

CAUSE NO. _____

MICHAEL CAROTHERS, SR.,	§	IN THE DISTRICT COURT
Individually and on Behalf of the Estate	§	
Of MICHAEL CAROTHERS, JR.,	§	126TH, DISTRICT COURT
Plaintiffs,	§	
	§	
vs.	§	_____ JUDICIAL COURT
	§	
CITY OF AUSTIN, TEXAS,	§	
	§	
Defendant.	§	TRAVIS COUNTY, TEXAS

PLAINTIFF’S ORIGINAL PETITION AND JURY DEMAND

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW, Plaintiff, Michael Carothers, Sr., Individually and on Behalf of the Estate of Michael Carothers, Jr., files this Original Petition complaining of Defendant City of Austin, Texas, and for causes of action, would respectfully show this Court as follows:

I.
DISCOVERY CONTROL PLAN LEVEL

I.1 It is the Plaintiff’s intent that Discovery be conducted under Level 3 of Rule 190 of the Texas Rules of Civil Procedure.

II.
PARTIES

2.1 Plaintiff Michael Carothers, Sr. (hereinafter “Carothers, Sr.” or “Plaintiff”) is an individual living in Austin, Texas. Partial identification, pursuant to the Texas Civil Practices and Remedies Code is as follows: the last three numbers of his Social Security number are 370.

2.2 Defendant, City of Austin, Texas, a city located in Travis County, Texas, may be served with process by serving the Mayor, Kirk Watson, at 301 W 2nd St., Austin, 78701, under the authority of Texas Civil Practice & Remedies Code section 17.024(b).

III. JURISDICTION

3.1 This is a claim brought under the Texas Tort Claims Act (TTCA), Texas Civil Practice & Remedies Code chapter 101. The Court has jurisdiction over this claim because the TTCA waives a defendant's governmental immunity for claims involving personal injury or death caused by the negligence of the defendant's employee in the use or condition of personal property, if that employee would be personally liable to the plaintiff under Texas law. Tex. Civ. Prac. & Rem. Code § 101.021(2). This claim, as set out more fully in Count 1, involves personal injury caused by negligence in the use/misuse of a firearm by defendant's employee, and that employee would be personally liable to plaintiff under Texas law.

3.2 No exception to the waiver of immunity applies to reinstate defendant's governmental immunity for this claim.

3.3 Defendant had actual notice of plaintiff's claim, and written notice was not required. The City of Austin was on notice of the liability for the injuries and death of Plaintiff's son, Michael Carothers, Jr., on October 9, 2021 as a result of the officer involved shooting by then Austin Police Department officer Glenn Vargas, as Officer Vargas was placed on administrative leave for this officer involved shooting that resulted in the death of Michael Carothers, Jr., Police Chief Joseph Chacon gave a press conference on this officer involved shooting, multiple investigations were conducted into the officer involved shooting, and on October 12, 2021, a press release was issued which was associated with Case 21-2820113 which involved the officer involved shooting and death of Michael Carothers, Jr. on October 9, 2021.

3.4 All statutory prerequisites to plaintiff's claim for relief have been met.

IV.
VENUE

4.1 Venue is mandatory in Travis County under Texas Civil Practice & Remedies Code section 101.102(a) because this suit is brought under the TTCA and this is the county where all of the cause of action arose, since this is the county where Defendant's employee negligently and recklessly discharged his department issued firearm, killing Carothers, Jr. in the City of Austin.

V.
FACTS AND ALLEGATIONS

5.1 On October 9, 2021, inside of the city limits of Austin, Texas inside of the County of Travis, Texas, Officer Glenn Vargas of the City of Austin Police Department negligently and recklessly discharged his department issued firearm, killing Michael Carothers, Jr., a seventeen-year-old boy who was not involved in any criminal activity at the time.

The City of Austin had Actual Notice of Civil Liability in This Case

5.2 The City of Austin was on notice of the liability for the death of Carothers, Jr. as a result of Officer Vargas negligently and recklessly discharged his department issued firearm.

5.3 Officer Vargas was placed on administrative leave for this officer involved shooting that resulted in the death of Carothers, Jr.

5.4 Police Chief Joseph Chacon gave a press conference on this officer involved shooting.

5.5 The Austin Police Department conducted two concurrent investigations into this incident: a criminal investigation by the APD Special Investigations Unit in conjunction with the Travis County District Attorney's Office, and an administrative investigation conducted by the APD Internal Affairs Unit, with oversight from the Office of Police Oversight.

5.6 On October 12, 2021, a press release was issued which was associated with Case 21-2820113 which involved the officer involved shooting and death of Michael Carothers, Jr. on October 9, 2021.

5.7 All of this shows that the City of Austin was on actual notice that its employee, Officer Glenn Vargas, caused the death of Michael Carothers, Jr., by negligently and recklessly discharged his department issued firearm on October 9, 2021.

The City of Austin is Liable for Officer Vargas' Negligent Use of His Firearm

5.8 Officer Vargas negligently and recklessly discharged his firearm in the middle of downtown Austin despite innocent bystanders, including Carothers, Jr., being present and in harm's way.

5.9 Officer Vargas was not acting in good faith when he negligently and recklessly discharged his firearm in the middle of downtown Austin despite innocent bystanders, including Carothers, Jr., being present and in harm's way – striking Carothers, Jr. and killing him.

5.10 A governmental unit is liable under the Texas Tort Claims Act “[i]f a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment.” Tex. Civ. Prac. & Rem. Code § 101.106(f).

5.11 The TTCA defines “scope of employment” as “the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority.” Tex. Civ. Prac. & Rem. Code § 101.001(5).

5.12 “An official acts within the scope of his authority if he is discharging the duties generally assigned to him.” *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 424 (Tex. 2004).

5.13 That is, an employee's scope of authority extends to job duties to which the official has been assigned, even if the official errs in completing the task. *Id.*

5.14 As a law enforcement officer, Officer Vargas was generally acting within the scope of his duties in responding to the gunshots heard being fired.

5.15 Even if conducted in an improper manner, Officer Vargas' actions remain within the general scope of duties of law enforcement officers.

5.16 Under the Texas Tort Claims Act, governmental immunity is waived for injuries arising from "a condition or use of tangible personal or real property." Tex. Civ. Prac. & Rem. Code § 101.021.

5.17 Officer Vargas' firearm was tangible personal property.

5.18 Here, Carothers, Jr. suffered personal injuries and death caused by the use of Officer Vargas' tangible personal property: his firearm.

5.19 In this instance, Officer Vagas discharged his firearm in downtown Austin with innocent bystanders in harm's way.

5.20 One of those bystanders was Carothers, Jr., an innocent seventeen-year-old boy.

5.21 At 1:17 AM on October 9, 2021, Officer Vargas, Officer Nathaniel Chambers, and Coproral Christopher Salacki were conducting a DWI investigation on a driver they stopped at the intersection of Fifth and Sabine, in Austin, Texas.

5.22 Shots were heard being fired north of their location.

5.23 The officers responded by heading toward the shots that had been fired.

5.24 Officer Vargas raised his firearm and discharged it, firing a shot.

5.25 Immediately after firing his weapon, Officer Vargas stopped running and said "Shit," indicating something went wrong.

5.26 When Officer Vargas discharged his weapon, it was dark outside, he did not have a clear target on anyone presenting a threat, he did not take a stable stance before firing his weapon to ensure accuracy of the shot, they were in the middle of downtown Austin and there were innocent bystanders in the area – including Carothers, Jr. who was exiting a local store at the time, Officer Vargas did not know who was in the path of his bullet, how many people were in the path, or what else would be struck by his bullet – but he knew he was in a populated area in downtown Austin with innocent bystanders out and about given that he had just assisted in the investigation of an uninvolved motorist.

5.27 Accordingly, Officer Vargas acted with conscious indifference and reckless disregard for the safety of others – including Carothers, Jr. – when Officer Vargas recklessly discharged his firearm shooting and killing Carothers, Jr.

5.28 Officer Chambers and Christopher Salacki were also present with Officer Vargas heading toward the gunshots they heard.

5.29 However, neither Officer Chambers nor Corporal Salacki discharged their firearms, as it was dangerous, reckless, and unreasonable to do so with high likelihood of striking an innocent bystander such as Carothers, Jr.

5.30 Upon information and belief, Carothers, Jr. was struck by Officer Vargas' bullet killing him.

5.31 Carothers, Jr. was pronounced dead less than five hours later at 5:45 AM on October 9, 2021.

5.32 Following the investigations into this incident, Officer Vargas' employment with the Austin Police Department terminated in July of 2022 after only five years at the Department.

5.33 Carothers, Jr.'s injuries and death were not the result of any other cause.

VI.
CAUSE OF ACTION

COUNT I
INJURY BY USE OF PERSONAL PROPERTY

6.1 Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as if fully repeated herein.

6.2 Defendant is a governmental unit, a city, that employed Glenn Vargas to perform the role of police officer for the City of Austin Police Department.

6.3 At the time of Carothers, Jr.'s death, defendant's employee was responding to shots fired, which was in the course and scope of his employment as a police officer with the City of Austin Police Department.

6.4 The employee did not act in good faith to perform his duties when he negligently and recklessly discharged his firearm by failing anticipate and account for the innocent bystanders in the direction he fired his weapon, failing to use caution and follow his training when firing his weapon, failing to have a legal justification for firing his weapon when he did and in the direction he did without a clear target, and failed to properly aim his weapon, all of which resulted in his shooting and killing Carothers, Jr. on October 9, 2021.

6.5 Officer Vargas acted with conscious indifference and reckless disregard for the safety of others – including Carothers, Jr. – when Officer Vargas recklessly discharged his firearm shooting and killing Carothers, Jr.

6.6 The employee's negligence and recklessness was the result of the employee's use of a firearm, an item of tangible personal property, which was contemporaneous with Carothers, Jr.'s death.

6.7 Had the employee used caution and followed his training, only fired at a target he had the legal justification to shoot, properly aimed his weapon, and properly anticipated and accounted for the innocent bystanders in the direction he fired his weapon, then the injury and death would not have resulted.

6.8 The employee would be personally liable to Plaintiff under Texas law for the wrongful death of his son, Carothers, Jr., for negligently and recklessly discharging his firearm which resulted in the death of Carothers, Jr.

6.9 The employee's use of tangible personal property proximately caused personal injury and death, which resulted in the following damages: physical injuries, physical pain and suffering, permanent physical disfigurement, mental and emotional anguish, and death.

6.10 Plaintiff seeks recovery of damages within the jurisdictional limits of this Court.

COUNT II **WRONGFUL DEATH**

6.11 Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as if fully repeated herein.

6.12 Plaintiff Michael Carothers, Sr. is Michael Carothers, Jr.'s father.

6.13 By reason of Defendant City of Austin's employee Officer Vargas' wrongful conduct of fatally shooting Carothers, Jr., Defendant City of Austin is liable for damages.

6.14 Officer Vargas' conduct that caused Carothers, Jr.'s death was a proximate cause of injury, which resulted in the following damages: loss of a family relationship, love, support, services, emotional pain and suffering, and Defendant City of Austin is liable for the acts and infliction of emotional distress caused by the wrongful death of Carothers, Jr.

6.15 Plaintiff seeks compensation as set forth more specifically in the section of this Complaint entitled "Damages."

COUNT III
SURVIVAL ACTION

6.16 Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as if fully repeated herein.

6.17 Plaintiff brings this claim on behalf of the Estate of Michael Carothers, Jr.

6.18 Carothers, Jr. died because of the Officer Vargas' wrongful conduct.

6.19 Carothers, Jr. would have been entitled to bring this action against the Defendant if he had lived.

6.20 The Decedent's right of action for wrongful conduct against the Defendant survives in favor of the estate of the deceased.

6.21 The Defendant City is liable for the mental anguish and conscious pain and suffering that Carothers, Jr. sustained prior to his death.

6.22 Plaintiff seeks compensation as set forth more specifically in the section of this Complaint entitled "Damages."

VII.
DAMAGES

7.1 Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs as if fully repeated herein.

7.2 Plaintiff's injuries were a foreseeable event. Those injuries were directly and proximately caused by the Defendant's actions as described above.

7.3 As a result, Plaintiff is entitled to recover all actual damages allowed by law.

7.4 As a direct and proximate result of the occurrence which made the basis of this lawsuit, Plaintiff was forced to suffer:

a. Actual damages;

- b. Loss of affection, consortium, comfort, financial assistance, protection, and care;
- c. Pain and suffering and mental anguish suffered by Carothers, Jr. prior to his death;
- d. Mental anguish and emotional distress suffered by Plaintiff;
- e. Loss of quality of life;
- f. Funeral and burial expenses;
- g. Loss of service;
- h. Loss of earnings and contributions to Plaintiff;
- i. Prejudgment interest; and
- j. Post judgment interest.

VIII.
JURY DEMAND

- 8.1 Plaintiff demands a jury trial and tenders the appropriate fee with this petition.

IX.
CONDITIONS PRECEDENT

- 9.1 All conditions precedent to plaintiff's claim for relief have been performed or have occurred.

X.
OBJECTION TO ASSOCIATE JUDGE

- 10.1 Plaintiff objects to the referral of this case to an associate judge for hearing a trial on the merits or presiding at a jury trial.

XI.
NOTICE PURSUANT TO TEX. R. CIV. P. 193.7

- 11.1 Plaintiff provides notice to Defendant pursuant to Rule 193.7 of the TEXAS RULES OF CIVIL PROCEDURE that Plaintiff may utilize as evidence during the trial of this lawsuit, all documents exchanged by the parties in written discovery in this case.

XII.
PRAYER

12.1 WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that judgment be rendered against Defendant, for an amount in excess of the jurisdictional minimum of this Court. Plaintiff further prays for all other relief, both legal and equitable, to which he may show himself justly entitled.

Respectfully submitted,

/s/ Scott H. Palmer

SCOTT H. PALMER

Texas Bar No. 00797196

/s/ James P. Roberts

JAMES P. ROBERTS

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/s/ Breanta Boss

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ATTORNEYS FOR PLAINTIFF

Automated Certificate of eService

This automated certificate of service was created by the e filing system. The filer served this document via email generated by the e filing system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Rachel Perez on behalf of James Roberts

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Filing Code Description: Petition

Filing Description: PLAINTIFFS ORIGINAL PETITION AND JURY DEMAND

Status as of 10/9/2023 4:22 PM CST

Associated Case Party: MICHAEL CAROTHERS

Name	BarNumber	Email	TimestampSubmitted	Status
James Roberts		james@scottpalmerlaw.com	10/9/2023 1:51:01 PM	SENT
Scott H.Palmer		scott@scottpalmerlaw.com	10/9/2023 1:51:01 PM	SENT
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CAUSE NO. D-1-GN-23-007203

MICHAEL CAROTHERS, SR.,	§	IN THE DISTRICT COURT
Individually and on Behalf of the Estate	§	
Of MICHAEL CAROTHERS, JR.,	§	
Plaintiffs,	§	OF TRAVIS COUNTY, TEXAS
	§	
v.	§	
	§	126th JUDICIAL DISTRICT
CITY OF AUSTIN,	§	
Defendant.	§	

**DEFENDANT CITY OF AUSTIN’S ORIGINAL ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFF’S ORIGINAL PETITION**

TO THE HONORABLE JUDGE PRESIDING:

COMES NOW, Defendant the City of Austin, and files this Original Answer and Defenses, and would respectfully show this Court as follows:

I. GENERAL DENIAL

Defendant City of Austin generally denies each and every, all and singular, the allegations contained in Plaintiff’s Original Petition, and upon this denial, demands strict proof by a preponderance of the evidence.

II. DEFENSES

A. Answering further, should it be necessary, Defendant City of Austin affirmatively pleads the exceptions from liability contained in §§101.021, 101.0215, 101.055, 101.056, 101.062, and 101.101 of the Texas Civil Practice and Remedies Code.

B. Defendant City of Austin is entitled to sovereign immunity, immunity from suit, and liability.

C. Defendant City of Austin would show that its liability for the Texas law claims, if any, is limited to the amount recited in §§101.023 and 101.024 of the Texas Civil Practice and Remedies Code.

D. Defendant City of Austin invokes §18.091 of the Texas Civil Practice And Remedies Code and requests, to the extent Plaintiff seeks recovery for loss of earnings or loss of earning capacity, that the evidence to prove such loss must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability. Defendant City of Austin further requests that the Court instruct the jury as to whether any recovery for compensatory damages sought by Plaintiff is subject to federal income taxes.

E. Answering further and in the affirmative, Defendant City of Austin invokes §41.0105 of the Texas Civil Practice and Remedies Code concerning Plaintiff's claim for the recovery of health care expenses and other related damages, past and future.

III. NOTICE

Defendant City of Austin intends to use any and all documents produced by all parties in response to written discovery, attached to depositions as exhibits, or produced for inspection at depositions in this case, at any hearings, pre-trial or at trial against the party that produced such documents, pursuant to Rule 193.7 of the Texas Rules of Civil Procedure.

IV. PRAYER FOR RELIEF

The City respectfully requests that Plaintiff take nothing by this suit and the City recover all court costs and any other and further relief, both at law and in equity, to which it may show itself justly entitled.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, CHIEF, LITIGATION

/s/ H. Gray Laird III

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties in compliance with the Texas Rules of Civil Procedure on November 6, 2023, as follows:

Via e-Service and/or facsimile:

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/s/ H Gray Laird III
H GRAY LAIRD III

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Priscilla Chavez on behalf of Gray Laird

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Envelope ID: 81317471

Filing Code Description: Answer/Response

Filing Description: DEFENDANT CITY OF AUSTIN'S ORIGINAL ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S ORIGINAL PETITION

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