovereign immunity by “using, misusing, or not using information”); *Martinez v. City of Abilene*, 963 S.W.2d 559, 561 (Tex. App. – Eastland 1998, no pet.) (failure to properly record vehicle identification number by police is not a case of misuse of tangible property).

c. Condition or Use of Real Property

In a claim based on the condition or use of real property (a premises defect claim), the government-landowner generally owes the same duties that a private landowner owes to a licensee. *See* TEX. CIV.

PRAC. & REM. CODE § 101.022(a) and (c); *City of Grapevine v. Roberts*, 946 S.W.2d 841, 843 (Tex. 1997). The plaintiff must prove that (1) the governmental unit possess the premises; (2) the condition on the property was a premises defect; (3) the condition posed an unreasonable risk of harm; (4) the defendant had actual knowledge of the danger; (5) the plaintiff did not have actual knowledge of the danger; (6) the defendant breached its duty of ordinary care by (a) not adequately warning the plaintiff, and (b) not making the condition reasonably safe; (7) the defendant's breach proximately caused the injuries; and (8) the defendant would have been liable if it was a private person. TEX. CIV. PRAC. & REM. CODE § 101.021(2); *Mogayzel v. Tex. Dep't of Transp.*, 66 S.W.3d 459, 464-65 (Tex. App. – Fort Worth 2001, pet. denied); see also *Univ. of Tex.-Pan Am. v. Aguilar*, 251 S.W.3d 511, 514 (Tex. 2008) (courts will consider whether the premises owner has received reports of prior injuries or reports of the potential danger); *City of Waco v. Kirwan*, 298 S.W.3d 618, 624 (Tex. 2009) (a city did not owe a duty to protect or warn against the dangers of natural conditions).

The liability of the government-landowner is not limited to the same duties that a private landowner owes to a licensee regarding the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets or the duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices. TEX. CIV. PRAC. & REM. CODE § 101.022(b).

d. Damages Under the Tort Claims Act

In general, the liability of a unit of local government for a claim under the Tort Claims Act is limited to money damages in a maximum amount of \$100,000 for each person and \$300,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property. TEX. CIV. PRAC. & REM. CODE § 101.023(b).

In regard to municipalities, however, money damages are limited to a maximum amount of \$250,000 for each person and \$500,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property. *Id.* at (c).

Exemplary or punitive damages are not available under the Tort Claims Act. TEX. CIV. PRAC. & REM. CODE § 101.024.

2. Governmental Immunity and Pleas to the Jurisdiction

Because governmental immunity from suit defeats a trial court's subject matter jurisdiction, it is properly asserted in a plea to the jurisdiction. *Sykes*, 136 S.W.3d at 638; *Tex. Natural Res. & Conservation Comm'n v.*

White, 13 S.W.3d 819, 822 (Tex. App. – Fort Worth 2000), *rev'd on other grounds*, 46 S.W.3d 864 (Tex. 2001)); see also *Jones*, 8 S.W.3d at 639. The plaintiff bears the burden of establishing the trial court's jurisdiction over a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (The standard for reviewing subject matter jurisdiction "requires the pleader to allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause."); *White*, 13 S.W.3d at 822 ("The plaintiff has the burden to allege facts that affirmatively demonstrate the lack of governmental immunity and, hence, the court's jurisdiction to hear the cause.") "Unless there is a pleading of consent, the trial court has no jurisdiction to hear the case." *Tex. Parks & Wildlife Dep't v. Garrett Place, Inc.*, 972 S.W.2d 140, 143 (Tex. App. – Dallas 1998, no pet.).

3. Suits Against Public Officials and the Election of Remedies

Texas law generally does not favor lawsuits against public officials. As a result, plaintiffs should give careful consideration to governmental and individual immunity issues before filing suit or the ill-advised plaintiff may find his or her lawsuit entirely dismissed with prejudice. Governmental immunity has already been discussed and various forms of individual immunity from state causes of action are discussed in the next section. A relatively recent change in the law that frequently catches plaintiffs attorneys unaware is the Election of Remedies in the Texas Tort Claims Act.

Texas Civil Practice and Remedies Code Section 101.106 is entitled "Election of Remedies" and limits a plaintiff's ability to bring suit against both a governmental entity and an individual employee of the governmental entity. This version of Section 101.106 became effective on September 1, 2003, and only applies to cases filed on or after that date. The old version of Section 101.106 provided a bar to an action against a governmental employee if there had been "a judgment in an action or a settlement of a claim under this chapter" if it involved the same subject matter. TEX. CIV. PRAC. & REM. CODE § 101.106 (2002). In contrast to official immunity, current section 101.106 is an election-of-remedies provision, requiring the plaintiff to carefully select, at the time of the suit's filing, which defendant--the governmental unit or its employee--to sue. See *Williams v. Nealon*, 199 S.W.3d 462, 465 (Tex. App. – Houston [1st Dist.] 2006, pet. filed); *Poland v. Willerson*, 2008 Tex. App. Lexis 1805, *32 (Tex. App. – Houston [1st Dist.] 2008, pet. denied). "The purpose of section 101.106 is to force a plaintiff to choose whether he will seek to impose tort liability on a governmental unit or on governmental employees, individually." *Williams*, 199 S.W.3d at 465. The Legislature's apparent goal of reducing cost

is enhanced by the amended statutory provisions because they narrow the issues for trial, thereby reducing the delay and expense otherwise associated with discovery related to theories no longer relevant in light of the election made by claimants on their initial filing of suit. *Poland*, 2008 Tex. App. Lexis 1805 at *14. The new version of Section 101.106 provides for a multi-faceted system of elections:

§ 101.106. Election of Remedies

(a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.

(b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.

(c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.

(d) A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.

(e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

(f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental

unit as defendant on or before the 30th day after the date the motion is filed.

Subsections (a) and (b) provide for an irrevocable election by the plaintiff when the suit is brought, requiring the plaintiff to choose whether to file suit against the governmental entity or its employees. Similarly, subsection (c) bars any suit against any employee of the governmental entity if the claim is settled and subsection (d) bars any suit against the governmental entity if a judgment is entered against the employee. Finally, subsections (e) and (f) provide a method for dismissing suits against government employees in favor of suits against the governmental entity. In interpreting whether Section 101.106 applies, however, there are a couple of key phrases that should be examined carefully: "same subject matter" and "under this chapter."

Under the pre-2003 version of Section 101.106, the courts defined the phrase "involving the same subject matter" as "arising out of the same actions, transactions, or occurrences." *White v. Annis*, 864 S.W.2d 127, 131 (Tex. App. – Dallas 1993, writ denied); *Welch v. Milton*, 185 S.W.3d 586, 595 (Tex. App. – Dallas 2006, pet. denied). "Same subject matter" is not whether the "claim" is alleged against the governmental entity, but "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage." *McGowen v. Huang*, 120 S.W.3d 452, 459-460 (Tex. App. – Texarkana 2003, pet. denied) (citing *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 631 (Tex. 1992)). While revised Section 101.106 uses the phrase "regarding the same subject matter," it seems unlikely that there will be any change in the standard.

Subsection (a) bars suits against a governmental employee when a suit is filed "under this chapter" against a governmental entity. Subsection (c) bars suits against a governmental employee when a claim "arising under this chapter" is settled. Subsection (e) requires immediate dismissal of a governmental employee when a motion is filed by the governmental entity and a suit is filed "under this chapter" against both the governmental entity and the employee. Finally, subsection (f) provides for replacing the governmental employee with the governmental entity when a suit is filed against the governmental employee for conduct within the general scope of the employee's employment and the suit "could have been brought under this chapter" against the governmental entity. Under the old version of Section 101.106,

A judgment in an action or a settlement of a claim **under this chapter** bars any action involving the same subject matter by the claimant against the employee of the

governmental unity whose act or omission gave rise to the claim.

TEX. CIV. PRAC. & REM. CODE § 101.106 (2002) (emphasis added). The older version of Section 101.106 was held to bar actions against public employees even when the judgment involving the governmental entity was dismissed for want of jurisdiction based on governmental immunity. *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998); *Newman v. Obersteller*, 960 S.W.2d 621, 622 (Tex. 1997). Under the new Section 101.106, however, various courts concluded that the bar on suits against governmental employees only applied when governmental immunity was waived by the Texas Tort Claims Act. *See, e.g., Meroney v. City of Colleyville*, 200 S.W.3d 707, 714-715 (Tex. App. – Fort Worth 2006, pet. granted, judgment vacated w.r.m.); *Mission Consol. Indep. Sch. Dist. v. Sotuyo*, 166 S.W.3d 902, 905 (Tex. App. – Corpus Christi 2005), *aff'd in part, rev. in part, Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653 (Tex. 2008); *see also Myart v. City of San Antonio*, 2007 U.S. Dist. Lexis 105 (W.D. Tex. 2007). The Texas Supreme Court recently clarified that, “there is nothing in the amended version that would indicate a narrower application of the phrase ‘under this chapter’ was intended.” *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008). “Because the Tort Claims Act is the only, albeit limited, avenue for common-law recovery against the government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be ‘under [the Tort Claims Act]’ for purposes of section 101.106.” *Id.* As a result, if a plaintiff brings suit against the governmental entity and the governmental employee on a tort for which immunity is not waived, the governmental entity may move for dismissal of the employee based on Section 101.106 and may request dismissal based on governmental immunity on its own behalf. As one court of appeals pointed out, “while the law was harsh before, the Legislature made it even stricter with the 2003 amendments.” *Coronado v. Milam*, 2004 Tex. App. Lexis 4908, *5 (Tex. App. – San Antonio 2004, pet. denied).

V. OFFICIAL IMMUNITY FROM STATE LAW CLAIMS

As was mentioned in regard to individual immunity from Section 1983 claims, the most common form of immunity from state law claims is qualified immunity. Nevertheless, like at the federal level, there are similar absolute immunities for judges, prosecutors, witnesses and legislators. *See e.g., Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002) (judicial immunity); *Butz v. Economou*, 438 U.S. 478, 511-13,

57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978) (prosecutor immunity); *Smith v. State*, 70 S.W.3d 848, 859 (Tex. Crim. App. 2002) (witness immunity from prosecution); *Joe v. Two Thirty Nine J.V.*, 145 S.W.3d 150, 154 (Tex. 2004) (legislator immunity). Since qualified immunities predominate in practice, however, this paper focuses on the relevant state law qualified immunities.

A. Introduction to Official Immunity

“Official immunity is an unsettled and important issue in our jurisprudence and cries out for elucidation for the benefit of future litigants...” *Travis v. City of Mesquite*, 830 S.W.2d 94, 100 (Tex. 1992) (Justice Cornyn concurrence joined by Justices Phillips and Gonzalez). This statement by Justice Cornyn was made in 1992 in the first Texas Supreme Court case to discuss, although not rule on, official immunity.

Since *Travis*, the Texas Supreme Court has ruled on issues relating to official immunity on eleven separate occasions. *See City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994); *Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994); *Gonzalez v. Avalos*, 907 S.W.2d 443 (Tex. 1995); *DeWitt v. Harris County*, 904 S.W.2d 650 (Tex. 1995); *City of Beverly Hills, Texas v. Guevara*, 904 S.W.2d 655 (Tex. 1995); *Wadewitz v. Montgomery*, 951 S.W.2d 464 (Tex. 1997); *Gross v. Innes*, 988 S.W.2d 727 (Tex. 1998); *Univ. of Houston v. Clark*, 38 S.W.3d 578 (Tex. 2000); and *Telthorster v. Tennell*, 92 S.W.3d 457 (Tex. 2002); *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417 (Tex. 2004); *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150 (Tex. 2004); *Tex. A&M Univ. v. Koseoglu*, 233 S.W.3d 835 (Tex. 2007); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 380 (Tex. 2009).⁴

Though the doctrine of official immunity is much clearer today than it was in 1992 when the *Travis* decision was rendered, one cannot dispute that further elucidation by the Texas Supreme Court would be of benefit to affected litigants.

The purpose of this section is to describe the doctrine of official immunity as it exists today and to identify issues related to the doctrine which may be the subject of future decisions of the Texas Supreme Court.

⁴ *See also Watson v. Newman*, 299 S.W.3d 129 (Tex. 2009), wherein Justice Willett joined Justice Hecht’s in a dissent from the denial of the motion for rehearing the petition that opined that the Court should consider when, for official immunity purposes, the role of a private security guard changes to a public peace officer for an officer moonlighting as a security guard.

B. A Brief History of Official Immunity; Roots in Federal Law

The history of the doctrine of official immunity illustrates a very important concept, namely, that the state law doctrine of official immunity is related to and grows out of the older and more fully developed doctrine of qualified immunity under federal law. This can be seen clearly in the first Texas Supreme Court decision to actually rule on the official immunity defense -- *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994).

In *Chambers*, the Texas Supreme Court established an objective test for establishing the good faith element of official immunity. In doing so, the *Chambers* court specifically cited, with approval, federal court cases which have enunciated the federal law defense of qualified immunity in § 1983 actions. The Court in *Chambers* stated that the objective test it was announcing was “derived substantially from the test that has emerged in § 1983 cases ...” *Chambers*, 883 S.W.2d at 656. The *Chambers* court explicitly stated that “citation to federal authority is appropriate because these holdings flow not from the more liberal summary judgment rules in federal court, but rather from the appropriate meaning of an objective reasonableness requirement in an immunity analysis.” *Chambers*, 883 S.W.2d at 657, n.7. Significantly, the *Chambers* court quoted approvingly *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986), which stated that, “qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.” Indeed, the Texas Supreme Court has continued to rely on federal court decisions regarding qualified immunity to inform its decisions regarding official immunity.⁵

Although the doctrines of official immunity and qualified immunity are not identical (they are siblings, but not twins), they do share the same history. Practitioners on both sides would do well to recognize

⁵ See e.g., *Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994) (citing *Westfall v. Erwin*, 484 U.S. 292, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988); *Barr v. Matteo*, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959)); *Telthorster v. Tennell*, 92 S.W.3d 457 (Tex. 2002) (citing, inter alia, *Scheuer v. Rhodes*, 416 U.S. 232, 240, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)); *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 427-428 (Tex. 2004) (citing *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Wood v. Strickland*, 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975) (reaffirms that the standard for good faith is objective legal reasonableness, not subjective bad faith)).

this history in their efforts to apply or distinguish the teachings of federal court cases on the state law defense of official immunity.

C. Official Immunity Generally

Official immunity “protects government officers from *personal liability* in performing discretionary duties in good faith within the scope of their authority.” *Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex. 1994) (citations omitted) (emphasis added). While sovereign immunity protects governmental entities, official immunity protects individual officials from liability. *Id.* “[W]hether the Texas Tort Claims Act waives sovereign immunity in a given case does not affect whether the governmental employee may assert official immunity as a defense. TEX. CIV. PRAC. & REM. CODE § 101.026; *Kassen*, 887 S.W.2d at 8.

1. A Common Law Affirmative Defense and the Burden of Proof

Official immunity is a common law defense which protects government officers from personal liability in performing discretionary duties in good faith within the scope of their authority. *Kassen*, 887 S.W.2d at 8; *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994); *Perry v. Tex. A&I Univ.*, 737 S.W.2d 106, 110 (Tex. App. – Corpus Christi 1987, writ ref’d n.r.e.); *Souder v. Cannon*, 235 S.W.3d 841, 852 (Tex. App. – Fort Worth 2007, no pet.). As such, the burden is on the defendant government official to conclusively establish each of these elements of the defense. *Chambers*, 883 S.W.2d at 653.

Two points are worth mentioning here. First, as with any affirmative defense, official immunity must be plead or it will be waived. Second, as with any common law defense, it has no statutory formulation. In order to be conversant in this defense, one must be familiar with the case law which has developed the defense and be familiar with the public policy reasons and purposes that support the defense.

2. The Purpose and the Public Policy Rationale for the Official Immunity Doctrine

Official immunity is an affirmative defense available only to an individual. *Battin v. Samaniego*, 23 S.W.3d 183, 187 (Tex. App. – El Paso 2000, pet. denied). It is only applicable in suits against public officials in their individual capacities, as it protects public officials from *individual liability*. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 380 (Tex. 2009) (citing *Telthorster v. Tennell*, 92 S.W.3d 457, 459-460 (Tex. 2002)).

A governmental employee is entitled to official immunity for (1) the performance of discretionary duties (2) within the scope of the employee’s authority,

(3) provided the employee acts in good faith. *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997) (citing *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994)); *Univ. of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000). The purpose of common-law official immunity is to insulate the functioning of government from the harassment of litigation, not to protect erring officials. *Kassen*, 887 S.W.2d at 8 (citing *Westfall v. Erwin*, 484 U.S. 292, 295, 108 S. Ct. 580, 98 L. Ed. 2d 619 (1988)). It shields governmental employees from personal liability, so that they are encouraged to vigorously perform their official duties. *Telthorster v. Tennell*, 92 S.W.3d 457, 460-461 (Tex. 2002) (citing *Kassen*, 887 S.W.2d at 8); see also *Clark*, 38 S.W.3d at 580 (citing *Chambers*, 883 S.W.2d at 653).

Official immunity is based on public policy that encourages public officers to perform their discretionary duties without fear of personal liability for negligent or improper performance. *Champan v. Gonzales*, 824 S.W.2d 685, 687 (Tex. App. – Houston [14th Dist.] 1992 writ denied). It is based on the necessity for public officials to act in the public interest with confidence and without the hesitation that could arise from having their judgment continually questioned by extended litigation. *Id.*; *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 424 (Tex. 2004); *Baker v. Story*, 621 S.W.2d 639, 643-44 (Tex. Civ. App. – San Antonio 1981, writ ref'd n.r.e.). The Texas Supreme Court has noted that the public would suffer if government officers that must exercise judgment and discretion in their jobs were subject to civil lawsuits that second-guessed their decisions. *Kassen*, 887 S.W.2d at 8; *Telthorster*, 92 S.W.3d at 463; *Ballantyne*, 144 S.W.3d at 424. Official immunity increases the efficiency of employees because they need not spend time defending frivolous charges. *Ballantyne*, 144 S.W.3d at 424.

The Texas Supreme Court in *Kassen* cited the following language from the U.S. Supreme Court case of *Barr v. Matteo*, 360 U.S. 564, 571, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959), in an effort to underscore the importance of official immunity: “Officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties -- suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.” That is, denying the affirmative defense of official immunity to public officials in circumstances where officials must exercise judgment and discretion would contribute not to principled and fearless decision-making but to intimidation. *Ballantyne*, 144 S.W.3d at 424. (citing *Wood v. Strickland*, 420 U.S. 308, 319, 95 S. Ct. 992, 43 L. Ed.

2d 214 (1975) and *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967)). The policy behind official immunity acknowledges the fact that public officials may err in the performance of their duties, while recognizing that the risk of error is preferable to intimidation from action at all. *Ballantyne*, 144 S.W.3d at 424. Further, some of the most capable candidates would be deterred from entering public service if the threat of personal liability loomed for errors in judgment. *Id.*; *Austin v. Hale*, 711 S.W.2d 64, 68 (Tex. App. – Waco 1986, no writ) (“If administrative officials are held liable for their negligence, the prudent would be reluctant to enter governmental service and even competent persons who entered public life would not be zealous in discharging their duties.”) (citations omitted).

Police officers’ particular need for immunity’s protection is well-recognized. *Telthorster*, 92 S.W.3d at 463. “Nowhere else in public service is official immunity more appropriate or necessary than in police work. In their routine work, police officers must be free to make split-second judgments ... based on their experience and training, without fear of personal liability.” *Travis v. City of Mesquite*, 830 S.W.2d 94, 103 (Tex. 1992) (Cornyn, J., concurring). If police officers were subject to liability for every mistake, the constant threat of suit could “dampen the ardor of all but the most resolute, or the most irresponsible” officers. *Telthorster*, 92 S.W.3d at 463 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)).

These public-policy concerns, in large part, underlie the test that the Texas Supreme Court articulated in *Chambers*. *Telthorster*, 92 S.W.3d at 463 (citing *Chambers*, 883 S.W.2d at 656-57). In *Chambers*, the Texas Supreme Court said that courts should focus on what the defendant “could have believed,” that is, on the reasonableness of the officer’s perception under the circumstances surrounding the incident, not on the facts as they appear through the clarity of hindsight. *Telthorster*, 92 S.W.3d at 463 (citing *Chambers*, 883 S.W.2d at 656; *Rowland v. Perry*, 41 F.3d 167, 172 (4th Cir. 1994)). The Texas Supreme Court summarized its approach to good faith as being shaped by a desire to avoid overdeterrence of energetic law enforcement. *Telthorster*, 92 S.W.3d at 463 (citing *Rowland*, 41 F.3d at 172).

a. Additional Rationale Regarding High-Speed Driving

In *Chambers*, *Wadewitz* and *Clark*, the Texas Supreme Court recognized the importance of energetic law enforcement, but also had to balance an important countervailing public-policy concern: the inherent risks that high-speed driving poses to those utilizing public streets and highways. *Telthorster*, 92 S.W.3d at 463.

To better protect “bystanders or other innocent parties” in a high-speed pursuit situation, *Chambers* required a police officer to consider both the need to immediately apprehend a suspect and the risk posed to the general public. *Telthorster*, 92 S.W.3d at 463-64 (citing *Chambers*, 883 S.W.2d at 656). To ensure that an officer’s consideration was more than merely pro forma, *Wadewitz* went one step further by requiring the officer to particularly and meaningfully balance the need for police intervention in a given case against the countervailing public-safety concerns. *Telthorster*, 92 S.W.3d at 464 (citing *Wadewitz*, 951 S.W.2d at 467); *Clark*, 38 S.W.3d at 586 (applying the *Wadewitz* factors to an officer’s high-speed emergency response because a risk to the general public “is present to some degree in every police pursuit”). Thus, the particularized need/risk factors were crafted in an attempt to tailor a test that would better weigh the risks that high-speed chases and responses pose to the general public.

b. Rationale in Arrest Cases

In cases involving allegations of injury during an arrest, the courts must balance competing interests. On the one hand, society benefits from unflinching law enforcement. On the other hand, citizens have a right to recover for injuries arising from unreasonable conduct. *Telthorster*, 92 S.W.3d at 464; *Chambers*, 883 S.W.2d at 656 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 240, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). When a suspect is injured during an arrest, the same public-policy concerns that caused the Texas Supreme Court to formulate the particularized need/risk analysis are not implicated. The inherent risk to the general public that high-speed driving causes is not an issue. Thus, an arrest situation does not present the same “countervailing public safety concerns” that the Supreme Court recognized in *Chambers*, *Wadewitz* and *Clark*. *Telthorster*, 92 S.W.3d at 464.

Official immunity’s underlying purpose is to encourage energetic law enforcement. *Telthorster*, 92 S.W.3d at 464. This purpose is most “salient in the context of street-level police work, which frequently requires quick and decisive action in the face of volatile and changing circumstances.” *Id.* (citing *Rowland*, 41 F.3d at 172). During arrest situations, officers routinely are “forced to make split-second judgments ... in circumstances that are tense, uncertain, and rapidly evolving.” *Telthorster*, 92 S.W.3d at 464 (citing *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). Arresting officers often confront at close range suspects whose violent intentions and capabilities may not be readily apparent. A high risk of liability in such a situation would likely compel arresting officers to act hesitantly when immediate action is required, subjecting themselves

and the public to unnecessary risks, and seriously hampering their efforts to apprehend dangerous criminal suspects. *Telthorster*, 92 S.W.3d at 464 (citing *United States v. Merritt*, 695 F.2d 1263, 1274 (10th Cir. 1982)).

Based upon these policy considerations, the Texas Supreme Court in *Telthorster* held that when an officer is engaged in an arrest that results in injury to the suspect, a particularized need/risk assessment is not compelled in light of official immunity’s overriding purpose to reduce the threat that civil liability may deter arresting officers from acting with the “decisiveness and the judgment required by the public good.” *Telthorster*, 92 S.W.3d at 464 (citing *Chambers*, 883 S.W.2d at 656). The Texas Supreme Court specifically disapproved of a number of courts of appeals’ decisions to the extent that those decisions applied the particularized need/risk analysis to claims brought by suspects injured during an arrest. In the *Telthorster* case, the Texas Supreme Court held that “the *Chambers* good-faith test, absent its need/risk component, strikes the appropriate balance.” *Telthorster*, 92 S.W.3d at 465.

3. Official Immunity Protects Even Negligent Officers

Official immunity protects public officials from being forced to defend their decisions that were reasonable when made, but upon which hindsight has cast a negative light. *Telthorster*, 92 S.W.3d at 463; *Souder v. Cannon*, 235 S.W.3d 841, 852 (Tex. App. – Fort Worth 2007, no pet.). It protects them from civil liability for conduct that would otherwise be actionable. *Chambers*, 883 S.W.2d at 653; *see also* TEX. CIV. PRAC. & REM. CODE § 101.026. “The complex policy judgment reflected by the doctrine of official immunity, if it is to mean anything, protects officers from suit even if they acted negligently.” *Chambers*, 883 S.W.2d at 655; *but see Juneman v. Harris County*, 84 S.W.3d 689 (Tex.App – Houston [1st Dist.] 2002, pet. denied). In *Juneman*, the Houston Court of Appeals noted that although a police officer can act in good faith and still be negligent, negligent acts “may still have some bearing on good faith.” *Id.* at 694.

4. Focus on the Facts First

Unlike the federal doctrine of qualified immunity which focuses first on the law (i.e., whether a constitutional violation has been alleged and whether the constitutional law was “clearly established”), the state law defense of official immunity focuses first on the facts of the case. “The focus must remain upon the facts of the individual case and the underlying policies promoted by official immunity.” *Kassen*, 887 S.W.2d at 4. The facts of the case can determine what standard

to apply in deciding the question of official immunity. This can be most clearly seen in the Texas Supreme Court's decision in *Telthorster v. Tennell*, 92 S.W.3d 457 (Tex. 2002), which reviewed the history of Supreme Court decisions regarding official immunity and made clear that the test to be applied in arrest cases was not the same test as that used in police chase cases. The type of factual scenario presented in a particular case has a profound effect on the ultimate test to be applied for state law official immunity.

D. The Elements of Official Immunity

A governmental employee is entitled to official immunity for (1) the performance of discretionary duties (2) that are within the scope of the employee's authority, (3) provided that the employee acts in good faith. *Telthorster v. Tennell*, 92 S.W.3d 457 (Tex. 2002), (citing *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994)); *DeWitt v. Harris County*, 904 S.W.2d 650, 651-52 (Tex. 1995); *Kassen v. Hatley*, 887 S.W.2d 4, 8-9 (Tex. 1994); *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994).

1. Performance of a Discretionary Duty

Ordinarily, official immunity extends to any action or decision by a state employee that is "discretionary." *Kassen*, 887 S.W.2d at 9 (citing *Chambers*, 883 S.W.2d at 653-54). Discretionary functions receive protection, but ministerial duties do not. *Chambers*, 883 S.W.2d at 653-54. That is, a defendant is not entitled to official immunity for the failure to perform (or negligent performance) of ministerial duties. See *Harris County v. Gibbons*, 150 S.W.3d 877, 886-87 (Tex. App. – Houston [14th Dist.] 2004, no pet.); *Myers v. Doe*, 52 S.W.3d 391, 396 (Tex. App. – Fort Worth 2001, pet. denied). The Texas Supreme Court admitted that the distinction between ministerial and discretionary duties is problematic. *Kassen*, 887 S.W.2d at 9.

Whether an action is discretionary or ministerial is a question of law. *Johnson v. Tex. Dep't of Transp.*, 905 S.W.2d 394, 397 (Tex. App. – Austin 1995, no pet.). If an action involves personal deliberation, decision, and judgment, it is discretionary; an action that requires obedience to orders or the performance of a duty to which the employee has no choice is ministerial. *Chambers*, 883 S.W.2d at 654; *Downing v. Brown*, 935 S.W.2d 112, 114 (Tex. 1996); *Ramos v. Tex. Dep't of Public Safety*, 35 S.W.3d 723, 727 (Tex. App. – Houston [1st Dist.] 2000, pet. denied); *Kassen*, 887 S.W.2d at 9 (citing *Chambers*, 883 S.W.2d at 654). Ministerial acts are those where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment. *Downing*, 935 S.W.2d at 114; *Looper v. Houston Comty. College Sys.*, 2007 Tex.

App. Lexis 9291, *6 (Tex. App. – Houston [14th Dist.] 2007, pet. denied).

"In determining if an act is discretionary, the issue is whether an employee was performing a discretionary function, not whether he had the discretion to do an allegedly wrongful act while discharging that function or whether the employee's job description included discretionary duties." *Souder v. Cannon*, 235 S.W.3d 841, 852 (Tex. App. – Fort Worth 2007, no pet.) (citing *Chambers*, 883 S.W.2d at 653; *Ramos*, 35 S.W.3d at 727). "Discretionary acts are those related to determining what the policy of the governmental unit will be, but do not extend to the carrying out of the specifics of particular policies or exercise of 'professional' or 'occupational' discretion." *Garza v. Salvatierra*, 846 S.W.2d 17, 22 (Tex. App. – San Antonio 1992, writ dismissed w.o.j.).

The distinction between these two categories is often one of degree, because any official act that is ministerial will still require the employee to use some discretion in its performance. *Chambers*, 883 S.W.2d at 654. Thus, mandatory language in a statute or policy does not, standing alone, make an act ministerial. *Titus Reg'l Med. Ctr. v. Tretta*, 180 S.W.3d 271, 275 (Tex. App. – Texarkana 2005, no pet.); *Eakle v. Tex. Dep't of Human Servs.*, 815 S.W.2d 869, 876 (Tex. App. – Austin 1991, writ denied); *Salazar v. Collins*, 255 S.W.3d 191, 204 (Tex. App. – Waco 2008, no pet.) (No summary judgment for correctional facilities officers based on official immunity, when they failed to perform duties found to be ministerial, not discretionary).

The doctrine of official immunity is a near nullity if its protection only extends to government employees exercising "uniquely governmental" functions. *Kassen*, 887 S.W.2d at 10; see also *Mitchell v. City of Dallas*, 855 S.W.2d 741, 745 (Tex. App. – Dallas 1993), *aff'd*, 870 S.W.2d 21 (Tex. 1994) (noting that the construction of a city park is a governmental function).

In *Ramos v. Texas Department of Public Safety*, 35 S.W.3d 723, 727 (Tex. App. – Houston [1st Dist.] 2000, pet. denied), troopers and examiners who conduct road tests at the drivers license division of DPS were held to have engaged in discretionary acts until the driving test is concluded. The court held that the discretion has two facets: (1) the discretion to request that the driver perform various driving actions so that the officer can evaluate the driver's ability to operate the vehicle; and (2) the discretion to continually evaluate whether the driver can safely operate the vehicle during the test.

The court of appeals in *Chambers* held that because the officers did not have discretion to drive their vehicles without due regard for the safety of others, that their actions could not be protected by official immunity. The Supreme Court disagreed with this approach. The Supreme Court insisted that the

court's focus should be on whether the officer is performing a discretionary function, not on whether the officer has discretion to do an allegedly wrongful act while discharging that function. The Supreme Court explained that "if official immunity existed only in the cramped sense used by the court of appeals, its qualified promise against personal civil liability to public officers would be hollow indeed." *Chambers*, 883 S.W.2d at 653-54.

2. Within The Scope of the Employee's Authority

The nature of an official's acts and whether the acts were committed within the course and scope of his employment are key to a determination of official immunity. *Neimes v. Ta*, 985 S.W.2d 132 (Tex. App. – San Antonio 1998, pet. dismiss'd); *Boozier v. Hambrick*, 846 S.W.2d 593, 596 (Tex. App. – Houston [1st Dist.] 1993, no writ). "An official acts within the scope of her authority if she is discharging the duties generally assigned to her." *Chambers*, 883 S.W.2d at 658; see also *Ballantyne*, 144 S.W.3d at 424. The Court in *Chambers* held that "the defendant officers were acting within the scope of their authority: each officer was on duty, in a squad car, pursuing a suspect." *Chambers*, 883 S.W.2d at 658.

Generally, municipal officers are not personally liable for acts performed within the scope of their public duties; public officials are held personally liable only when they have acted willfully or maliciously. *Richardson v. Thompson*, 390 S.W.2d 30, 35 (Tex. Civ. App. – Dallas 1965, writ dismiss'd); *Dallas County Flood Control Dist. v. Fowler*, 280 S.W.2d 336, 339-40 (Tex. Civ. App. – Dallas 1955, writ refused n.r.e.). "The fact that a specific act that forms the basis of the suit may have been wrongly or negligently performed does not take it outside of the scope of authority." *Souder*, 235 S.W.3d at 853 (quoting *Wethington v. Mann*, 172 S.W.3d 146, 152 (Tex. App. – Beaumont 2005, no pet.); *Koerselman v. Rhynard*, 875 S.W.2d 347, 350 (Tex. App. – Corpus Christi 1994, no writ)); *Tex. Dep't of Pub. Safety v. Tanner*, 928 S.W.2d 731, 735 (Tex. App. – San Antonio 1996, no writ). Public officials who act wholly without authority, however, become personally liable for their torts and for willful and malicious acts. See *Campbell v. Jones*, 264 S.W.2d 425, 427 (Tex. 1954).

A police officer's duties include making arrests; thus a police officer acts within his authority when he makes an arrest. Even if the employee's specific action was wrong or negligent, he was still acting within the scope of his authority. *Harris County v. Ochoa*, 881 S.W.2d 884, 888 (Tex. App. – Houston [14th Dist.] 1994, writ denied); *Koerselman v. Rhynard*, 875 S.W.2d 347, 350 (Tex. App. – Corpus Christi 1994, no writ).

An affidavit stating that an employee's duties

included the acts complained of is sufficient to show the employee was acting within the course and scope of her authority, see *City of Houston v. Swindall*, 960 S.W.2d 413 (Tex. App. – Houston [1st Dist.] 1998, no pet.); however, the testimony must be "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and [capable of being] readily controverted." TEX. R. CIV. P. 166a(c); *Tex. Dep't of Family & Protective Servs. v. E.R.*, 2009 Tex. App. Lexis 1135, *23-24 (Tex. App. – Corpus Christi 2009, no pet.).

3. Actions Taken in Good Faith

For official immunity, the standard of good faith as an element of official immunity is not a test of carelessness or negligence, legality, or a measure of an official's motivation. *Ballantyne*, 144 S.W.3d at 426-27; *Tex. State Tech. College v. Cressman*, 172 S.W.3d 61, 67 (Tex. App. – Waco 2005, pet. denied); *Titus Reg'l Med. Ctr. v. Tretta*, 180 S.W.3d 271, 276 (Tex. App. – Texarkana 2005, no pet.). Evidence concerning the defendant's subjective intent is irrelevant. *Ballantyne*, 144 S.W.3d at 428 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998)). "This test of good faith does not inquire into 'what a reasonable person would have done,' but into 'what a reasonable [person] could have believed.'" *Ballantyne*, 144 S.W.3d at 426. "[W]e do not require the [government official's action] to be legally correct, only colorable." *Ballantyne*, 144 S.W.3d at 426. Whether the officer was negligent is immaterial in determining good faith. See *Chambers*, 883, S.W.2d at 656.

Instead, to determine whether a public official acted in good faith, the court applies an objective standard, inquiring whether a reasonably prudent official, under the same or similar circumstances, could have believed that his conduct was justified based on the information he possessed at the time of the act. *Ballantyne*, 144 S.W.3d at 426; *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 162, 164 (Tex. 2004); *Thomas-Smith v. Mackin*, 238 S.W.3d 503 (Tex. App. – Houston [14th Dist.] 2007, no pet.). An official must prove that a reasonably prudent official might have believed the action taken was appropriate, not that it would have been unreasonable to take different action or that all reasonably prudent officials would have acted as he or she did. *Perry v. Greanias*, 95 S.W.3d 683, 697 (Tex. App. – Houston [1st Dist.] 2002, pet. denied) (citing *Wadewitz v. Montgomery*, 951 S.W.2d 464, 467 (Tex. 1997)). "When a public official considers two courses of action that could reasonably be believed to be justified, and selects one, he satisfies the good faith prong of official immunity as a matter of law." *Ballantyne*, 144 S.W.3d at 426; *Anderson v. City of San Antonio*, 2008 Tex. App. Lexis 3642 (Tex. App.

– San Antonio 2008, no pet.).

When applying the good faith element of official immunity, the parties should focus on the facts first because the Texas Supreme Court has developed different tests for good faith depending on the type of factual scenario involved. The following four Supreme Court cases illustrate the varying tests for different factual scenarios.

a. City of Lancaster v. Chambers

In *City of Lancaster v. Chambers*, 883 S.W.2d 650, 656 (Tex. 1994), a high-speed pursuit of a motorcyclist allegedly caused a fleeing suspect to crash, injuring a passenger. The Supreme Court held that an officer acts in good faith *in a pursuit case* if: a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing the pursuit. *Telthorster*, 92 S.W.3d at 461 (emphasis in the original) (citing *Chambers*, 883 S.W.2d at 656).

This test's "could have believed" aspect requires an officer to prove only that a "reasonably prudent officer might have believed that the pursuit should have been continued." *Chambers*, 883 S.W.2d at 656-57. An officer does not have to prove that it would have been unreasonable to stop the pursuit or that all reasonably prudent officers would have continued the pursuit. *Univ. of Houston v. Clark*, 38 S.W.3d 578, 581 (Tex. 2000) (citing *Chambers*, 883 S.W.2d at 656). Instead, the officers must prove only that a reasonably prudent officer *might* have believed that he should have continued the pursuit. *Clark*, 38 S.W.3d at 581 (citing *Chambers*, 883 S.W.2d at 656-57). An officer acts in bad faith only if he could not have reasonably reached the decision in question. *Clark*, 38 S.W.3d at 581. If the officer meets this burden, the nonmovant must present evidence that "no reasonable person in the officer's position could have thought the facts were such that they justified the officer's acts." *Chambers*, 883 S.W.2d at 657 (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993)).

The Court determined that a court must measure good faith in official immunity cases against a standard of objective legal reasonableness, without regard to the officer's subjective state of mind. *Wadewitz*, 951 S.W.2d at 466 (citing *Chambers*, 883 S.W.2d at 656); *Ballantyne*, 144 S.W.3d at 426; *Joe*, 145 S.W.3d at 164. The Court sought to articulate a good faith standard that would strike the proper balance between two competing interests: the threat of severely hampering police officers' discretion by imposing civil liability for their mistakes, and the rights of bystanders and other innocent parties that may be trampled by an officer's gross disregard for public safety. *Chambers*, 883 S.W.2d at 656 (citing *Scheuer v. Rhodes*, 416 U.S.

232, 240, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). The test for official immunity's good faith element in police pursuit cases is analogous to the abuse of discretion standard of review. *Clark*, 38 S.W.3d at 581 (citing *Chambers*, 883 S.W.2d at 657 n. 7).

b. Wadewitz v. Montgomery

In *Wadewitz v. Montgomery*, 951 S.W.2d 464 (Tex. 1997), the Supreme Court extended the test to an officer's high-speed emergency response and elaborated on *Chambers*' need and risk elements by announcing specific factors that officers must consider to show that they acted in good faith. *Wadewitz*, 951 S.W.2d at 466-67. Under *Wadewitz*, good faith depends on how a reasonably prudent police officer would have assessed both the need for the officer's response and the risks of the officer's course of action. *Wadewitz*, 951 S.W.2d at 467 (applying *Chambers*, 883 S.W.2d at 656). The need element refers to the "urgency of the circumstances requiring police intervention" while the risk element refers to "the countervailing public safety concerns." *Clark*, 38 S.W.3d at 581.

The Court made clear that conclusory statements that a reasonable officer could or could not have taken some action will neither establish good faith on summary judgment nor raise a fact issue to defeat summary judgment. *Wadewitz*, 951 SW.2d at 467. Instead, testimony on good faith must discuss what a reasonable officer could have believed under the circumstances, and must be substantiated with facts showing that the officer assessed both the need to apprehend the suspect and the risk of harm to the public. *Id.*

c. University of Houston v. Clark

In *University of Houston v. Clark*, 38 S.W.3d 578 (Tex. 2000) the Texas Supreme Court held that the *Wadewitz* need and risk factors apply to good faith determinations in police pursuit cases as well as emergency responses. *Clark*, 38 S.W.3d at 583. The Court applied these factors, because "pursuing a suspect and responding to an emergency involve the same general risk to the public -- collision with a third party." *Id.* The Court held that a police officer's summary judgment proof does not offer a suitable basis for determining good faith unless it sufficiently assesses the *Wadewitz* need/risk factors. *Clark*, 38 S.W.3d at 584-85. Further, the Court held that "the *Chambers* balancing test inherently includes all the *Wadewitz* factors." *Clark*, 38 S.W.3d at 582. The Court went on to state that, "to conclusively prove good faith in a police pursuit case, an officer must prove that a reasonably prudent officer in the same or similar circumstance could agree that the need to

apprehend the suspect outweighed the risk to the public in continuing the pursuit and that the officer must substantiate his determination with facts showing that he assessed all *Wadewitz's* need and risk factors.” *Clark*, 38 S.W.3d at 588.

d. *Telthorster v. Tennell*

In *Telthorster v. Tennell*, 92 S.W.3d 457 (Tex. 2002), the Texas Supreme Court held that the *Wadewitz* particularized need/risk assessment is not required in a case in which a suspect sues a police officer for injuries sustained during an arrest.

Officer *Telthorster* argued that a particularized need/risk assessment is not appropriate to evaluate his good-faith in this case. *See e.g.*, *City of San Antonio v. Garcia*, 974 S.W.2d 756, 758 (Tex. App. – San Antonio 1998, no pet.) (defining good faith more generally in an arrest case without reference to the need/risk elements); *Rhodes v. Torres*, 901 S.W.2d 794, 797-99 (Tex. App. – Houston [14th Dist.] 1995, no writ) (same); *City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W.2d 374, 376 (Tex. App. – Dallas 1994, no writ) (same). The Texas Supreme Court agreed with Officer *Telthorster* because the public policy interest underlying the need/risk analysis was not implicated in his case.

When a suspect sues for injuries sustained during an arrest, official immunity’s good-faith element requires the defendant to show that a reasonably prudent officer, under the same or similar circumstances, could have believed that the disputed conduct was justified based on the information the officer possessed when the conduct occurred. *Telthorster*, 92 S.W.3d at 459-60; *see e.g.*, *City of Fort Worth v. Robinson*, 300 S.W.3d 892, 898-900 (Tex. App. – Fort Worth 2009, no pet.) (applying *Telthorster* good-faith standard when granting officers plea to the jurisdiction in accidental discharge of weapon case).

E. Summary Judgment: Establishing and Controverting Official Immunity

To obtain summary judgment on the basis of official immunity, the burden is on the governmental employee to conclusively establish each of the three elements. *Telthorster v. Tennell*, 92 S.W.3d 457, 461 (Tex. 2002) (citing *Univ. of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000)); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994); *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984); *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996); *Moon v. Lesikar*, 230 S.W.3d 800, 802-03 (Tex. App. – Houston [14th Dist.] 2007, pet. denied); *Johnson v. Baylor Univ.*, 188 S.W.3d 296, 300 (Tex. App. – Waco 2006, pet. denied); *Salazar v. Collins*, 255 S.W.3d 191, 203 (Tex. App. – Waco 2008, no

pet.). In deciding whether the governmental employee’s proof conclusively establishes the official immunity defense, the court must determine whether there are disputed facts that are material to its elements. *Telthorster*, 92 S.W.3d at 461. If the defendant establishes the elements, then the plaintiff must come forward with summary judgment evidence to the contrary. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). That is, the plaintiff must submit or identify evidence in the record raising a genuine issue of material fact as to the defense. TEX. R. CIV. P. 166a; *Norville v. Phelan*, 2008 Tex. App. Lexis 499, *6 (Tex. App. – Amarillo 2008, pet. denied).

1. What An Official Must Prove to Establish the Defense of Official Immunity

The “could have believed” aspect of the good faith test means that, in order to be entitled to summary judgment, an officer must prove that a reasonably prudent officer might have believed that the pursuit should have been continued. *Chambers*, 883 S.W.2d at 656-57. It does not mean that an officer has to prove that it would have been unreasonable to stop the pursuit; nor must the officer prove that all reasonably prudent officers would have continued the pursuit. *Chambers*, 883 S.W.2d at 657.

To establish good faith, an officer must show that a reasonably prudent officer, under the same or similar circumstances, could have believed that his conduct was justified based on the information he possessed when the conduct occurred. *Telthorster*, 92 S.W.3d at 465 (citing *Chambers*, 883 S.W.2d at 656-57); *see also Gallia v. Schreiber*, 907 S.W.2d 864, 869 (Tex. App. – Houston [1st Dist.] 1995, no writ). An officer need not prove that it would have been unreasonable not to engage in the conduct or that all reasonably prudent officers would have engaged in the same conduct. *Telthorster*, 92 S.W.3d at 465. Rather, the officer must prove only that a reasonably prudent officer, under similar circumstances *might* have reached the same decision. *Id.* The fact that an officer was negligent will not defeat good faith; the test of good faith does not inquire into “what a reasonable officer *would have done*,” but into “what a reasonable officer *could have believed*.” *Id.*; *Wadewitz v. Montgomery*, 951 S.W.2d 464, 467 n.1 (Tex. 1997); *Chambers*, 883 S.W.2d at 661 n.5.

2. What a Plaintiff Must Do To Controvert an Assertion of Official Immunity

To controvert an officer’s summary judgment proof on good faith, the plaintiff must do more than show that a reasonably prudent officer could have decided to stop the pursuit; the plaintiff must show that “no reasonable person in the defendant’s position could

have thought the facts were such that they justified defendant's acts." *Chambers*, 883 S.W.2d at 657 (citing, inter alia, *Malley v. Briggs*, 475 US. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) ("if officers of reasonable competence could disagree on this issue, immunity should be recognized"))).

In order to defeat an officer's entitlement to official immunity, a plaintiff must show that no reasonable officer under similar circumstances could have believed that the facts were such that they justified the disputed conduct. *Telthorster*, 92 S.W.3d at 460.

The Texas Supreme Court in *Telthorster* disagreed with the argument, made by plaintiff, that this test for good faith allows officers free rein and leaves those injured during an arrest without a remedy. The Court explained that "good faith is not a mechanical inquiry, but rather turns on the particular facts presented." *Telthorster*, 92 S.W.3d at 465. When an officer exceeds the bounds of reasonableness, good faith cannot be shown, and the officer will not enjoy official immunity's protection. *Telthorster*, 92 S.W.3d at 465 (citing *Chambers*, 883 S.W.2d at 656-57). Thus, the public interest in deterring abusive police conduct and in compensating victims remains protected by the objective test for good faith. *Telthorster*, 92 S.W.3d at 465.

3. An Elevated Standard of Proof Is Required to Defeat Official Immunity

The Texas Supreme Court in *Chambers* explicitly stated that its good faith test for official immunity "sets an elevated standard of proof for the nonmovant seeking to defeat a claim of official immunity in response to a motion for summary judgment." *Chambers*, 883 S.W.2d at 656.

4. Official vs Qualified Immunity

The Texas Supreme Court conceded that the test they created in *Chambers* is "somewhat less likely to be resolved at the summary judgment stage than is the federal test." *Chambers*, 883 S.W.2d at 657. The *Chambers* court explained that there were substantive and procedural reasons why summary judgment is more difficult to obtain under official immunity than under qualified immunity. "First, federal qualified immunity may be conferred at the summary judgment stage by the Court's finding that the constitutional right at issue was not clearly established." *Chambers*, 883 S.W.2d at 657. The Texas Supreme Court noted in *Chambers* that "No analogous threshold legal question has been written into a good faith test for immunity from nonconstitutional torts." *Id.* Second, the Court recognized that summary judgments are generally more easily obtained in the federal courts than in the Texas courts.

A decision from the Eastland Court of Appeals illustrates well this concept that summary judgment is harder to obtain on official immunity than it is to obtain on qualified immunity. See *Eastland County Coop. Dispatch v. Poyner*, 64 S.W.3d 182 (Tex. App. – Eastland 2001, pet. denied). In *Poyner*, two officers shot and killed a 96-year-old man after responding to a call from the man's elderly wife. She was worried that her husband thought she was involved with another man and was looking for his "six shooter" in order to "stop this tonight." Both officers were entitled to qualified immunity from the plaintiff's federal law claims but both were denied official immunity from the plaintiff's state law claims.

5. Summary Judgment Evidence For Official Immunity

"[P]robative evidence on the issue of good faith is limited to objective evidence." *Ballantyne*, 144 S.W.3d at 427; see *Wadewitz*, 951 S.W.2d at 466; *Freeman v. Wirecut E.D.M., Inc.*, 159 S.W.3d 721, 730 (Tex. App. – Dallas 2005, no pet.).

An expert's testimony will support summary judgment only if it is "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies and could have been readily controverted." TEX. R. CIV. P. 166a(c); *Wadewitz*, 951 S.W.2d at 466. Conclusory statements by an expert are insufficient to support or defeat summary judgment. *Wadewitz*, 951 S.W.2d at 466; see also *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991) (per curiam) (op. on reh'g). Thus, an expert witness's conclusory statement that a reasonable officer could or could not have taken some action will neither establish good faith at the summary judgment stage nor raise a fact issue to defeat summary judgment. *Id.* Instead, expert testimony on good faith must address what a reasonable officer *could have believed* under the circumstances and must be substantiated with reference to each aspect of the *Chambers* balancing test. *Id.* at 466-67. Expert testimony on good faith must address what a reasonable officer could have believed under the circumstances and must be substantiated with facts showing the officer assessed both the need to apprehend the suspect and the risk of harm to the public. See *Univ. of Houston v. Clark*, 38 S.W.3d 578, 589 n. 3 (Tex. 2000) (citing *Wadewitz*, 951 S.W.2d at 467).

"[C]onclusory statements that a reasonable officer could or could not have taken some action will neither establish good faith on summary judgment nor raise a fact issue to defeat summary judgment." *Clark*, 38 S.W.3d at 589 n. 3; see also *State v. McGeorge*, 925 S.W.2d 105, 109 (Tex. App. – Houston [14th Dist.] 1996, writ denied); *City of San Juan v. Gonzalez*, 22 S.W.3d 69, 73 (Tex. App. – Corpus Christi 2000, no

pet.) (Officers statements that arrestee resisted arrest and a struggle ensued were conclusory and did not provide factual support. Furthermore, the evidence did not show that the arrestee was a danger to himself and others and therefore the officer was not entitled to official immunity.).

In cases involving force used during an arrest, courts have articulated the standard as whether “a reasonably prudent officer might have believed that force was necessary.” *Victory v. Bills*, 897 S.W.2d 506, 509 (Tex. App. – El Paso 1995, no writ); *see also City of Harlingen v. Vega*, 951 S.W.2d 25, 31 (Tex. App. – Corpus Christi 1997, no writ).

F. The Relationship Between Official Immunity and Sovereign Immunity: Using Official Immunity to Aid Entities

Unlike sovereign immunity, the doctrine of official immunity is not a bar to suit or a jurisdictional issue. *See McCartney, M.D. v. May, M.D.*, 50 S.W.3d 599, 603 (Tex. App. – Amarillo 2001, no pet.). That said, official immunity can implicate sovereign immunity. The *Chambers* Court discussed the relationship between official immunity for individual public officials and immunity for municipalities under the Texas Tort Claims Act. The *Chambers* Court noted that “a municipality, as a political subdivision of the state, is not liable for the acts or conduct of its officers or employees unless the municipality’s common law immunity is waived by the Texas Tort Claims Act (“TTCA”). *Chambers*, 883 S.W.2d at 658. The Court then quoted the applicable waiver provision, in pertinent part, with emphasis added to a portion by italics as set out below:

A governmental unit in the state is liable for:

- (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within the scope of employment if:
 - (a) the property damage, personal injury or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; *and*,
 - (b) *the employee would be personally liable to the claimant according to Texas law ...*

TEX. CIV. PRAC. & REM. CODE § 101.021.

The Court explained that if the officers are immune from suit, they are not “personally liable to the claimant according to Texas law.” *Id.* When official immunity shields a governmental employee from liability, the governmental employer is shielded from liability under the doctrine of sovereign immunity. *Clark*, 38 S.W.3d at 580; *see also Travis*, 830 S.W.2d at 105; *City of Fort Worth v. Robinson*, 300 S.W.3d

892, 897 (Tex. App. – Fort Worth 2009, no pet.); *Vela v. Rocha*, 52 S.W.3d 398, 404 (Tex. App. – Corpus Christi, 2001, pet. denied) (“When official immunity shields a governmental employee from liability, sovereign immunity shields the governmental employer from vicarious liability.”). A governmental entity may not have respondeat superior liability when the employee possesses official immunity. *DeWitt v. Harris County*, 904 S.W.2d 650 (Tex. 1995); *see also City of Beverly Hills, Texas v. Guevara*, 904 S.W.2d 655 (Tex. 1995) (a city can rely on the official immunity of its employees and agents even when those employees or agents have not been named as parties to the suit.). This can apply even in cases where the governmental unit would have otherwise been liable under the TTCA. *See Royal v. Harris County*, ___ S.W.3d ___, 2010 Tex. App. LEXIS 1217, *28 (Tex. App. – Houston [14th Dist.] 2010, no pet.) (in a personal-injury case stemming from a vehicle collision, sovereign immunity found for County when peace officer had official immunity). Therefore, a motion for summary judgment by the employer of an official may be based on an assertion of official immunity. *See William Marsh Rice Univ. v. Coleman*, 291 S.W.3d 43, 45 (Tex. App. – Houston [14th Dist.] 2009, pet. filed).

G. Interlocutory Appeals from Denials of Official Immunity

Section 51.014(5) of the Texas Civil Practice & Remedies Code authorizes interlocutory appeals for claims based on an assertion of immunity by an individual. *City of Beverly Hills, Texas v. Guevara*, 904 S.W.2d 655 (Tex. 1995); *see also Texas A&M Univ. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007).

A denial of an official’s motion for summary judgment is only appealable to the court of appeals because of a special statute, TEX. CIV. PRAC. & REM. CODE § 51.014(5). This statute does not itself state or necessarily imply that the Supreme Court also has the authority to review the appeal. An appeal to the Supreme Court, therefore, falls under the provisions of TEX. GOV’T CODE § 22.225(c), stating that all interlocutory appeals are final in the court of appeals, absent dissent or conflict jurisdiction. Supreme Court jurisdiction, absent a special statute, must be based on the Government Code provision conferring general Supreme Court jurisdiction. TEX. GOV’T CODE § 22.001; *see also Gross v. Innes*, 988 S.W.2d 727 (Tex. 1998) (the Texas Supreme Court did not have jurisdiction over an interlocutory appeal of a denial of official immunity, absent dissenting opinions in the court of appeals or conflicting cases.).

A public official may pursue an interlocutory appeal from the denial of a motion for summary judgment based upon official immunity. Section 51.014(a) of the Texas Civil Practices & Remedies

Code authorizes public officials to pursue interlocutory appeals in this circumstance. *Gross*, 988 S.W.2d at 729. Such an interlocutory appeal is normally final in the court of appeals. *Gross*, 988 S.W.2d at 729 (citing Section 22.225(b)(3)). The only exception is found in Section 22.225(c). That section affords the Supreme Court jurisdiction over any appealable interlocutory order, including denials of summary judgment motions based upon immunity claims when “the justices of the court of appeals disagree on a question of law material to the decision or when the court of appeals holds differently from a prior decision of another court of appeals or of the Supreme Court. *Gross*, 988 S.W.2d at 729 (citing TEX. GOV’T CODE § 22.225 (c)).

H. Issues and Questions

1. Does Official Immunity Protect Government Officials from Discovery?

Since official immunity has its roots in the federal law doctrine of qualified immunity and since the federal courts have recognized that qualified immunity protects government officials from the hassles of general discovery, it makes sense to ask whether official immunity protects government officials from discovery. See e.g., *Anthony v. Tex. Dep’t of Crim. Justice*, 2009 Tex. App. Lexis 1482, *5 (Tex. App. – Houston [1st Dist] 2009, no pet.); *Johnson v. Sandel*, 920 S.W.2d 751, 752 (Tex. App. – Houston [1st Dist.] 1996, writ filed). This is a question which does not appear to have a clear answer. Advocates for government officials will have to raise this issue and cite to the policy reasons supporting official immunity in order for this issue to be settled. The argument, in a nut shell, is that official immunity, like qualified immunity, is immunity both from suit and from damages.

2. Should a Court Review an Officer’s Every Step?

In *Wadewitz v. Montgomery*, 951 S.W.2d 464 (Tex. 1997), Justice Enoch filed a dissenting opinion which was joined by Justices Hecht and Owen. In that dissenting opinion, the three Justices criticized the majority’s opinion in *Wadewitz* in two ways.

First, the dissent claimed that the majority glossed over an important distinction between the facts in *Chambers* and the facts in *Wadewitz*. The dissent believed that it was an important distinction that, in *Chambers*, the police were pursuing a moving vehicle, while in *Wadewitz*, the police were responding to a call at a fixed location. The dissent explained that, when an officer is responding to a fixed location, the officer “must make but one decision -- how to respond.” *Wadewitz*, 951 S.W.2d at 468.

Second, the dissent criticized the majority for second-guessing the officer’s decision every step of the

way. The dissent explained that “our focus must be on the officer’s decision as she initiated her response rather than on each discrete circumstance that confronts her at each moment of her course of action. To second-guess the officer along each freeze frame of the route to the scene of the crime would deprive that officer of any meaningful official immunity...As the frames get closer to the scene of the accident, the risk becomes greater and the officer’s conduct appears less reasonable. Eventually, official immunity as a viable public policy protection disappears.” *Wadewitz*, 951 S.W.2d at 468.

Although the dissent’s position did not carry the day in *Wadewitz*, it is worth recognizing and reurging in the proper case. The policy considerations underlying official immunity could well support a more deferential approach as opposed to a frame-by-frame approach to an officer’s conduct.

VI. OTHER STATE LAW QUALIFIED IMMUNITIES

A. Educator Immunity

Section 22.0511 (formerly §22.051) of the Texas Education Code sets out an educator’s immunity in the following language:

(a) A professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee’s position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.

(b) This section does not apply to the operation, use, or maintenance of any motor vehicle.

(c) In addition to the immunity provided under this section and under other provisions of state law, an individual is entitled to any immunity and any other protections afforded under the Paul D. Coverdell Teacher Protection Act of 2001 (20 U.S.C. Section 6731 et seq.), as amended. Nothing in this subsection shall be construed to limit or abridge any immunity or protection afforded an individual under state law. For purposes of this subsection, “individual” includes a person who provides services to private schools, to the extent provided by federal law.

The legislative goal of educator immunity is to ensure the continued availability of quality public education.

Stout v. Grand Prairie Indep. Sch. Dist., 733 S.W.2d 290 (Tex. Civ. App. – Dallas 1987, writ ref'd n.r.e.).

A professional school employee is not personally liable for acts done within the scope of their employment, and which involve the exercise of judgment or discretion, except in circumstances where, in disciplining a student, the employee uses excessive force or his negligence results in bodily injury of the student. *Barr v. Bernhard*, 562 S.W.2d 844 (Tex. 1978); *Williams v. Conroe Indep. Sch. Dist.*, 809 S.W.2d 954 (Tex. Civ. App. – Beaumont 1991, no writ); see also *Schumate v. Thompson*, 580 S.W.2d 47 (Tex. Civ. App. – Houston [1st Dist.] 1979, writ ref'd n.r.e.); *Stout v. Grand Prairie Indep. Sch. Dist.*, 733 S.W.2d 290 (Tex. Civ. App. – Dallas 1987, writ ref'd, n.r.e.); *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49 (Tex. 1992); *Closs v. Goose Creek Consol. Indep. Sch. Dist.*, 874 S.W.2d 859 (Tex. App. – Texarkana 1994, no writ); *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990); *Lane v. Young*, 2007 Tex. App. Lexis 144, 25 I.E.R. Cas. (BNA) 1069 (Tex. App. – Beaumont 2007, no pet.); *Rosencrans v. Altschuler*, 161 S.W.3d 517 (Tex. App. – Eastland 2004, no pet.) (charter school educator); *Morrone v. Prestonwood Christian Acad.*, 215 S.W.3d 575 (Tex. App. – Eastland 2007, pet. denied) (Coverdale Act applied to private school educator); *Choctaw Props., L.L.C. v. Aledo Indep. Sch. Dist.*, 127 S.W.3d 235 (Tex. App. – Waco 2003, no pet.), *overruled in part by Thomas v. Long*, 207 S.W.3d 334 (Tex. 2006).

B. Emergency Response Immunity

Although the case law is not entirely clear on this issue, there is some authority to support the position that a separate immunity defense exists for individuals responding to an emergency situation. In *City of Amarillo v. Martin*, 971 S.W.2d 426 (Tex. 1998), the Texas Supreme Court implied that such an immunity defense existed under the Texas law and that to overcome the immunity defense a plaintiff must meet a very high standard of proof.

[E]mergency vehicle operators and their governmental employers, in most states, are immune from suits based on negligence because the employees' official immunity is waived only for more culpable conduct, such as gross negligence, bad faith, or willful or wanton conduct . . . Therefore, a substantial majority of states provide some form of immunity barring suit against governmental employers or employees based on negligent operation of emergency vehicles. Whatever form such immunity takes, the underlying policy is the same: to balance the safety of the public with the need for prompt responses to police, fire, and medical emergencies.

City of Amarillo v. Martin, 971 S.W.2d at 429.

"[T]o recover damages resulting from the emergency operation of an emergency vehicle, a plaintiff must show that the operator has committed an act that the operator knew or should have known posed a high degree of risk of serious injury (emphasis added)." *City of Amarillo v. Martin*, 971 S.W.2d 426, 430 (Tex. 1998). The Supreme Court further construed section 101.055(2) as specifically excluding the "operation of emergency vehicles in emergency situations from the general waiver of immunity for negligent operation of governmental vehicles." *Id.*

Section 101.055(2) of the Texas Civil Practices and Remedies Code states that: "This chapter does not apply to a claim arising: (2) from the action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action, or in the absence of such law or ordinance, if the action is not taken with conscious indifference or reckless disregard for the safety of others." TEX. CIV. PRAC. & REM. CODE § 101.055(2). Only one published decision refers to this section as an emergency response immunity. See *Green v. City of Friendswood*, 22 S.W.3d 588, 591 (Tex. App. – Houston [1st Dist.] 2000, pet. denied).

At least one municipality has effectively used Section 101.055(2) of the Texas Civil Practices and Remedies Code to protect itself from liability in a premises liability context. In *City of Arlington v. Whitaker*, 977 S.W.2d 742 (Tex. App. – Fort Worth 1998, pet. denied), the City argued that the emergency exception in the Texas Tort Claims Act supplanted its duty under the same Act to adequately warn of special defects. The plaintiff claimed wrongful death and survival after decedent, intoxicated and returning from a fraternity party in the early morning hours, drove past a fire department vehicle with lights flashing, horn honking, and sirens sounding into four feet of rushing flood water where a creek had overflowed across a bridge. The City argued that its sovereign immunity was preserved as a matter of law because the jury found that the fireman in the vehicle alerting decedent to the danger was reacting to an emergency situation in compliance with a City Ordinance and Section 101.055. Since the case dealt with a premises defect (i.e. rushing water), the plaintiff argued that the City waived its immunity under the Texas Tort Claims Act. See TEX. CIV. PRAC. & REM. CODE §§ 101.021-022. The City argued that the classification as a premises defect was irrelevant in light of the jury's determination that the City, through its fireman, was responding to an emergency. Essentially, the City argued, and the Court agreed, that the "emergency exception" to waiver found in section 101.055 of the Texas Tort Claims Act overrides the waiver for special and premises defects.

Section 546.001, Texas Transportation Code, authorizes emergency vehicle operators to exceed a maximum speed limit and disregard a regulation governing the direction of movement or turning in specified directions. TEX. TRANSP. CODE §§ 546.001(3), (4). Section 546.002 authorizes the privileges set out in 546.001 when the operator is responding to but not returning from a fire alarm. Section 546.003 requires an operator of an emergency vehicle engaging in conduct permitted by section 546.001 to use audible or visual signals. Section 546.005 provides:

This chapter does not relieve the operator of an authorized emergency vehicle from:

- (1) the duty to operate the vehicle with appropriate regard for the safety of all persons; or
- (2) the consequences of reckless disregard for the safety of others.

TEX. TRANSP. CODE § 546.005.

Section 546.005 replaced former section 24(e), article 6701d, Vernon's Annotated Civil Statutes. Section 24(e) provided that an emergency vehicle driver should exercise *due regard* for others while responding to an emergency, but must face the consequences of reckless disregard for others. *See Martin*, 971 S.W.2d at 428; *Green v. Alford*, 274 S.W.3d 5 (Tex. App. – Houston [14th Dist.] 2008, pet. denied) (firefighter was reckless when driving fire truck through an intersection against a red light, causing an accident, where firefighter was not wearing corrective lenses, was driving too fast, should have known the degree of risk, and the siren was allegedly not engaged). Section 546.005, which became effective September 1, 1995, replaced *due regard* with *appropriate regard*. With respect to this change, the Supreme Court stated:

The Legislature's substitution of "appropriate regard" for "due regard" lends credence to our view that the Legislature intended for emergency vehicle operators in emergency situations to be cognizant of public safety, but only intended to impose liability for reckless conduct.

Martin, 971 S.W.2d at 431.