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CAUSE NO. D-1-GN-21-007467

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| AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,<br>Plaintiffs,<br><br>v.<br><br>TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN,<br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | IN THE DISTRICT COURT OF<br><br><br><br><br><br><br><br><br><br>TRAVIS COUNTY, TEXAS<br><br><br><br><br>201st<br>_____ DISTRICT |

## PLAINTIFFS' ORIGINAL PETITION AND JURY DEMAND

**TO THE HONORABLE JUDGE OF SAID COURT:**

Plaintiffs Amy-Marie Howard, individually and as next friend of Daniel Aguilar, a minor, and as a representative of the estate of Johnathon Aguilar, and on behalf of all those entitled to recover under the Texas Wrongful Death Act for the death of Johnathon Aguilar ("Ms. Howard"), and Nanette Mojica ("Ms. Mojica") (collectively, "Plaintiffs"), file this Original Petition and Jury Demand against Defendants, Tavistock Freebirds, LLC ("Freebirds"), Galls, LLC ("Galls"), Safariland, LLC ("Safariland"), and the City of Austin (collectively, "Defendants"), and respectfully show the following:

## I.
## INTRODUCTION

1. On January 3, 2020, Johnathon Aguilar ("Johnathon") was stabbed and killed as the result of a culmination of grievous errors by the Defendants.

2. First, City of Austin employee and police officer, Patrick Spradlin ("Spradlin"), was negligent when he failed to properly maintain and use his City of Austin-provided duty belt, allowing Dylan Woodburn ("Woodburn") to escape from restraint and stab and kill Johnathon minutes later.

3. Second, the duty belt – which was designed and manufactured by Safariland and sold to the City of Austin by Galls – was defective. Due to the duty belt's negligent manufacture or design, Spradlin's duty belt malfunctioned and allowed Woodburn to escape from custody and kill Johnathon.

4. Third, Freebirds was grossly negligent when its general manager failed to lock Freebirds' door after having direct knowledge that Woodburn (who appeared emotionally disturbed and intoxicated) was attempting to access the business while Freebirds was closed, and after having direct knowledge of violent acts on and around the property by trespassers.

5. As a direct result of these failures, Johnathon was stabbed multiple times and killed.

## II.
## DISCOVERY CONTROL PLAN

6. Plaintiffs intend for discovery in this case to be conducted under Level 3 of Rule 190.3 of the Texas Rules of Civil Procedure.

## III.
## CLAIMS FOR RELIEF

7. Plaintiffs seek monetary relief of over $1,000,000.00 in damages. Tex. R. Civ. P. § 47(c)(4).

8. This Court has jurisdiction because the amount in controversy exceeds the minimum jurisdictional limits of this Court.

## IV.
## JURISDICTION AND VENUE

9. **Venue is Proper** – Venue is proper in Travis County because a substantial part of the events or omissions giving rise to the claim occurred there. TEX. CIV. PRAC. REM. CODE § 15.002(a)(1). Namely, Johnathon was stabbed and killed in Travis County when a City of Austin employee negligently used his personal property in Travis County, the City of Austin purchased a defective duty belt from Galls and Safariland in Travis County, and Freebirds' general manager failed to reasonably prevent Woodburn from gaining access to the Travis County business where Johnathon was killed.

10. **This Court has Subject Matter Jurisdiction** – This Court has subject matter jurisdiction because the amount in controversy exceeds the minimum jurisdictional limits of this Court.

11. **This Court has Personal Jurisdiction over Defendants** – This Court has personal jurisdiction over Defendants because Defendants (1) committed some or all of the tortious acts that are the basis of this action within the state of Texas; (2) are residents and/or citizens of the state of Texas; (3) engage in foreseeable, intentional, continuous, and/or systematic contacts within the state of Texas; and/or (4) maintain a registered agent for

service of process in Texas. Thus, there is both general and specific personal jurisdiction, and exercising jurisdiction over Defendants does not offend the notions of fair play and substantial justice.

12. Further, although Plaintiffs seek damages in an amount exceeding $75,000, federal courts lack jurisdiction over this suit. There is incomplete diversity of citizenship, and Plaintiffs' claims raise no federal question. Further, Plaintiffs seek no relief under a federal law, statute, regulation, treaty, or constitution, nor does their right to relief necessarily depend on the resolution of a substantial question of federal law. Thus, removal would be improper.

## V.
## PARTIES

13. Plaintiff Amy-Marie Howard sues in the following capacities, and can be served with process through the undersigned attorney:

a. Ms. Howard sues in her individual capacity as Johnathon's spouse. Ms. Howard has standing to bring suit for Johnathon's death under Tex. Civ. Prac. & Rem. Code § 71.004(a) and Tex. Labor Code § 408.001(b). Ms. Howard and Johnathon were informally married. Neither Johnathon or Ms. Howard were married to a third party, the couple agreed to be married, and – after the agreement to be married – the couple lived together in Texas as husband and wife and held themselves out as married in Texas. At all times pertinent to this action, Ms. Howard and Johnathon were residents of Travis County, Texas.

b. Ms. Howard also sues in her capacity as a representative of the estate of Johnathon, and on behalf of all those entitled to recover under the Texas Wrongful Death Act for the death of Johnathon. At the time of his death, Johnathon did not have a will. No administration of his estate is pending. No administration of Johnathon's estate is necessary because Johnathon's estate held fewer than two debts, and Ms. Howard and their biological son, Daniel Aguilar, are the only surviving heirs entitled to the estate. Further, a partition is not necessary because there is a family agreement regarding any distribution of the estate. Further, at all times pertinent to this action, Ms. Howard and Johnathon were residents of Travis County, Texas.

c. Ms. Howard also sues as next friend of Daniel Aguilar, a minor. Daniel is Johnathon and Ms. Howard's only biological child and has standing to bring suit for Johnathon's death under Tex. Civ. Prac. & Rem. Code § 71.004(a) and Tex. Labor Code § 408.001(b). At all times pertinent to this suit, Johnathon, Ms. Howard, and Daniel were residents of Travis County, Texas.

14. Plaintiff Nanette Mojica sues in her individual capacity as Johnathon's mother. Ms. Mojica has standing to bring suit for Johnathon's death under Tex. Civ. Prac. & Rem. Code § 71.004(a). Ms. Mojica is a resident of Travis County, Texas, and she may be served with process through the undersigned attorney.

15. Defendant Tavistock Freebirds, LLC ("Freebirds"), is a limited liability company that owns and operates the premises where Johnathon was killed. Freebirds' principal office is located in Travis County, at 13620 N FM 620, Building C, Suite 175, Austin, TX, 78717. Freebirds may be served with process through its registered agent, Corpdirect Agents, Inc., at 1999 Bryan St., Ste. 900 Dallas, TX, 75201.

16. Defendant City of Austin is a municipal corporation located in Travis County, Texas. The City of Austin can be served with process through its registered agent, Spencer Cronk, 301 W. 2nd Street, 3rd Floor, Austin, TX, 78701.

17. Defendant Galls, LLC ("Galls"), is a limited liability company authorized to conduct business in the State of Texas. Defendant Galls sold the City of Austin the malfunctioning duty belt at issue in this case. Galls may be served with process through its registered agent, C T Corporation System at 1999 Bryan St., Ste. 900 Dallas, TX 75201.

18. Defendant Safariland, LLC ("Safariland"), is a limited liability company authorized to conduct business in the State of Texas. Defendant Safariland manufactured

the duty belt at issue in this case. Safariland may be served with process through its registered agent, C T Corporation System at 1999 Bryan St., Ste. 900 Dallas, TX 75201.

## VI.
## FACTS

19. On January 3, 2020, Johnathon was stabbed to death by Woodburn while Johnathon was preparing to open Freebirds for business.

20. Woodburn was able to gain access to Freebirds and kill Johnathon because (a) Spradlin negligently used his personal property (the duty belt), which allowed Woodburn to escape from restraint and kill Johnathon, (b) the duty belt malfunctioned, due to a negligent design or manufacture, which allowed Woodburn to escape from custody and kill Johnathon, and (c) Freebirds' general manager did not appropriately secure Freebirds, knowing that Woodburn was attempting to access the property while it was closed and knowing that Woodburn was intoxicated and emotionally disturbed.

A. Spradlin negligently used his duty belt – allowing Woodburn to escape from restraint and kill Johnathon.

21. On January 3, 2020, Austin Police Department ("APD") received a "suspicious person" call related to a man – later determined to be Woodburn – inside Bennu Coffee ("Bennu") disturbing customers, holding a large rock, and threatening customers.

22. After the call to police, Woodburn attacked a Bennu customer with a large object and was eventually wrestled to the ground and restrained by multiple Bennu customers.

23. Spradlin was the first APD officer to respond to the "suspicious person" call at Bennu.

24. When Spradlin arrived at Bennu, multiple Bennu customers were restraining Woodburn by holding him on the ground and preventing his escape (or any additional violent actions).

25. When Spradlin approached Woodburn, he directed the Bennu customers that were restraining Woodburn to release Woodburn.

26. The Bennu customers complied with Spradlin's order, and Spradlin attempted to continue to restrain Woodburn by placing him into handcuffs. However, during the exchange, Spradlin's duty belt came loose, Spradlin put his handcuffs down and, with both hands, attempted to put his duty belt back on.

27. While Spradlin attempted to re-secure his duty belt, Woodburn was able to stand up and flee from restraint – ultimately gaining access to Freebirds and killing Johnathon.

B. Freebirds was grossly negligent in failing to lock the door that Woodburn used to kill Johnathon.

28. After Spradlin's misuse of his duty belt allowed Woodburn the ability to escape from restraint, Woodburn entered Freebirds' business through a door that Freebirds' general manager – Ryan Bramlett ("Bramlett") – left unlocked.

29. Around 7:50am, Bramlett arrived at work to help Johnathon prepare the business to open. Before entering, Bramlett witnessed Woodburn behaving erratically and peering into the door (that he later used to enter Freebirds and kill Johnathon).

30. Based upon Woodburn's actions (which were erratic an strange), Bramlett believed that Woodburn was either intoxicated or emotionally disturbed.

31. After noticing a clearly emotionally disturbed Woodburn peering into Freebirds, Bramlett entered the store – where Johnathon was working to prepare the business to open – and locked the door behind him.

32. Minutes later, Bramlett unlocked the door to allow a knife sharpening vendor access to the business – where the vendor set out freshly-sharpened cooking knives on the counter.

33. After accompanying the vendor out of the building, Bramlett chose not to re-lock the closed business's door – where Bramlett witnessed Woodburn peering into minutes earlier.

34. Moments later, Woodburn entered the door Bramlett left unlocked, picked up a knife from the counter, and stabbed Johnathon multiple times.

35. Leaving the door unlocked was unreasonable for multiple reasons. For instance, Bramlett had actual knowledge that Woodburn – a clearly emotionally disturbed and potentially intoxicated person – was peering into, and attempting to access, the door he chose not to lock. Further, Bramlett and Freebirds' management had direct knowledge of emotionally disturbed individuals previously causing violent and destructive disturbances inside the business.

C. Galls and Safariland sold the City of Austin a defective duty belt.

36. The City of Austin purchased for, and issued, Spradlin the Bianchi Accumold Elite duty belt ("duty belt"), that caused Woodburn to escape from restraint and kill Johnathon. The duty bely was created and manufactured by the Safariland brand, Bianchi.

37. The City of Austin purchased Spradlin's duty belt from Galls – a retailer that sells duty equipment to police departments, among other consumers.

38. Upon information and belief, Safariland created and participated in the design and manufacture of the duty belt, yet breached its duty of care with respect to the creation, design, and manufacture of the duty belt by failing to incorporate elements which would have resulted in a safer alternative design of the duty belt and which would have prevented Johnathon's death.

39. Specifically, Safariland failed to incorporate design or manufacture elements to prevent the duty belt from sagging, loosening, or becoming unfastened during normal use. Additional design elements, such as additional required keepers or stronger velcro, would have prevented the unexpected loosening of the duty belt, which ultimately caused Woodburn to escape from restraint and kill Johnathon.

40. If Safariland would have incorporated these design or manufacture elements to prevent sagging or unanticipated loosening, Spradlin would have been able to restrain Woodburn, thus preventing Johnathan's stabbing and death.

D. The City of Austin's responded to the duty belt failure by conducting an internal review.

41. On January 6, 2020, City of Austin employee (and APD Chief of Police), Brian Manley, stated that, "[o]bviously, [Spradlin's duty belt coming loose] is something that we do not expect to have happened. We expect to provide our officers with the best equipment, and we expect our equipment to perform appropriately." Upon information and belief, the City of Austin conducted an internal review to determine how the duty

belt malfunctioned, and whether it was the City of Austin's misuse of the duty belt, Spradlin's misuse of the duty belt, or whether the duty belt was defective.

## VII.
## RESPONDEAT SUPERIOR AND VICARIOUS LIABILITY

42. At all times pertinent to this action, the agents, servants, and employees of the Defendants were acting within the course and scope of their employment and official duties. Therefore, the City of Austin, Safariland, Galls, and Freebirds are responsible for all damages resulting from the negligent acts and omissions of their agents, servants, and employees pursuant to the doctrine of *respondeat superior*.

43. Wherever in this petition it is alleged that any defendant (or the Defendants) did any act or thing, it is meant that the defendant's or Defendants' agents, officers, servants, borrowed servants, employees, or representatives did such act or thing and that the time such act or thing was done, it was done with the full authorization or ratification of the defendant or Defendants or was done in the normal and routine course and scope of employment of defendant's or Defendants' officers, agents, servants, borrowed servants, employees, or representatives.

44. The principal is vicariously liable for the acts of the agent because of an employer/employee status, agency by estoppel, ostensible agency, or borrowed-servant doctrine.

## VIII.
## CAUSES OF ACTION

### COUNT 1:
### NEGLIGENT USE OR CONDITION OF PERSONAL PROPERTY
### *CITY OF AUSTIN*

45. Plaintiffs incorporates by reference the paragraphs above as if fully set forth herein.

46. The City of Austin is a governmental unit, as described by the Texas Tort Claims Act ("TTCA"), as it is a political subdivision of the State.

47. At all times relevant and material to this lawsuit, Spradlin was working in the course and scope of his employment with the City of Austin. Accordingly, the City of Austin is vicariously liable for the acts and omissions of Spradlin through the application of *respondeat superior*.

48. As a result, the City of Austin is liable for Spradlin negligently using personal property (namely, his City of Austin-issued duty belt), which proximately caused Johnathon's death.

49. More specifically, the City of Austin was negligent *via* Spradlin's various acts or omissions involving Spradlin's use of the duty belt, and Spradlin's negligence was the proximate cause of Johnathon's stabbing and death.

50. Spradlin had a duty to exercise the degree of care that a reasonably prudent person would use to avoid harm to others under circumstances similar to the facts described above.

51. Specifically, Spradlin breached the below duties to Johnathon that resulted in Johnathon's death:

a. Knowing that Woodburn was potentially violent, Spradlin had a duty to use his duty belt in a way that would not increase the imminent risk of violence to third parties (like Johnathon);

b. Spradlin had a duty to properly inspect his duty belt to ensure that it would not malfunction during normal use;

c. Spradlin had a duty to properly care for his duty belt to ensure that it would properly function during normal use;

d. Spradlin had a duty to properly install his duty belt to ensure that it would not loosen, unfasten, unbuckle, or sag during normal use;

e. Spradlin had a duty to comply with the City of Austin's various regulations and ordinances related to the appropriate use of equipment and uniform, including §§ 801.2.2(c)(1), 801.2.2(c)(2), & 801.3(a) of APD's General Orders; and

f. Spradlin had a duty to use additional safety equipment to ensure his duty belt would not loosen, unfasten, unbuckle, or sag during normal use.

52. In addition to the various duties the City of Austin vicariously breached through Spradlin's misuse of the duty belt, the City of Austin breached additional duties to Johnathon, including:

a. The City of Austin's duty to provide properly functioning equipment to officers to avoid the risk of harm to third parties;

b. The duty to properly inspect Spradlin's duty belt to ensure that it would not malfunction during normal use;

c. The duty to ensure proper care for Spradlin's duty belt to so that it would properly function during normal use;

d. The duty to ensure that Spradlin properly installed his duty belt so that it would not loosen, unfasten, unbuckle, or sag during normal use; and

e. The duty to issue additional equipment to ensure Spradlin's duty belt would not loosen, unfasten, unbuckle, or sag during normal use.

53. Johnathon was stabbed and killed as a direct and proximate result of Spradlin's and the City of Austin's negligent use of the duty belt, when the misuse of the duty belt allowed a violent (but restrained) Woodburn to escape restraint and kill Johnathon.

54. Spradlin would be personally liable for the above acts and omissions:

a. First, Spradlin's use of his duty belt was not discretionary and was ministerial – as it an APD officer's use of his duty belt was precisely prescribed by APD policy that Spradlin had no discretion or judgment in using his duty belt (APD chose, and issued, Spradlin's duty belt; and APD instructed Spradlin on how to use the duty belt and what additional safety features were required). Specifically, Spradlin's use of his duty belt was strictly mandated by §§ 801.2.2(c)(1), 801.2.2(c)(2), & 801.3(a) of APD's General Orders.

b. Second, Spradlin's use of his duty belt was not an exercise of governmental discretion.

c. Third, Spradlin's misuse of his duty belt was not in good faith: no reasonable officer would use police equipment in a way (by failing to use or install it properly) that causes a previously-restrained person to flee and harm a third party.

55. No exception to the waiver of immunity contained within the TTCA bars Plaintiffs' claims because no exception applies. Specifically, Plaintiffs' claims do not involve the City of Austin's (or Spradlin's) response (or lack of response) to a 911-call or emergency. Rather, Spradlin responded to a suspicious person call and, when he arrived, encountered a person restrained by citizens. Thus, no ongoing emergency existed. Rather than Spradlin harming Johnathon while responding to an emergency, Spradlin's misuse of his police uniform and equipment created the situation that killed Johnathon: as Spradlin's duty belt caused a previously-restrained Woodburn to escape from restraint and kill Johnathon moments later.

56. Regardless, the City of Austin is liable for Spradlin's negligent actions because Spradlin's misuse of his duty belt violated §§ 801.2.2(c)(1)&(2) of APD's General Orders, in that – upon information and belief – Spradlin did not use the required trouser belt or keepers to prevent his duty belt from sagging or loosening. Further, Spradlin violated § 801.3(a) of APD's General Orders, in that Spradlin neither possessed or maintained "the necessary equipment to perform uniformed field duty," when he caused the duty belt issued to him to loosen, sag, or unfasten during normal use.

57. Further, Spradlin was not responding to an emergency when he misused his duty belt. By the time Spradlin responded to the "suspicious person" scene at Bennu, Woodburn was already detained and restrained by Bennu customers – and no emergent situation existed.

58. Further, by failing to properly use and maintain his duty belt, and by prioritizing his failing duty belt over continuing to restrain a potentially violent and aggressive Woodburn, Spradlin acted with conscious indifference or reckless disregard for the safety of others, including Johnathon.

59. Further, Johnathon's death was not caused by APD's policy to require a specific duty belt, but by Spradlin's negligence in carrying out APD's policy of requiring officers to wear a functioning duty belt in a specific manner.

60. Plaintiffs have been damaged as a result of Spradlin's negligence. Such damages are in excess of the minimum jurisdictional limits of this Court.

61. **Notice:** The City of Austin had actual notice and subjective awareness of the claims alleged in this lawsuit. Specifically, APD's former police chief – Brian Manley –

publicly stated at a Press Conference on January 6, 2020, which was held in response to Johnathon's death, that:

> [t]here's a lot of information we're still culling through and a lot of people we're still talking with.. . . We want to know the circumstances under which the officer's duty belt came free.. . . Obviously, that is something that we do not expect to have happened. We expect to provide our officers with the best equipment, and we expect our equipment to perform appropriately. That's why we're conducting this review (of Spradlin's misuse of his duty belt, which resulted in Johnathon's death) .

Further, not only did the City of Austin have notice of the facts giving rise to the claims in this lawsuit, the City of Austin purportedly conducted an internal review related to the duty belt failure: "This is an ongoing investigation. ... We're also conducting an internal investigation into our response to this incident to ensure that it was compliant with our policies and practices as well." Further, based upon the various police reports authored by responding APD officers and Chief Manley's public statements, the City of Austin had actual notice of (a) when, where, and how Johnathon's death occurred, (b) that Johnathon was killed as a result of the duty belt's use, (c) Johnathon's identity, (d) Johnathon's address, and (e) the names and contact information for the various witnesses to the incident. Further, based upon Chief Manley's above statements, the City of Austin was subjectively aware that the duty belt at issue contributed to, or caused, Johnathon's death.

## COUNT 2:
## GROSS NEGLIGENCE - PREMISES LIABILITY
*Freebirds*

62. Plaintiffs incorporate the paragraphs above as if fully set forth herein.

63. Freebirds is liable for failing to use ordinary care to protect Johnathon from the foreseeable and unreasonable risk of injury to Johnathon.

64. At all times relevant and material to this lawsuit, Bramlett was working in the course and scope of his employment with the Freebirds as its general manager. Accordingly, Freebirds is vicariously liable for the acts and omissions of Bramlett through the application of *respondeat superior*.

65. As a result, Freebirds is liable for Bramlett's gross negligence in failing to lock Freebirds' door, which proximately caused Johnathon's death.

66. Freebirds is the owner and possessor of the premises where Johnathon was stabbed and killed.

67. Johnathon was an invitee on the premises, as he was Freebirds' employee.

68. Freebirds knew or reasonably should have known of the general danger to Johnathon and the risk of violence to its employees, as – upon information and belief – there had been multiple instances of aggression, violence, and trespass in and around the business within the two years before Johnathon was killed.

69. Further, Freebirds' general manager – Bramlett – had actual knowledge that Woodburn represented a risk of harm to Johnathon, as Bramlett believed that Woodburn was emotionally disturbed and witnessed Woodburn acting erratically and peering into Freebirds just minutes before Woodburn entered Freebirds through an unlocked door and killed Johnathon.

70. Because the general danger to Johnathon was both foreseeable and unreasonable, Freebirds had a duty to use ordinary care to protect Johnathon from the danger and risk

of being assaulted on Freebirds' premises, a duty to take whatever action was reasonably prudent under the circumstances to reduce or to eliminate the unreasonable risk of harm to Johnathon (including locking the doors while the business was closed to the public), and to otherwise make the premises reasonably safe for Johnathon.

71. Freebirds breached each of these duties.

72. Freebirds' breaches were a proximate and producing cause of Johnathon's stabbing and death.

73. **Exemplary Damages:** Freebirds' conduct constitutes gross negligence as set out in Tex. Civ. Prac. & Rem. Code § 41.003. Therefore, Plaintiffs seek exemplary damages.

**COUNT 3:**
**GROSS NEGLIGENCE – NEGLIGENT UNDERTAKING AND AFFIRMATIVE COURSE OF ACTION**
***Freebirds***

74. Plaintiffs hereby incorporate by reference the paragraphs above as if fully set forth herein.

75. At all times relevant and material to this lawsuit, Bramlett was working in the course and scope of his employment with Freebirds as its general manager. Accordingly, Freebirds is vicariously liable for the acts and omissions of Bramlett through the application of *respondeat superior*.

76. As a result, Freebirds is liable for Bramlett's gross negligence in failing to lock Freebirds' door, which proximately caused Johnathon's death.

77. Freebirds was grossly negligent by affirmatively undertaking a duty to protect Johnathon and other employees from the risks of assault to workers on its premises and by failing to use reasonable care in carrying out its duty.

78. Specifically, Freebirds undertook an affirmative course of action by attempting to secure the premises from trespassers while the business was closed.

79. For instance, upon information and belief, Freebirds either had a policy or a practice of locking the business's doors while Freebirds was closed to prevent intruders from entering the business without the employees' knowledge.

80. As a result, employees – like Johnathon – relied on Freebirds' affirmative course of action to keep them safe from intruders entering the premises. Indeed, employees relied on the locked door policy or practice to keep intruders out of the closed business, as employees typically worked in the back office or kitchen while the business was closed and did not monitor the doors. Due to this policy and practice of locking the doors while the business was closed, Freebirds owed Johnathon a duty to implement and maintain proper safety and security measures while the business was closed (including keeping the doors locked or otherwise alerting employees to intruders entering the premises).

81. Freebirds therefore undertook a duty keep employees' safe while the business was closed. Freebirds failed to exercise reasonable care in carrying out its duty when – contrary to its practice and policy – its general manager left the door unlocked while the business was closed. As described herein, Freebirds knew (or had reason to know) that there was an unreasonable risk of harm to its employees due to prior instances of trespass and criminal mischief occurring within (and around) its business.

82. Further, Freebirds' general manager – Bramlett – had actual knowledge that Woodburn represented a risk of harm to Johnathon (just minutes before Johnathon was stabbed and killed), as Bramlett believed that Woodburn was emotionally disturbed and

witnessed Woodburn acting erratically and peering into Freebirds just minutes before Woodburn entered Freebirds through an unlocked door and killed Johnathon.

83. Freebirds breached its duty to Johnathon when Bramlett failed to lock the door after recognizing that Woodburn represented a risk of harm to Johnathon. Any reasonably competent general manager would have attempted to ensure the safety of their employees by choosing to secure the premises by locking the doors.

84. As a result of Freebirds' failure to use ordinary care in performing its duties, Johnathon was stabbed and killed by an intruder while Freebirds was closed.

85. **Exemplary Damages:** Freebirds' conduct constitutes gross negligence as set out in Tex. Civ. Prac. & Rem. Code § 41.003. Therefore, Plaintiffs seek exemplary damages.

**COUNT 4:**
**GROSS NEGLIGENCE**
***Freebirds***

86. Plaintiffs hereby incorporate by reference the paragraphs above as if fully set forth herein.

87. At all times relevant and material to this lawsuit, Bramlett was working in the course and scope of his employment with Freebirds as its general manager. Accordingly, Freebirds is vicariously liable for the acts and omissions of Bramlett through the application of *respondeat superior*.

88. Freebirds knew or reasonably should have known of the general danger to Johnathon and the risk of violence to its employees, as – upon information and belief – there had been multiple instances of aggression, violence, and trespass in and around the business within the two years before Johnathon was killed.

89. Further, Freebirds' general manager – Bramlett – had actual knowledge that Woodburn represented a risk of harm to Johnathon, as Bramlett believed that Woodburn was emotionally disturbed and witnessed Woodburn acting erratically and peering into Freebirds just minutes before Woodburn entered Freebirds through an unlocked door and killed Johnathon.

90. As a result, Freebirds is liable for Bramlett's gross negligence in failing to lock Freebirds' door, which proximately caused Johnathon's death.

91. Freebirds had – and breached – the following duties, which proximately caused Johnathon's stabbing and death:

a. The duty to avoid a foreseeable risk of harm to Johnathon by securing the premises and locking the business's doors, knowing that trespassers (generally) and Woodburn (specifically) represented an unreasonable risk of harm to employees;

b. Given Freebirds' policy and practice of keeping the doors locked while the business was closed, the duty to ensure the doors remained locked while the business was closed;

c. The duty to take affirmative action to control or avoid increasing the danger that Woodburn presented to Johnathon, given that Bramlett and Freebirds created the condition (the unlocked door) that caused Johnathon's stabbing and death; and

d. The duty to use ordinary care in (by locking the door) not placing Johnathon in harm's way of foreseeable criminal activity (an emotionally disturbed person attempting to access the closed business).

92. Freebirds breached these duties to Johnathon when Bramlett failed to lock the door, after recognizing that Woodburn represented a risk of harm to Johnathon. Any reasonably competent general manager would have attempted to ensure the safety of their employees by choosing to secure the premises by locking the doors while the business was closed.

93. As a result of Freebirds' failure to use ordinary care in performing its duties, Johnathon was stabbed and killed by an intruder while Freebirds was closed.

94. **Exemplary Damages:** Freebirds' conduct constitutes gross negligence as set out in Tex. Civ. Prac. & Rem. Code § 41.003. Therefore, Plaintiffs seek exemplary damages.

## COUNT 5:
## DESIGN AND MANUFACTURE DEFECTS
### *Safariland*

95. Plaintiffs hereby incorporate by reference the paragraphs above as if fully set forth herein.

96. Safariland created and/or participated in the design of the duty belt at issue in this case.

97. On information and belief, Safariland breached its duty of care with respect to the creation, design, and manufacture of the duty belt, when it failed to incorporate elements that would have resulted in a safer alternative design for the duty belt, including design elements (such as additional keepers and stronger velcro) to prevent the duty belt from sagging, becoming unfastened, or unexpectedly loosening during normal use.

98. Implementing stronger velcro, or additional required keepers, on the duty belt would have been reasonable from a financial and technological standpoint, and the addition of these additional safety features would have kept the product's use and utility, while reducing risk of failure and injury.

99. Due to Safariland's design or manufacture failure, Johnathon was stabbed and killed as a result of Spradlin's duty belt unexpectedly loosening while he attempted to restrain Woodburn.

100. Plaintiffs have been damaged as a result of the Safariland's breach. Such damages are in excess of the minimum jurisdictional limits of this Court.

101. **Exemplary Damages:** Safariland's conduct constitutes gross negligence as set out in Tex. Civ. Prac. & Rem. Code § 41.003. Therefore, Plaintiffs seek exemplary damages.

## COUNT 6:
## DESIGN AND MANUFACTURE DEFECTS
*Galls*

102. Plaintiffs hereby incorporate by reference the paragraphs above as if fully set forth herein.

103. Galls sold the faulty duty belt at issue in this case (described generally above, and specifically in Count 5) to the City of Austin, and otherwise engaged in the business of distributing or otherwise placing Safariland's defective duty belts into the stream of commerce by advertising – and selling – the duty belt to consumers in Texas.

104. Although Safariland is subject to the jurisdiction of this Court due to it placing its duty belt into the stream of commerce with the expectation that its products (including the duty belt) would be sold to police departments in Texas, Galls is liable for Safariland's defective duty belt should the Court determine that Safariland is not subject to the jurisdiction of this Court.

105. Johnathon was damaged as a result of defective duty belt, when he was stabbed and killed as a direct and proximate result of its malfunction. Plaintiffs' damages are in excess of the minimum jurisdictional limits of this Court.

106. **Exemplary Damages:** Galls' conduct constitutes gross negligence as set out in Tex. Civ. Prac. & Rem. Code § 41.003. Therefore, Plaintiffs seek exemplary damages.

## IX.
## JURY DEMAND

107. Plaintiffs demand a trial by jury. With this Petition, Plaintiffs tender the fee of $40.00, as required by Tex. Gov. Code § 51.604(a).

## X.
## DAMAGES

A. Wrongful Death Damages

108. As a result of Johnathon's death, Plaintiffs seek monetary damages to compensate them for the following elements of damages:

a. Past and future pecuniary loss;

b. Past and future loss of companionship and society;

c. Past and future mental anguish; and

d. Exemplary damages.

B. Estate of Johnathon

109. As a result of Johnathon's death, his estate seeks monetary damages to compensate for the following elements of damages:

a. Johnathon's pain and suffering;

b. Johnathon's mental anguish; and

c. Johnathon's medical, funeral, and burial expenses.

110. Plaintiffs request that the Court enter judgment for their actual damages, consequential damages, special damages, punitive and exemplary damages, interest and costs. Plaintiffs also pray for such other and further relief to which they may be justly entitled in both law and equity.

## XI.
## TEX. R. CIV. P. 193.7 NOTICE

111. Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, Plaintiffs hereby give notice that documents produced by Defendants will be used at pretrial proceedings or at trial of this matter.

## XII.
## CONDITIONS PRECEDENT

112. Pursuant to Rule 54 of the Texas Rules of Civil Procedure, all conditions precedent to Plaintiffs right to recover herein and to Defendants' liability have been performed or have occurred.

## XIII.
## CONCLUSION AND PRAYER

Wherefore, premises considered, Plaintiffs pray that Defendants be cited and required to appear herein, and that upon final judgment, Plaintiffs be awarded their actual damages, exemplary damages, lawful prejudgment interest, lawful interest on the judgment, costs, and all other relief, at law or in equity, to which they are otherwise entitled.

Filed: December 30, 2021.

Respectfully submitted,

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**CAUSE NO. D-1-GN-21-007467**

| | | |
|---|---|---|
| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,** | § | **IN THE DISTRICT COURT OF** |
| **Plaintiffs** | § | |
| | § | |
| **v.** | § | **TRAVIS COUNTY, TEXAS** |
| | § | |
| **TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN,** | § | |
| **Defendants.** | § | **201ST DISTRICT** |

**PLAINTIFFS' RESPONSE TO**
**DEFENDANT CITY OF AUSTIN'S PLEA TO THE JURISDICTION**

Three cases are dispositive in denying the City of Austin's Plea to the Jurisdiction:

(1) *Texas Dept. of Corrections v. Jackson*, 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.) (TTCA waiver when a defective belt fell off and caused a chain of events ending with the plaintiff getting electrocuted),

(2) *Michael v. Travis County Housing Authority*, 995 S.W.2d 909 (Tex. App. – Austin 1999) (TTCA waiver when 2 dogs escaped through holes in a fence and attacked a plaintiff on a sidewalk), and

(3) *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992) (TTCA proximate cause established when the City's failure to follow policy caused an injury, even though the ultimate harm was directly caused by a fleeing criminal).

These cases place Plaintiffs' allegations against the City squarely within the Texas Tort Claims Act's ("TTCA") waiver of immunity, and as a result (and for the reasons below), the City's Plea to the Jurisdiction ("Plea") should be denied.

## I.
## INTRODUCTION AND EXECUTIVE SUMMARY

The reason the City mandates such strict requirements for police officer equipment is because of its importance during critical moments. And when police equipment fails (as it did in this case), the City spends time and effort investigating the cause of the failure (as it did in this case) – so to prevent injuries and dangerous conditions from occurring in the future. Plainly, it is foreseeable to the City that equipment failures can cause injuries (like in *Texas Dept. of Corrections v. Jackson*, 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.), and when equipment failures occur, the City knows that its failure to follow standards and regulations can constitute a waiver of the Texas Tort Claims Act (as it did in *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992)).

Johnathon Aguilar would be alive today if Officer Spradlin followed City policy and used a duty belt that had necessary and integral safety components (known as belt "keepers"). The City's use of a duty belt without keepers caused Officer Spradlin's belt to fall off of his waist while attempting to restrain Woodburn, thereby allowing him – a known dangerous and violent person – to walk away from restraint, enter a connecting business, and stab Johnathon to death just moments after the belt's malfunction.

Plainly, had the City provided and used a duty belt with keepers (which are an essential integral safety component for duty belts), Officer Spradlin's belt would not have fallen off his waist and Woodburn – the killer – would not have immediately walked away to murder Johnathon in the adjacent business.

Based upon these allegations and the below reasons, Plaintiffs' suit against the City fits squarely within the TTCA's waiver of immunity, and the City's plea should be denied:

1. **Plaintiffs have alleged a valid waiver under the TTCA.** Plaintiffs have pleaded facts that affirmatively demonstrate jurisdiction by alleging a valid waiver of immunity,[1] as Plaintiffs' claim that a condition of the City's duty belt (the fact that it did not have appropriate and necessary keepers) caused Spradlin's belt to fall off and allowed Woodburn to escape next door and kill Johnathon. *Texas Dept. of Corrections v. Jackson*[2] addressed an almost identical theory and found it to fall within the TTCA's waiver.

2. **The City's reliance on *Bossley* is misplaced: a condition allowing a dangerous actor to escape and injure a person has been deemed to fall within the TTCA's waiver.** *Michael v. Travis County Housing Authority*[3] is controlling regarding the City's *Bossley* argument. In *Michael*, the Third Court of Appeals expressly rejected the City's argument that *Bossley* requires the property itself to directly inflict the injury. Rather, *Michael*, along with *Mesquite* and a litany of proximate cause cases, hold that multiple negligent actors may be proximate causes of an injury when they each contribute to the injury.

3. **Given the facts of this case, the City's proximate cause argument is more appropriately analyzed at the Summary Judgment stage – when the Court can weigh the facts to determine whether Plaintiffs can meet their factual burden.** The Court has wide discretion to – and should – deny the City's plea to allow a factual record to be developed.

## II.
## FACTUAL SUMMARY

### A. *Facts alleged in Plaintiffs' Petition*

Given the requirement for the Court to take as true Plaintiffs' allegations and to "liberally construe the pleadings, taking all factual assertions as true and looking to [the Plaintiffs'] intent,'"[4] the following facts alleged in Plaintiffs' Petition are relevant for the Court's analysis:

- On January 3, 2020, Austin Police Department ("APD") received a "suspicious person" call related to a man – later determined to be Dylan Woodburn – inside

[1] *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003).

[2] 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.).

[3] *Michael v. Travis County Hous. Auth.*, 995 S.W.2d 909, 913 (Tex. App.—Austin 1999, no pet.).

[4] *Tex. Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020) (quoting *City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015)).

Bennu Coffee ("Bennu"), disturbing customers, holding a large rock, and threatening customers.[5]

- After the call to police, Woodburn attacked a Bennu customer with a large object and was eventually wrestled to the ground and restrained by multiple Bennu customers.[6]

- The City's employee, Officer Spradlin, was the first APD officer to respond to the "suspicious person" call at Bennu.[7]

- When Spradlin arrived at Bennu, multiple Bennu customers were restraining Woodburn by holding him on the ground and preventing his escape (or any additional violent actions).[8]

- When Spradlin approached Woodburn, he directed the Bennu customers that were restraining Woodburn to release Woodburn.[9]

- The Bennu customers complied with Spradlin's order, and Spradlin attempted to continue to restrain Woodburn by placing him into handcuffs. However, during the exchange, Spradlin's duty belt came loose, Spradlin put his handcuffs down and, with both hands, attempted to put his duty belt back on.[10]

- While Spradlin attempted to re-secure his duty belt, Woodburn was able to stand up and walk from restraint – ultimately gaining access to Freebirds and killing Johnathon.[11]

***B. Facts disclosed in the City's recent production***

The City recently provided the results of an internal investigation into Johnathon's death and Spradlin's duty belt malfunction,[12] which provided Plaintiffs additional facts that

[5] Petition at ¶ 21.

[6] Petition at ¶ 22.

[7] Petition at ¶ 23.

[8] Petition at ¶ 24.

[9] Petition at ¶ 25.

[10] Petition at ¶ 26.

[11] Petition at ¶ 27.

[12] On January 6, 2020, City of Austin employee (and former APD Chief of Police), Brian Manley, stated that, "[o]bviously, [Spradlin's duty belt coming loose] is something that we do not expect to have happened. We expect to provide our officers with the best equipment, and we expect our equipment to perform appropriately." The City produced the results of this investigation, but has

will be included in a subsequent amendment. Because the Court is instructed to look to the Plaintiffs' intent and to liberally construe the facts alleged in determining whether to deny a plea to the jurisdiction, the Court should consider the following recently learned facts, which Plaintiffs intend to plead in an amended petition:

- On January 3, 2020, Officer Spradlin was not wearing an approved duty belt, but – instead – was wearing a duty belt provided by his prior APD supervisor. He was not wearing keepers on the non-approved and non-standard belt.

- After Johnathon was killed, the City of Austin conducted an internal review to determine whether Officer Spradlin violated APD policy, or any laws, during his involvement in Johnathon's death. During that internal review, Officer Spradlin gave three interviews.

***The First Interview: Spradlin admits that him not wearing keepers caused his belt to malfunction and allowed Woodburn to escape.***

- During the first interview, Officer Spradlin recounted that, when he attempted restrain Woodburn, Spradlin "realized his belt's not there [,] his taser's not there[, and his] belt's gone," and Woodburn was "able to get up and run out the door" as a result.

- In reality, Woodburn did not run out the door, he walked out – while Spradlin stood, distracted by and buckling his belt. Further, Spradlin did not attempt to chase after Woodburn and did not even tell him to stop – all because he was

marked the results confidential. Although Plaintiffs contest and object to this designation, Plaintiffs will file this response under seal.

distracted while trying to reattach his belt.

CHANCELLOR: 'Kay. Did you lose a little bit of focus on him when the incident happened with your belt?

SPRADLIN: When I realized that my taser wasn't there I did.

CHANCELLOR: Okay. And walk me through what was going on in your mind at that point.

SPRADLIN: My belt's not here. Where did it go? And I need to get him but I gotta get my belt.

CHANCELLOR: 'Kay. So Mr. Woodburn, he - he stood up and left the coffee shop. He actually walked out, got to the door, and then ran, right?

SPRADLIN: He ran out as far as I remember.

CHANCELLOR: 'Kay. Did you give him any commands to, "Stop?"

SPRADLIN: I don't recall telling him to, "Stop," once he stood up.

CHANCELLOR: Okay. And why was that?

SPRADLIN: Uh, I n- probably because I'm focused on trying to find my gun belt.

– Spradlin stated that his belt "completely fell off because [he] didn't have his keepers on that day." He stated that he realized he did not have his keepers on his belt before the incident with Woodburn and that he was concerned about his lack of keepers for safety reasons.

CHANCELLOR: Okay. Was that concerning to you?

SPRADLIN: Yes. Uh, my belt stays pretty tight. Um, once you get it locked in it - it - it's a tight belt but I still like to have my keepers 'cause I'll (tell you) - for this reason.

CHANCELLOR: And what is the purpose of keepers?

SPRADLIN: In case it does c- the buckle does come undone the keepers will help hold it to your hand belt so it doesn't come completely off your waist.

– Spradlin further admitted that failing to wear keepers was a "safety concern" and that, had he been wearing keepers, the belt "would have realistically stayed where it [was supposed to]."

– Spradlin believes that he violated APD policy by not wearing "keepers that day," and that he brought discredit upon the City due to his actions.

CHANCELLOR: Mm-kay, so you don't think that being in there with your belt coming loose and everyone seeing that and this guy getting away - and I'm not - we're not gonna go into the rest of it because what - what happens after that, um, a- to that point s- is the next step in it. But just off what happened in the coffee shop with you going in there going to put hands on this guy, th- they've got him held down. You loose your belt. You're having to put equipment back on. You're not out there to chase after him. You don't believe that that would tend to destroy public confidence or respect for our department?

SPRADLIN: I can see that. Yes, sir.

CHANCELLOR: 'Kay. So I g- I'll ask it one more time. Do you believe that you could have violated or brought discredit or destroyed public confidence to our...

SPRADLIN: Yes, sir.



- Spradlin stated that he was embarrassed about the incident, and that because of his belt coming undone, he "wasn't able to control Woodburn, and [he] feels bad for everybody that's involved."

- During the interview, when asked about whether he typically wears keepers, Officer Spradlin stated that he had only not worn keepers one other time in his career, and that he always wears keepers otherwise.

***The Second Interview – Spradlin lies about his use of keepers.***

- After the first interview, APD conducted a review to determine whether Spradlin was being truthful in his first interview. To test some of Spradlin's claims, APD reviewed a collection of Spradlin's body cam recordings to determine whether Spradlin typically wore keepers.

- Based upon that audit, APD did not find any evidence that Spradlin wore keepers on his duty belt and showed Officer Spradlin screenshots of body cam recordings where keepers were clearly not visible on Spradlin's duty belt.

- When confronted with those screenshots, Officer Spradlin stated that APD could not see his keepers, because he wore them in a hyper-specific way that made them invisible to the eye, and that he had been wearing his keepers that way for years.

- When asked to demonstrate, Spradlin had difficulty recreating the way he had been purportedly wearing his belt for "13 years." Regardless of his difficulty and the multiple screenshots of him plainly not wearing keepers, Spradlin insisted that he was being truthful.

– Spradlin again confirmed that he always wore keepers due to keepers being an essential safety component:

| | |
|---|---|
| WILSON: | But I'm sayin', you - so but based on what you're sayin', I'm just askin' you this question, just an open question. What you're explainin' to them is because you know that it'll fall off that's the reason why you - you carry keepers and you have 'em on (unintelligible)? |
| SPRADLIN: | That's why we wear 'em, yeah. |
| WILSON: | Okay. And that was - that was what you were meanin' at that particular time, because if you don't have 'em they'll fall , that why you? |
| SPRADLIN: | The- that will come - yeah, if it comes undone like mine did it will fall off. |

***The Third Interview – Spradlin lies again and, when caught, retires.***

– Because of the difficulty Spradlin had while putting on his belt, APD allowed Spradlin another chance to showcase him placing his keepers on his belt in the way that he reported to APD. To ensure fairness, Spradlin was asked to wear his full duty uniform.

– During the demonstration, Spradlin appeared to get sick, canceled the demonstration, and "retired while under investigation" days later.

***The APD Investigation establishes that Spradlin's duty belt malfunction was a proximate cause of Johnathon's death.***

– During its investigation, APD determined the following timeline regarding Spradlin's duty belt malfunction.

– At 7:50am, APD first received a call from Bennu coffee regarding Woodburn threatening people in Bennu and Freebirds' parking lot.

– 20 minutes later, at 8:10, Spradlin arrived to Bennu/Freebirds' shared parking lot.

– 10 seconds after Spradlin's arrival (but before Spradlin left his car), Woodburn assaulted a man in Bennu, and Bennu customers subdued Woodburn by tackling him to the ground.

– A few seconds later while Spradlin was still sitting in his car, a Bennu coffee employee opened the front door and motioned for Spradlin to come into Bennu to help.

- Spradlin entered Bennu, pointed his taser at one of the men restraining Woodburn, and told him to "stop." The bystanders complied and let go of Woodburn as Spradlin knelt to arrest him.

- Four seconds later, Spradlin's duty belt came off and, when he attempted to reattach it to his waist, Woodburn stood up and walked out of Bennu.

- Spradlin did not chase after Woodburn – he did not even tell him to stop, due to the fact that he was distracted while trying to reattach his duty belt. Given his distraction, it took him twelve seconds to exit the store after Woodburn walked out.

- During the time that Spradlin was attempting to reattach his belt after its malfunction, it took Woodburn less than 30 seconds to enter into Freebirds, which is located across the small parking lot from, and in the same building as, Bennu. Once inside, Woodburn stabbed Johnathon multiple times.

- From the time the duty belt malfunction caused Woodburn's release to the time Woodburn was seen leaving Freebirds after killing Johnathon, only **two minutes and 48 seconds elapsed**.

## III.
## LEGAL STANDARDS

In Texas, a governmental unit is generally immune from tort liability unless the legislature has waived immunity.[13] Waivers to sovereign immunity are generally dependent on statute – which is the TTCA in Texas.[14] The TTCA only waives governmental immunity in a limited number of circumstances, one of which is "personal injury and death so caused by a condition or use of tangible personal or real property."[15]

[13] See *Harris County v. Dillard*, 883 S.W.2d 166, 168 (Tex. 1994).

[14] *See Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex.), *cert. denied*, 525 U.S. 1017 (1998).

[15] *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994) (quoting Tex. Civ. Prac. & Rem. Code § 101.021).

The party suing a governmental unit bears the burden of pleading facts that affirmatively demonstrate[s] jurisdiction by alleging a valid waiver of immunity.[16] And although resolution of a plea to the jurisdiction may be determined on (1) the pleadings or (2) an evidentiary record,[17] the City's plea should be denied if the Plaintiffs have alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause,[18] because the City's Plea only argues dismissal under the first theory.[19]

In determining whether the Plaintiffs have met their burden, trial courts should "liberally construe the pleadings, taking all factual assertions as true and looking to [the Plaintiffs'] intent.'"[20] And although a trial court may rule on a preliminary plea to the jurisdiction when "the pleadings affirmatively negate the existence of jurisdiction,"[21] a trial court has broad discretion to defer the decision on a plea to the jurisdiction to allow additional facts to be developed and discovered.[22]

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[16] *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003).

[17] *Tex. Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020) (quoting *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018)).

[18] *Tex. Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020).

[19] Plea, at fn. 1 ("The City is not challenging the existence of jurisdictional facts at this stage and is only challenging whether Plaintiffs have, and can, plead a claim against it that comes within the Texas Tort Claims Act's limited immunity waiver.").

[20] *Id.* (quoting *City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015)).

[21] *Tex. Dep't of Transp. v. Self*, No. 02-21-00240-CV, 2022 WL 1259094, at *6 (Tex. App.—Fort Worth Apr. 28, 2022, no pet. h.), reh'g denied (June 9, 2022).

[22] *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("[w]hether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion.").

## IV.
## ARGUMENT AND AUTHORITIES

### A. Plaintiffs alleged a valid waiver under the TTCA.

Woodburn – an aggressive and violent person – was able to walk from restraint and kill Johnathon just moments after he escaped due to Spradlin's duty belt malfunctioning, which occurred because Spradlin used his duty belt without integral and necessary keepers. Had Spradlin worn keepers, Woodburn would not have been able to escape from restraint and kill Johnathon less than three minutes later.

These allegations clearly fall within the TTCA's waiver of immunity,[23] as Plaintiffs' suit alleges that (a) Johnathon was stabbed and killed (b) as a direct result of (c) the defective condition or use of the City's belt.

An analogous factual scenario was previously held to fall within the TTCA's waiver of immunity in *Texas Dept. of Corrections v. Jackson*.[24] In that case, the plaintiff was injured after a tool belt he was provided by the State slipped and caused a chain of events that led to him being shocked by electricity.[25] Under the plaintiff's theory, the tool belt slipped because it contained an improper attachment that caused it to bind, which further caused him to have a sensation of falling, which further caused him to instinctively reach up and grab the electrical wires above him.[26]

Although the plaintiff in that case failed to meet his proximate cause burden *at trial* when he did not provide any evidence that the belt malfunctioned, that the belt malfunction

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[23] Namely that Johnathon's injuries were "caused by a condition or use of tangible personal [] property." Tex. Civ. Prac. Rem. Code § 101.121(2).

[24] 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.)

[25] *Id.* at 154-156.

[26] *Id.* at 156-157.

was caused by the condition of the belt, or that the belt malfunction was the cause of him reaching up and being shocked, the Court of Appeals found that the *allegations* were enough to bring the claim within the TTCA's waiver.[27]

The similarity is striking between the allegations in *Jackson* and the facts here.

| | ***Jackson*** | ***Howard*** |
|---|---|---|
| **Type of Equipment** | Belt | Belt |
| **Equipment Defect** | *Wrong* safety component | *Missing* safety component |
| **Defect Result** | Belt fell *down* | Belt fell *off* |
| **Did the equipment directly inflict the injury?** | No. Equipment defect → the belt fell → plaintiff had a sensation of falling → plaintiff instinctively reached up → plaintiff grabbed the electrical wire → the wire shocked him. | No. Equipment defect → the belt fell → Woodburn escaped moments later and killed Johnathon. |
| **TTCA Waiver?** | Immunity waived. | Immunity waived. |

*Jackson* is dispositive: Plaintiffs' petition alleges a valid liability theory under Tex. Civ. Prac. Rem. Code § 101.121(2), and, as a result, the City's plea should be dismissed.

**B. The City's reliance on *Bossley* is misplaced: a condition allowing a dangerous actor to escape and injure a person has been deemed to fall within the TTCA's waiver.**

The City argues that *Bossley* and its progeny yield dismissal in this case because the TTCA requires that the property itself – rather than some other force – actually inflict a plaintiff's injury to validly state a claim under the TTCA.[28]

[27] *Id.* at 158.

[28] Plea at pp. 4-6.

This argument is wrong and has previously been rejected by the Third Court of Appeals.

1. *Michael v. Travis County Housing* is controlling and contradicts the City's argument.

In *Michael v. Travis County Housing Authority*,[29] the Third Court of Appeals expressly rejected the City's argument that *Bossley*[30] requires the property itself to directly inflict the injury. In that case, the Third Court of Appeals found a valid TTCA waiver when a governmental actor negligently maintained a fence, which allowed two dogs to escape and maul a child on a nearby sidewalk.[31] In that case, the plaintiff was mauled by two pit bulls after they escaped through a hole in a fence maintained by the County.[32]

Like the City here, the County in *Michael* argued that *Bossley's* analysis required dismissal, because "the injury was caused by the dogs, not the fence, and therefore it cannot be said that a condition or use of property proximately caused the injury."[33] The Austin Court rejected the County's (and the City's) argument, reasoning that *Bossley* does not "require that [the] property causing injury must be the device that directly inflicts the injury.. . . as long as there is a reasonably close causal relation between the property and the resulting injury." The similarities – once again – are striking:

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[29] *Michael v. Travis County Hous. Auth.*, 995 S.W.2d 909, 913 (Tex. App.—Austin 1999, no pet.).

[30] 968 S.W.2d 339, 343 (Tex. 1998).

[31] *Michael* at 913.

[32] *Id.* at 911.

[33] *Id.* at 913.

| | *Michael* | *Howard* |
|---|---|---|
| **Did the equipment actually inflict the injury?** | No.<br>Property: Fence<br>Injuring thing: Dog | No.<br>Property: Belt<br>Injuring thing: Person |
| **Causal Link** | Dangerous dogs (not owned by the County) escaped because of a defective fence, which allowed them to run down the street and attack a third party. | Dangerous person escaped because of a defective belt, which allowed him to run across a parking lot and attack a third party. |
| **Temporal and Geographic Connection** | "The attack occurred on a nearby sidewalk in close proximity to the fence" and happened "immediately" after the dogs' escape. | The attack occurred in a nearby business close in proximity to where the belt malfunctioned. The attack happened less than 3 minutes after the belt allowed Woodburn's escape. |
| **TTCA Waiver?** | Immunity waived. | Immunity waived. |

Unlike the injury in *Bossley* but like the plaintiffs' injuries in *Michael*, Johnathon's stabbing was not "distant geographically, temporally, and causally" from the property malfunction.[34] Rather, the ultimate attack occurred at the same address that the property malfunctioned and occurred only moments after the defective property allowed Woodburn to escape – placing the Plaintiffs' allegation firmly within the TTCA's waiver.

2. <u>The actual injury need not be directly caused by the defective property – it need only be proximately caused by the property.</u>

The City's plea attempts to place a heightened causal standard than what is currently required of injured plaintiffs. But, because the Texas Supreme Court has "consistently construed the causation requirement in section 101.021(2) to be one of proximate cause, not

[34] *Michael* at 914.

a different standard such as immediate cause, direct cause, or sole cause,"[35] the City's argument should be rejected and its plea denied.

Whether it's the removal of a knee-brace that allowed a prior injury to resurface during a football game,[36] the failure to provide life jackets that allowed a swimmer to drown,[37] the failure to install beds with rails that allowed a patient to fall,[38] the failure to provide an ice scoop that allowed an environment for E.coli to grow in an ice receptacle,[39] or the failure to appropriately secure parts of a wheelchair that allowed a mentally ill person

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[35] *Michael* at 912-913, *citing Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 299 (Tex.1976), *and Bossley*, 968 S.W.2d at 342 ("Section 101.021(2) requires that for immunity to be waived, personal injury or death must be proximately caused by the condition or use of tangible property."), among other cases.

[36] *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex.1976). In *Lowe v. Texas Tech Univ.*, Lowe alleged that he injured his knee while playing football for the university. The injury allegedly occurred when a coach ordered him to remove his knee brace, which he wore because of a previous knee injury, and reenter a game without it. The Texas Supreme Court concluded that Lowe's injury was proximately caused by the removal of the brace, even though playing football – rather than the brace itself – was the direct cause of the injury.

[37] *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169, 171 (Tex. 1989). In *Robinson v. Central Texas MHMR Center*, MHMR took several patients, including Robinson, swimming. Knowing that Robinson was epileptic, MHMR and its employees failed to provide Robinson with a life preserver, and he subsequently drowned while swimming. And even though it was the plaintiff's epilepsy – and not the life preserver – that directly caused him to lose consciousness and drown while swimming, the Texas Supreme Court held that the failure to provide life preservers was a proximate cause of the plaintiff's injuries.

[38] *Overton Mem'l Hosp. v. McGuire*, 518 SW2d 528 (Tex. 1975). In *Overton Memorial Hospital v. McGuire,* the City owned and operated hospital waived immunity by failing to install rails on a bed of a patient, who fell from the bed while receiving postoperative. The Texas Supreme Court found that the "injuries were proximately caused by negligently providing a bed without bed rails," even though the rails themselves were not the direct cause of the plaintiff's injuries.

*See also, Hampton v. Univ. of Tex.- M.D. Anderson Cancer Ctr.*,6 S.W.3d 627, 631 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (where the court determined that a bed provided by hospital with bed rails that were not activated lacked an integral safety component, and this condition of tangible personal property triggered waiver of immunity.

[39] *Univ. of N. Tex. V. Harvey*, 124 S.W.3d 216(Tex. App.—Fort Worth 2003, pet. filed). In *University of North Texas v. Harvey*, the Fort Worth Court found proximate cause when a University failed to include an ice scoop at a drill team's water station, which contributed to the transmission of E.coli bacteria. The scoop itself was not a direct cause of the injury. Rather, the failure to provide a scoop led to bacteria getting into the ice and contaminating it, which led to an E.coli outbreak that caused plaintiffs' injuries.

to assault another patient,[40] Texas Courts have found valid TTCA waivers even when the defective property at issue only triggers the causal chain-of-events that leads to the plaintiff's injury.

This is because Texas Courts have long held that there can be more than one proximate cause of an injury,[41] so long as a more recent cause does not "intervene[] between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause."[42] And absent an intervening cause,[43] an event proximately causes an injury if the breach at issue is (a) a cause in fact of the harm[44] and (b) if the injury was foreseeable.[45]

Specifically relevant here, foreseeability "does not require that a person anticipate the precise manner in which injury will occur once he has created a dangerous situation through his negligence."[46] Further, although the criminal conduct of a third party *may* be a

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[40] *Texas Dept. of MHMR v. McClain*, 947 S.W.2d 694, 698 (Tex. App – Austin 1997, pet. denied). In *Texas Dept. of MHMR v. McClain*, a patient at a State hospital was assaulted and killed by a fellow patient when the patient attacked the other patient with a wheelchair part that the State did not secure. Even though it was the patient's violence and aggression that directly injured the victim and the State's actions only provided the opportunity for the patient to assault the other, the Third Court of Appeals concluded that plaintiff's injuries fell within the TTCA because there was a direct causal connection between the property supplied by the state and the injury that occurred.

[41] *See Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992).

[42] *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450 (Tex. 2006) (plurality op.).

[43] *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009).

[44] *Id.* Cause in fact requires "proof that (1) the negligent act or omission was a substantial factor in bringing about the harm at issue, and (2) absent the negligent act or omission ('but for' the act or omission), the harm would not have occurred."

[45] *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). A plaintiff proves foreseeability of the injury by establishing that "a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission."

[46] *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992); *Brown v. Edwards Transfer Co.,* 764 S.W.2d 220, 222 (Tex. 1988); *El Chico Corp. v. Poole,* 732 S.W.2d 306, 313 (Tex. 1987).

superseding cause which relieves the negligent actor from liability, the actor's negligence will not be excused when the criminal conduct is a foreseeable result of such negligence.[47]

These proximate cause principles requiring rejection of the City's plea are evident in *Travis v. City of Mesquite*.[48] In that case, third parties sued the City of Mesquite after they were injured when a fleeing driver crashed into their vehicles.[49] There, off-duty Mesquite police officers attempted to detain a driver for suspicious activities at a truck stop where the City employees worked security, but the driver fled the off-duty officers' request.[50] After the driver fled, the off-duty officers pursued the driver down the wrong-way, while on-duty officers responded and gave chase from the opposite direction.[51] After only 2-minutes, the high-speed car chase ended with the fleeing driver crashing into – and killing – the plaintiffs.[52]

Ultimately, the Texas Supreme Court held that the plaintiffs appropriately met their summary judgment burden on the proximate cause element[53] because the foreseeability and cause in fact elements were met – even though the actual injuries resulted from the actor fleeing from the police, driving recklessly, and crashing into the plaintiffs' vehicle, rather than the officers' decision to pursue the driver. But because the driver fleeing while driving

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[47] *Mesquite* at 98; *Poole,* 732 S.W.2d at 314; *Nixon,* 690 S.W.2d at 550; RESTATEMENT (SECOND) OF TORTS § 448 (1965).

[48] 830 S.W.2d 94, 96 (Tex. 1992).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

recklessly was a foreseeable result of the officers' decision to chase, the driver's subsequent negligent and criminal conduct did not relieve the officers from liability.

Here, Spradlin knew that keepers on a duty belt are safety features that prevent duty belts from creating a safety hazard and falling off. Further, Spradlin had knowledge before the event that his non-use of keepers created a safety hazard – yet he chose to proceed with his response to the Woodburn incident while knowing that he was using defective equipment.

And when the belt failed, as Spradlin knew it could, the belt's malfunction led to Woodburn – who was previously restrained and incapacitated – fleeing from restraint. Spradlin was so preoccupied and distracted by his belt falling off that he did not chase after Woodburn or even command Woodburn to stop. This allowed a dangerous and aggressive Woodburn the opportunity to run next-door and stab Johnathon to death – all of which occurred less than 3 minutes after Woodburn fled from his restraint.

As highlighted by *Mesquite* and the cases cited above, Spradlin's actions proximately caused Johnathon's death, and the City is liable – along with all persons and entities whose negligent conduct contributed to Johnathon's and Plaintiffs' injuries.[54]

### C. The City's proximate cause argument depends on factual development and requires additional time to complete discovery.

"Whether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be

[54] *Mesquite* at 98; *Poole,* 732 S.W.2d at 313; *Strakos v. Gehring,* 360 S.W.2d 787, 789 (Tex.1962); *McAfee v. Travis Gas Corp.,* 137 Tex. 314, 323, 153 S.W.2d 442, 447 (1941).

left largely to the trial court's sound exercise of discretion."[55] Because Plaintiffs have validly pleaded a TTCA waiver, and because the proximate cause analysis will depend on the development of a factual record, the Court should deny the City's plea until jurisdictional facts can be established through the adversarial process.

## V.
## CONCLUSION AND PRAYER FOR RELIEF

Because Plaintiffs have alleged sufficient facts to establish that the City does not enjoy immunity for Spradlin's use of a defective duty belt, the City's plea to the jurisdiction should be denied.

Respectfully submitted,

**SUMPTER & GONZALEZ L.L.P.**
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[55] *Tex. Dep't of Transp. v. Self*, No. 02-21-00240-CV, 2022 WL 1259094, at *6 (Tex. App.—Fort Worth Apr. 28, 2022, no pet. h.), *reh'g denied* (June 9, 2022), *citing Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

Mandy Nelson
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this document has been served on counsel of record pursuant to Tex. R. Civ. P. 21 and 21a on this 27th day of June, 2022.

*/s/ Worth D. Carroll*
Worth D. Carroll

**CAUSE NO. D-1-GN-21-007467**

| | | |
|---|---|---|
| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,** | § | **IN THE DISTRICT COURT OF** |
| **Plaintiffs,** | § | |
| | § | |
| **v.** | § | **TRAVIS COUNTY, TEXAS** |
| | § | |
| **TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN,** | § | |
| **Defendants.** | § | **201ST DISTRICT** |

**DEFENDANT TAVISTOCK FREEBIRDS, LLC'S ORIGINAL ANSWER**

COMES NOW, Defendant Tavistock Freebirds, LLC ("Freebirds") and files its Original Answer to Plaintiffs' Original Petition.

**I.**
**GENERAL DENIAL**

1. Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Freebirds generally denies each and every allegation contained in Plaintiffs' petition and any amendments or supplements thereto, and demands strict proof thereof. Freebirds further reserves the right to amend or supplement this answer at a future fate in accordance with the Texas Rules of Civil Procedure.

**II.**
**ADDITIONAL DEFENSES**

2. Plaintiffs fail to state a claim upon which relief can be granted.

3. The sole proximate cause of the injuries or damages alleged in the Petition, if any, was the negligence and/or tortious conduct of persons or entities other than Freebirds, and therefore Plaintiffs are barred from obtaining a recovery herein against Freebirds, or, alternatively, any such recovery must be reduced in proportion to the negligence and tortious conduct of others, including all limitations set forth in the Comparative Responsibility Act, TEX. CIV. PRAC. & REM. CODE §§ 33.001, et seq., or otherwise under applicable law.

4. The incident which is the subject of Plaintiffs' Petition was neither caused in fact nor proximately caused by any fault, negligence, act, omission, conduct, or breach of duty attributable to Freebirds.

5. The injuries and damages alleged by Plaintiffs were the result of intervening and superseding causes for which Freebirds cannot be held liable.

6. The decedent assumed the risk of injury and/or failed to exercise due care on his own behalf and/or voluntarily elected to subject himself to a known risk.

7. Plaintiffs' alleged injuries and damages, if any exist, were caused in whole or in part by a new and independent cause. Freebirds is entitled to offset, credit, contribution, and submission of comparative responsibility as to all potentially responsible parties pursuant to Chapters 32 and 33 of the Texas Civil Practice and Remedies Code.

8. Plaintiffs have failed to join one or more indispensable parties necessary for the proper adjudication of this action.

9. Plaintiffs' claims for economic losses are barred or subject to set off to the extent Plaintiffs received, or are entitled to receive, payments outside the scope of the collateral source rule from non-parties.

10. Any right to recovery by Plaintiffs in this action, and any liability on the part of Freebirds, which is expressly denied, is limited in accordance with the provisions of the applicable wrongful death statutes and common law.

11. Any applicable limitations on damages, including but not limited to those set forth in Section 41.008 of the Texas Civil Practice and Remedies Code, should be applied in this case.

12. Plaintiffs' request for punitive/exemplary damages, if available, is capped by applicable rule and/or statute and is subject to reduction.

13. Freebirds reserves the right to amend and supplement its answer to add additional defenses as necessary based on information obtained during investigation or discovery.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Defendant Tavistock Freebirds, LLC respectfully requests that upon trial or other final hearings of this matter, Plaintiffs take nothing and that the Court grant such other and further relief to which Freebirds may be justly entitled.

Respectfully submitted,

*/s/ Lauren D. Ogle*

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**ATTORNEYS FOR DEFENDANT TAVISTOCK FREEBIRDS, LLC**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been delivered on this the 15th day of February 2022, to the following counsel of record via email, e-service, certified mail, and/or facsimile:

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**ATTORNEYS FOR PLAINTIFFS**

*/s/ Lauren D. Ogle*
Lauren D. Ogle

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CAUSE NO. D-1-GN-21-007467

| | | |
|---|---|---|
| AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR AND NANETTE MOJICA, INDIVIDIALLY, | § | IN THE DISTRICT COURT OF |
| *Plaintiffs,* | § | |
| v. | § | |
| TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN, | § | |
| *Defendants.* | § | TRAVIS COUNTY, TEXAS |
| | § | 201ST DISTRICT COURT |

**DEFENDANT CITY OF AUSTIN'S ORIGINAL ANSWER AND AFFIRMATIVE AND OTHER DEFENSES**

TO THE HONORABLE JUDGE PRESIDING:

Defendant City of Austin hereby files this Original Answer and Affirmative and Defenses and in support respectfully shows as follows:

## I. GENERAL DENIAL

1. The City generally denies the allegations in Plaintiff's Original Petition, along with any amendments and supplements thereto. *See* Tex. R. Civ. P. 92.

## II. AFFIRMATIVE AND OTHER DEFENSES

Without assuming a burden of proof it would not otherwise be required to bear, the City asserts the following affirmative and other defenses, which are asserted in the alternative if and to the extent of any conflict:

2. Plaintiffs' claims are barred, in whole or in part, because Defendant City of Austin is a home-rule municipality and political subdivision of the State of Texas and has governmental immunity from suit and from liability unless waived.

3. Plaintiffs' claims are barred, in whole or in part, because the City's actions did not proximately cause Plaintiffs' injuries and/or because the actions of Dylan Woodburn were an independent intervening cause and/or superseding cause.

4. Plaintiffs' claims are barred, in whole or in part, because the Texas Tort Claims Act does not apply to a claim arising out of assault, battery, false imprisonment, or any other intentional tort. *See* Tex. Civ. Prac. & Rem. Code § 101.057.

5. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs' claims stem from nonuse of personal property, as opposed to use. *See* Tex. Civ. Prac. & Rem. Code § 101.021(2).

6. Plaintiffs' claims are barred, in whole or in part, because of the emergency exception. *See* Tex. Civ. Prac. & Rem. Code § 101.055(2).

7. Plaintiffs' claims are barred, in whole or in part, by official immunity.

8. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs failed to provide notice of their claims. *See* Tex. Civ. Prac. & Rem. Code § 101.101.

## III. RELIEF REQUESTED

The City respectfully requests that Plaintiffs take nothing by this suit and the City recover its costs of court along with 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/ *Hannah M. Vahl*
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**ATTORNEYS FOR DEFENDANT CITY OF AUSTIN**

## CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on counsel of record in compliance with the Texas Rules of Civil Procedure on February 22, 2022, as follows:

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**ATTORNEYS FOR DEFENDANT TAVISTOCK FREEBIRDS, LLC**

/s/ *Hannah M. Vahl*
Hannah M. Vahl

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Associated Case Party: TAVISTOCK FREEBIRDS LLC

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**CAUSE NO. D-1-GN-21-007467**

| | | |
|---|---|---|
| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHAN AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,** | § | **IN THE DISTRICT COURT** |
| **Plaintiffs,** | § | |
| **v.** | § | **201ST JUDICIAL DISTRICT** |
| **TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN,** | § | **TRAVIS COUNTY, TEXAS** |
| **Defendants.** | § | |

**DEFENDANT SAFARILAND, LLC'S ORIGINAL ANSWER**

Defendant Safariland, LLC (hereinafter referred to as "Safariland" or "Defendant") files this *Original Answer*, and would respectfully show the Court as follows:

## I.
## GENERAL DENIAL

1. As provided for and allowed under Texas Rule of Civil Procedure 92, Defendant denies generally each and every, all and singular, of the material allegations in the pleadings filed by Plaintiff and demands strict proof thereof by a preponderance of the evidence.

## II.
## AFFIRMATIVE DEFENSES

2. Any and all damages alleged to have been suffered by Plaintiff resulted, if at all, from the acts or omissions of some third party or parties over whom Defendant had no control, connection, or affiliation with, and not from any act or omission of Defendant.

3. The injuries in question and Plaintiff's alleged resulting damages were caused as a result of intervening, superseding, or new and independent causes, including but not limited to, the negligence or intentional acts of other persons over whom Defendant had no control or affiliation.

4. The alleged duty belt's design and labeling complied with applicable mandatory safety standards or regulations adopted and promulgated by the federal government or an agency thereof. Thus, the presumption established in Section 82.008 of the Texas Civil Practice and Remedies Code relieves Defendant of any possible liability.

5. Defendant, as the manufacturer of the duty belt in question, is not liable, as a matter of law, for any unsoundness of the product that may have developed by reason of the misuse of the product by its purchaser, his employer, or his agents or employees, when such product was not under the control of, nor being used by, the Defendant.

6. Defendant maintains that it has no liability to Plaintiff, but in the unlikely event that Defendant is found liable, Defendant is entitled to have its liability to the Plaintiff reduced by the percentage of causation of the injuries at issue found by the trier of fact to have resulted from the acts or omissions of Plaintiff, and/or any other third parties pursuant to Chapters 32 and 33 of the Texas Civil Practice and Remedies Code.

## IV.
## PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant Safariland, LLC prays that Plaintiff take nothing by reason of this suit and Defendant be awarded such other and further relief to which Defendant shows itself to be justly entitled at law or in equity.

Respectfully submitted,

*/s/ Shauna Wright*
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**ATTORNEYS FOR DEFENDANT**

## CERTIFICATE OF SERVICE

This is to certify that on this 21st day of February, 2022, a true and correct copy of the foregoing document was served via the Court's e-service system to the following party:

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*/s/ Shauna Wright*
Shauna Wright

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| Tyson Lies | | tyson.lies@kellyhart.com | 2/21/2022 5:03:06 PM | SENT |
| Shauna Wright | | shauna.wright@kellyhart.com | 2/21/2022 5:03:06 PM | SENT |

**CAUSE NO. D-1-GN-21-007467**

| | | |
|---|---|---|
| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHAN AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,** | § | **IN THE DISTRICT COURT** |
| **Plaintiffs,** | § | |
| **v.** | § | |
| **TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN,** | § | **201ST JUDICIAL DISTRICT** |
| **Defendants.** | § | **TRAVIS COUNTY, TEXAS** |

**NOTICE OF FILING RULE 11 AGREEMENT DATED MARCH 17, 2022**

Defendant Safariland, LLC hereby provides notice that it is filing a Rule 11 Agreement in the above-captioned cause. A copy of the Agreement is attached hereto as Exhibit A.

Respectfully submitted,

*/s/ Tyson M. Lies*
Shauna Wright
shauna.wright@kellyhart.com
State Bar No. 24052054
Tyson M. Lies
State Bar No. 24087927
tyson.lies@kellyhart.com
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500

**ATTORNEYS FOR DEFENDANT SAFARILAND, LLC**

## CERTIFICATE OF SERVICE

This is to certify that on this 17th day of March, 2022, a true and correct copy of the foregoing document was served via the Court's e-service system to the following party:

Worth D. Carroll
David M. Gonzalez
SUMPTER & GONZALEZ L.L.P.
3011 N. Lamar Blvd, Suite 200
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Telephone: (512) 381-9955
Facsimile: (512) 485-3121

**ATTORNEYS FOR PLAINTIFFS**

Lauren Ogle
William Moye
**THOMPSON COE**
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Houston, Texas 77056
Telephone: (713) 403-8287

**ATTORNEYS FOR DEFENDANT TAVISTOCK FREEBIRDS, LLC**

Zachary C. Burnett
**KING & SPALDING**
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Austin, Texas 78701
Telephone: (512) 457-2013

**ATTORNEYS FOR DEFENDANT GALLS, LLC**

Hannah Vahl
City of Austin Law Department
P.O. Box 1088
Austin, TX 78767

**ATTORNEYS FOR DEFENDANT CITY OF AUSTIN**

*/s/ Tyson M. Lies*
Tyson M. Lies

# EXHIBIT A

KELLY HART

ATTORNEYS AT LAW

TYSON M. LIES
*tyson.lies@kellyhart.com*

TELEPHONE: (817) 878-3534

March 17, 2022

Via Email (worth@sg-llp.com)
Worth D. Carroll
SUMPTER & GONZALEZ L.L.P.
301 Commerce Street, Suite 2900
Fort Worth, Texas 76102

Via Email (ZBurnett@KSLAW.com)
Zachary C. Burnett
KING & SPALDING
500 West 2nd Street
Austin, Texas 78701

Via Email (LOgle@thompsoncoe.com;
WMoye@thompsoncoe.com)
Lauren Ogle
William Moye
THOMPSON COE
One Riverway, Suite 1400
Houston, Texas 77056
Telephone: (713) 403-8287

Via Email (Hannah.Vahl@austintexas.gov)
Hannah Vahl
City of Austin Law Department
P.O. Box 1088
Austin, TX 78767

Re: *Amy-Marie Howard v. Tavistock Freebirds, LLC, et al.*; Cause No. D-1-GN-21-007467; in the 201st District Court of Travis County, Texas

Dear Counsel:

This Rule 11 Agreement sets forth an agreement regarding the exchange of initial disclosures in the above-captioned case. In particular, the parties have agreed that they will exchange initial disclosures on April 25, 2022. If this letter accurately reflects our agreement, please sign in the space below and email a signed copy to me at your convenience. Please give me a call if you have any questions or would like to discuss anything further.

Sincerely,

Tyson M. Lies

3481171

**AGREED AS TO FORM AND SUBSTANCE:**

*/s/ Worth D. Carroll*
Worth D. Carroll
David M. Gonzalez
**SUMPTER & GONZALEZ L.L.P.**
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**ATTORNEYS FOR PLAINTIFF**

*/s/ Lauren Ogle*
Lauren Ogle
William Moye
**THOMPSON COE**
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Houston, Texas 77056
Telephone: (713) 403-8287

**ATTORNEYS FOR DEFENDANT TAVISTOCK FREEBIRDS, LLC**

*/s/ Zachary C. Burnett*
Zachary C. Burnett
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**ATTORNEYS FOR DEFENDANT GALLS, LLC**

*/s/ Hannah Vahl*
Hannah Vahl
City of Austin Law Department
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Austin, TX 78767

**ATTORNEYS FOR DEFENDANT CITY OF AUSTIN**

# Automated Certificate of eService

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Shauna Wright
Bar No. 24052054
shauna.wright@kellyhart.com
Envelope ID: 62696500
Status as of 3/21/2022 11:25 AM CST

Associated Case Party: SAFARILAND LLC

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Kathryn Moore | | kathryn.moore@kellyhart.com | 3/17/2022 10:58:43 AM | SENT |
| Shauna Wright | | shauna.wright@kellyhart.com | 3/17/2022 10:58:43 AM | SENT |
| Krystal Collins | | krystal.moran@kellyhart.com | 3/17/2022 10:58:43 AM | SENT |
| Tyson Lies | | tyson.lies@kellyhart.com | 3/17/2022 10:58:43 AM | SENT |

Case Contacts

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Briana Nicholson | | briana.nicholson@austintexas.gov | 3/17/2022 10:58:43 AM | SENT |
| Sara Schaefer | | sara.schaefer@austintexas.gov | 3/17/2022 10:58:43 AM | SENT |
| Ruth Blackwelder | | ruth.blackwelder@austintexas.gov | 3/17/2022 10:58:43 AM | SENT |
| Hannah Vahl | | Hannah.Vahl@austintexas.gov | 3/17/2022 10:58:43 AM | SENT |

Associated Case Party: TAVISTOCK FREEBIRDS LLC

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| William R.Moye | | WMoye@thompsoncoe.com | 3/17/2022 10:58:43 AM | SENT |
| William Moye | | wmoye.service@thompsoncoe.com | 3/17/2022 10:58:43 AM | SENT |
| Adan Torres | | atorres@thompsoncoe.com | 3/17/2022 10:58:43 AM | SENT |
| Lauren Ogle | | logle@thompsoncoe.com | 3/17/2022 10:58:43 AM | SENT |

Associated Case Party: AMY-MARIE HOWARD

| Name |
|---|
| Worth Carroll |

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Shauna Wright
Bar No. 24052054
shauna.wright@kellyhart.com
Envelope ID: 62696500
Status as of 3/21/2022 11:25 AM CST

Associated Case Party: AMY-MARIE HOWARD

| | | | | |
|---|---|---|---|---|
| David Gonzalez | | david@sg-llp.com | 3/17/2022 10:58:43 AM | ERROR |

Associated Case Party: GALLS , LLC

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Zachary Burnett | | zburnett@kslaw.com | 3/17/2022 10:58:43 AM | SENT |

Associated Case Party: CITY OF AUSTIN

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Hannah Vahl | | Hannah.Vahl@austintexas.gov | 3/17/2022 10:58:43 AM | SENT |

**NO. D-1-GN-21-007467**

| | | |
|---|---|---|
| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,** | § | **IN THE DISTRICT COURT** |
| | § | **TRAVIS COUNTY, TEXAS** |
| | § | **201ST JUDICIAL DISTRICT** |
| **Plaintiffs,** | § | |
| **v.** | § | |
| **TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN** | § | |
| **Defendants.** | § | |

**RULE 11 AGREEMENT TO EXTEND TIME FOR DEFENDANT GALLS, LLC TO RESPOND TO PLAINTIFFS' ORIGINAL PETITION**

Defendant Galls, LLC ("Galls") and Plaintiffs, through their respective counsel, file this agreement to extend by thirty-seven (37) days the time for Galls to respond to Plaintiffs' Original Petition and Jury Demand.

Galls and Plaintiffs agree that this thirty-seven-day extension shall reset Galls's responsive-pleading deadline from March 23, 2022 to April 29, 2022.

The attorneys' signatures, as provided below, are evidence of their intent that this document serve as a Rule 11 agreement, enforceable upon filing with this Court. *See* Tex. R. Civ. P. 11.

DATED: March 23, 2022

Respectfully submitted,

**KING & SPALDING LLP**

/s/ *Zachary C. Burnett*
Zachary C. Burnett
State Bar No. 24105560
zburnett@kslaw.com
Lana K. Varney
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*Attorneys for Defendant Galls, LLC*

**SUMPTER & GONZALEZ, L.L.P.**

*/s/ Worth D. Carroll*
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David M. Gonzalez
State Bar No. 24012711
david@sg-llp.com
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Austin, TX 78705
T: 512/381-9955
F: 512/485-3121

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing has been served in compliance with Texas Rules of Civil Procedure 21 and 21a on the parties listed below through Texas E-File and Serve on this the 23rd of March, 2022.

Worth D. Carroll
David M. Gonzalez
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*Attorneys for Plaintiffs*

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*Attorneys for Defendant Safariland, LLC*

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*Attorneys for Defendant Tavistock Freebirds, LLC*

Hannah Vahl
City of Austin Law Department
P.O. Box 1088
Austin, TX 78767
hannah.vahl@austintexas.gov

*Attorneys for Defendant City of Austin*

*/s/ Zachary C. Burnett*
Zachary C. Burnett

# Automated Certificate of eService

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Noah Strohacker on behalf of Zachary Burnett
Bar No. 24105560
nstrohacker@kslaw.com
Envelope ID: 62890171
Status as of 3/23/2022 3:35 PM CST

Associated Case Party: SAFARILAND LLC

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Kathryn Moore | | kathryn.moore@kellyhart.com | 3/23/2022 3:32:28 PM | SENT |
| Shauna Wright | | shauna.wright@kellyhart.com | 3/23/2022 3:32:28 PM | SENT |
| Krystal Collins | | krystal.moran@kellyhart.com | 3/23/2022 3:32:28 PM | SENT |
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Case Contacts

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| Ruth Blackwelder | | ruth.blackwelder@austintexas.gov | 3/23/2022 3:32:28 PM | SENT |
| Hannah Vahl | | Hannah.Vahl@austintexas.gov | 3/23/2022 3:32:28 PM | SENT |

Associated Case Party: TAVISTOCK FREEBIRDS LLC

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| William R.Moye | | WMoye@thompsoncoe.com | 3/23/2022 3:32:28 PM | SENT |
| William Moye | | wmoye.service@thompsoncoe.com | 3/23/2022 3:32:28 PM | SENT |
| Adan Torres | | atorres@thompsoncoe.com | 3/23/2022 3:32:28 PM | SENT |
| Lauren Ogle | | logle@thompsoncoe.com | 3/23/2022 3:32:28 PM | SENT |

Associated Case Party: AMY-MARIE HOWARD

| Name |
|---|
| Worth Carroll |

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Noah Strohacker on behalf of Zachary Burnett
Bar No. 24105560
nstrohacker@kslaw.com
Envelope ID: 62890171
Status as of 3/23/2022 3:35 PM CST

Associated Case Party: AMY-MARIE HOWARD

| | | | | |
|---|---|---|---|---|
| David Gonzalez | | david@sg-llp.com | 3/23/2022 3:32:28 PM | ERROR |

Associated Case Party: GALLS , LLC

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
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Associated Case Party: CITY OF AUSTIN

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Hannah Vahl | | Hannah.Vahl@austintexas.gov | 3/23/2022 3:32:28 PM | SENT |

**CAUSE NO. D-1-GN-21-007467**

| | | |
|---|---|---|
| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,** | **§** | **IN THE DISTRICT COURT OF** |
| **Plaintiffs,** | **§** | |
| | **§** | |
| **v.** | **§** | **TRAVIS COUNTY, TEXAS** |
| | **§** | |
| **TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN,** | **§** | |
| **Defendants.** | **§** | **201ST DISTRICT** |

**DEFENDANT TAVISTOCK FREEBIRDS, LLC'S FIRST AMENDED ANSWER**

COMES NOW, Defendant Tavistock Freebirds, LLC ("Freebirds") and files its First Amended Answer to Plaintiffs' Original Petition.

**I.**
**GENERAL DENIAL**

1.1 Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Freebirds generally denies each and every allegation contained in Plaintiffs' petition and any amendments or supplements thereto, and demands strict proof thereof. Freebirds further reserves the right to amend or supplement this answer at a future fate in accordance with the Texas Rules of Civil Procedure.

**II.**
**VERIFIED DENIAL**

2.2 Pursuant to Rule 93 of the Texas Rules of Civil Procedure, Defendant asserts a verified denial of Plaintiff's pleadings. Specifically, Defendant assert that Plaintiff Amy-Marie

Howard, Individually and As A Representative of The Estate of Johnathan Aguilar, and Nanette Mojica, Individually, are not entitled to recover in the capacity in which they bring this lawsuit.[1]

## III.
## ADDITIONAL DEFENSES

3.1 Pursuant to §408.001 of the Texas Workers' Compensation Act, recovery of workers' compensation benefits is the exclusive remedy for an employee covered by workers' compensation insurance coverage, or a legal beneficiary, against the employer or an agent or employee of the employer. Accordingly, the claims by Plaintiffs Amy-Marie Howard, Individually and As A Representative of The Estate of Johnathan Aguilar, and Nanette Mojica, Individually, are barred by the Texas Worker's Compensation Act.

3.2 Defendant denies Plaintiff Amy-Marie Howard, Individually and As A Representative of The Estate of Johnathan Aguilar, is a widow, surviving spouse, or heir of the body of Johnathan Aguilar as these expressions are contemplated within Article 16, Section 26 of the Texas Constitution, or the Texas Workers Compensation Act.

3.3 Defendant denies Plaintiff Nanette Mojica, Individually is a widow, surviving spouse, or heir of the body of Johnathan Aguilar as these expressions are contemplated within Article 16, Section 26 of the Texas Constitution or the Texas Workers' Compensation Act.

3.4 Plaintiffs fail to state a claim upon which relief can be granted.

3.5 The sole proximate cause of the injuries or damages alleged in the Petition, if any, was the negligence and/or tortious conduct of persons or entities other than Freebirds, and therefore Plaintiffs are barred from obtaining a recovery herein against Freebirds, or,

[1] *See* Signed Verification attached hereto as "Exhibit A".

alternatively, any such recovery must be reduced in proportion to the negligence and tortious conduct of others, including all limitations set forth in the Comparative Responsibility Act, TEX. CIV. PRAC. & REM. CODE §§ 33.001, et seq., or otherwise under applicable law.

3.6 The incident which is the subject of Plaintiffs' Petition was neither caused in fact nor proximately caused by any fault, negligence, act, omission, conduct, or breach of duty attributable to Freebirds.

3.7 The injuries and damages alleged by Plaintiffs were the result of intervening and superseding causes for which Freebirds cannot be held liable.

3.8 The decedent assumed the risk of injury and/or failed to exercise due care on his own behalf and/or voluntarily elected to subject himself to a known risk.

3.9 Plaintiffs' alleged injuries and damages, if any exist, were caused in whole or in part by a new and independent cause. Freebirds is entitled to offset, credit, contribution, and submission of comparative responsibility as to all potentially responsible parties pursuant to Chapters 32 and 33 of the Texas Civil Practice and Remedies Code.

3.10 Plaintiffs have failed to join one or more indispensable parties necessary for the proper adjudication of this action.

3.11 Plaintiffs' claims for economic losses are barred or subject to set off to the extent Plaintiffs received, or are entitled to receive, payments outside the scope of the collateral source rule from non-parties.

3.12 Any right to recovery by Plaintiffs in this action, and any liability on the part of Freebirds, which is expressly denied, is limited in accordance with the provisions of the applicable wrongful death statutes and common law.

3.13 Any applicable limitations on damages, including but not limited to those set forth in Section 41.008 of the Texas Civil Practice and Remedies Code, should be applied in this case.

3.14 Plaintiffs' request for punitive/exemplary damages, if available, is capped by applicable rule and/or statute and is subject to reduction.

3.15 Freebirds reserves the right to amend and supplement its answer to add additional defenses as necessary based on information obtained during investigation or discovery.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Defendant Tavistock Freebirds, LLC respectfully requests that upon trial or other final hearings of this matter, Plaintiffs take nothing and that the Court grant such other and further relief to which Freebirds may be justly entitled.

Respectfully submitted,

*/s/ Lauren D. Ogle*

William R. Moye
State Bar No. 24027553
wmoye@thompsoncoe.com
Lauren Ogle
State Bar No. 24123187
logle@thompsoncoe.com
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(713) 403-8210; Fax: (713) 403-8299
**E-serve: Wmoye.service@thompsoncoe.com**

**ATTORNEYS FOR DEFENDANT TAVISTOCK FREEBIRDS, LLC**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been delivered on this the 27th day of April 2022, to the following counsel of record via email, e-service, certified mail, and/or facsimile:

SUMPTER & GONZALEZ L.L.P.
Worth D. Carroll
State Bar No. 24091192
worth@sg-11p.com
David M. Gonzalez
State Bar No. 24012711
david@sg-11p.com
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Austin, Texas 78705
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Facsimile: (512) 485-3121

&

CARROLL MALONEY HENRY & NELSON, PLLC
Mandy Nelson
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**ATTORNEYS FOR PLAINTIFFS**

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**ATTORNEYS FOR DEFENDANT GALLS, LLC**

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Tyson M. Lies
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Fort Worth, TX 76102
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F: 817/878-9280
**ATTORNEY FOR DEFENDANT SAFARILAND, LLC**

CITY OF AUSTIN LAW DEPARTMENT
Hannah Vahl
hannah.vahl@austintexas.gov
P.O. Box 1088
Austin, TX 78767
**ATTORNEY FOR DEFENDANT CITY OF AUSTIN**

*/s/ Lauren D. Ogle*
Lauren D. Ogle

**VERIFICATION**

STATE OF Texas §
§
COUNTY OF Harris §

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally William R. Moye, the Affiant, who being by me first duly sworn did depose and say that he has reviewed the Verified Denial of Defendant's First Amended Answer and that the statements contained therein are true and correct based on his personal knowledge.

William R. Moye

SUBSCRIBED AND SWORN TO BEFORE ME this 27th day of April, 2022.

LORI JONES
Notary Public
STATE OF TEXAS
ID#359120-5
My Comm. Exp. June 3, 2023

Lori Jones

Notary Public in the State of Texas

Exhibit A

# Automated Certificate of eService

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Adan Torres on behalf of William Moye
Bar No. 24027553
atorres@thompsoncoe.com
Envelope ID: 63968566
Status as of 5/4/2022 5:10 PM CST

Associated Case Party: SAFARILAND LLC

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Kathryn Moore | | kathryn.moore@kellyhart.com | 4/27/2022 3:23:42 PM | SENT |
| Shauna Wright | | shauna.wright@kellyhart.com | 4/27/2022 3:23:42 PM | SENT |
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Associated Case Party: TAVISTOCK FREEBIRDS LLC

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Case Contacts

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| Sara Schaefer | | sara.schaefer@austintexas.gov | 4/27/2022 3:23:42 PM | SENT |
| Ruth Blackwelder | | ruth.blackwelder@austintexas.gov | 4/27/2022 3:23:42 PM | SENT |
| Hannah Vahl | | Hannah.Vahl@austintexas.gov | 4/27/2022 3:23:42 PM | SENT |

Associated Case Party: AMY-MARIE HOWARD

| Name |
|---|
| Mandy Nelson |

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Adan Torres on behalf of William Moye
Bar No. 24027553
atorres@thompsoncoe.com
Envelope ID: 63968566
Status as of 5/4/2022 5:10 PM CST

Associated Case Party: AMY-MARIE HOWARD

| | | | | |
|---|---|---|---|---|
| Codi Foster | | codi@cmhnlaw.com | 4/27/2022 3:23:42 PM | SENT |
| Susana Benavidez | | susana@cmhnlaw.com | 4/27/2022 3:23:42 PM | SENT |
| David Gonzalez | | david@sg-llp.com | 4/27/2022 3:23:42 PM | ERROR |
| Worth Carroll | | worth@sg-llp.com | 4/27/2022 3:23:42 PM | SENT |

Associated Case Party: CITY OF AUSTIN

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
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Associated Case Party: GALLS , LLC

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**CAUSE NO. D-1-GN-21-007467**

| | | |
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| **AMY-MARIE HOWARD, Individually and as Next Friend of DANIEL AGUILAR, a Minor, and as a Representative of the Estate of JOHNATHON AGUILAR, and on Behalf of all Those Entitled to Recover Under the Texas Wrongful Death Act for the Death of JOHNATHON AGUILAR, and NANETTE MOJICA, Individually,** | § | IN THE DISTRICT COURT |
| **Plaintiffs,** | § | TRAVIS COUNTY, TEXAS |
| **v.** | § | 201ST JUDICIAL DISTRICT |
| **TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, and THE CITY OF AUSTIN,** | § | |
| **Defendants.** | § | |

**DEFENDANT GALLS, LLC'S ORIGINAL ANSWER, AFFIRMATIVE DEFENSES, AND SPECIAL EXCEPTIONS**

Defendant Galls, LLC ("Galls") hereby files this Original Answer, Affirmative Defenses, and Special Exceptions in response to Plaintiffs' Original Petition and Jury Demand:

## I. GENERAL DENIAL

1. Galls hereby asserts a general denial under Rule 92 of the Texas Rules of Civil Procedure to Plaintiffs' Original Petition and Jury Demand and any subsequent supplemental or amended petitions filed by Plaintiffs. Galls demands strict proof of Plaintiffs' allegations by the highest legal standards required by law.

## II. AFFIRMATIVE DEFENSES

2. Discovery and investigation may reveal that one or more of the following additional defenses should be available to Galls in this matter. Galls accordingly preserves the right to assert these separate and additional defenses in response to the allegations in Plaintiffs' Original Petition

and Jury Demand. Upon completion of discovery Galls may withdraw any of these additional defenses as appropriate. Galls further reserves the right to amend its answer and defenses, and to assert additional defenses and other claims, as discovery proceeds.

3. Plaintiffs' Original Petition and Jury Demand fails to state a claim, or claims, upon which relief may be granted against Galls.

4. Galls is not liable for the alleged incident, injuries and damages of which Plaintiffs complain and, should any liability be established in this case, Galls is entitled to indemnification under Texas's "Innocent Seller" doctrine. TEX. CIV. PRAC. & REM. CODE § 82.002; *see also Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 106 n.6 (Tex. 2021).

5. The action is barred pursuant to the doctrines of improper venue and/or *forum non conveniens*.

6. Plaintiffs have failed to join one or more parties who should or must be joined and, without the joinder of such parties, complete relief cannot be accorded among those already attempted to be made parties to this civil action.

7. Plaintiffs' claims are barred by the applicable statute of limitations and/or statute of repose.

8. The alleged incident, injuries and damages of which Plaintiffs complain were caused by unauthorized, unintended or improper use of the device(s) complained of and as a result of the failure to exercise reasonable and ordinary care, caution or vigilance for which Galls is not legally liable or responsible.

9. Plaintiffs' claims are barred, in whole or in part, by the doctrines of equitable estoppel, laches, consent, waiver, informed consent, release, unclean hands, res judicata, and collateral estoppel.

10. Plaintiffs' claims are barred, in whole or in part, because the device(s) was not in a defective condition when it left the possession, custody and control of Galls and it was fit and proper for the use for which it was designed and intended.

11. Plaintiffs' claims are barred by the doctrine of assumption of the risk.

12. Plaintiffs' alleged injuries and damages were the result of, and were caused solely and proximately by, the acts, fault, conduct, or negligence of persons or entities other than Galls; such negligence, fault, act, or conduct was of a character that is not reasonably expected to happen in the natural sequence of events; and such negligence, fault, act, or conduct was the independent, intervening, and superseding cause and therefore the sole proximate cause of any such damages, thus relieving Galls of any liability.

13. Galls is immune from liability for any conduct performed in conformance with government specifications.

14. At all relevant times hereto, Galls complied with all applicable Federal, State, and other regulations.

15. The device(s), including the methods and techniques of manufacturing, inspection, and testing, that is the subject of Plaintiffs' Original Petition and Jury Demand conformed with the state of the art at the time the device(s) was first sold.

16. Plaintiffs cannot show that any reasonable alternative design would have rendered the device(s) safer overall.

17. Plaintiffs' claims are further barred by Texas Civil Practice and Remedies Code Section 82.008 because Galls complied with all applicable state and federal statutes regarding the device(s) at issue. In the event that Plaintiffs' claims are not barred, Galls is entitled to a presumption that the device(s) at issue are free from any defect or defective condition as the plans

or design for the device(s) at issue or the methods and techniques of manufacturing, inspecting, and testing the device(s) at issue were in conformity with government standards established for the industry that were in existence at the time the plans or designs for the device(s) at issue or the methods and techniques of manufacturing, inspecting, and testing the device(s) at issue were adopted. TEX. CIV. PRAC. & REM. CODE § 82.008.

18. Plaintiffs' claimed damages proximately resulted from alterations or modifications of the device(s), which were not reasonably foreseeable or were made by a person other than Galls and were subsequent to the time of the original sale. Consequently, the alterations or modifications were the proximate and/or producing cause of any alleged injuries or damages precluding liability of Galls.

19. Plaintiffs' claimed damages proximately resulted from misuse of the device(s), which was not reasonable foreseeable or was made by a person other than Galls. Such unforeseeable misuse of the device(s) was the proximate and/or producing cause of any alleged injuries or damages precluding liability of Galls.

20. Plaintiffs' damages are subject to set-off, reduction, and related legal principles where such damages are attributable to the fault of others or non-parties.

21. As to Plaintiffs or to any other entity or person whose conduct or intervening negligence resulted in the alleged injuries and/or damages of Plaintiffs, if any, Galls expressly pleads the doctrines of comparative fault and/or comparative negligence, as well as the provisions of any applicable comparative fault and/or comparative negligence and/or contributory negligence statute, law or policy of Texas and any other applicable state.

22. Galls specifically incorporates by reference Chapter 33 of the Texas Civil Practice and Remedies Code, including but not limited to the determination of percentage of responsibility

in section 33.003, the determination of the amount of recovery in section 33.012, and the determination of the amount of liability in section 33.013. The injuries or damages sustained by the Plaintiffs, if any, can be attributed to several causes, and accordingly, should be apportioned among the various causes according to the respective contribution of each such cause to the harm sustained, including, but not limited to, current or future parties to this case who cease to be parties to the case at the time of trial. TEX. CIV. PRAC. & REM. CODE § 33.013.

23. Galls is unaware at this time of any settlements by any alleged joint tortfeasor. In the event any settlement has been or will be made by any alleged joint tortfeasor, then Galls is entitled to a full credit, offset, pro rata reduction, or percentage reduction, based on the percentage of fault attributable to each settling party, person, or other entity herein, and Galls makes known to the other parties and to the Court that it will avail itself of its rights. TEX. CIV. PRAC. & REM. CODE § 33.013.

24. Galls did not make nor did it breach any express or implied warranties and/or breach any warranties created by law. To the extent that Plaintiffs relied on any theory of breach of warranty, such claims are barred by applicable law by the lack of privity between Plaintiffs and Galls, and/or by Plaintiffs' failure to give Galls timely notice of the alleged breach of warranty and an opportunity to cure. Galls further specifically pleads as to any breach of warranty claim all affirmative defenses available to Galls under the Uniform Commercial Code, as enacted in the State of Texas or any other state whose law is deemed to apply in this case, and under the common law principles of any state whose law is deemed to apply in this case.

25. Collateral sources, managed care discounts, and charitable and/or governmental benefits received, available, or to be received in the future reduce the Plaintiffs' alleged damages.

26. Plaintiffs' claims are barred, in whole or in part, because the commercial speech relating to the device(s) is protected under the First Amendment of the United States Constitution and the Texas Constitution.

27. Plaintiffs' Original Petition and Jury Demand fails to specify any willful or wanton conduct on the part of Galls, and therefore, all claims in reference to the recovery of punitive damages in Plaintiffs' Original Petition and Jury Demand must be stricken.

28. Plaintiffs' Original Petition and Jury Demand fails to allege with sufficient specificity any acts, actions or conduct on the part of Galls which constitutes negligence, fraud, or conspiracy as required by Texas law and, therefore, all claims and/or damages based upon allegations of negligence, fraud or conspiracy must be stricken.

29. The imposition of punitive or exemplary damages in this case would be unconstitutionally vague and/or overbroad and would violate Galls's constitutional rights as secured by the Fifth and Seventh Amendments to the United States Constitution, would violate its rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution and the prohibition against excessive fines in the United States Constitution, and would contravene other provisions of the United States Constitution and the Texas Constitution.

30. With respect to Plaintiffs' demand for punitive or exemplary damages, Galls specifically incorporates by reference Chapter 41 of the Texas Civil Practice and Remedies Code, including but not limited to the statutory caps in section 41.008.

31. Any award of punitive or exemplary damages is barred to the extent that it is inconsistent with the standards and limitations set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (*as extended by Cooper Industries Inc. v. Leatherman Tool Group, Inc.*, 532

U.S. 424 (2001), *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008)).

32. Plaintiffs' claims are barred, in whole or in part, by any applicable state statutes barring recovery for such claims in product liability and/or personal injury actions.

33. Plaintiffs' claims for injunctive or other equitable relief are barred because Plaintiffs have an adequate remedy at law.

## III. SPECIAL EXCEPTION

41. The Texas Rules of Civil Procedure authorize special exceptions because each party is entitled to notice of his adversary's claims and defenses. *See Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007); TEX. R. CIV. P. 91. Rules 45 and 47 require pleadings to give fair and adequate notice of each claim asserted so that the opposing party will have information sufficient to enable him to prepare a defense. *Paramount Pipe & Sup. Co. v. Muhr*, 749 S.W.2d 491, 494–95 (Tex. 1988). A court must be able to ascertain with reasonable certainty, upon examination of the Plaintiffs' pleadings alone, a cause of action pled with sufficient particularity. *Stoner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979).

42. If the pleadings are insufficient and not properly amended or the defective pleadings are incurable, they may be stricken and the case, or the cause of action, dismissed. *Sonnichsen*, 221 S.W.3d at 635.

43. Galls specially excepts to the allegations in the "Conclusion and Prayer" section on page 24 and the "Claims for Relief" section on page 3 of Plaintiffs' Original Petition and Jury Demand, inasmuch as Plaintiffs do not specify with sufficient particularity the maximum amount of damages sought in this lawsuit. *See* TEX. R. CIV. P. 47 ("[U]pon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed.").

## IV. DEMAND FOR JURY TRIAL

45. Galls demands trial by jury on all issues so triable.

## V. PRAYER FOR RELIEF

WHEREFORE, Defendant Galls, LLC requests that judgment be entered dismissing Plaintiffs' Original Petition and Jury Demand with prejudice and awarding Galls all costs, disbursements, and further relief permitted by law.

Respectfully submitted,

DATED: April 29, 2022

KING & SPALDING LLP

By: /s/ *Zachary C. Burnett*

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing has been served in compliance with Texas Rules of Civil Procedure 21 and 21a on the parties listed below through Texas E-File and Serve on this the 29th of April, 2022.

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*/s/ Zachary C. Burnett*
Zachary C. Burnett

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| Mandy Nelson |

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CAUSE NO. D-1-GN-21-007467

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|---|---|---|
| AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR AND NANETTE MOJICA, INDIVIDIALLY, *Plaintiffs,* | § | IN THE DISTRICT COURT OF |
| v. | § | TRAVIS COUNTY, TEXAS |
| TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN, *Defendants.* | § | 201ST DISTRICT COURT |

**DEFENDANT CITY OF AUSTIN'S PLEA TO THE JURISDICTION**

Defendant City of Austin hereby moves to dismiss Plaintiffs' claims against it for want of subject-matter jurisdiction and in support respectfully shows as follows:

## I. INTRODUCTION

This lawsuit stems from the tragic and senseless death of Johnathon Aguilar, an employee of Freebird's World Burrito, after Dylan Woodburn, who was intoxicated and emotionally disturbed, stabbed him. Plaintiffs seek to hold the City of Austin—as well as other defendants—liable for Mr. Aguilar's death and allege that Austin Police Department Officer Patrick Spradlin's failure to maintain and use his duty belt (or, the City's provision of a defective duty belt) caused it. They assert that because Officer Spradlin's duty belt came loose as he was attempting to restrain Mr. Woodburn in Bennu Coffee, Mr. Woodburn escaped and was able to enter Freebird's and stab Mr. Aguilar. But their allegations do not come within the limited waiver of the City's immunity

for tort claims under the Texas Tort Claims Act. For the Texas Tort Claims Act to waive the City's immunity for this claim, Mr. Aguilar's death must be caused by a condition or use of tangible personal property—here, the duty belt Officer Spradlin was wearing. But there is no causation if such condition or use "does no more than furnish the condition that made the injury possible." *Dall. Cnty. Mental Health & Mental Retardation v. Bossley,* 968 S.W.2d 339, 343 (Tex.1998). The true cause of Aguilar's death was his stabbing by Woodburn, not any issue with the duty belt. Similarly, when the real substance of a plaintiff's complaint is that a death was caused, not by the condition or use of property, but some other non-actionable cause such as the failure of governmental employees to restrain the actor, the TTCA does not waive governmental immunity. *Id.* That is precisely Plaintiffs' claim here: Plaintiffs' true claim is that the City of Austin failed to restrain Mr. Woodburn and, accordingly, Mr. Aguilar died after Mr. Woodburn stabbed him. Such a complaint is not actionable under the TTCA—a defect that cannot be cured through pleading—and the claim against the City of Austin should be dismissed with prejudice.

## II. FACTUAL BACKGROUND

On January 3, 2020, Austin Police Department received a suspicious person call regarding Dylan Woodburn, who was inside Bennu Coffee threatening customers. Pls' Orig. Pet. ¶ 21. After the call to police, Woodburn attacked a Bennu customer and was later wrestled to the ground and restrained by multiple Bennu customers. *Id.* ¶ 22. APD Officer Patrick Spradlin was the first APD officer to respond to the suspicious person call. *Id.* ¶ 23. Officer Spradlin directed the Bennu customers to release Woodburn. *Id.* ¶ 25. He then attempted to place Woodburn in handcuffs. *Id.* ¶ 26. But as he was doing so, his duty belt came loose, and he put the handcuffs down. *Id.* ¶ 26. As he was attempting to secure his duty belt, Woodburn escaped. *Id.* ¶ 27. Woodburn then went to Freebird's, where Freebirds' general manager Ryan Bramlett witnessed Woodburn behaving

erratically and peering into the door. *Id.* ¶¶ 28–29. Bramlett entered Freebirds and locked the door behind him. *Id.* ¶ 31. But he later unlocked the door to let a knife-sharpening vendor in and left the door unlocked when he escorted the vendor out of Freebirds. *Id.* ¶ 32–33. Woodburn then entered Freebird's and used one of the freshly-sharpened knives the vendor had left out on the counter to stab Mr. Aguilar, resulting in his death. *Id.* ¶¶ 32, 34. In addition to suing the City and Freebird's, Plaintiffs also sue Safariland, the alleged duty belt manufacturer, and Galls, the alleged duty belt retailer, on the ground that the duty belt was negligently manufactured or designed. *Id.* ¶¶ 3, 95–106.

## III. APPLICABLE STANDARD

Governmental units are immune from suit unless immunity is waived by state law. *City of San Antonio v. Maspero*, 640 S.W.3d 523, 528 (Tex. 2022). The Texas Tort Claims Act waives immunity for the negligent acts of government employees in specific, narrow circumstances. Tex. Civ. Prac. & Rem. Code § 101.021. The TTCA's limited immunity waiver is subject to strict construction. *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992) (noting "clear intent of the [TTCA] that the waiver of sovereign immunity be limited); *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 927 (Tex. 2015) (strictly construing TTCA "[g]iven the Legislature's preference for a limited immunity waiver").

Governmental immunity from suit defeats a trial court's subject matter jurisdiction and is thus properly asserted in a plea to the jurisdiction. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). When, as here, a plea to the jurisdiction challenges the pleadings,[1] a court determines if the pleader has alleged facts that affirmatively demonstrate the

[1] The City is not challenging the existence of jurisdictional facts at this stage and is only challenging whether Plaintiffs have, and can, plead a claim against it that comes within the Texas Tort Claims Act's limited immunity waiver.

court's jurisdiction to hear the cause. *Id.* at 226. The issue is whether the pleadings, construed liberally, allege sufficient facts to invoke a waiver of governmental immunity. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 725 (Tex. 2016) (per curiam).

## IV. ARGUMENT AND AUTHORITIES

### A. Plaintiffs have not—and cannot—plead that the City's alleged negligent use of the duty belt "caused" Aguilar's death under the Texas Tort Claims Act.

The Texas Tort Claims Act is a limited waiver of governmental immunity of political subdivisions such as the City of Austin for certain tort claims. *LeLeaux*, 835 S.W.2d at 51. Under the TTCA:

> 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 his 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 it a private person, be liable to the claimant according to Texas law.

Tex. Civ. Prac. & Rem. Code § 101.021.

For immunity to be waived under 101.021(2), as Plaintiffs allege, "injury or death must be proximately caused by the condition or use of tangible property." *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998). Proximate cause requires both "cause in fact and foreseeability." *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d

922, 929 (Tex. 2015). For a condition of property to be a cause in fact, the condition must "serve as a substantial factor in causing the injury and without which the injury would not have occurred." *Id.* "To be a substantial factor, the condition or use of the property 'must have actually caused the injury.'" *Sanchez*, 494 S.W.3d at 726 (quoting *Dallas Cnty. v. Posey*, 290 S.W.3d 869, 872 (Tex. 2009)). "The requirement of causation is more than merely involvement[.]" *Id.* at 343; *accord Texas Dep't of Crim. Just. v. Miller*, 51 S.W.3d 583, 588 (Tex. 2001) ("[T]hat some property is merely involved is not enough. Using that property must have actually caused the injury."). Causation is lacking if the tangible property "does no more than furnish the condition that makes the injury possible." *Bossley*, 968 S.W.2d at 343. And if the real substance of the complaint is that death was caused not by the condition or use of tangible personal property but by something else, the TTCA does not waive immunity. *Id.* ("The real substance of plaintiffs' complaint is that [Bossley's] death was caused, not by the condition or use of property, but by the failure of Hillside's staff to restrain him once they learned he was still suicidal. The Tort Claims Act does not waive Dallas County MHMR's immunity from such a complaint."); *cf.*, *e.g.*, *City of Austin v. Anam*, 623 S.W.3d 15, 19 (Tex. App.—Austin 2020, no pet.) (en banc) ("[T]he real substance of the Anams' claim is that Zachary's suicide was caused not by the failure to refasten his seatbelt or the condition of the seatbelt but by the fact that Wall failed to detect and remove Zachary's gun before putting him in the patrol car. The Tort Claims Act does not waive immunity from such a complaint.").

*Bossley* is instructive on when the TTCA's causation requirement is lacking for a claim of personal injury or death regarding the use or condition or tangible personal or real property. In *Bossley*, patient Roger Bossley was committed to Hillside Center, a treatment facility. *Id.* at 340. Hillside knew that Bossley was suicidal. *Id.* Hillside had a locked front door but a self-locking

glass door just inside the front door was left open. *Id.* When a Hillside technician who was leaving for lunch (and who passed Bossley on the telephone in the hallway as she was leaving) unlocked the front door, Bossley pushed her aside and fled. *Id.* at 340–41. Hillside staff members chased Bossley about half a mile to Interstate Highway 30, where he attempted to hitchhike. *Id.* at 341. As he was approached by Hillside personnel and police, however, Bossley leaped into the path of a truck and was killed. *Id.*

The plaintiffs alleged that the Hillside technician's unlocking of the outer door without looking for Bossley—a use of property—and the unlocked inner door—a condition of property—gave rise to subject-matter jurisdiction under the TTCA. *Id.* at 343. But the Texas Supreme Court disagreed: "Neither can be said to have caused [Bossley's] suicide." *Id.* While the doors permitted Bossley's escape, they did not cause his death. *Id.* "Although [Bossley's] escape through the unlocked doors was part of a sequence of events that ended in his suicide, the use and condition of the doors were too attenuated from [his] death to be said to have caused it." *Id.*

More recently, the Texas Supreme Court again construed the causation requirement in the TTCA and found it lacking in *City of Dallas v. Sanchez*, 494 S.W.3d 722 (Tex. 2016) (per curiam). In *Sanchez*, a 911 operator dispatched an ambulance to Matthew Sanchez's apartment complex to respond to a call regarding his drug overdose. *Id.* at 724. Once on scene, EMS personnel provided assistance to a different drug-overdose victim at the same complex, erroneously concluding that two closely timed 911 calls concerning overdose victims at the same complex concerned the same victim, and did not treat Sanchez. *Id.* Sanchez's parents sued the City of Dallas and alleged "(1) the City's 9–1–1 dispatcher misused the phone system by hanging up before emergency responders arrived to assist Sanchez, or in the alternative, the 9–1–1 phone system malfunctioned, causing the call to disconnect prematurely; (2) the 9–1–1 dispatcher failed to follow proper procedure and

violated various federal, state, and local laws and regulations by either disconnecting the call or failing to redial after the call disconnected; and (3) if the emergency responders had located Sanchez before leaving the premises, they 'would have most likely saved [his] life.'" *Id.* at 725.

These allegations were insufficient to show the requisite causation, the Texas Supreme Court held. First, the use of property that simply hinders or delays treatment does not actually cause the injury and does not constitute a proximate cause of an injury. *Id.* at 726. Additionally, the 911-system malfunction was not a proximate cause of Sanchez's death. For the requisite causal nexus, the use or condition of tangible personal or real property must be a substantial factor without which the injury would not have occurred. *Id.* at 726. There, however,

> [a]lthough disconnection of the telephone call may have contributed to circumstances that delayed potentially life-saving assistance, the malfunction was too attenuated from the cause of Sanchez's death—a drug overdose—to be a proximate cause. . . The malfunction was merely one of a series of factors that contributed to Sanchez not receiving timely medical assistance. Sanchez's death was caused by drugs, the passage of time, and misinterpretation of information.

*Id.* at 727 (internal citations omitted). The Texas Supreme Court accordingly rendered judgment dismissing the case for want of subject matter jurisdiction. *Id.*

Similar to these cases, in *Lopez v. McMillion*, 113 S.W.3d 447 (Tex. App.—San Antonio, no pet.), a Bexar County Sheriff's deputy transported inmate Gorman to a clinic for medical treatment and, upon reaching the clinic, removed Gorman's restraints and permitted him to use the restroom without accompanying him. *Id.* at 449. Gorman escaped the clinic through the bathroom window, stole a vehicle, drove to the McMillion's home, posed as a delivery person to gain entry, and then robbed the McMillions, bound and gagged Donna McMillion, threatened her with a gun, and severely beat her. *Id.* The San Antonio Court of Appeals held that the deputy's non-use of handcuffs and shackles did not waive immunity as the Texas Tort Claims Act only waives

immunity for use, not non-use. *Id.* at 450–51.[2] Similarly, the use of the bathroom door "may have furnished the condition that made the McMillions' injuries possible, but the use of the door was too attenuated from their injuries to be said to have caused them." *Id.* at 452. It explained that "[t]he use of the bathroom door permitted Gorman to escape the clinic, but it was Gorman's assault and robbery that caused the McMillions' injuries. Therefore, the McMillions' "bathroom door" allegation is insufficient to waive sovereign immunity." *Id.*

Likewise, in *Amador v. San Antonio State Hosp.*, 993 S.W.2d 253, 255 (Tex. App.—San Antonio 1999, pet. denied), plaintiffs sued over patient Cindy's sexual assault while out on hospital grounds without supervision using a ground pass she had been given. They alleged use of tangible personal or real property based on "the misuse of entrance and exit doors, i.e., unlocking the door to permit Cindy to exit unsupervised onto the hospital grounds" and "providing a chapel without lockable doors and/or using a chapel without proper security." *Id.* The San Antonio Court of

[2] Some other cases involving intentional torts similarly hold that the governmental involvement was really non-use of property, not use. *E.g.*, *Ballard*, 174 S.W.3d at 268 (gravamen of the complaint was "the failure to restrain Mark properly" in the patrol car, which "is an allegation of non-use of property, for which the TTCA does not waive immunity from suit"); *Lacy v. Rusk State Hosp.*, 31 S.W.3d 625, 630 (Tex. App.—Tyler 2000, no pet.) (where hospital patient escaped, went swimming, and drowned, "[f]ailure to lock a door through which the deceased escaped is not a 'use' of tangible property waiving immunity"). The Texas Supreme Court recently held that the failure to engage an emergency brake on a car qualified as "use" of a motor-driven vehicle for purposes of the TTCA and, in so doing, clarified that the governmental employee need not be actively operating the vehicle at the time of the incident for there to be a "use." *PHI, Inc. v. Texas Juvenile Justice Dep't.*, 593 S.W.3d 296, 302–306 (Tex. 2019). It rejected a "hyper-literal" distinction between use and non-use that would mean that the failure to use an emergency brake is non-use. *Id.* at 306. But it nevertheless reiterated that "'[t]his Court has never held that mere non-use of property can support a claim under the Texas Tort Claims Act.'" *Id.* (quoting *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 594 (Tex. 1996)). Even if these cases' statements regarding non-use may be called into question after *PHI*, they still nevertheless note that the crux of the claim is something other than use or condition of property which the TTCA does not waive immunity. *Lacy*, 31 S.W.3d at 630 ("Allegations that the hospital was negligent in its care or supervision of Michael are not actionable under the Tort Claims Act"); *Ballard*, 174 S.W.3d at 266 ("The actual cause of Mark's death was his deliberate decision to flee into freeway traffic and a separate car's hitting him there; the failure to secure Mark in the first place merely furnished the condition that made it possible for him to escape and then run into oncoming traffic.").

Appeals held jurisdiction was lacking for reasons including that, as in *Bossley*, "the real substance of the Amadors' complaint is SASH's failure to properly evaluate and restrain Cindy." *Id.* at 256.

In *Laman v. Big Spring State Hosp.*, 970 S.W.2d 670, 672 (Tex. App.—Eastland 1998, pet. denied), *disapproved of on other grounds by Mansions in the Forest, L.P. v. Montgomery Cnty.*, 365 S.W.3d 314 (Tex. 2012), another sexual assault case, a psychiatric patient sued a state hospital after she had been left sedated and unattended in room with the door open to the men's hall, after which she was sexually assaulted. The plaintiff alleged that room in which she was assaulted was "(1) unlocked with the door open to the men's hall; (2) unstaffed; and (3) occupied only by a heavily-sedated female patient" and that the condition of the room constituted a premises defect, the use of the room in that condition constituted a misuse of tangible property, and that the use of the room constituted the negligent implementation of policy. *Id.* at 671. The appellate court held that the state hospital had immunity: "The facts showing that Laman was heavily-sedated and was left unattended in the room with the door open to the men's hall do not support a cause of action for a premises defect because they do not involve a defect, shortcoming, or imperfection of the room or the door." *Id.* at 672. Additionally, "the real substance of Laman's complaint is that her injuries were caused by the failure of the Hospital's staff to supervise her as she was sedated, not by the condition or use of property." *Id.*

In another sexual assault case, *Texas Dep't of Mental Health & Mental Retardation v. Lee*, 38 S.W.3d 862, 865 (Tex. App.—Fort Worth 2001, pet denied), a patient sued after she was sexually assaulted by an HIV-positive patient while she was under the care of Wichita Falls State Hospital. She asserted that her injuries were caused by "both a use of property—leaving the interior door to her room unlocked—and a condition of property—no locking device on the door leading from the men's wing to the women's wing of the hospital." *Id.* at 867. The court disagreed:

> The unlocked doors permitted the assailant's entry into Lee's room, but did not cause the sexual assault resulting in her injuries. Although the assailant's entry through the unlocked doors was part of a sequence of events that ended in the sexual assault, the use and unlocked condition of the doors were too attenuated from Lee's injuries to be said to have caused them. The true substance of Lee's complaint is that the sexual assault was caused, not by the condition or use of the hospital doors, but by the failure of the hospital staff to protect her from her assailant when they knew that she was hypersexual and promiscuous and that male patients had exploited her hypersexuality in the past; conduct that does not fall within the Act's limited waiver of immunity.

*Id.* at 867–68.

Most recently, in *Doe v. City of Fort Worth*, No. 02-21-00026-CV, 2022 WL 1496527, at *1 (Tex. App.—Fort Worth May 12, 2022, no pet. h.), the Fort Worth appellate court upheld dismissal of a suit by Jane Doe, who alleged she was sexually assaulted by a City employee working at a City-owned animal shelter while she was a teen volunteer there. Doe's allegations included that the assault occurred as a result of use of keycards and the keycard system; on appeal, she also argued that it resulted from the City's maintenance of a keycard system. *Id.* at **6, 8. The appellate court held the requisite causal nexus between such uses and her injuries was absent. *Id.* *9. "The City's maintenance of a keycard system was but one of many circumstances that made her sexual assault possible, but Doe's pleadings did not demonstrate that it was the actual, contemporaneous cause of her injuries." *Id.* Additionally, "[t]he substance of Doe's complaint is that her sexual assault occurred, not by the City's maintenance of a keycard system or provision of a keycard, but by the City's 'allowing a sexual predator to work alone with and beside Jane Doe' without additional supervision and 'failing to protect [Doe] from sexual assault.'" *Id.*

Courts have also not found waiver of immunity under the TTCA for injuries to arrestees under police care. In *City of Sugarland v. Ballard*, 174 S.W.3d 259, 263 (Tex. App.—Houston [1st Dist.] 2005, no pet.), for example, police officers for the City of Sugarland arrested Mark, a minor.

Mark tried to escape by kicking out the rear window. *Id.* The officers then placed Mark in a second police car but failed to secure him adequately and he escaped while being transported. *Id.* After he escaped, a private car struck and killed him. *Id.* The appellate court held that, even assuming that the failure to properly secure Mark in the car could constitute a use of a motor-driven vehicle for purposes of Section 101.021(1)(A) of the TTCA, Mark's injury "did not arise from those uses." *Id.* at 266. It explained that "[t]he actual cause of Mark's death was his deliberate decision to flee into freeway traffic and a separate car's hitting him there; the failure to secure Mark in the first place merely furnished the condition that made it possible for him to escape and then run into oncoming traffic." *Id.* Similarly, in *City of Austin v. Anam*, 623 S.W.3d 15, 16 (Tex. App.—Austin 2020, no pet.) (en banc), an en banc Third Court of Appeals found an immunity waiver lacking where arrestee Zachary Anam committed suicide by shooting himself while he was handcuffed and seated in the backseat of an Austin Police Department patrol car. Anam's family sued and asserted that the police officer's failure to fasten his seatbelt caused his death. *Id.* The Third Court of Appeals explained that "the real substance of the Anams' claim is that Zachary's suicide was caused not by the failure to refasten his seatbelt or the condition of the seatbelt but by the fact that Wall failed to detect and remove Zachary's gun before putting him in the patrol car. The Tort Claims Act does not waive immunity from such a complaint." *Id.* at 20.

In this case, the cause of Aguilar's death was Woodburn's stabbing, not Officer Spradlin's alleged failure to maintain and use his duty belt or the City's alleged provision of a defective belt. *See Bossley*, 968 S.W.2d at 343 (neither unlocking of outer door nor unlocked inner door "can be said to have caused [Bossley's] suicide"); *Sanchez*, 494 S.W.3d 722, 727 (Tex. 2016) (911 system use or condition "too attenuated from the cause of Sanchez's death—a drug overdose—to be a proximate cause"); *Ballard,* 174 S.W.3d at 266 ("The actual cause of Mark's death was his

deliberate decision to flee into freeway traffic and a separate car's hitting him there; the failure to secure Mark in the first place merely furnished the condition that made it possible for him to escape and then run into oncoming traffic"); *Pakdimounivong v. City of Arlington*, 219 S.W.3d 401, 412 (Tex. App.—Fort Worth 2006, pet. denied) (in case where arrestee escaped from police car and was killed on highway by another car, injury was not caused by improper application of handcuffs and leg restraints; "[t]heir failure, if any, did not cause the window to break, nor cause Vattana to crawl out the broken window, nor cause Vattana to throw himself on to the highway in front of oncoming traffic. Vattana did these things."). The sequence of events Plaintiffs allege is that the duty belt came loose, Officer Spradlin reached for the belt rather than continue to try to put Woodburn in handcuffs or restrain him in some other manner, Woodburn escaped, and he went to a different establishment from where he escaped, where he was able to enter because the door was left unlocked when a knife-sharpening vendor was let out and was able to stab Aguilar because those freshly-sharpened knives had just been put out by that vendor. Pls' Orig. Pet. ¶¶ 21–35. As with the failure to secure the arrestee in *Ballard*, Officer Spradlin's alleged failure to failure to maintain and use his duty belt merely furnished the condition that made it possible for Woodburn to reach Aguilar and stab him, which was also made possible by alleged intervening causes, is insufficient to show the requisite causation. *Ballard*, 174 S.W.3d at 266 ("The actual cause of Mark's death was his deliberate decision to flee into freeway traffic and a separate car's hitting him there; the failure to secure Mark in the first place merely furnished the condition that made it possible for him to escape and then run into oncoming traffic"); *Bossley*, 968 S.W.2d at 343 ("Although [Bossley's] escape through the unlocked doors was part of a sequence of events that ended in his suicide, the use and condition of the doors were too attenuated from [his] death to be said to have caused it."); *cf. Michael v. Travis Cnty Hous. Auth.,* 995 S.W.3d 909, 914 (Tex.

App.—Austin 1999, no pet.) (finding proximate cause for injuries sustained when pitbulls escaped through fence of dwelling owned and maintained by housing authority which was "meant to protect passers-by from vicious dogs, but which, because of defects, failed to serve its basic purpose" and where "attack occurred on a nearby sidewalk in close proximity to the fence" and "the record here does not show the type or degree of intervening causes, nor the attenuation and remoteness of causation, found in *Bossley*").[3]

Plaintiffs also have not—and cannot—show Aguilar's injuries were caused by a condition or use of tangible personal property within the meaning of Section 101.021(2) because their true complaint is that Officer Spradlin reached for secure his belt that had come loose rather than continue to handcuff Woodburn or, more broadly, failed to restrain Woodburn, not that his duty belt came loose. Pls' Orig. Pet. ¶ 26 ("Spradlin attempted to continue to restrain Woodburn by placing him in handcuffs. However, during the exchange, Spradlin's duty belt came loose, Spradlin put his handcuffs down and, with both hands, attempted to put his duty belt back on."), *id.* ¶ 58 (complaining that Officer Spradlin "prioritize[ed] his failing duty belt over continuing to restrain a potentially violent and aggressive Woodburn"). As the Texas Supreme Court noted in *Bossley*, "[t]he real substance of plaintiffs' complaint is that Roger's death was caused, not by the condition or use of property, but by the failure of Hillside's staff to restrain him once they learned he was still suicidal. The Tort Claims Act does not waive Dallas County MHMR's immunity from such a complaint." *Id.* at 343. In cases where the requisite causal nexus lacking between the TTCA's use requirement and the injuries complained is lacking, the real substance of the claim is not a use or

[3] The *Michael* Court distinguished *San Antonio State Hosp. v. Koehler*, 981 S.W.2d 32 (Tex. App.—San Antonio 1998, pet. denied), in which the San Antonio Appeals Court held causation was lacking for lawsuit over sexual assault of schizophrenic patient who escaped hospital through hole in fence to leave with male acquaintance and ex-patient who took her to a boarding house, where he sexually assaulted her, on grounds including that "[t]his intervening criminal act of a third party further attenuated the causal nexus between the property and the injury."

condition actionable under the TTCA but something else which is non-actionable. *Amador*, 993 S.W.2d at 256 ("[T]he real substance of the Amadors' complaint is SASH's failure to properly evaluate and restrain Cindy"); *Laman*, 970 S.W.2d at 672 ("[T]he real substance of Laman's complaint is that her injuries were caused by the failure of the Hospital's staff to supervise her as she was sedated, not by the condition or use of property"); *Anam*, 623 S.W.3d at 19 ("[T]he real substance of the Anams' claim is that Zachary's suicide was caused not by the failure to refasten his seatbelt or the condition of the seatbelt but by the fact that Wall failed to detect and remove Zachary's gun before putting him in the patrol car."). Plaintiffs' true complaint is that Officer Spradlin—and APD generally—failed to restrain Woodburn, not that Officer Spradlin failed to maintain and use his duty belt or that the City provided him with a defective duty belt. But the TTCA is a limited immunity waiver, and it does not waive immunity for a failure to restrain a suspicious person.

Causation is lacking even though Plaintiffs' petition, while not indicating the exact distance geographically and temporarily between the duty belt coming loose and Aguilar's death, may perhaps be interpreted to suggest that it was close in time and location. See Pls' Orig. Pet. ¶¶ 2, 32, 34 (describing sequence of events as "minutes later" and "moments later"); *but see id.* ¶¶ 26, 28, 32, 33 (alleging that the death took place in a different commercial establishment from where the belt came loose and further alleges intervening causes allegedly contributing to Aguilar's death, including an alleged failure to lock the door of Freebird's after a suspicious person was seen peering through the window). Although the *Bossley* Court noted in its analysis that Bossley's death was "distant geographically, temporally, and causally from the open doors at Hillside," *Bossley*, 968 S.W.2d at 343, mere geographic and temporal proximity does not necessarily show proximate cause, particularly when the ultimate cause of injury differs radically from the alleged condition

or use of property giving rise to that injury, and *Bossley* and its progeny do not turn solely on geographic and temporal proximity. *Amador*, 993 S.W.2d at 256–57 (rejecting argument that causation was present because of geographic and temporal proximity where "the real substance of the Amadors' complaint is SASH's failure to properly evaluate and restrain Cindy," for which immunity was not waived under the TTCA); *Hendrix v. Bexar Cnty Hosp. Dist.*, 31 S.W.3d 661, 662 (Tex. App.—San Antonio 2000, pet. denied) (hospital immune from claim over employee's sexual assault of patient; while patient claimed injuries were caused by condition or use of tangible personal or real property because employee used examination room, examination table, patient gown, and PA system to commit assault, "[w]e have previously refused to distinguish *Bossley* based on geographic and temporal distinctions," and employee's "use of the examination room, examination table, patient gown, and public address system did not cause the assault; they merely furnished some of the conditions that made the assault possible"); *Ballard*, 174 S.W.3d at 263 (dismissing claim for want of jurisdiction even though "[t]he petition does not state, and no one presented evidence concerning, the second police car's location at the time of the escape, whether or how fast the car was then moving, or how soon Mark was struck after he escaped. Ballard's reply to the jurisdictional plea, however, alleged, without evidentiary support, that the second police car was moving at the time of the escape and that Mark was killed "immediately" upon exiting the patrol car.). Notably, *Bossley* also focuses on *causal* distance, not just geographic and temporal distance, and a duty belt coming loose and a death by stabbing at the hands of an arrestee who escaped is more causally removed than, say, an emergency brake on a vehicle not being engaged, thereby rolling backward down an incline into a grounded helicopter as in *PHI*, or even vicious pit bulls escaping a defective fence as in *Michael*. That greater removal means that the City's immunity is not waived for the claim, and the duty belt coming loose merely furnished the

condition that made it possible for Woodburn to escape and stab Aguilar and did not cause it within the meaning of Section § 101.021(2) of the Texas Tort Claims Act.

## V. CONCLUSION

The facts of this case are tragic, but the tragedy of what happened cannot enlarge the limited waiver of the City's immunity for certain injuries under the Texas Tort Claims Act. As one court of appeals has put it, "[t]he horrific nature of the injury inflicted on appellee cries out for damages. However, waiver of governmental immunity is a matter addressed to the legislature, and we are bound by its statutes in that regard." *Texas Youth Comm'n v. Ryan*, 889 S.W.2d 340, 345 (Tex. App.—Fort Worth 1994, no writ). Even assuming the truth of Plaintiffs' allegations, and liberally construing them, what happened to Aguilar is too removed from the issue of the allegedly misused, mis-maintained, or defective duty belt to have been said to have been caused by Officer Spradlin's alleged failure to maintain and use his duty belt or the City's provision of a defective belt. Plaintiffs' true complaint is not that the duty belt malfunctioned, but that APD failed to restrain Woodburn to prevent Aguilar's death. But there is no waiver for the City's immunity for such a complaint. For the foregoing reasons, Defendant City of Austin respectfully requests that Plaintiffs' claims against it be dismissed for lack of subject-matter jurisdiction.[4]

RESPECTFULLY SUBMITTED,

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*/s/ Hannah M. Vahl*
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[4] And because the issue is not one of pleading sufficiency, and the defect is not one that could be cured through pleading, Defendant City of Austin respectfully request that the claims be dismissed without leave to amend, i.e., with prejudice. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004).

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CAUSE NO. D-1-GN-21-007467

| | | |
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| AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR AND NANETTE MOJICA, INDIVIDIALLY, *Plaintiffs,* | § | IN THE DISTRICT COURT OF |
| v. | § | TRAVIS COUNTY, TEXAS |
| TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN, *Defendants.* | § | 201ST DISTRICT COURT |

**DEFENDANT CITY OF AUSTIN'S NOTICE OF HEARING**

PLEASE TAKE NOTICE that Defendant City of Austin's Plea to the Jurisdiction has been set for hearing on **June 28, 2022 at 2:00 PM for 1.5 hours** on the Central Docket in the Travis County Civil District Courts.

Pursuant to the existing Emergency Orders resulting from the COVID-19 pandemic, this hearing will take place remotely, using Zoom videoconferencing, which is free to download at https://zoom.us, and is available as an app for smart phones and tablets. Since several cases may be scheduled at the same time, your case may be called later in the day [and possibly later in the week if it is on the long docket], and you must be available when your case is called. Prior to the hearing, the assigned court will email all counsel and self-represented parties for whom it has current email addresses, the court's instructions and procedures, with information on how to access

the hearing on Zoom. If your current email address is not on file, you do not receive the instructions and procedures from the court at least two days prior to the hearing, or you do not have access to the internet over a smart phone, tablet, or computer, please contact the Court Administrator's office at 512-854-2484 for information on how to participate in the hearing.

RESPECTFULLY SUBMITTED,

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**ATTORNEYS FOR DEFENDANT SAFARILAND, LLC**

*/s/ Hannah M. Vahl*
Hannah M. Vahl

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Envelope ID: 64629389
Status as of 5/25/2022 4:01 PM CST

Associated Case Party: SAFARILAND LLC

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Associated Case Party: TAVISTOCK FREEBIRDS LLC

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Associated Case Party: AMY-MARIE HOWARD

| Name |
|---|

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Associated Case Party: AMY-MARIE HOWARD

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Associated Case Party: CITY OF AUSTIN

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CAUSE NO. D-1-GN-21-007467

| | | |
|---|---|---|
| AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR AND NANETTE MOJICA, INDIVIDIALLY, *Plaintiffs,* | § | IN THE DISTRICT COURT OF |
| v. | § | TRAVIS COUNTY, TEXAS |
| TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN, *Defendants.* | § | 201ST DISTRICT COURT |

**DEFENDANT CITY OF AUSTIN'S REPLY**
**IN SUPPORT OF ITS PLEA TO THE JURISDICTION**

TO THE HONORABLE JUDGE GUERRA GAMBLE:

The City files this reply brief in support of its Plea to the Jurisdiction and, in support, respectfully shows as follows:

1. ***Texas Dept. of Corrections v. Jackson* is about a belt, but the resemblance to this case ends there, and does not involve an attenuated causation issue as this case does.**

*Texas Dept. of Corrections v. Jackson*, 661 S.W.2d 154 (Tex. App.— Houston [1st Dist.] 1983, writ ref'd n.r.e.) is not helpful in deciding the City's plea. In *Jackson*, the plaintiff, a former inmate who trained and worked as an electrician while he was incarcerated, was electrocuted and had to have his left arm amputated. *Id.* at 155. He alleged that incident occurred his tool belt slipped and as he was falling back, he instinctively reached up and grabbed a wire. *Id.* The *Jackson* court held that there was an immunity waiver for the claim, but its reasoning was not particularly helpful.

The appellant apparently argued that "the negligence of State employees does not constitute a waiver of government immunity," and the court responded:

> The appellant's contention that the negligence of state employees does not constitute a waiver of governmental immunity created by the Texas Tort Claims Act is not the issue in the instant case. The issue is whether the appellant furnished and failed to replace a tool belt which was insufficient or inappropriate for the purpose for which it was used. We hold that the appellee's pleadings and proof were sufficient to bring him within the waiver of governmental immunity created by the Texas Tort Claims Act.

*Id.* at 158. The real issue, to the court, was not whether there was an immunity waiver, but whether sufficient evidence had been presented that an issue with the tool belt is what caused the electrocution, since no one saw the accident, and the plaintiff himself did not remember what happened and was simply speculating that the slipping tool belt had caused the issue. *Id.* at 155–56. The court rendered a take-nothing judgment for the government on the ground that there was insufficient evidence the belt proximately caused the plaintiff's injury. Id. at 157–58. *Jackson* does not address the attenuated causation issue presented by this case. In *Jackson*, the allegation was that the slipping tool belt caused Jackson to grab onto a live wire and get electrocuted. While Plaintiffs contend that this causal chain was attenuated—that the slipping tool belt gave Jackson the sensation of falling, thereby causing him to instinctively grab onto the wire—there was no intervening criminal act by a third party, there was no additional series of events in between the tool belt failure and the complained-of injury.

**2. *Travis v. City of Mesquite* involves a police pursuit, not the police's failure to restrain.**

*Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992) (plurality op.) is also not helpful in deciding the City's plea. In *Travis*, the trial court granted summary judgment for four police officers and the City on a case stemming from the officers' high-speed chase of a vehicle that went the wrong way on a highway and collided with a third party. *Id.* at 96. The appeals court affirmed,

"holding that as a matter of law the police officers' actions could not constitute a proximate cause of the accident." *Id.* The Texas Supreme Court, in a plurality opinion, affirmed the grant of summary judgment as to two officers but reversed as to the other two officers and the city "because the summary judgment evidence raises a fact issue whether the decision to pursue, under the facts and circumstances, was a proximate cause of the accident." *Id.* In *Travis*, the police were chasing someone who fled after they went to check his identification, whereas in this case, police tried by failed to apprehend Woodburn. In effect, Plaintiffs' complaint is that police failed to chase him, or their chase was inadequate, not that they chased him when doing so was dangerous. Unlike in *Travis*, Woodburn may have well committed the crime he did regardless of whether police tried to stop him, and the police's actions did not prompt him to go to Freebirds to stab Mr. Aguilar; instead, Woodburn did that on his own initiative. *Travis* is also not helpful because the city in that case conceded, in argument on a motion for rehearing, that fact issues required reversal and remand for trial, whereas here the City makes no such concession. *Id.* at 99. Additionally, while *Travis* addresses proximate cause, it does not analyze the TTCA, and the plurality noted that it was specifically not addressing any immunity issues as they were not presented in the original summary judgment motion nor in the motion for rehearing. *Id.* at 100.

**3. *Michael v. Travis County Housing Authority* also lacks the attenuation present in this case, which is more like *Bonham v. Texas Dep't of Crim. Just.*, 101 S.W.3d 153, 160 (Tex. App.—Austin 2003, no pet.)**

*Michael v. Travis County Housing Authority*, 995 S.W.2d 909 (Tex. App.—Austin 1999, no pet.) likewise does not involve attenuated causation as in this case. In *Michael*, vicious dogs escaped through a fence with holes in it that it was the Housing Authority's responsibility to maintain and attacked the plaintiffs' eight-year-old daughter. *Id.* at 911–12. The court held that there was no causation problem under the TTCA: the purpose of the fence was to contain the dogs,

it failed in that purpose because it had holes, and the attack occurred on the nearby sidewalk. *Id.* at 914. Here, the purpose of a duty belt is to hold a police officer's gear, not to prevent third parties from committing murder, and a duty belt slipping does not necessarily mean that a third party will senselessly murder another person unprovoked. Instead, this case is instead more like *San Antonio State Hosp. v. Koehler*, 981 S.W.2d 32 (Tex. App.—San Antonio 1998, pet. denied), in which a hospital patient escaped through a hole in a fence with a an acquaintance she met at the hospital who later assaulted her at a boarding house and in which the San Antonio Court of Appeals held there was too much attenuation between the alleged property condition and the injury for a waiver of immunity to lie, and the hole in the fence did no more than furnish the condition that allowed the injury.[1] It is also more like *Bonham v. Texas Dep't of Crim. Just.*, 101 S.W.3d 153, 160 (Tex. App.—Austin 2003, no pet.), in which the Third Court of Appeals held that the layout and lack of surveillance equipment in the men's bathroom, where the plaintiff was sexually assaulted while cleaning, "provided no more than the condition for the guard's intervening intentional acts, which proximately caused Bonham's injuries."

**4. In *Tex. Dep't of Mental Health & Mental Retardation v. McClain*, which Plaintiffs cite, while a criminal act was involved, both a perpetrator and a victim who were under the State's control, and causation was also less attenuated.**

*Texas Dep't of Mental Health & Mental Retardation v. McClain*, 947 S.W.2d 694 (Tex. App.—Austin 1997, writ denied), while also involving the criminal acts of third parties, is likewise distinguishable from the facts of this case. In *McClain*, the victim Leta McClain was involuntarily confined to Austin State Hospital, where she was assaulted by a fellow patient Roger Pugh who either used a metal rod removed from a hospital locker or a metal foot pedal removed from his wheelchair to assault the victim, who subsequently died from her injuries. *Id.* at 695. The State

[1] Notably, the *Michael* court distinguished that case on the ground that the "intervening criminal act of a third party further attenuated the causal nexus between the property and the injury." *Id.* at 915.

argued, after a jury verdict in the victim's favor, that there had been no "use" of personal property under the TTCA because no state employee had "used" the rod or foot pedal. *Id.* at 696. The Third Court of Appeals rejected that argument and instead held that the case belonged in the line of cases finding an immunity waiver when the government negligently provides property that lacks an integral safety component when the lack of the integral safety component led to the plaintiff's injuries. *Id.* at 696–97; *see also, e.g.*, *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 300 (Tex. 1976) (TTCA waived immunity for claim by football player that school failed to furnish him proper protective equipment as part of his football uniform); *Robinson v. Central Texas MHMR Ctr.*, 780 S.W.2d 169, 169 (Tex. 1989) (TTCA waived immunity for claim that hospital employees took handicapped man to swim at local lake and failed to provide him with a life preserver although they knew he suffered from epileptic seizures that caused him to lose consciousness).

While *McClain* shows that the criminal act of a third party does not necessarily break a causal chain,[2] in that case, the hospital knew that the assailant "had a long criminal record that included convictions for voluntary manslaughter, assault with a deadly weapon, resisting arrest, and burglary. . . had a substance abuse problems… [and had been] diagnosed as a paranoid schizophrenic with antisocial personality disorder," *id.* at 695. The *McClain* court also found it "significant" that the victim had been involuntarily committed to the state's care, and noted that it had "a duty to exercise reasonable care to prevent a third person from intentionally harming or creating an unreasonable risk of harm to a person whom it has taken custody of[.]" *Id.* at 697–98. It added: "The state, having taken custody of both Pugh and McClain, owed McClain a duty to exercise reasonable care to control Pugh's conduct." *Id.* at 698. Here, by contrast, neither Woodburn nor Mr. Aguilar was under APD's control: as alleged in Plaintiffs' Original Petition,

[2] *See id. at* 697 ("One may also be liable for the acts of a third person when he or she has superior knowledge of a particular risk that the third person poses.").

Woodburn was "able to flee from restraint," Pls' Orig. Pet. ¶ 27, and Mr. Aguilar had been helping open up Freebirds when Woodburn entered that business through an unlocked door and attacked him, *id.* ¶¶ 29, 34.

**5. While true that the personal property need not be what actually inflicted the injury, the injury must still be "immediately and directly related" to the property, which is not the case here.**

Plaintiffs argue that the City claims the property itself must directly inflict the complained-of injury. Resp. at 12–13. But that is not what the City is arguing, and, indeed, the case the City principally relies on, *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998), even indicates that the personal property need not itself inflict the injury—although it instead suggests that the injury must be "immediate and directly related to" to the personal property. Here, there were many more steps in the causal chain than, say, the missing side rails for a hospital bed that the plaintiff fell out of suffered injury in *Overton Memorial Hospital v. McGuire,* 518 S.W.2d 528 (Tex.1975), a case discussed in *Bossley*. Plaintiffs allege that Officer Spradlin's duty belt fell and that allowed Woodburn to escape. But his belt could have still fallen and he could have nonetheless potentially captured Woodburn. Additionally, it was not just the belt that fell which led to Mr. Aguilar's death, but the fact that a side door to Freebirds happened to have been left open to let out a vendor, allowing Woodburn to enter the building, and the fact that the vendor that had just been let out of the building happened to have been a knife-sharpening vendor who left freshly-sharpened knives out on the counter, giving Woodburn, whom Freebirds knew to be "intoxicated and emotionally disturbed," easy access to them. Pls. Orig. Pet. ¶¶ 20, 31, 32–34.

## RELIEF REQUESTED

For the foregoing reasons, Defendant City of Austin respectfully requests that its Plea to the Jurisdiction be granted and that Plaintiffs' claims against it be dismissed with prejudice.

RESPECTFULLY SUBMITTED,

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

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## CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on counsel of record in compliance with the Texas Rules of Civil Procedure on June 28, 2022, as follows:

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Associated Case Party: AMY-MARIE HOWARD

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CAUSE NO. D-1-GN-007467

| | | |
|---|---|---|
| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,** | § | **IN THE DISTRICT COURT OF** |
| **Plaintiffs,** | § | |
| **v.** | § | |
| **TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN,** | § | |
| **Defendants.** | § | **201st DISTRICT COURT** |

**ORDER DENYING DEFENDANT CITY OF AUSTIN'S PLEA TO THE JURISDICTION**

The Court has considered Defendant City of Austin's Plea to the Jurisdication, responses and other papers properly on file with the Court and the arguments of counsel if any. The Court finds that Defendant City of Austin's Plea to the Jurisdiction should be DENIED.

SIGNED this 28th day of June, 2022.

PRESIDING JUDGE

MAYA GUERRA GAMBLE
459th DISTRICT COURT

CAUSE NO. D-1-GN-21-007467

| | | |
|---|---|---|
| AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR AND NANETTE MOJICA, INDIVIDUALLY,<br>*Plaintiffs,* | § | IN THE DISTRICT COURT OF<br><br>TRAVIS COUNTY, TEXAS |
| v. | § | |
| TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN,<br>*Defendants.* | § | 201ST DISTRICT COURT |

**ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR PERMANENT SEALING**

On July 14, 2022 came to be heard Defendant City of Austin's Motion for Permanent Sealing Order (June 27, 2022). After considering the Motion, the Response, the Reply, and the arguments of counsel, the Court FINDS as follows:

The Court FINDS that the City has made the requisite showing that it has a specific, serious and substantial interest in sealing certain portions of Plaintiffs' Response to the City's Plea to the Jurisdiction that reference or show portions of Austin Police Department internal affairs files concerning alleged employee misconduct that did not result in disciplinary action and are therefore confidential under Tex. Loc. Gov't Code § 143.089(g), and that the

requirements of Tex. Loc. Gov't Code § 143.089(g) clearly outweighs the presumption of openness and any probable adverse effect that sealing will have upon the general public health or safety, and that no less restrictive means that sealing through redaction portions of the filing that reference or show those documents will adequately and effectively protect the specific interest asserted.

It is accordingly ORDERED that Plaintiffs' Response to the City's Plea to the Jurisdiction be filed with the following portions redacted:

- The last bullet point at the bottom of page 6
- The entirety of page 7
- The section on page 8 beginning with the header "The Third Interview" and the two subsequent bullet points immediately following that header.

Any other requested redactions are hereby DENIED.

It is further ORDERED that the unredacted version of Plaintiffs' Response to the City's Plea to the Jurisdiction be filed under permanent seal.

SIGNED this 15 day of July, 2022.

JUDGE DAVID PHILLIPS

**APPROVED AS TO FORM ONLY:**

*/s/ /s/ Worth D. Carroll (by permission)*

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CAUSE NO. D-1-GN-21-007467

| | | |
|---|---|---|
| AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR AND NANETTE MOJICA, INDIVIDUALLY, *Plaintiffs,* | § | IN THE DISTRICT COURT OF |
| v. | § | TRAVIS COUNTY, TEXAS |
| TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN, *Defendants.* | § | 201ST DISTRICT COURT |

**DEFENDANT'S NOTICE OF APPEAL**

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

Pursuant to Tex. R. App. P. 25.1, Defendant City of Austin hereby gives notice that it desires to appeal the Order Denying Defendant City of Austin's Plea to the Jurisdiction signed June 28, 2022 to the Third Court of Appeals. The appeal is from the 459th District Court, Travis County, Texas, which presided over the hearing on the City's plea.

The appeal is accelerated pursuant to Tex. R. App. P. 28.1(a) because it is an interlocutory appeal of the denial of a plea to the jurisdiction by a governmental unit under Tex. Civ. Prac. & Rem. Code § 51.014(8). The case is not a parental termination or child protection case, as defined in Rule 28.4.

The City's plea to the jurisdiction was filed and requested for hearing not later than the 180th day after the date the City filed its original answer. Tex. Civ. Prac. & Rem. Code § 51.014(c)(2). Accordingly, appeal "stays the commencement of a trial in the trial court pending resolution of the appeal" and "also stays all other proceedings in the trial court pending resolution of that appeal." Tex. Civ. Prac. & Rem. Code § 51.014(b). The City hereby invokes its right to the automatic stay under Section 51.014(b).

RESPECTFULLY SUBMITTED,

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MEGHAN L. RILEY, CHIEF OF LITIGATION

*/s/ Hannah M. Vahl*
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## CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing pleading on counsel of record in compliance with the Texas Rules of Civil Procedure on July 18, 2022, as follows:

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**CAUSE NO. D-1-GN-21-007467**

| | | |
|---|---|---|
| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,** | § | **IN THE DISTRICT COURT OF** |
| **Plaintiffs** | § | |
| | § | |
| **v.** | § | **TRAVIS COUNTY, TEXAS** |
| | § | |
| **TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN,** | § | |
| **Defendants.** | § | **201ST DISTRICT** |

**PLAINTIFFS' RESPONSE TO**
**DEFENDANT CITY OF AUSTIN'S PLEA TO THE JURISDICTION**

Three cases are dispositive in denying the City of Austin's Plea to the Jurisdiction:

(1) *Texas Dept. of Corrections v. Jackson*, 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.) (TTCA waiver when a defective belt fell off and caused a chain of events ending with the plaintiff getting electrocuted),

(2) *Michael v. Travis County Housing Authority*, 995 S.W.2d 909 (Tex. App. – Austin 1999) (TTCA waiver when 2 dogs escaped through holes in a fence and attacked a plaintiff on a sidewalk), and

(3) *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992) (TTCA proximate cause established when the City's failure to follow policy caused an injury, even though the ultimate harm was directly caused by a fleeing criminal).

These cases place Plaintiffs' allegations against the City squarely within the Texas Tort Claims Act's ("TTCA") waiver of immunity, and as a result (and for the reasons below), the City's Plea to the Jurisdiction ("Plea") should be denied.

## I.
## INTRODUCTION AND EXECUTIVE SUMMARY

The reason the City mandates such strict requirements for police officer equipment is because of its importance during critical moments. And when police equipment fails (as it did in this case), the City spends time and effort investigating the cause of the failure (as it did in this case) – so to prevent injuries and dangerous conditions from occurring in the future. Plainly, it is foreseeable to the City that equipment failures can cause injuries (like in *Texas Dept. of Corrections v. Jackson*, 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.), and when equipment failures occur, the City knows that its failure to follow standards and regulations can constitute a waiver of the Texas Tort Claims Act (as it did in *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992)).

Johnathon Aguilar would be alive today if Officer Spradlin followed City policy and used a duty belt that had necessary and integral safety components (known as belt "keepers"). The City's use of a duty belt without keepers caused Officer Spradlin's belt to fall off of his waist while attempting to restrain Woodburn, thereby allowing him – a known dangerous and violent person – to walk away from restraint, enter a connecting business, and stab Johnathon to death just moments after the belt's malfunction.

Plainly, had the City provided and used a duty belt with keepers (which are an essential integral safety component for duty belts), Officer Spradlin's belt would not have fallen off his waist and Woodburn – the killer – would not have immediately walked away to murder Johnathon in the adjacent business.

Based upon these allegations and the below reasons, Plaintiffs' suit against the City fits squarely within the TTCA's waiver of immunity, and the City's plea should be denied:

1. **Plaintiffs have alleged a valid waiver under the TTCA.** Plaintiffs have pleaded facts that affirmatively demonstrate jurisdiction by alleging a valid waiver of immunity,[1] as Plaintiffs' claim that a condition of the City's duty belt (the fact that it did not have appropriate and necessary keepers) caused Spradlin's belt to fall off and allowed Woodburn to escape next door and kill Johnathon. *Texas Dept. of Corrections v. Jackson*[2] addressed an almost identical theory and found it to fall within the TTCA's waiver.

2. **The City's reliance on *Bossley* is misplaced: a condition allowing a dangerous actor to escape and injure a person has been deemed to fall within the TTCA's waiver.** *Michael v. Travis County Housing Authority*[3] is controlling regarding the City's *Bossley* argument. In *Michael*, the Third Court of Appeals expressly rejected the City's argument that *Bossley* requires the property itself to directly inflict the injury. Rather, *Michael*, along with *Mesquite* and a litany of proximate cause cases, hold that multiple negligent actors may be proximate causes of an injury when they each contribute to the injury.

3. **Given the facts of this case, the City's proximate cause argument is more appropriately analyzed at the Summary Judgment stage – when the Court can weigh the facts to determine whether Plaintiffs can meet their factual burden.** The Court has wide discretion to – and should – deny the City's plea to allow a factual record to be developed.

## II.
## FACTUAL SUMMARY

### A. *Facts alleged in Plaintiffs' Petition*

Given the requirement for the Court to take as true Plaintiffs' allegations and to "liberally construe the pleadings, taking all factual assertions as true and looking to [the Plaintiffs'] intent,'"[4] the following facts alleged in Plaintiffs' Petition are relevant for the Court's analysis:

- On January 3, 2020, Austin Police Department ("APD") received a "suspicious person" call related to a man – later determined to be Dylan Woodburn – inside

[1] *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003).

[2] 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.).

[3] *Michael v. Travis County Hous. Auth.*, 995 S.W.2d 909, 913 (Tex. App.—Austin 1999, no pet.).

[4] *Tex. Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020) (quoting *City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015)).

Bennu Coffee ("Bennu"), disturbing customers, holding a large rock, and threatening customers.[5]

- After the call to police, Woodburn attacked a Bennu customer with a large object and was eventually wrestled to the ground and restrained by multiple Bennu customers.[6]

- The City's employee, Officer Spradlin, was the first APD officer to respond to the "suspicious person" call at Bennu.[7]

- When Spradlin arrived at Bennu, multiple Bennu customers were restraining Woodburn by holding him on the ground and preventing his escape (or any additional violent actions).[8]

- When Spradlin approached Woodburn, he directed the Bennu customers that were restraining Woodburn to release Woodburn.[9]

- The Bennu customers complied with Spradlin's order, and Spradlin attempted to continue to restrain Woodburn by placing him into handcuffs. However, during the exchange, Spradlin's duty belt came loose, Spradlin put his handcuffs down and, with both hands, attempted to put his duty belt back on.[10]

- While Spradlin attempted to re-secure his duty belt, Woodburn was able to stand up and walk from restraint – ultimately gaining access to Freebirds and killing Johnathon.[11]

***B. Facts disclosed in the City's recent production***

The City recently provided the results of an internal investigation into Johnathon's death and Spradlin's duty belt malfunction,[12] which provided Plaintiffs additional facts that

[5] Petition at ¶ 21.

[6] Petition at ¶ 22.

[7] Petition at ¶ 23.

[8] Petition at ¶ 24.

[9] Petition at ¶ 25.

[10] Petition at ¶ 26.

[11] Petition at ¶ 27.

[12] On January 6, 2020, City of Austin employee (and former APD Chief of Police), Brian Manley, stated that, "[o]bviously, [Spradlin's duty belt coming loose] is something that we do not expect to have happened. We expect to provide our officers with the best equipment, and we expect our equipment to perform appropriately." The City produced the results of this investigation, but has

will be included in a subsequent amendment. Because the Court is instructed to look to the Plaintiffs' intent and to liberally construe the facts alleged in determining whether to deny a plea to the jurisdiction, the Court should consider the following recently learned facts, which Plaintiffs intend to plead in an amended petition:

- On January 3, 2020, Officer Spradlin was not wearing an approved duty belt, but – instead – was wearing a duty belt provided by his prior APD supervisor. He was not wearing keepers on the non-approved and non-standard belt.

- After Johnathon was killed, the City of Austin conducted an internal review to determine whether Officer Spradlin violated APD policy, or any laws, during his involvement in Johnathon's death. During that internal review, Officer Spradlin gave three interviews.

***The First Interview: Spradlin admits that him not wearing keepers caused his belt to malfunction and allowed Woodburn to escape.***

- During the first interview, Officer Spradlin recounted that, when he attempted restrain Woodburn, Spradlin "realized his belt's not there [,] his taser's not there[, and his] belt's gone," and Woodburn was "able to get up and run out the door" as a result.

- In reality, Woodburn did not run out the door, he walked out – while Spradlin stood, distracted by and buckling his belt. Further, Spradlin did not attempt to chase after Woodburn and did not even tell him to stop – all because he was

marked the results confidential. Although Plaintiffs contest and object to this designation, Plaintiffs will file this response under seal.

distracted while trying to reattach his belt.

CHANCELLOR: 'Kay. Did you lose a little bit of focus on him when the incident happened with your belt?

SPRADLIN: When I realized that my taser wasn't there I did.

CHANCELLOR: Okay. And walk me through what was going on in your mind at that point.

SPRADLIN: My belt's not here. Where did it go? And I need to get him but I gotta get my belt.

CHANCELLOR: 'Kay. So Mr. Woodburn, he - he stood up and left the coffee shop. He actually walked out, got to the door, and then ran, right?

SPRADLIN: He ran out as far as I remember.

CHANCELLOR: 'Kay. Did you give him any commands to, "Stop?"

SPRADLIN: I don't recall telling him to, "Stop," once he stood up.

CHANCELLOR: Okay. And why was that?

SPRADLIN: Uh, I n- probably because I'm focused on trying to find my gun belt.

– Spradlin stated that his belt "completely fell off because [he] didn't have his keepers on that day." He stated that he realized he did not have his keepers on his belt before the incident with Woodburn and that he was concerned about his lack of keepers for safety reasons.

CHANCELLOR: Okay. Was that concerning to you?

SPRADLIN: Yes. Uh, my belt stays pretty tight. Um, once you get it locked in it - it - it's a tight belt but I still like to have my keepers 'cause I'll (tell you) - for this reason.

CHANCELLOR: And what is the purpose of keepers?

SPRADLIN: In case it does c- the buckle does come undone the keepers will help hold it to your hand belt so it doesn't come completely off your waist.

– Spradlin further admitted that failing to wear keepers was a "safety concern" and that, had he been wearing keepers, the belt "would have realistically stayed where it [was supposed to]."

–

- [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

– Spradlin again confirmed that he always wore keepers due to keepers being an essential safety component:

| | |
|---|---|
| WILSON: | But I'm sayin', you - so but based on what you're sayin', I'm just askin' you this question, just an open question. What you're explainin' to them is because you know that it'll fall off that's the reason why you - you carry keepers and you have 'em on (unintelligible)? |
| SPRADLIN: | That's why we wear 'em, yeah. |
| WILSON: | Okay. And that was - that was what you were meanin' at that particular time, because if you don't have 'em they'll fall , that why you? |
| SPRADLIN: | The- that will come - yeah, if it comes undone like mine did it will fall off. |

[redacted]

– [redacted]

– [redacted]

***The APD Investigation establishes that Spradlin's duty belt malfunction was a proximate cause of Johnathon's death.***

– During its investigation, APD determined the following timeline regarding Spradlin's duty belt malfunction.

– At 7:50am, APD first received a call from Bennu coffee regarding Woodburn threatening people in Bennu and Freebirds' parking lot.

– 20 minutes later, at 8:10, Spradlin arrived to Bennu/Freebirds' shared parking lot.

– 10 seconds after Spradlin's arrival (but before Spradlin left his car), Woodburn assaulted a man in Bennu, and Bennu customers subdued Woodburn by tackling him to the ground.

– A few seconds later while Spradlin was still sitting in his car, a Bennu coffee employee opened the front door and motioned for Spradlin to come into Bennu to help.

- Spradlin entered Bennu, pointed his taser at one of the men restraining Woodburn, and told him to "stop." The bystanders complied and let go of Woodburn as Spradlin knelt to arrest him.

- Four seconds later, Spradlin's duty belt came off and, when he attempted to reattach it to his waist, Woodburn stood up and walked out of Bennu.

- Spradlin did not chase after Woodburn – he did not even tell him to stop, due to the fact that he was distracted while trying to reattach his duty belt. Given his distraction, it took him twelve seconds to exit the store after Woodburn walked out.

- During the time that Spradlin was attempting to reattach his belt after its malfunction, it took Woodburn less than 30 seconds to enter into Freebirds, which is located across the small parking lot from, and in the same building as, Bennu. Once inside, Woodburn stabbed Johnathon multiple times.

- From the time the duty belt malfunction caused Woodburn's release to the time Woodburn was seen leaving Freebirds after killing Johnathon, only **two minutes and 48 seconds elapsed**.

## III.
## LEGAL STANDARDS

In Texas, a governmental unit is generally immune from tort liability unless the legislature has waived immunity.[13] Waivers to sovereign immunity are generally dependent on statute – which is the TTCA in Texas.[14] The TTCA only waives governmental immunity in a limited number of circumstances, one of which is "personal injury and death so caused by a condition or use of tangible personal or real property."[15]

[13] See *Harris County v. Dillard*, 883 S.W.2d 166, 168 (Tex. 1994).

[14] *See Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex.), *cert. denied*, 525 U.S. 1017 (1998).

[15] *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994) (quoting Tex. Civ. Prac. & Rem. Code § 101.021).

The party suing a governmental unit bears the burden of pleading facts that affirmatively demonstrate[s] jurisdiction by alleging a valid waiver of immunity.[16] And although resolution of a plea to the jurisdiction may be determined on (1) the pleadings or (2) an evidentiary record,[17] the City's plea should be denied if the Plaintiffs have alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause,[18] because the City's Plea only argues dismissal under the first theory.[19]

In determining whether the Plaintiffs have met their burden, trial courts should "liberally construe the pleadings, taking all factual assertions as true and looking to [the Plaintiffs'] intent.'"[20] And although a trial court may rule on a preliminary plea to the jurisdiction when "the pleadings affirmatively negate the existence of jurisdiction,"[21] a trial court has broad discretion to defer the decision on a plea to the jurisdiction to allow additional facts to be developed and discovered.[22]

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[16] *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003).

[17] *Tex. Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020) (quoting *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018)).

[18] *Tex. Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020).

[19] Plea, at fn. 1 ("The City is not challenging the existence of jurisdictional facts at this stage and is only challenging whether Plaintiffs have, and can, plead a claim against it that comes within the Texas Tort Claims Act's limited immunity waiver.").

[20] *Id.* (quoting *City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015)).

[21] *Tex. Dep't of Transp. v. Self*, No. 02-21-00240-CV, 2022 WL 1259094, at *6 (Tex. App.—Fort Worth Apr. 28, 2022, no pet. h.), reh'g denied (June 9, 2022).

[22] *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("[w]hether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion.").

## IV.
## ARGUMENT AND AUTHORITIES

### A. Plaintiffs alleged a valid waiver under the TTCA.

Woodburn – an aggressive and violent person – was able to walk from restraint and kill Johnathon just moments after he escaped due to Spradlin's duty belt malfunctioning, which occurred because Spradlin used his duty belt without integral and necessary keepers. Had Spradlin worn keepers, Woodburn would not have been able to escape from restraint and kill Johnathon less than three minutes later.

These allegations clearly fall within the TTCA's waiver of immunity,[23] as Plaintiffs' suit alleges that (a) Johnathon was stabbed and killed (b) as a direct result of (c) the defective condition or use of the City's belt.

An analogous factual scenario was previously held to fall within the TTCA's waiver of immunity in *Texas Dept. of Corrections v. Jackson*.[24] In that case, the plaintiff was injured after a tool belt he was provided by the State slipped and caused a chain of events that led to him being shocked by electricity.[25] Under the plaintiff's theory, the tool belt slipped because it contained an improper attachment that caused it to bind, which further caused him to have a sensation of falling, which further caused him to instinctively reach up and grab the electrical wires above him.[26]

Although the plaintiff in that case failed to meet his proximate cause burden *at trial* when he did not provide any evidence that the belt malfunctioned, that the belt malfunction

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[23] Namely that Johnathon's injuries were "caused by a condition or use of tangible personal [] property." Tex. Civ. Prac. Rem. Code § 101.121(2).

[24] 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.)

[25] *Id.* at 154-156.

[26] *Id.* at 156-157.

was caused by the condition of the belt, or that the belt malfunction was the cause of him reaching up and being shocked, the Court of Appeals found that the *allegations* were enough to bring the claim within the TTCA's waiver.[27]

The similarity is striking between the allegations in *Jackson* and the facts here.

| | ***Jackson*** | ***Howard*** |
|---|---|---|
| **Type of Equipment** | Belt | Belt |
| **Equipment Defect** | *Wrong* safety component | *Missing* safety component |
| **Defect Result** | Belt fell *down* | Belt fell *off* |
| **Did the equipment directly inflict the injury?** | No. Equipment defect → the belt fell → plaintiff had a sensation of falling → plaintiff instinctively reached up → plaintiff grabbed the electrical wire → the wire shocked him. | No. Equipment defect → the belt fell → Woodburn escaped moments later and killed Johnathon. |
| **TTCA Waiver?** | Immunity waived. | Immunity waived. |

*Jackson* is dispositive: Plaintiffs' petition alleges a valid liability theory under Tex. Civ. Prac. Rem. Code § 101.121(2), and, as a result, the City's plea should be dismissed.

**B. The City's reliance on *Bossley* is misplaced: a condition allowing a dangerous actor to escape and injure a person has been deemed to fall within the TTCA's waiver.**

The City argues that *Bossley* and its progeny yield dismissal in this case because the TTCA requires that the property itself – rather than some other force – actually inflict a plaintiff's injury to validly state a claim under the TTCA.[28]

[27] *Id.* at 158.

[28] Plea at pp. 4-6.

This argument is wrong and has previously been rejected by the Third Court of Appeals.

1. *Michael v. Travis County Housing* is controlling and contradicts the City's argument.

In *Michael v. Travis County Housing Authority*,[29] the Third Court of Appeals expressly rejected the City's argument that *Bossley*[30] requires the property itself to directly inflict the injury. In that case, the Third Court of Appeals found a valid TTCA waiver when a governmental actor negligently maintained a fence, which allowed two dogs to escape and maul a child on a nearby sidewalk.[31] In that case, the plaintiff was mauled by two pit bulls after they escaped through a hole in a fence maintained by the County.[32]

Like the City here, the County in *Michael* argued that *Bossley's* analysis required dismissal, because "the injury was caused by the dogs, not the fence, and therefore it cannot be said that a condition or use of property proximately caused the injury."[33] The Austin Court rejected the County's (and the City's) argument, reasoning that *Bossley* does not "require that [the] property causing injury must be the device that directly inflicts the injury.. . . as long as there is a reasonably close causal relation between the property and the resulting injury." The similarities – once again – are striking:

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[29] *Michael v. Travis County Hous. Auth.*, 995 S.W.2d 909, 913 (Tex. App.—Austin 1999, no pet.).

[30] 968 S.W.2d 339, 343 (Tex. 1998).

[31] *Michael* at 913.

[32] *Id.* at 911.

[33] *Id.* at 913.

| | *Michael* | *Howard* |
|---|---|---|
| **Did the equipment actually inflict the injury?** | No.<br>Property: Fence<br>Injuring thing: Dog | No.<br>Property: Belt<br>Injuring thing: Person |
| **Causal Link** | Dangerous dogs (not owned by the County) escaped because of a defective fence, which allowed them to run down the street and attack a third party. | Dangerous person escaped because of a defective belt, which allowed him to run across a parking lot and attack a third party. |
| **Temporal and Geographic Connection** | "The attack occurred on a nearby sidewalk in close proximity to the fence" and happened "immediately" after the dogs' escape. | The attack occurred in a nearby business close in proximity to where the belt malfunctioned. The attack happened less than 3 minutes after the belt allowed Woodburn's escape. |
| **TTCA Waiver?** | Immunity waived. | Immunity waived. |

Unlike the injury in *Bossley* but like the plaintiffs' injuries in *Michael*, Johnathon's stabbing was not "distant geographically, temporally, and causally" from the property malfunction.[34] Rather, the ultimate attack occurred at the same address that the property malfunctioned and occurred only moments after the defective property allowed Woodburn to escape – placing the Plaintiffs' allegation firmly within the TTCA's waiver.

2. <u>The actual injury need not be directly caused by the defective property – it need only be proximately caused by the property.</u>

The City's plea attempts to place a heightened causal standard than what is currently required of injured plaintiffs. But, because the Texas Supreme Court has "consistently construed the causation requirement in section 101.021(2) to be one of proximate cause, not

[34] *Michael* at 914.

a different standard such as immediate cause, direct cause, or sole cause,"[35] the City's argument should be rejected and its plea denied.

Whether it's the removal of a knee-brace that allowed a prior injury to resurface during a football game,[36] the failure to provide life jackets that allowed a swimmer to drown,[37] the failure to install beds with rails that allowed a patient to fall,[38] the failure to provide an ice scoop that allowed an environment for E.coli to grow in an ice receptacle,[39] or the failure to appropriately secure parts of a wheelchair that allowed a mentally ill person

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[35] *Michael* at 912-913, *citing Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 299 (Tex.1976), *and Bossley*, 968 S.W.2d at 342 ("Section 101.021(2) requires that for immunity to be waived, personal injury or death must be proximately caused by the condition or use of tangible property."), among other cases.

[36] *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex.1976). In *Lowe v. Texas Tech Univ.*, Lowe alleged that he injured his knee while playing football for the university. The injury allegedly occurred when a coach ordered him to remove his knee brace, which he wore because of a previous knee injury, and reenter a game without it. The Texas Supreme Court concluded that Lowe's injury was proximately caused by the removal of the brace, even though playing football – rather than the brace itself – was the direct cause of the injury.

[37] *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169, 171 (Tex. 1989). In *Robinson v. Central Texas MHMR Center*, MHMR took several patients, including Robinson, swimming. Knowing that Robinson was epileptic, MHMR and its employees failed to provide Robinson with a life preserver, and he subsequently drowned while swimming. And even though it was the plaintiff's epilepsy – and not the life preserver – that directly caused him to lose consciousness and drown while swimming, the Texas Supreme Court held that the failure to provide life preservers was a proximate cause of the plaintiff's injuries.

[38] *Overton Mem'l Hosp. v. McGuire*, 518 SW2d 528 (Tex. 1975). In *Overton Memorial Hospital v. McGuire,* the City owned and operated hospital waived immunity by failing to install rails on a bed of a patient, who fell from the bed while receiving postoperative. The Texas Supreme Court found that the "injuries were proximately caused by negligently providing a bed without bed rails," even though the rails themselves were not the direct cause of the plaintiff's injuries.

*See also, Hampton v. Univ. of Tex.- M.D. Anderson Cancer Ctr.*,6 S.W.3d 627, 631 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (where the court determined that a bed provided by hospital with bed rails that were not activated lacked an integral safety component, and this condition of tangible personal property triggered waiver of immunity.

[39] *Univ. of N. Tex. V. Harvey*, 124 S.W.3d 216(Tex. App.—Fort Worth 2003, pet. filed). In *University of North Texas v. Harvey*, the Fort Worth Court found proximate cause when a University failed to include an ice scoop at a drill team's water station, which contributed to the transmission of E.coli bacteria. The scoop itself was not a direct cause of the injury. Rather, the failure to provide a scoop led to bacteria getting into the ice and contaminating it, which led to an E.coli outbreak that caused plaintiffs' injuries.

to assault another patient,[40] Texas Courts have found valid TTCA waivers even when the defective property at issue only triggers the causal chain-of-events that leads to the plaintiff's injury.

This is because Texas Courts have long held that there can be more than one proximate cause of an injury,[41] so long as a more recent cause does not "intervene[] between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause."[42] And absent an intervening cause,[43] an event proximately causes an injury if the breach at issue is (a) a cause in fact of the harm[44] and (b) if the injury was foreseeable.[45]

Specifically relevant here, foreseeability "does not require that a person anticipate the precise manner in which injury will occur once he has created a dangerous situation through his negligence."[46] Further, although the criminal conduct of a third party *may* be a

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[40] *Texas Dept. of MHMR v. McClain*, 947 S.W.2d 694, 698 (Tex. App – Austin 1997, pet. denied). In *Texas Dept. of MHMR v. McClain*, a patient at a State hospital was assaulted and killed by a fellow patient when the patient attacked the other patient with a wheelchair part that the State did not secure. Even though it was the patient's violence and aggression that directly injured the victim and the State's actions only provided the opportunity for the patient to assault the other, the Third Court of Appeals concluded that plaintiff's injuries fell within the TTCA because there was a direct causal connection between the property supplied by the state and the injury that occurred.

[41] *See Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992).

[42] *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450 (Tex. 2006) (plurality op.).

[43] *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009).

[44] *Id.* Cause in fact requires "proof that (1) the negligent act or omission was a substantial factor in bringing about the harm at issue, and (2) absent the negligent act or omission ('but for' the act or omission), the harm would not have occurred."

[45] *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). A plaintiff proves foreseeability of the injury by establishing that "a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission."

[46] *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992); *Brown v. Edwards Transfer Co.,* 764 S.W.2d 220, 222 (Tex. 1988); *El Chico Corp. v. Poole,* 732 S.W.2d 306, 313 (Tex. 1987).

superseding cause which relieves the negligent actor from liability, the actor's negligence will not be excused when the criminal conduct is a foreseeable result of such negligence.[47]

These proximate cause principles requiring rejection of the City's plea are evident in *Travis v. City of Mesquite*.[48] In that case, third parties sued the City of Mesquite after they were injured when a fleeing driver crashed into their vehicles.[49] There, off-duty Mesquite police officers attempted to detain a driver for suspicious activities at a truck stop where the City employees worked security, but the driver fled the off-duty officers' request.[50] After the driver fled, the off-duty officers pursued the driver down the wrong-way, while on-duty officers responded and gave chase from the opposite direction.[51] After only 2-minutes, the high-speed car chase ended with the fleeing driver crashing into – and killing – the plaintiffs.[52]

Ultimately, the Texas Supreme Court held that the plaintiffs appropriately met their summary judgment burden on the proximate cause element[53] because the foreseeability and cause in fact elements were met – even though the actual injuries resulted from the actor fleeing from the police, driving recklessly, and crashing into the plaintiffs' vehicle, rather than the officers' decision to pursue the driver. But because the driver fleeing while driving

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[47] *Mesquite* at 98; *Poole,* 732 S.W.2d at 314; *Nixon,* 690 S.W.2d at 550; RESTATEMENT (SECOND) OF TORTS § 448 (1965).

[48] 830 S.W.2d 94, 96 (Tex. 1992).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

recklessly was a foreseeable result of the officers' decision to chase, the driver's subsequent negligent and criminal conduct did not relieve the officers from liability.

Here, Spradlin knew that keepers on a duty belt are safety features that prevent duty belts from creating a safety hazard and falling off. Further, Spradlin had knowledge before the event that his non-use of keepers created a safety hazard – yet he chose to proceed with his response to the Woodburn incident while knowing that he was using defective equipment.

And when the belt failed, as Spradlin knew it could, the belt's malfunction led to Woodburn – who was previously restrained and incapacitated – fleeing from restraint. Spradlin was so preoccupied and distracted by his belt falling off that he did not chase after Woodburn or even command Woodburn to stop. This allowed a dangerous and aggressive Woodburn the opportunity to run next-door and stab Johnathon to death – all of which occurred less than 3 minutes after Woodburn fled from his restraint.

As highlighted by *Mesquite* and the cases cited above, Spradlin's actions proximately caused Johnathon's death, and the City is liable – along with all persons and entities whose negligent conduct contributed to Johnathon's and Plaintiffs' injuries.[54]

### C. The City's proximate cause argument depends on factual development and requires additional time to complete discovery.

"Whether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be

[54] *Mesquite* at 98; *Poole,* 732 S.W.2d at 313; *Strakos v. Gehring,* 360 S.W.2d 787, 789 (Tex.1962); *McAfee v. Travis Gas Corp.,* 137 Tex. 314, 323, 153 S.W.2d 442, 447 (1941).

left largely to the trial court's sound exercise of discretion."[55] Because Plaintiffs have validly pleaded a TTCA waiver, and because the proximate cause analysis will depend on the development of a factual record, the Court should deny the City's plea until jurisdictional facts can be established through the adversarial process.

## V.
## CONCLUSION AND PRAYER FOR RELIEF

Because Plaintiffs have alleged sufficient facts to establish that the City does not enjoy immunity for Spradlin's use of a defective duty belt, the City's plea to the jurisdiction should be denied.

Respectfully submitted,

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[55] *Tex. Dep't of Transp. v. Self*, No. 02-21-00240-CV, 2022 WL 1259094, at *6 (Tex. App.—Fort Worth Apr. 28, 2022, no pet. h.), *reh'g denied* (June 9, 2022), *citing Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this document has been served on counsel of record pursuant to Tex. R. Civ. P. 21 and 21a on this 27th day of June, 2022.

*/s/ Worth D. Carroll*
Worth D. Carroll

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**IN THE THIRD COURT OF APPEALS**
**AUSTIN, TEXAS**

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THE CITY OF AUSTIN,
*Appellant*,

v.

AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF D. A., A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR AND NANETTE MOJICA, INDIVIDUALLY,
*Appellees*.

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Appeal from Cause No. D-1-GN-21-007467
201st District Court, Travis County, Texas

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# BRIEF OF APPELLANT

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**ORAL ARGUMENT REQUESTED**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**

## Other Authorities

## RECORD REFERENCES

Clerk's Record. Citations to the Clerk's Record will be to "CR." with the page number following, e.g., "CR.7."

## STATEMENT OF THE CASE

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|---|---|
| *Nature of the case*: | This is a personal injury case brought against the City of Austin under the Texas Tort Claims Act. Plaintiffs allege the condition or use of a City police officer's duty belt caused the stabbing death of Johnathon Aguilar. |
| *Course of proceedings:* | The City of Austin filed a non-evidentiary plea to the jurisdiction challenging proximate cause. CR. 33–52. |
| *Trial court*: | 201st Judicial District Court, the Honorable Maya Guerra Gamble presiding |
| *Disposition in the trial court*: | The trial court denied the City's plea to the jurisdiction. CR.130. This interlocutory appeal followed. CR.164–166. |

## STATEMENT REGARDING ORAL ARGUMENT

Because this case raises important and difficult questions about the proximate cause requirement and the application of the public duty doctrine, the City respectfully requests oral argument and believes that it will aid the Court's decisional process.

## ISSUES PRESENTED

1. Johnathon Aguilar tragically died after being stabbed by Dylan Woodburn. Police were called after Mr. Woodburn had been disturbing customers at Bennu Coffee. After police were called, Mr. Woodburn attacked a Bennu customer and was thereafter restrained by multiple other customers. A City police officer arrived and started to restrain Mr. Woodburn but, as he did so, his duty belt fell off. Thereafter, Mr. Woodburn escaped restraint, left Bennu, and went into Freebirds World Burrito, which he was able to do because the door to that business had been left unlocked. There, he used a knife that had been freshly sharpened, just delivered by a knife-sharpening vendor, and left out on the counter to stab Mr. Aguilar, causing his death. Was Mr. Aguilar's death proximately caused by a condition or use of the police officer's duty belt?

2. Under the public duty doctrine, law enforcement officers generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct. This lawsuit seeks to hold the City liable for criminal conduct based on the failure of one of its officers to protect Johnathon Aguilar from his murder at the hands of Dylan Woodburn.

Does the Texas Tort Claims Act confer subject-matter jurisdiction for such a claim?

## INTRODUCTION

TO THE HONORABLE THIRD COURT OF APPEALS:

Johnathon Aguilar died a tragic and senseless death at the hands of Dylan Woodburn, alleged to be an intoxicated and emotionally disturbed individual. His death is the kind that cries out for damages. But the City cannot properly be held liable for it—despite its less than perfect response when police were first called to assist.

The Texas Tort Claims Act provides a limited waiver of the City's immunity for certain damages arising from a condition or use of tangible personal property. To come within that immunity waiver, the damages must have been proximately caused by that condition or use. Plaintiffs allege that because the responding police officer's duty belt fell off as he went to restrain Mr. Woodburn—and Mr. Woodburn thereafter escaped restraint and stabbed Mr. Aguilar—Mr. Aguilar's death was proximately caused by a condition or use of the officer's duty belt. But the causal chain is too attenuated, and the duty belt falling off did no more than furnish the condition that made the injury possible. Plaintiffs have not and

cannot allege facts showing proximate cause under the Texas Tort Claims Act and, accordingly, their claims against the City should have been dismissed for want of subject-matter jurisdiction.

More broadly, Plaintiffs' true complaint is not that the first responding officer's belt came loose but, instead, that he failed to restrain Mr. Woodburn and generally failed to protect Mr. Aguilar from his murder at the hands of Mr. Woodburn. But law enforcement officers generally cannot be held liable for a failure to protect individual citizens from harm caused by criminal conduct. Plaintiffs' true complaint is that the officer failed to discharge his public duty to protect. But the duty of peace officers to protect the public from crime is a public duty, unenforceable by any one individual. If there is dereliction of such duty, the remedy lies in internal disciplinary proceedings or, if rising to that level, criminal proceedings—not tort lawsuits by individuals—and the Texas Tort Claims Act does not generally waive the City's immunity for plaintiffs to sue the City for its police officers' alleged failure to protect.

## STATEMENT OF FACTS

Plaintiffs alleged in their Original Petition that on January 3, 2020, the Austin Police Department ("APD") received a suspicious person call regarding Dylan Woodburn, who was inside Bennu Coffee threatening customers and who was intoxicated and emotionally disturbed. CR.9. After the call to police, Mr. Woodburn attacked a Bennu customer and was later wrestled to the ground and restrained by multiple Bennu customers. *Id.* APD Officer Patrick Spradlin was the first APD officer to respond to the suspicious person call. *Id.* Officer Spradlin directed the Bennu customers to release Mr. Woodburn. CR.10. He then attempted to place Mr. Woodburn in handcuffs. *Id.* But as he was doing so, his duty belt came loose. *Id.* Officer Spradlin then put down his handcuffs and attempted to secure his duty belt. *Id.* As he was attempting to secure his duty belt, Mr. Woodburn escaped. *Id.*

Mr. Woodburn then went to Freebirds World Burrito, where Freebirds' general manager Ryan Bramlett had previously witnessed Mr. Woodburn behaving erratically and peering into the door. *Id.* Bramlett entered Freebirds and locked the door behind him. CR.11. But he later unlocked the door to let a knife-sharpening vendor in and left the door

unlocked when he escorted the vendor out of Freebirds. *Id.* Mr. Woodburn then entered Freebirds and used one of the freshly-sharpened knives the vendor had left out on the counter to stab Mr. Aguilar, resulting in his death. *Id.*

In addition to suing the City and Freebirds, Plaintiffs also sue Safariland, the alleged duty belt manufacturer, and Galls, the alleged duty belt retailer, on the ground that the duty belt was negligently manufactured or designed. CR.5, 24–25. And in their response to the City's plea to the jurisdiction, Plaintiffs cited additional facts they "intend to plead in an amended petition." CR.203. Those facts included that at the time of the incident, "Officer Spradlin was not wearing an approved duty belt, but—instead—was wearing a duty belt provided by his prior APD supervisor. He was not wearing keepers[1] on the non-approved and non-standard belt." *Id.*

## SUMMARY OF ARGUMENT

The City of Austin's plea to the jurisdiction should have been granted because the limited waiver of immunity under the Texas Tort

[1] Keepers are loops that wrap around a duty belt and pant belt, thereby securing a duty belt to a pant belt. Wikipedia, the Free Encyclopedia, https://en.wikipedia.org/w/index.php?title=Police_duty_belt&oldid=1100849346.

Claims Act for tort claims caused by a condition or use of tangible personal property requires that the personal property proximately cause the complained-of damage, and that requisite proximate cause is lacking here. Officer Spradlin's duty belt falling down did no more than furnish the condition that made Mr. Aguilar's injury possible, and the real cause of his injuries was that Mr. Woodburn stabbed him. Plaintiffs' true complaint is not that Officer Spradlin's duty belt fell down, but instead that he failed to restrain Mr. Woodburn, thereby allowing him to escape and murder Mr. Aguilar. But the Texas Tort Claims Act does not generally waive immunity for the failure to restrain a person from committing criminal acts. And, more broadly, under the public-duty doctrine, the City cannot be held liable for the failure to protect specific individuals from criminal acts by third parties. Judgment should be rendered dismissing the claims against the City for lack of subject-matter jurisdiction.

## STANDARD OF REVIEW

A trial court's order granting or denying a plea to the jurisdiction is subject to *de novo* review. *See Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 929 (Tex. 2010). Additionally, an appellate court may entertain a new immunity argument for the first time on appeal. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). A reviewing court determines if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause, construing the pleadings liberally in favor of the plaintiffs and looking at the pleaders' intent. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend." *Id. at* 226–27. If the pleadings affirmatively negate the existence of jurisdiction, then the plea may be granted without allowing amendment. *Id.* at 227.

## ARGUMENT

### A. Plaintiffs cannot show that Johnathon Aguilar's death was proximately caused by the first responding officer's duty belt falling off.

#### 1. Plaintiffs have not and cannot allege facts showing the duty belt falling off was a cause in fact of Mr. Aguilar's death.

The Texas Tort Claims Act is a limited waiver of governmental immunity of governmental entities for certain tort claims. *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992) (noting "clear intent of the [Act] that the waiver of sovereign immunity be limited"); *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 927 (Tex. 2015) (strictly construing the Act "[g]iven the Legislature's preference for a limited immunity waiver").

Under the Act:

> 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 his 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 it a private person, be liable to the claimant according to Texas law.

Tex. Civ. Prac. & Rem. Code § 101.021.

For immunity to be waived under 101.021(2), "injury or death must be proximately caused by the condition or use of tangible property." *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998). Proximate cause, in turn, requires both "cause in fact and foreseeability." *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 929 (Tex. 2015). For a condition of property to be a cause in fact, the condition must "serve as a substantial factor in causing the injury and without which the injury would not have occurred." *Id.* "To be a substantial factor, the condition or use of the property 'must have actually caused the injury.'" *City of Dallas v. Sanchez*, 494 S.W.3d 722, 726 (Tex. 2016) (per curiam) (quoting *Dallas Cnty. v. Posey*, 290 S.W.3d 869, 872 (Tex. 2009)). "The requirement of causation is more than merely

involvement[.]" *Id.* at 343; *accord Texas Dep't of Crim. Just. v. Miller*, 51 S.W.3d 583, 588 (Tex. 2001) ("[T]hat some property is merely involved is not enough. Using that property must have actually caused the injury."). Causation is lacking if the tangible property "does no more than furnish the condition that makes the injury possible." *Bossley*, 968 S.W.2d at 343.

*Bossley* is instructive on when the Texas Tort Claims Act's causation requirement is lacking for a claim of personal injury or death predicated on the use or condition or tangible personal or real property. In *Bossley*, patient Roger Bossley was committed to Hillside Center, a treatment facility. *Id.* at 340. Hillside knew that Bossley was suicidal. *Id.* Hillside had a locked front door but a self-locking glass door just inside the front door was left open. *Id.* When a Hillside technician who was leaving for lunch (and who passed Bossley on the telephone in the hallway as she was leaving) unlocked the front door, Bossley pushed her aside and fled. *Id.* at 340–41. Hillside staff members chased Bossley about half a mile to Interstate Highway 30, where he attempted to hitchhike. *Id.* at 341. As he was approached by Hillside personnel and police, however, Bossley leaped into the path of a truck and was killed. *Id.*

The *Bossley* plaintiffs alleged that the Hillside technician's unlocking of the outer door without looking for Bossley—a use of property—and the unlocked inner door—a condition of property—gave rise to subject-matter jurisdiction under the Texas Tort Claims Act. *Id.* at 343. But the Texas Supreme Court disagreed: "Neither can be said to have caused [Bossley's] suicide." *Id.* While the doors permitted Bossley's escape, they did not cause his death. *Id.* "Although [Bossley's] escape through the unlocked doors was part of a sequence of events that ended in his suicide, the use and condition of the doors were too attenuated from [his] death to be said to have caused it." *Id.*

Here, although the duty belt falling off was part of a sequence of events leading to Mr. Aguilar's death, it did no more than furnish the condition that made Mr. Aguilar's death possible and cannot be said to have caused it. *Bossley*, 968 S.W.2d at 343 (unlocked doors part of a sequence of events that ended in suicide but did not cause it); *see also, e.g.*, *Texas Dep't of Crim. Justice v. Rangel*, 595 S.W.3d 198, 206 (Tex. 2020) (concluding that unlocked doors of treatment facility did not cause respondent's suicide); *Bonham v. Texas Dep't of Crim. Just.*, 101 S.W.3d 153, 160 (Tex. App.—Austin 2003, no pet.) (layout and lack of

surveillance equipment in the men's bathroom, where the plaintiff was sexually assaulted while cleaning, "provided no more than the condition for the guard's intervening intentional acts, which proximately caused Bonham's injuries"); *cf. City of Sugarland v. Ballard*, 174 S.W.3d 259, 266 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("The actual cause of Mark's death was his deliberate decision to flee into freeway traffic and a separate car's hitting him there; the failure to secure Mark [in the patrol car] in the first place merely furnished the condition that made it possible for him to escape and then run into oncoming traffic"); *Pakdimounivong v. City of Arlington*, 219 S.W.3d 401, 412 (Tex. App.—Fort Worth 2006, pet. denied) (in case where arrestee escaped from police car and was killed on highway by another car, injury was not caused by improper application of handcuffs and leg restraints; "[t]heir failure, if any, did not cause the window to break, nor cause Vattana to crawl out the broken window, nor cause Vattana to throw himself on to the highway in front of oncoming traffic. Vattana did these things.").

The sequence of events Plaintiffs allege is that the duty belt came loose, Officer Spradlin reached for the belt rather than continue to try to put Mr. Woodburn in handcuffs or restrain him in some other manner,

Mr. Woodburn escaped, and he went to a different establishment from where he escaped, which he was able to enter because the door was left unlocked when a knife-sharpening vendor was let out, and where he was able to stab Aguilar because those freshly-sharpened knives had just been left out by that vendor. CR.9–11. The duty belt falling down merely furnished the condition that made it possible for Mr. Woodburn to reach Aguilar and stab him, which was also made possible by alleged intervening causes. It is possible the belt could have fallen down and the City police officer could have nonetheless restrained Mr. Woodburn (or Bennu customers could have again intervened to restrain him). Thus, the duty belt falling down was not a "cause in fact" of Mr. Aguilar's death on these facts.

Causation is lacking even though Plaintiffs' petition, while not indicating the exact distance geographically and temporarily between the duty belt coming loose and Aguilar's death, may be read to suggest that it was close in time and location, and Plaintiffs asserted in their response to the City's plea that they could plead additional facts showing such

temporal and geographic proximity.[2] Although the *Bossley* Court noted, in holding the doors were not a cause in fact of Bossley's death, that his death was "distant geographically, temporally, and causally from the open doors at Hillside," *Bossley*, 968 S.W.2d at 343, mere geographic and temporal proximity does not necessarily show proximate cause, particularly when the ultimate cause of injury differs radically from the alleged condition or use of property giving rise to that injury, and *Bossley* and cases following it do not turn solely on geographic and temporal proximity. *See Hendrix v. Bexar Cnty Hosp. Dist.*, 31 S.W.3d 661, 662 (Tex. App.—San Antonio 2000, pet. denied) (hospital immune from claim over employee's sexual assault of patient; while patient claimed injuries were caused by condition or use of tangible personal or real property because employee used examination room, examination table, patient gown, and PA system to commit assault, "[w]e have previously refused to

[2] *See* CR.5, CR.11 (in petition, describing sequence of events as "minutes later" and "moments later"); CR.207 (asserting, in response to the City's plea, that "[d]uring the time that Spradlin was attempting to reattach his belt after its malfunction, it took Mr. Woodburn less than 30 seconds to enter into Freebirds, which is located across the small parking lot from, and in the same building as, Bennu. Once inside, Mr. Woodburn stabbed Johnathon multiple times." and "[f]rom the time the duty belt malfunction caused Mr. Woodburn's release to the time Mr. Woodburn was seen leaving Freebirds after killing Johnathon, only **two minutes and 48 seconds elapsed").**

distinguish *Bossley* based on geographic and temporal distinctions," and employee's "use of the examination room, examination table, patient gown, and public address system did not cause the assault; they merely furnished some of the conditions that made the assault possible"); *Amador v. San Antonio State Hosp.*, 993 S.W.2d 253, 256–57 (Tex. App.—San Antonio 1999, pet. denied) (rejecting argument that causation was present because of geographic and temporal proximity where "the real substance of the Amadors' complaint is SASH's failure to properly evaluate and restrain Cindy," for which immunity was not waived under the TTCA); *cf. Ballard*, 174 S.W.3d at 263 (dismissing claim for want of jurisdiction where "[t]he petition does not state, and no one presented evidence concerning, the second police car's location at the time of the escape, whether or how fast the car was then moving, or how soon Mark was struck after he escaped. Ballard's reply to the jurisdictional plea, however, alleged, without evidentiary support, that the second police car was moving at the time of the escape and that Mark was killed "immediately" upon exiting the patrol car.).

Moreover, *Bossley* also focuses on *causal* distance, not just geographic and temporal distance. Here, a duty belt coming loose is

causally removed from a death by stabbing at the hands of an escaped attempted arrestee. In *Michael v. Travis Cnty Hous. Auth.,* 995 S.W.2d 909, 914 (Tex. App.—Austin 1999, no pet.), this Court found the requisite proximate cause and waiver of immunity for injuries sustained when pitbulls escaped through fence of dwelling owned and maintained by housing authority which was "meant to protect passers-by from vicious dogs, but which, because of defects, failed to serve its basic purpose" when the "attack occurred on a nearby sidewalk in close proximity to the fence" and "the record here does not show the type or degree of intervening causes, nor the attenuation and remoteness of causation, found in *Bossley*." Here, however, unlike in *Michael*, in which the very thing designed to restrain the pitbulls—the fence—failed, thus allowing the pitbulls to escape and attack a young girl, the duty belt was not itself intended to restrain a person; instead, it was intended to hold items such as a gun, taser, and handcuffs that could aid police in restraining a person and was therefore more causally removed from the injury than the fence at issue in *Michael* (along with the difference that Michael did not involve the criminal act of a third person). Those differences show that the City's immunity is not waived for the claim, and the duty belt

coming loose merely furnished the condition that made it possible for Mr. Woodburn to escape and stab Aguilar and did not cause it within the meaning of Section § 101.021(2) of the Texas Tort Claims Act.

**2. At most, the duty belt falling off caused a failure to stop the complained-of injury and therefore cannot be said to be a cause in fact of that injury under Section 101.021(2).**

Plaintiffs' claim is that the City police officer failed to assist in restraining Mr. Woodburn because his duty belt fell off, and, accordingly, a condition or use of his duty belt proximately caused Mr. Aguilar's death at Mr. Woodburn's hands. But as Texas Supreme Court recently clarified in *City of Dallas v. Sanchez*, 494 S.W.3d 722 (Tex. 2016) (per curiam), a failure or delay in rendering aid occasioned by a condition or use of tangible personal property is not a "cause in fact" of an injury. While *Sanchez* dealt with medical assistance by EMS providers, its logic extends to aid by police officers as well. The failure to render aid is not a cause in fact of injury for purposes of Section 101.021(2).

In *Sanchez*, a 911 operator dispatched an ambulance to Matthew Sanchez's apartment complex to respond to a call regarding his drug overdose. *Id.* at 724. Once on scene, EMS personnel assisted a different drug-overdose victim at the same complex, erroneously concluding that

two closely timed 911 calls concerning overdose victims at the same complex concerned the same victim, and they did not treat Sanchez. *Id.* Sanchez's parents sued the City of Dallas and alleged:

> (1) the City's 9–1–1 dispatcher misused the phone system by hanging up before emergency responders arrived to assist Sanchez, or in the alternative, the 9–1–1 phone system malfunctioned, causing the call to disconnect prematurely; (2) the 9–1–1 dispatcher failed to follow proper procedure and violated various federal, state, and local laws and regulations by either disconnecting the call or failing to redial after the call disconnected; and (3) if the emergency responders had located Sanchez before leaving the premises, they 'would have most likely saved [his] life.

*Id.* at 725.

These allegations were insufficient to show the requisite causation, the Texas Supreme Court held. First, the use of property that simply hinders or delays treatment does not actually cause the injury and does not constitute a proximate cause of an injury. *Id.* at 726. Additionally, the 911-system malfunction was not a proximate cause of Sanchez's death. For the requisite causal nexus, the use or condition of tangible personal or real property must be a substantial factor without which the injury would not have occurred. *Id.* at 726. In that case, however,

> [a]lthough disconnection of the telephone call may have contributed to circumstances that delayed potentially life-saving assistance, the malfunction was too attenuated from the cause of Sanchez's death—a drug overdose—to be a proximate cause. . . The malfunction was merely one of a series of factors that contributed to Sanchez not receiving timely medical assistance. Sanchez's death was caused by drugs, the passage of time, and misinterpretation of information.

*Id.* at 727 (internal citations omitted).

Here, Plaintiffs allege that the falling duty belt allowed Mr. Woodburn to escape restraint and fatally stab Mr. Aguilar. CR.10. But such allegations are insufficient to make the falling duty belt a "cause in fact" of Mr. Aguilar's death. While the issue in this case is not the hindering or delay of treatment for an injury as in *Sanchez*, like in *Sanchez*, the allegation is a failure to *stop* an injury (or the consequence of an injury) rather than causing that injury in the first place. Like in *Sanchez*, in which the true cause of the complained-of injury was a drug overdose and the missteps in the 911 response simply hindered or delayed treatment, the true cause of Mr. Aguilar's death was Mr. Woodburn stabbing him, and the duty belt falling, at best, simply meant that Mr. Woodburn was not stopped. If "use of property that simply hinders or delays treatment does not actually cause the injury and does

not constitute a proximate cause of an injury," *Sanchez* at 726, neither can the use of property that hinders or delays police aid be said to cause the injury or be a proximate cause of an injury. The responding officer did not create the situation that led to Mr. Aguilar's death; he just failed to stop it.

*Roberts v. Healey*, 991 S.W.2d 873, 879 (Tex. App.—Houston [14th Dist.] 1999, pet. denied), while not involving the Texas Tort Claims Act's limited immunity waiver, is instructive on the proximate cause issue in this general context. In *Roberts*, a divorcing wife sued her divorce attorney for negligence and other cause of action on the theory that the attorney's failure to obtain a protective order against her estranged husband resulted in the death of her two children and injury to her mother after he attacked them. *Id.* at 876. The divorce attorney argued on summary judgment that his failure to obtain a protective order was not, as a matter of law, the proximate cause of the complained-of injuries because even if he had obtained the protective order, it would not have deterred the estranged husband from committing criminal acts of violence against the wife's family. *Id.* at 879. The Houston Court of Appeals agreed that proximate cause was lacking; the attorney's "failure

to obtain a protective order did no more than create the condition (absence of a protective order) that enabled [the estranged husband] to kill [his client's] children and wound her mother." *Id.* It added: "We hold that Healy's failure to obtain a protective order is too attenuated from Kennedy's criminal conduct to constitute a legal cause of injury to Karin, her mother, and her children." *Id.*

As in *Healy*, the duty belt falling down is too attenuated from Mr. Woodburn's criminal conduct to constitute a legal cause of Mr. Aguilar's injury. The duty belt could have fallen down and the City officer could have nevertheless restrained Mr. Woodburn; conversely, the duty belt could have remained secured and Mr. Woodburn could have nevertheless evaded restraint by the City's police officer. The duty belt falling down did no more than create the condition that allowed Mr. Woodburn to stab Mr. Aguilar but was not a legal cause of that injury. *See Healy*, 991 S.W.2d at 879. Like in *Healy*, the real allegation is that the responding officer failed to prevent Mr. Aguilar's murder, but his duty belt falling down did no more than furnish the condition that made Mr. Aguilar's murder possible.

### 3. Plaintiffs' true complaint is that the responding officer failed to restrain Mr. Woodburn, but there is no immunity waiver for such a complaint.

If the real substance of the complaint is that death was caused not by the condition or use of tangible personal property but by something else, the Texas Tort Claims Act does not waive immunity. *Bossley*, 968 S.W.2d at 343 ("The real substance of plaintiffs' complaint is that [Bossley's] death was caused, not by the condition or use of property, but by the failure of Hillside's staff to restrain him once they learned he was still suicidal. The Tort Claims Act does not waive Dallas County MHMR's immunity from such a complaint."); *cf.*, *e.g.*, *City of Austin v. Anam*, 623 S.W.3d 15, 19 (Tex. App.—Austin 2020, no pet.) (en banc) ("[T]he real substance of the Anams' claim is that Zachary's suicide was caused not by the failure to refasten his seatbelt or the condition of the seatbelt but by the fact that Wall failed to detect and remove Zachary's gun before putting him in the patrol car. The Tort Claims Act does not waive immunity from such a complaint."); *Doe v. City of Fort Worth*, 646 S.W.3d 889, 904 (Tex. App.—Fort Worth 2022, no pet.) ("The [true] substance of Doe's complaint is that her sexual assault occurred, not by the City's maintenance of a keycard system or provision of a keycard, but by the

City's 'allowing a sexual predator to work alone with and beside Jane Doe' without additional supervision and 'failing to protect [Doe] from sexual assault.'"); *Texas Dep't of Mental Health & Mental Retardation v. Lee*, 38 S.W.3d 862, 867–68 (Tex. App.—Fort Worth 2001, pet denied) ("The true substance of Lee's complaint is that the sexual assault was caused, not by the condition or use of the hospital doors, but by the failure of the hospital staff to protect her from her assailant when they knew that she was hypersexual and promiscuous and that male patients had exploited her hypersexuality in the past; conduct that does not fall within the Act's limited waiver of immunity."); *Lacy v. Rusk State Hosp.*, 31 S.W.3d 625, 630 (Tex. App.—Tyler 2000, no pet.) (where hospital patient escaped, went swimming, and drowned, "[f]ailure to lock a door through which the deceased escaped is not a 'use' of tangible property waiving immunity. Allegations that the hospital was negligent in its care or supervision of Michael are not actionable under the Tort Claims Act"); *Amador*, 993 S.W.2d at 255–56 (where plaintiffs sued over patient Cindy's sexual assault while out on hospital grounds and alleged use of tangible personal or real property based on "the misuse of entrance and exit doors, i.e., unlocking the door to permit Cindy to exit unsupervised

onto the hospital grounds" and "providing a chapel without lockable doors and/or using a chapel without proper security," no waiver of San Antonio State Hospital's immunity under the Act because "the real substance of the Amadors' complaint is [the hospital's] failure to properly evaluate and restrain Cindy.").

Plaintiffs have not—and cannot—show Mr. Aguilar's injuries were caused by a condition or use of tangible personal property because their true complaint is that Officer Spradlin reached for secure his belt that had come loose rather than continue to handcuff Mr. Woodburn or, more broadly, failed to restrain Mr. Woodburn, not that his duty belt came loose. CR.17 (complaining that Officer Spradlin "prioritize[ed] his failing duty belt over continuing to restrain a potentially violent and aggressive Mr. Woodburn"). In cases where the requisite causal nexus between the Texas Tort Claims Act's use requirement and the complained-of injuries is lacking, the real substance of the claim is generally not a use or condition actionable under the TTCA but something else which is non-actionable. *Bossley*, 968 S.W.2d at 545; *Anam*, 623 S.W.3d at 19; *Doe*, 646 S.W.3d at 904; *Lee*, 38 S.W.3d at 867–68; *Lacy*, 31 S.W.3d at 630; *Amador*, 993 S.W.2d at 255–56. Plaintiffs' true complaint here is that

Officer Spradlin—and APD generally—failed to restrain Mr. Woodburn, not that Officer Spradlin failed to maintain and use his duty belt or that the City provided him with a defective duty belt. But the Texas Tort Claims Act is a limited immunity waiver, and it does not waive immunity for a failure to restrain a person.

#### 4. Mr. Woodburn stabbing Mr. Aguilar may also be viewed as a superseding cause of his injuries, making the duty belt not a cause in fact of Mr. Aguilar's injuries for that reason as well.

Proximate cause is also lacking because the cause of Mr. Aguilar's death was Mr. Woodburn's stabbing, which was a new and independent cause, separate and apart from the duty belt falling. New and independent cause is a component of the proximate cause issue. *See Dallas Ry. & Terminal Co. v. Bailey,* 250 S.W.2d 379, 383–84 (Tex. 1952) ("The theory of new and independent cause is not an affirmative defense; it is but an element to be considered by the jury in determining the existence or non-existence of proximate cause."). While the criminal act of a third party does not necessarily break the causal chain, *see Nixon v. Mr. Prop. Mgmt. Co.,* 690 S.W.2d 546, 550 (Tex. 1985), courts, including this one, in construing Section 101.021, have found jurisdiction lacking when the injury was caused by the criminal act of a third party, and this

Court has previously interpreted cases from sister courts involving such criminal acts to turn on the issue of superseding cause. *See Bonham v. Texas Dep't of Crim. Just.*, 101 S.W.3d 153 (Tex. App.—Austin 2003, no pet.).

In *Bonham*, an inmate sued the Texas Department of Criminal Justice after she was sexually assaulted by a guard. She alleged her injuries were proximately caused by tangible personal and real property—specifically, the defective layout of the facility and that the facility lacked an integral safety component, which was surveillance equipment that would monitor the men's restroom. *Id.* at 158. She further alleged that these defects made it possible for the guard to perpetrate the assault undetected by other employees and that if the restroom had been equipped with surveillance equipment, her assault could have been prevented. *Id.* at 157. This Court held that subject-matter jurisdiction under the Texas Tort Claims Act was lacking, in part because:

> [T]he guard's sexual assault is the type of intervening intentional act contemplated and referred to in the caselaw as an example of when sovereign immunity is not waived . . . Although the layout of the facility was part of the context of the guard's sexual assault on Bonham, it was, at

> most, a condition that made the guard's intervening intentional act possible.

*Id.* at 159; *see also Doe*, 646 S.W.3d at 901–04 (issuance of key card or use of key card system allowing Jane Doe to come and go from animal shelter little to no supervision was not 'use' of tangible personal property for purposes of immunity waiver; "[t]he City's maintenance of a keycard system was but one of many circumstances that Doe alleged made her sexual assault possible, but Doe's pleadings did not demonstrate that it was the actual, contemporaneous cause of her injuries"); *Lopez v. McMillion*, 113 S.W.3d 447, 449–52 (Tex. App.—San Antonio 2003, no pet.) (where sheriff's deputy transporting inmate let him to use bathroom without restraints and without accompanying him, thereby allowing him to escape and ultimately rob and beat homeowners, use of bathroom door "may have furnished the condition that made [the homeowners'] injuries possible, but the use of the door was too attenuated from their injuries to be said to have caused them,"; and "it was Gorman's assault and robbery that caused [the homeowners'] injuries"); *Lee*, 38 S.W.3d at 862, 865, 867–68 (in suit brought by patient seeking recovery for her sexual assault by another HIV-positive patient in which patient alleged her injuries were caused by the hospital's failure to lock the door to her room and to provide

locking devices on the doors between the men's and women's wings of the hospital, "[n]either can be said to have caused Lee's injuries from the sexual assault"); *Hendrix*, 31 S.W.3d at 663 (in suit alleging that a hospital employee assaulted the plaintiff under the guise of performing a breast exam, "use of the examination room, examination table, patient gown, and public address system did not cause the assault; they merely furnished some of the conditions that made the assault possible"); *Scott v. Prairie View A & M Univ.,* 7 S.W.3d 717, 720 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (claims by participants in youth summer program, one of whom was raped by a counselor and the other was unsuccessfully coerced into having sex with that same counselor, did not fall within Texas Tort Claims Act's waiver of immunity for claims arising from condition or misuse of property; their "claim regarding the dormitory room and the money used to rent the hotel rooms is too attenuated from the claimed injuries to have said to have caused them. While these tragedies occurred on property either owned or rented by the state, the property did not cause [their] injuries"); *Lamar Univ. v. Doe*, 971 S.W.2d 191, 196 (Tex. App.—Beaumont 1998, no pet.) (in suit over a Lamar University student paying minor children to be photographed and

videotaped in explicit sexual poses, no waiver of immunity under the Texas Tort Claims Act predicated on leasing dormitory room to student; "it was the occupant of the dormitory room who brought about the injuries to the Doe children, not the dormitory itself . . . [T]he dorm room merely provided a setting for [the student] to perform his sexual misconduct"); *Texas Youth Comm'n v. Ryan*, 889 S.W.2d 340, 341, 343–45 (Tex. App.—Fort Worth 1994, no writ) (where individual was beaten, stabbed, and raped by a student in the Texas Youth Commission's custody, while "appellees lawsuit is not automatically barred by the [Texas Tort Claims Act] simply because criminal conduct played a role in her injuries . . . . the use of written diagnostic tools in this case simply does not rise to the level required to implicate a waiver of sovereign immunity under the [Texas Tort Claims Act]"). While *Scott*, *Lee*, and *Lamar Univ.* were not explicitly decided on grounds of intervening or superseding cause, the *Bonham* Court nevertheless cited them for the proposition that the intervening criminal conduct meant immunity was not waived. *Bonham*, 101 S.W.3d at 159.

Where this Court has previously found an immunity waiver in a Texas Tort Claims Act case involving a sexual assault and allegation that

it was caused by a condition or use of tangible personal property, this Court found it significant that the state knew of the perpetrator's violent tendencies and both the victim and the perpetrator were under the State's care. *Texas Dep't of Mental Health & Mental Retardation v. McClain*, 947 S.W.2d 694 (Tex. App.—Austin 1997, writ denied). In *McClain*, Leta McClain was involuntarily confined to Austin State Hospital, where she was assaulted by a fellow patient Roger Pugh, who either used a metal rod removed from a hospital locker or a metal foot pedal removed from his wheelchair to assault the victim, who subsequently died from her injuries. *Id.* at 695. The State argued, after a jury verdict in the victim's favor, that there had been no "use" of personal property under the Texas Tort Claims Act because no state employee had "used" the rod or foot pedal. *Id.* at 696. The Third Court of Appeals rejected that argument and instead held that the case belonged in the line of cases finding an immunity waiver when the government negligently provides property that lacks an integral safety component when the lack of the integral safety component led to the plaintiff's injuries. *Id.* at 696–97; *see also, e.g.*, *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 300 (Tex. 1976) (Texas Tort Claims Act waived immunity for

claim by football player that school failed to furnish him proper protective equipment as part of his football uniform); *Robinson v. Central Texas MHMR Ctr.*, 780 S.W.2d 169, 169 (Tex. 1989) (Texas Tort Claims Act waived immunity for claim that hospital employees took handicapped man to swim at local lake and failed to provide him with a life preserver although they knew he suffered from epileptic seizures that caused him to lose consciousness). The *McClain* holding turned on the hospital's knowledge of the perpetrator's violent tendencies and its assumption of the care of the victim in the case. The hospital knew that the assailant "had a long criminal record that included convictions for voluntary manslaughter, assault with a deadly weapon, resisting arrest, and burglary. . . had a substance abuse problems… [and had been] diagnosed as a paranoid schizophrenic with antisocial personality disorder." *Id.* at 695. The *McClain* court also found it "significant" that the victim had been involuntarily committed to the state's care, and noted that it had "a duty to exercise reasonable care to prevent a third person from intentionally harming or creating an unreasonable risk of harm to a person whom it has taken custody of[.]" *Id.* at 697–98. It added: "The

state, having taken custody of both Pugh and McClain, owed McClain a duty to exercise reasonable care to control Pugh's conduct." *Id.* at 698.

Here, by contrast, neither Mr. Woodburn nor Mr. Aguilar was under APD's control. As alleged in Plaintiffs' Original Petition, even if the allegations may be read to indicate that Officer Spradlin initially took control over Mr. Woodburn, Mr. Woodburn was "able to flee from restraint," CR.10, and Mr. Aguilar had been helping open up Freebirds when Mr. Woodburn entered that business through an unlocked door and attacked him, CR.10–11. Nor was the responding officer aware when responding that Mr. Woodburn had the capacity to kill. Restatement (Second) of Torts § 442(b) (1965) (factor for whether intervening force is superseding cause is whether the it appears extraordinary that the negligence would have brought about the harm); *see also Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 451 (Tex. 2006) (approvingly citing Restatement (Second) of Torts factors "to aid us in determining when an intervening force rises to the level of a new and independent or superseding cause").

### B. The City retains immunity, and there is no jurisdiction under the Texas Tort Claims Act, for a claim that police failed to protect a person from criminal harm under the public duty doctrine.

The City retains its immunity for Plaintiffs' claims based on the public duty doctrine, under which, as expressed by one Texas appellate court, "the victim of the crime does not have recourse against the individual policeman for failing to take action to prevent or stop the commission of a crime." *Munoz v. Cameron County,* 725 S.W.2d 319, 321–22 (Tex. App.—Corpus Christi 1986, no writ); *accord, e.g.*, *Dent v. City of Dallas,* 729 S.W.2d 114, 116 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (no liability for failing to arrest a suspect under the public duty doctrine); *Crider v. United States*, 885 F.2d 294, 297 (5th Cir. 1989) (no liability for police officer failing to restrain drunk driver under public duty doctrine); *South v. Maryland,* 59 U.S. (18 How.) 396, 403, 15 L. Ed. 433 (1856) (allegation that sheriff neglected to 'preserve the public peace' was "public duty, for neglect of which he is amenable to the public, and punishable by indictment only").[3]

[3] *See also, e.g.*, *City of Rome v. Jordan*, 426 S.E.2d 861, 863 (Ga. 1993) ("[W]here failure to provide police protection is alleged, there can be no liability based on a municipality's duty to protect the general public"); *Ashburn v. Anne Arundel Cnty.*, 510 A.2d 1078, 1083 (Md. 1986) ("[W]e recognize the general rule, as do most courts, that absent a 'special relationship' between police and victim, liability for failure to

The public duty doctrine, which dates to the U.S. Supreme Court's decision in *South v. Maryland*, prevents law enforcement officers from being held liable for failure to protect individual citizens from harm caused by criminal conduct.[4] It is grounded in the idea that the duty owed is owned to the public in general, not the plaintiff, and a violation of that duty is best addressed through internal disciplinary proceedings or, if rising to that level, criminal proceedings. *See Morgan v. District of Columbia*, 468 A.2d 1306, 1311–12 (D.C. 1983) (en banc); *accord, e.g.*, *Ashburn*, 510 A.2d at 1084 ("[T]he 'duty' owed by the police by virtue of their positions as officers is a duty to protect the public, and the breach of that duty is most properly actionable by the public in the form of criminal prosecution or administrative disposition."). If otherwise, "police officials would be placed in the position of insuring the personal safety of

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protect an individual citizen against injury caused by another citizen does not lie against police officers."); *Crosby v. Town of Bethlehem*, 457 N.Y.S.2d 618, 619 (3d Dep't 1982) ("[A] municipality has a duty to furnish adequate police protection to the general public but cannot be cast in damages for failure to furnish adequate protection to a specific individual").

[4] The general rule is subject to exceptions, such as when there is a special relationship between the police and the victim. *See, e.g.*, *Cummins v. Lewis Cnty.*, 133 P.3d 458, 462 (Wa. 2006) (en banc) (recognizing special relationship exception to public duty doctrine when there is a direct contact or privity between the public official and the injured plaintiff, there are express assurances given by a public official, and those assurances give rise to justifiable reliance on the part of the plaintiff).

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every member of the community, notwithstanding limited resources and the inescapable choices of allocation that must be made." *Morgan,* 468 A.2d at 1311. Additionally, "[r]ather than exercise reasoned discretion and evaluate each particular allegation on its own merits, the police may well be pressured to make hasty arrests solely to eliminate the threat of personal prosecution by the putative victim." *Id.*

Many courts view the public duty doctrine as a failure of the duty element of a negligence claim because the duty that must be shown is a duty to the specific plaintiff and not to the public generally. *E.g.*, *Morris v. Anderson Cnty.*, 564 S.E.2d 649, 652 (S.C. 2002) ("The 'public duty rule' doctrine recognizes that, generally speaking, statutes which create or define the duties of a public office create no duty of care towards an individual member of the public."); *Kolbe v. State*, 625 N.W.2d 721 (Iowa 2001) ("a breach of duty *owed to the public at large* is not actionable unless the plaintiff can establish, based on the unique or particular facts of the case, a special relationship between the State and the injured plaintiff"). Accordingly, the issue is often litigated as a failure to meet an element of a negligence claim rather than one of immunity. *See, e.g., Shore v. Town of Stonington*, 444 A.2d 1379, 1380 (Conn. 1982) (affirming

grant of summary judgment to defendant on grounds of lack of duty to plaintiff's decedent based on public duty doctrine); *cf. Benson v. Kutsch*, 380 S.E.2d 36, 37 (W. Va. 1989) ("The public duty doctrine is a principle independent of the doctrine of governmental immunity, although in practice it achieves much the same result.").

But it is also a failure to show a statutory waiver of immunity under the Texas Tort Claims Act.[5] The waiver of immunity Plaintiffs rely on under Section 101.021 is for personal injury or death "so caused" by a condition or use of tangible personal property. Tex. Civ. Prac. & Rem. Code § 101.021(2). "[S]o caused" in Section 101.021(2) means "proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment." *Id.* § 101.021(1); *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 32–33 (Tex. 1983) (quoting *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 299 (Tex. 1976) (construing former version of statute)). To show negligence under Section 101.021, in turn, a litigant must show (1) a legal duty; (2) a breach of that duty; and (3) damages proximately caused by that breach. *Praesel v. Johnson*, 967

[5] *But see Gonzalez v. Saenz*, No. 04-05-00525-CV, 2006 WL 622578, at *3 (Tex. App.—San Antonio Mar. 15, 2006) (whether duty owed under public duty doctrine is not an issue based on immunity and, as such, cannot be reviewed in an accelerated appeal based on immunity).

S.W.2d 391, 394 (Tex. 1998) (elements of negligence). On the first element of duty, "the plaintiff must establish both the existence and violation of a duty owed *to the plaintiff*." *Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) (emphasis added).[6]

Officer Spradlin had a legal duty to preserve the peace, prevent or suppress crime, and make arrests. Tex. Code Crim. P. art. 2.13(a), (b)(1), (b)(4). That duty is one owed to the public at large, not any one individual. Although Plaintiffs' petition complains that he violated his duty to properly care for and use his duty belt, CR.15, the true substance of the claim in this case, in effect, is that he violated his duty to prevent or suppress crime. But that is not something that can be the subject of a negligence claim against the City under the Texas Tort Claims Act, nor does the Texas Tort Claims Act waive the City's immunity for such a claim. Plaintiffs' claims should have been dismissed for want of subject-matter jurisdiction.

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[6] Strains of the public duty doctrine appear to fit under the Texas Tort Claims Act's discretionary function exception, Tex. Civ. Prac. & Rem. Code § 101.056, and its exception for the failure to provide or the method of providing police or fire protection, *id.* § 101.055(3), but neither exception, at least as courts have so far construed them, appears to be a perfect fit. *See, e.g.*, *State v. Terrell*, 588 S.W.2d 784, 788 (Tex. 1979) (construing former version of Section 101.055(3) "to exclude from the Act only those acts or omissions which constitute the execution of or actual making of these policy decisions").

## RELIEF REQUESTED

For the foregoing reasons, Appellant City of Austin respectfully requests that the Court reverse the trial court's denial of its plea to the jurisdiction and render judgment dismissing Plaintiffs' claims for want of subject-matter jurisdiction.

RESPECTFULLY SUBMITTED,

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing documents contains 7,874 words, in compliance with Rule 9.4 of the Texas Rules of Appellate Procedure.

*/s/ Hannah M. Vahl*
Hannah M. Vahl

## CERTIFICATE OF SERVICE

This is to certify that I served a copy of the foregoing document on all parties on September 20, 2022, as follows:

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Hannah M. Vahl

**No. 03-22-00439-CV**

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**IN THE THIRD COURT OF APPEALS**
**AUSTIN, TEXAS**

---

THE CITY OF AUSTIN,
*Appellant*,

v.

AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF D. A., A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR AND NANETTE MOJICA, INDIVIDUALLY,
*Appellees*.

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Appeal from Cause No. D-1-GN-21-007467
201st District Court, Travis County, Texas

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**APPENDIX IN SUPPORT OF APPELLANT'S BRIEF**

# TAB A:
# ORDER DENYING DEFENDANT CITY OF AUSTIN'S PLEA TO THE JURISDICTION

21

CAUSE NO. D-1-GN-007467

| | | |
|---|---|---|
| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,** | § | **IN THE DISTRICT COURT OF** |
| **Plaintiffs,** | § | |
| **v.** | § | |
| **TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN,** | § | |
| **Defendants.** | § | **201st DISTRICT COURT** |

**ORDER DENYING DEFENDANT CITY OF AUSTIN'S PLEA TO THE JURISDICTION**

The Court has considered Defendant City of Austin's Plea to the Jurisdication, responses and other papers properly on file with the Court and the arguments of counsel if any. The Court finds that Defendant City of Austin's Plea to the Jurisdiction should be DENIED.

SIGNED this 28th day of June, 2022.

PRESIDING JUDGE

MAYA GUERRA GAMBLE
459th DISTRICT COURT

# TAB B:
# CIVIL PRACTICE & REMEDIES CODE § 101.021

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 5. Governmental Liability
Chapter 101. Tort Claims (Refs & Annos)
Subchapter B. Tort Liability of Governmental Units (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 101.021

# § 101.021. Governmental Liability

Currentness

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 his 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 it a private person, be liable to the claimant according to Texas law.

**Credits**
Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

**O'CONNOR'S NOTES**
**Editor's note:** The word "and" at the end of §101.021(1)(B) should probably be "or." *See* ***Bryant v. MTA***, 722 S.W.2d 738, 740 (Tex.App.--Houston [14th Dist.] 1986, no writ), *overruled on other grounds,* ***Fleming Foods, Inc. v. Rylander***, 6 S.W.3d 278 (Tex.1999).

**O'CONNOR'S CROSS REFERENCES**
See also ***O'Connor's Texas COA***, "Suits Against the Government," ch. 24, § 1 et seq.; ***O'Connor's Texas COA,*** "Texas Tort Claims Act--Negligence," ch. 25, § 1 et seq.; ***O'Connor's Texas COA,*** "Texas Tort Claims Act--Premises Liability," ch. 26, § 1 et seq.

**O'CONNOR'S CHARTS REFERENCES**
See Chart 6, "Waivers of Governmental Immunity Chart."

  

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**03-22-00439-CV**

# IN THE THIRD COURT OF APPEALS
**AUSTIN, TEXAS**

The City of Austin,
*Appellant*
v.
Amy-Marie Howard, Individually and as Next Friend of D.A., a Minor, and as a Representative of the Estate of Johnathon Aguilar, and on behalf of all those entitled to recover under the Texas Wrongful Death Act for the Death of Johnathon Aguilar and Nanette Mojica, Individually,
*Appellees*

Appeal from Cause No. D-1-GN-21-007467
201st District Court, Travis County, Texas

## Appellees' Brief
***Oral Argument Not Requested***

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**FEDERAL CASES**

## STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary, as binding precedent (*Ryder Integrated Logistics, Inc. v. Fayette Cnty.*,[1] *Michael v. Travis County Hous. Auth.*,[2] *Texas Dept. of Corrections v. Jackson*,[3] and *Travis v. City of Mesquite*[4] dispose of the City's arguments. As a result, the Court of Appeals can decide the issues without oral argument.

## ISSUES PRESENTED

(1) Given the proximity of the property malfunction to Johnathon Aguilar's killing (as well as the fact that Officer Spradlin implied that using keepers would have prevented Johnathon's death), do Appellees' allegations raise a fact issue regarding whether the gun belt failure was a cause of Johnathon's death under the Texas Tort Claims Act (TTCA)? Yes. Dylan Woodburn had just assaulted a person with a weapon but had been subdued and restrained before Officer Spradlin's property malfunctioned and allowed Woodburn to escape from restraint and kill Johnathon. Officer Spradlin's gun belt malfunctioned and caused Woodburn's escape because

[1] 453 S.W.3d 922 (Tex. 2015).

[2] 995 S.W.2d 909, 913 (Tex. App.—Austin 1999, no pet.).

[3] 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.).

[4] 830 S.W.2d 94, 98 (Tex. 1992).

Officer Spradlin was using a gun belt, or duty belt, without "keepers" – which are safety devices intended to prevent gun belts from failing (falling off) at critical moments. Officer Spradlin's gun belt malfunction allowed Woodburn to leave restraint and caused Officer Spradlin to become too distracted to even attempt to restrain Woodburn. Less than 3 minutes after Officer Spradlin's gun belt malfunctioned and Woodburn escaped, Woodburn entered an adjoining business and stabbed Johnathon to death.

(2) Does the Public Duty Doctrine warrant dismissal when the Legislature has waived governmental immunity for injuries arising from defective governmental property? No. Although police officers – and police departments – are typically not liable for policy decisions regarding whether (or how) to provide police services to the public, that no-duty principle does not absolve law enforcement from liability for all acts and omissions that occur while an officer is providing police protection to the public, and it does not absolve the City for causing Johnathon's death by using faulty equipment.

## STATEMENT OF FACTS

This appeal is from a wrongful death case related to a City of Austin (the City)/Austin Police Department (APD) officer's gun belt malfunctioning, which allowed a dangerous and violent person to escape from restraint, enter an adjacent business, and stab Johnathon Aguilar (Johnathon) to death.[5]

The following facts alleged in Appellees' pleadings[6] are relevant for the Court of Appeals' analysis:

**A. Johnathon was killed after Officer Spradlin's belt malfunctioned.**

On January 3, 2020, APD received a suspicious person call related to a man – later determined to be Dylan Woodburn – outside and inside Bennu Coffee (Bennu), disturbing customers, holding a large rock, and threatening customers.[7] After the call to police, Woodburn violently (and unprovoked) attacked a Bennu customer with a weapon and was eventually wrestled to the ground and fully-restrained by multiple Bennu customers.[8]

---

[5] C.R. at 200.

[6] *See Tex. Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020) (quoting *City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015)) (Reviewing courts take as true Plaintiffs' allegations and "liberally construe the pleadings, taking all factual assertions as true and looking to [the Plaintiffs'] intent.").

[7] C.R. at 9.

[8] C.R. at 9.

The City's employee, Officer Spradlin, was the first APD officer to respond to the call at Bennu.[9] When Officer Spradlin arrived at Bennu, multiple Bennu customers had restrained Woodburn by holding him on the ground to prevent his escape (or any additional violent actions).[10] As Officer Spradlin approached Woodburn, Officer Spradlin directed the Bennu customers that were restraining Woodburn to release Woodburn so that Officer Spradlin could handcuff him and continue restraining him.[11]

The Bennu customers complied with Officer Spradlin's order, and Officer Spradlin attempted to continue to restrain Woodburn by placing him into handcuffs.[12] However, during the exchange, Officer Spradlin's gun belt came loose, causing Officer Spradlin to put his handcuffs down to look for his gun belt so that he could attempt to reattach it.[13] While Officer Spradlin attempted to find and re-secure his gun belt, Woodburn stood up and walked away from restraint – ultimately gaining access to an adjoining business and killing Johnathon.[14]

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[9] C.R. at 9-10.

[10] C.R. at 10.

[11] C.R. at 10.

[12] C.R. at 10 and 153.

[13] C.R. at 10.

[14] C.R. at 10.

### B. The lack of keepers caused the gun belt to malfunction.

On the day Johnathon was killed, Officer Spradlin was not wearing an approved gun belt and instead was wearing a gun belt provided by his prior APD supervisor.[15] Officer Spradlin was not wearing keepers on the non-approved and non-standard belt.[16] In a post-mortem investigation conducted by the City that investigated Officer Spradlin's belt malfunction and Johnathon's killing, Officer Spradlin admitted to the City's investigators that police officers wear "keepers" because they are safety components:[17]

> *APD Investigator*: What you're explainin' to them . . . that [your gun belt] will fall off [and] that's the reason that you carry keepers and you have 'em on.
>
> *Officer Spradlin*: That's why we wear 'em, yeah.
>
> *APD Investigator*: . . . because if you don't have 'em they'll fall.
>
> *Officer Spradlin*: . . . yeah, if it comes undone like mine did it will fall off.

### C. Had Officer Spradlin worn a gun belt with keepers, Woodburn would not have escaped.

Woodburn was able to get up, walk away, and kill Johnathon next door because Officer Spradlin stopped restraining Woodburn when he "realized

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[15] C.R. at 203.

[16] C.R. at 203.

[17] C.R. at 204-206 (cleaned up).

his belt's not there[,] his Taser's not there[, and his] belt's gone," and Woodburn was "able to get up and run out the door" as a result.[18] When Woodburn left restraint and walked away, Officer Spradlin did not attempt to chase after Woodburn and did not tell him to stop – all because he was distracted while trying to reattach his belt.[19]

> Spradlin: [When my gun belt fell off, I was thinking] I need to get him but I gotta get my belt.. . . [I didn't tell him to stop as he left restraint] because I'm focused on trying to find my gun belt.

Spradlin stated that his belt "completely fell off because [he] didn't have his keepers on that day," that failing to wear keepers was a "safety concern," that the belt "would have realistically stayed where it [was supposed to]"[20] had he worn keepers, and that the purpose of wearing a belt with keepers was "cause, I'll (tell you) – for this reason."[21]

**D. The gun belt's malfunction was a cause of Johnathon's death.**

During a post-mortem investigation by the City, the City determined the following timeline regarding Officer Spradlin's gun belt malfunction:[22]

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[18] C.R. at 203.

[19] C.R. at 203.

[20] C.R. at 204.

[21] C.R. at 204.

[22] C.R. at 204-207.

| Time | Event |
|---|---|
| 7:50am | APD first received a call from Bennu regarding Woodburn threatening people. |
| 8:10am | Officer Spradlin arrived at Bennu's parking lot. |
| + 10 seconds (after Spradlin's arrival) | Unprovoked, Woodburn assaulted a man in Bennu, and Bennu customers subdued and restrained Woodburn. |
| + Beginning seconds after Woodburn's first aggravated assault. | Officer Spradlin entered Bennu, pointed his taser at one of the men restraining Woodburn, and told him to "stop." The bystanders complied and let go of Woodburn as Officer Spradlin knelt to arrest him. |
| + 4 seconds | Officer Spradlin's gun belt came off, and – when he attempted to find and reattach it – Woodburn stood up and walked out of Bennu. Officer Spradlin did not chase after Woodburn and did not tell him to stop because he was distracted while trying to reattach his gun belt. Given his distraction, it took Officer Spradlin twelve additional seconds to exit the store after Woodburn walked out. |
| + 30 seconds | While Officer Spradlin was reattaching his gun belt after its malfunction, Woodburn entered an adjoining business and stabbed Johnathon multiple times. |

From the time the gun belt malfunction caused Woodburn's release to the time Woodburn was seen leaving Freebirds *after* killing Johnathon, only 2 minutes and 48 seconds elapsed.[23]

[23] C.R. at 207.

## SUMMARY OF THE ARGUMENT

To defeat the City's claim of immunity, Appellees' need only raise a fact issue as to whether Officer Spradlin's gun belt malfunction was a cause-in-fact of Johnathon's killing – which Appellees' pleadings clearly do. Johnathon was killed in a neighboring business just minutes after Officer Spradlin's gun belt malfunction allowed Woodburn to leave restraint. Officer Spradlin admitted that Woodburn was allowed to leave restraint because of his gun belt malfunctioning, and that his gun belt malfunctioned because he was not wearing keepers – which are safety components designed to prevent this precise danger from occurring.

Officer Spradlin's gun belt malfunction was a cause-in-fact of Johnathon's death because Woodburn killed Johnathon in an adjoining business just minutes after the belt malfunction allowed him to leave where he had been fully restrained after violently assaulting another person with a weapon. The killing's proximity in time and place to the belt malfunction (in addition to Officer Spradlin's various admissions about the City's culpability) raise a fact issue as to the City's property malfunction being a proximate cause of Johnathon's death.

Four cases – among others – dispose of the City's attempt to avoid liability on immunity grounds:

(1) *Texas Dept. of Corrections v. Jackson* (TTCA waiver when a defective belt fell off and caused a chain of events ending with the plaintiff getting electrocuted).[24]

(2) *Michael v. Travis County Housing Authority* (TTCA waiver when 2 dogs escaped through holes in a fence and attacked a plaintiff on a sidewalk).[25]

(3) *Travis v. City of Mesquite* (TTCA proximate cause established when the City's failure to follow policy caused an injury, even though the ultimate harm was directly caused by a fleeing criminal).[26]

(4) *Ryder Integrated Logistics, Inc. v. Fayette Cnty.* (a plaintiff properly pleaded proximate cause and invoked the TTCA's waiver by alleging that law enforcement's use of its headlights caused another driver to become distracted, drive off the road, and collide with the plaintiff's vehicle).[27]

Because these cases control (and because they are more factually analogous to Appellees' allegations than *Bossley*), the City's immunity claim should be rejected and the trial court's order should be affirmed.

[24] 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.).

[25] 995 S.W.2d 909 (Tex. App. – Austin 1999).

[26] 830 S.W.2d 94, 98 (Tex. 1992).

[27] 453 S.W.3d 922 (Tex. 2015).

## LEGAL ARGUMENT

The trial court's order should be affirmed (and the City's arguments rejected) for two reasons:

I. *Response to Issue I*: Appellees' pleadings have raised a fact issue regarding whether Officer Spradlin's gun belt malfunction was a cause of Johnathon's killing. Johnathon's killing was proximate in both time and place to the gun belt malfunction that caused Woodburn's escape. This proximity places Appellees' claims firmly within established TTCA precedent.

II. *Response to Issue II*: The City's Public Duty Doctrine argument fails because (A) it is not ripe for review, and (B) Appellees' claims center on the City's deficient property (rather than the City's police response). As such, Appellees' claims properly invoke subject matter jurisdiction under Tex. Civ. Prac. & Rem. Code § 101.021(2).

## Response to Issue I.
## The City is incorrect. Appellees raised a fact issue (thus defeating the City's immunity claim) regarding the gun belt malfunction being a cause of Johnathon's death.

### A. Applicable Legal Standards.

#### 1. *Standard of Review.*

When a plea to the jurisdiction challenges the pleadings, reviewing courts analyze the issue *de novo* to determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause.[28] In doing so, the Courts of Appeals should construe the pleadings liberally in favor of the plaintiff and look to the pleader's intent.[29]

Where the pleadings generate a "fact question regarding the jurisdictional issue," a plea to the jurisdiction should be denied.[30]

#### 2. *The Texas Tort Claims Act.*

Appellees allege that their claims against the City fall within the governmental immunity-waivers contained within the TTCA.[31]

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[28] *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 927 (Tex. 2015), *citing Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 226 (Tex. 2004).

[29] *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d at 927.

[30] *Id.* at 927.

[31] C.R. at 14-18.

"The TTCA provides a limited waiver of governmental immunity."[32] Under the TTCA, a governmental unit [like the City] is liable for . . . personal injury and death so caused by a condition or use of tangible personal if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."[33]

Relevant here, the Texas Supreme Court has "consistently construed the causation requirement in section 101.021(2) to be one of proximate cause, not a different standard such as immediate cause, direct cause, or sole cause."[34] The components of proximate cause are cause-in-fact and foreseeability.[35] A tortious act is a cause-in-fact[36] if it serves as "a substantial factor in causing the injury and without which the injury would not have occurred."[37]

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[32] *Alexander v. Walker,* 435 S.W.3d 789, 790 (Tex. 2014) (*citing* Tex. Civ. Prac. & Rem. Code § 101.023).

[33] Tex. Civ. Prac. & Rem. Code § 101.021.

[34] *Michael* at 912-913, *citing Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 299 (Tex.1976), *and Bossley*, 968 S.W.2d at 342 ("Section 101.021(2) requires that for immunity to be waived, personal injury or death must be proximately caused by the condition or use of tangible property."), among other cases.

[35] *W. Invs., Inc. v. Urena,* 162 S.W.3d 547, 551 (Tex. 2005).

[36] Because the City only argues for dismissal under the cause-in-fact prong of the analysis, this section does not address the foreseeability prong of the proximate cause analysis.

[37] *Del Lago Partners, Inc. v. Smith,* 307 S.W.3d 762, 774 (Tex.2010) (citation omitted), *and Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 929 (Tex. 2015).

Because proximate cause is ultimately a question for a factfinder, the Court of Appeals need only determine whether Appellees' pleading-intent "creates a fact question" regarding the causal relationship between the gun belt malfunction and Johnathon's killing.[38] And if a fact issue as to but-for-causation has been raised, the City's plea to the jurisdiction (and appeal) should be denied.

### B. Appellees' allegations raise a fact issue as to cause-in-fact. If Officer Spradlin's belt would not have malfunctioned due to the lack of keepers, Johnathon would not have been killed minutes later.

Appellees' claims against the City clearly fall within the TTCA's waiver of immunity in § 101.021(2),[39] as Appellees' pleadings allege that Johnathon was stabbed and killed as a direct result of the defective condition of Officer Spradlin's gun belt. Due to the specific facts of the case, *Texas Dept. of Corrections v. Jackson, Ryder Integrated Logistics, Michael v. Travis County*, and *Travis v. City of Mesquite* control over *Bossley* and require the Court to deny the City's appeal.

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[38] *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 929 (Tex. 2015); *see also Ark. Fuel Oil Co. v. State,* 280 S.W.2d 723, 729 (Tex. 1955) ("Question[s] of causation such as proximate cause are normally treated as questions of fact unless reasonable minds cannot differ.").

[39] Namely that Johnathon's injuries were "caused by a condition or use of tangible personal [] property." Tex. Civ. Prac. Rem. Code § 101.121(2).

### 1. *A faulty belt setting-off a causal chain of events leading to an injury supported a TTCA-waiver in Jackson.*

Woodburn – an aggressive and violent person that had just assaulted a man with a deadly weapon without provocation – had been subdued and completely restrained before Officer Spradlin's gun belt failed and allowed Woodburn to leave restraint and kill Johnathon.[40] Had Officer Spradlin worn keepers, Woodburn would not have been able to escape from restraint and kill Johnathon in an adjoining business less than three minutes later.

An analogous factual scenario was previously held to fall within the TTCA's waiver of immunity in *Texas Dept. of Corrections v. Jackson*.[41] In that case, the plaintiff was injured after a tool belt he was provided by the State slipped and caused a chain of events that led to him being shocked by electricity.[42] Under the plaintiff's theory in that case, the tool belt slipped because it used an improper attachment that caused it to bind, which further caused Jackson to have a sensation of falling, which further caused him to

[40] C.R. at 9-10, 105.

[41] 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.).

[42] *Id.* at 154-156.

instinctively reach up and grab the electrical wires above him, which finally resulted in his injury due to the wires being electrified.[43]

Although the plaintiff in that case failed to meet his burden *at trial* when he did not provide any evidence that the belt malfunctioned, that the belt malfunction was caused by the condition of the belt, or that the belt malfunction was the cause of him reaching up and being shocked, the Court of Appeals found that the *allegations* were enough to bring the claim within the TTCA's waiver.[44]

The causal chains in each case – which began in both cases due to a belt malfunctioning – are similar and establish a valid TTCA waiver.

| ***Jackson*** | ***This Appeal*** |
|---|---|
| Wrong belt component → the belt fell down → the belt falling caused plaintiff to have a sensation of falling → plaintiff instinctively reached up → plaintiff grabbed the electrical wire → the wire shocked him. | Missing belt component → the belt fell off → Spradlin put down handcuffs and let Woodburn leave due to the belt malfunction → Woodburn escaped moments later and killed Johnathon. |

[43] *Id.* at 156-157.

[44] *Id.* at 158.

### 2. *Controlling caselaw does not require that the property itself cause the harm.*

The City argues that *Bossley* yields dismissal in this case because the TTCA requires that the property itself – rather than some other force – actually inflict a plaintiff's injury to validly state a claim under the TTCA.[45]

This argument is wrong and was previously rejected by the Third Court of Appeals in *Michael*.

#### a. *Michael v. Travis County Housing* is controlling and contradicts the City's argument.

In *Michael v. Travis County Housing Authority*,[46] the Third Court of Appeals rejected the City's argument[47] that *Bossley*[48] (and the TTCA) requires the property itself to directly inflict the injury for a TTCA-waiver to apply. In that case, the Third Court of Appeals found a valid TTCA-waiver when a governmental actor negligently maintained a fence, which allowed two dogs to escape and maul a child on a nearby sidewalk.[49] In that case, the plaintiff

[45] Appellant's Brief at pp. 11-13.

[46] *Michael v. Travis County Hous. Auth.*, 995 S.W.2d 909, 913 (Tex. App.—Austin 1999, no pet.).

[47] Appellant's Brief, at pp. 11-13.

[48] 968 S.W.2d 339, 343 (Tex. 1998).

[49] *Michael*, 995 S.W.2d at 913.

was mauled by two pit bulls after they escaped through a hole in a fence maintained by the County.[50]

Like the City here, the County in *Michael* argued that *Bossley's* analysis required dismissal because "the injury was caused by the dogs, not the fence, and therefore it cannot be said that a condition or use of property proximately caused the injury."[51] The Third Court of Appeals rejected the County's argument, reasoning that *Bossley* does not "require that [the] property causing the injury [be the] device that directly inflicts the injury.. . . as long as there is a reasonably close causal relation between the property and the resulting injury."[52]

The cause-in-fact similarities between the two cases are striking:

| | ***Michael*** | ***This Appeal*** |
|---|---|---|
| **Did the equipment actually inflict the injury?** | No.<br>Property: Fence.<br>Injuring thing: Dog. | No.<br>Property: Belt.<br>Injuring thing: Person. |
| **Causal Link** | Dangerous dogs (not owned by the County) escaped because of a defective fence, which | Dangerous person escaped because of a defective belt, which allowed him to run across |

[50] *Michael*, 995 S.W.2d at 911.

[51] *Id.* at 913.

[52] *Id.* at

| | | |
|---|---|---|
| | allowed them to run down the street and attack a third party. | a parking lot and attack a third party. |
| **Temporal and Geographic Connection** | "The attack occurred on a nearby sidewalk in close proximity to the fence" and happened "immediately" after the dogs escaped. | The attack occurred in a nearby business close in proximity to where the belt malfunctioned. The attack happened less than 3 minutes after the belt's malfunction allowed Woodburn's escape. |

Unlike the injury in *Bossley* but like the plaintiffs' injuries in *Michael*, Johnathon's killing was not "distant geographically, temporally, and causally" from the gun belt malfunction.[53] Rather, the ultimate attack occurred at the same address where the property malfunctioned and occurred only moments after the defective property allowed Woodburn to escape – placing Appellees' allegations firmly within the TTCA's waiver.

b. *Lowe*, *Robinson*, *Overton Mem'l Hosp.*, *Hampton, and Harvey* presented more attenuated allegations than Appellees', and each established a TTCA waiver – as the actual injury need not be directly caused by the defective property to properly invoke the TTCA.

The City's appeal attempts to place a heightened causal standard than what is currently required of injured plaintiffs under the TTCA. But because the Texas Supreme Court has "consistently construed the causation

[53] *Michael* at 914.

requirement in section 101.021(2) to be one of proximate cause, not a different standard such as immediate cause, direct cause, or sole cause,"[54] the City's argument should be rejected, and its plea denied.

Six cases highlight the range of acceptable attenuation under § 101.021(2)'s proximate cause analysis. Whether it's the removal of a knee-brace that allowed a prior injury to resurface during a football game,[55] the failure to provide life jackets that allowed a swimmer to drown,[56] the failure to install beds with rails that allowed a patient to fall,[57] the failure to provide

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[54] *Michael* at 912-913, *citing Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 299 (Tex.1976), *and Bossley*, 968 S.W.2d at 342 ("Section 101.021(2) requires that for immunity to be waived, personal injury or death must be proximately caused by the condition or use of tangible property."), among other cases.

[55] *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex.1976). In *Lowe,* Lowe alleged that he injured his knee while playing football for the university. The injury allegedly occurred when a coach ordered him to remove his knee brace, which he wore because of a previous knee injury, and reenter a game without it. The Texas Supreme Court concluded that Lowe's injury was proximately caused by the removal of the brace, even though playing football – rather than the brace itself – was the direct cause of the injury.

[56] *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169, 171 (Tex. 1989). In *Robinson*, MHMR took several patients, including Robinson, swimming. Knowing that Robinson was epileptic, MHMR and its employees failed to provide Robinson with a life preserver, and he subsequently drowned while swimming. And even though it was the plaintiff's epilepsy – and not the life preserver – that directly caused him to lose consciousness and drown while swimming, the Texas Supreme Court held that the failure to provide life preservers was a proximate cause of the plaintiff's injuries.

[57] *Overton Mem'l Hosp. v. McGuire*, 518 SW2d 528 (Tex. 1975). In *Overton*, the City-owned and operated hospital waived immunity by failing to install rails on a bed of a patient, who fell from the bed while receiving postoperative care. The Texas Supreme Court found that the "injuries were proximately caused by negligently providing a bed without bed rails," even though the rails themselves were not the direct cause of the plaintiff's injuries.

an ice scoop that allowed an environment for E. coli bacteria to grow in an ice receptacle,[58] or the failure to appropriately secure parts of a wheelchair that allowed a mentally ill person to assault another patient,[59] Texas Courts have found valid TTCA-waivers even when the defective property at issue only triggers a causal chain-of-events that leads to the plaintiff's injury.

| ***Case*** | ***Proximate Cause Facts*** |
|---|---|
| *Lowe v. Texas Tech Univ.*[60] | Lowe's injury allegedly occurred when a coach ordered him to remove his knee brace, which he wore because of a previous knee injury, and reenter a game without it. The Texas Supreme Court concluded that Lowe's injury was proximately caused by the University's failure to provide the brace, even though playing football – |

*See also, Hampton v. Univ. of Tex.- M.D. Anderson Cancer Ctr.*,6 S.W.3d 627, 631 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (where the court determined that a bed provided by hospital with bed rails that were not activated lacked an integral safety component, and this condition of tangible personal property triggered a waiver of immunity.

[58] *Univ. of N. Tex. v. Harvey*, 124 S.W.3d 216(Tex. App.—Fort Worth 2003, pet. filed). In *University of North Texas v. Harvey*, the Fort Worth Court found proximate cause when a University failed to include an ice scoop at a drill team's water station, which contributed to the transmission of E. coli bacteria. The scoop itself was not a direct cause of the injury. Rather, the failure to provide a scoop led to bacteria getting into the ice and contaminating it, which led to an E. coli outbreak that caused plaintiffs' injuries.

[59] *Texas Dept. of MHMR v. McClain*, 947 S.W.2d 694, 698 (Tex. App – Austin 1997, pet. denied**).** In Texas Dept. of MHMR v. McClain, a patient at a State hospital was assaulted and killed by a fellow patient when the patient attacked the other patient with a wheelchair part that the State did not secure. Even though it was the patient's violence and aggression that directly injured the victim and the State's actions only provided the opportunity for the patient to assault the other, the Third Court of Appeals concluded that plaintiff's injuries fell within the TTCA because there was a direct causal connection between the property supplied by the state and the injury that occurred.

[60] 540 S.W.2d 297 (Tex. 1976).

| | |
|---|---|
| | rather than the brace itself – was the direct cause of the injury. |
| *Robinson v. Central Texas MHMR Center*[61] | Robinson drowned after suffering a seizure while swimming, because MHMR failed to provide Robinson a life preserver. Even though it was Robinson's epilepsy and the water – and not the life preserver – that directly caused him to lose consciousness and drown while swimming, the Texas Supreme Court held that the failure to provide a life jacket to Robinson was a proper invocation of the TTCA. |
| *Overton Mem'l Hosp. v. McGuire*[62] | Overton was injured when he fell out of a hospital bed without rails. The Texas Supreme Court held that the "injuries were proximately caused by negligently providing a bed without bed rails," even though the rails themselves were not the direct cause of the plaintiff's injuries. |
| *Univ. of N. Tex. v. Harvey*[63] | Harvey was injured after becoming ill from E. coli bacteria she ingested at a watering station provided by a University. The scoop itself was not the direct cause of the injury. Rather, the failure to provide a scoop led to bacteria getting into the ice and contaminating it, which led to an E. coli outbreak within the water station, which caused plaintiffs' injuries after she ingested water from the station. |
| *Texas Dept. of MHMR v. McClain*[64] | McClain was assaulted and killed at a State Hospital by a fellow patient when the patient attacked the other patient with a wheelchair part |

[61] 780 S.W.2d 169, 171 (Tex. 1989).

[62] 518 SW2d 528 (Tex. 1975).

[63] 124 S.W.3d 216 (Tex. App.—Fort Worth 2003, pet. filed).

[64] 947 S.W.2d 694, 698 (Tex. App – Austin 1997, pet. denied).

| | |
|---|---|
| | that the State did not properly secure. Even though it was the patient's intentional act of violence that directly injured the victim, and the State's actions only provided the opportunity for the patient to commit assault, the Third Court of Appeals concluded that plaintiff's injuries fell within the TTCA because there was a causal connection between the property supplied by the State and the injury that occurred. |
| *Ryder Integrated Logistics, Inc. v. Fayette Cnty*[65] | A plaintiff-driver was injured when he was stuck by another truck. The plaintiff had been stopped by law enforcement, and the plaintiff and officer were stopped on an embankment on the roadside. While repositioning his vehicle, the officer purportedly shined his headlights at a different driver and allegedly caused the driver to careen off the roadway and into the plaintiff. Because the plaintiff alleged that his injury was caused by the officer directing the cruiser's lights toward traffic, which caused the second driver to drive erratically and hit the plaintiff, he properly pleaded proximate cause under the TTCA. |

These cases represent the long-standing principle that there can be more than one proximate cause of an injury – and that tenet clearly applies in the § 101.021(2) proximate cause analysis.

[65] 453 S.W.3d 922 (Tex. 2015).

c. Harm caused by a fleeing criminal does not create an intervening cause as a matter of law.

There can be more than one proximate cause of an injury[66] so long as a more recent cause does not "intervene[] between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause."[67] And absent an intervening cause,[68] a breach proximately causes an injury if (a) the breach at issue is a cause-in-fact of the harm[69] and (b) if the injury was foreseeable.[70]

Although the criminal conduct of a third party *may* be an intervening cause which relieves the negligent actor from liability, the actor's negligence will not be excused when the criminal conduct is a foreseeable result of such negligence.[71] That is, if Woodburn's escape and Johnathon's injuries were a

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[66] *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992).

[67] *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450 (Tex. 2006) (plurality op.).

[68] *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009).

[69] *Id. (*Cause in fact requires "proof that (1) the negligent act or omission was a substantial factor in bringing about the harm at issue, and (2) absent the negligent act or omission ('but for' the act or omission), the harm would not have occurred.").

[70] *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995) (A plaintiff proves foreseeability of the injury by establishing that "a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission.").

[71] *Mesquite* at 98; Restatement (Second) of Torts § 448 (1965).

foreseeable result of the gun belt malfunction – it is not a superseding or intervening cause.

The Texas Supreme Court addressed this precise issue in *Travis v. City of Mesquite*.[72] In that case, the plaintiffs sued the City of Mesquite after they were injured when an evading driver crashed into their vehicles.[73] There, off-duty police officers attempted to detain a driver for suspicious activities, but the driver fled the off-duty officers' request.[74] After the driver fled, the off-duty officers pursued the driver while on-duty officers gave chase from the opposite direction.[75] After only 2 minutes, the high-speed car chase ended with the fleeing driver crashing into – and killing – the plaintiffs.[76]

Ultimately, the Texas Supreme Court found that the plaintiffs appropriately met their summary judgment burden on proximate cause[77] because the foreseeability and cause-in-fact elements were met – even though the actual injuries resulted from the actor fleeing from the police,

[72] 830 S.W.2d 94, 96 (Tex. 1992).

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

driving recklessly, and crashing into the plaintiffs' vehicle, rather than the officers' decision to pursue the driver.[78]

Quoting from deposition transcripts of the officers, the Texas Supreme Court highlighted multiple admissions regarding the subjective foreseeability of the ultimate harm – which "raised the inference that . . .the conduct of the police officers was a cause in fact of the accident in question."[79]

The same inference is raised here. Officer Spradlin knew that keepers on a gun belt are safety features that prevent gun belts from creating safety hazards and falling off – which he admitted to APD Investigators.[80] Further, Officer Spradlin had knowledge before the event that his non-use of keepers created a safety hazard – yet he chose to proceed with his response to the Woodburn incident while knowing that he was using defective equipment.[81]

Officer Spradlin admitted that his belt "completely fell off because [he] didn't have his keepers on that day," that failing to wear keepers was a "safety concern," that the belt "would have realistically stayed where it [was

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[78] *Id.* at 97-98.

[79] *Id.* at 98.

[80] C.R. at 203-207.

[81] C.R. at 203-207.

supposed to]"[82] had he worn keepers, and that the purpose of wearing a belt with keepers was "cause, I'll (tell you) – for this reason."[83]

And when the belt failed, as Officer Spradlin knew it might, the belt's malfunction led to Woodburn – who was previously restrained and incapacitated – fleeing from restraint and into the business next door.[84] Officer Spradlin was so preoccupied and distracted by his gun belt failing and falling off that he did not chase after Woodburn or even command Woodburn to stop.[85] This allowed the dangerous and aggressive Woodburn the opportunity to travel next door and stab Johnathon to death – all of which occurred less than 3 minutes after Woodburn fled from restraint when Officer Spradlin's gun belt failed.

As highlighted by *Mesquite* and the cases cited above, the gun belt malfunction proximately caused Johnathon's death, and the City is potentially liable – along with all persons and entities whose negligent conduct contributed to Johnathon's injuries.[86]

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[82] C.R. at 204.

[83] C.R. at 204.

[84] C.R. at 204-205.

[85] C.R. at 207.

[86] *Mesquite* at 98; *Strakos v. Gehring*, 360 S.W.2d 787, 789 (Tex.1962); *McAfee v. Travis Gas Corp.*, 137 Tex. 314, 323, 153 S.W.2d 442, 447 (1941).

d. *Bossley* is inapplicable.

*Bossley* is inapplicable to this appeal for three reasons:

*i. This case is a lacking safety component case – to which Bossley explicitly doesn't apply.*

*Bossley* is inapplicable because that case was not a "lacking integral safety component" case – as this case is.

The plaintiff in *Bossley* claimed that a County was liable for leaving a door unlocked door at a mental hospital, which allowed a suicidal man to escape, run a half-mile, attempt to hitchhike, and jump in front of a moving vehicle when he was about to be captured.[87] The plaintiff in that case did not allege that the County provided a piece of property lacking a safety component, but instead argued that the entity was subject to the TTCA because (a) it left a door unlocked (a condition of property), and (b) it unlocked a door (the use of property).[88] In that case, the Supreme Court of Texas reasoned that the man's death was too "distant geographically, temporally, and causally from the [property condition at issue]" for the governmental unit to be subject to liability – given that the negligent

[87] *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998).

[88] *Bossley* at 343.

condition was too attenuated from the eventual harm to be a legal cause of the man's suicide.[89]

Importantly, the *Bossley* Court did not overrule prior causal-chain TTCA cases like *Lowe* or *Overton*, which plainly allow TTCA claims to survive when plaintiffs allege that their injuries are caused by a piece of property that lacks an integral safety component – even when the harm is not caused directly by the property but instead by a chain-of-events that were set in motion by defective property.[90]

> Plaintiffs also argue that this case is analogous to *Lowe* and to *Robinson* . . . We have held that "[t]he precedential value of these cases is ... limited to claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and that the lack of this integral component led to the plaintiff's injuries."

Plainly, the Supreme Court in *Bossley* recognized in 1998 that the TTCA waives immunity when plaintiffs allege that missing safety components create conditions that allow plaintiffs to get injured – which is precisely what happened in *Lowe*,[91] *Robinson*,[92] and *Jackson*.[93] And after *Bossley*, the courts of

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[89] *Bossley* at 343.

[90] *Bossley* at 343.

[91] 540 S.W.2d 297 (Tex. 1976).

[92] 780 S.W.2d 169, 171 (Tex. 1989).

[93] 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.).

appeals in *Michael*[94] and *Harvey*[95] affirmed the Supreme Court's continued recognition that the TTCA waives immunity when defective property triggers a causal chain-of-events leading to a plaintiff's injury.

*ii. Spradlin's gun belt violated policies designed to prevent this exact harm from occurring, while the Bossley defendant acted in accordance with County policy.*

*Bossley* is further distinguishable from this case because the property at issue in that case was used in accordance with County policy[96] (the door at issue was allowed to be unlocked). Spradlin, on the other hand, used a non-standard belt with missing safety features that were specifically designed to prevent the belt from failing at critical moments.

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[94] 995 S.W.2d 909, 913 (Tex. App.—Austin 1999, no pet.) ("The supreme court also noted in Bossley that sovereign immunity is waived under section 101.021(2) when a governmental unit provides property that lacks "an integral safety component" that leads to personal injuries. On several occasions, the court has construed section 101.021(2) to provide a waiver of immunity for injuries caused by safety-defective property. As in those situations, the present case could be construed to involve tangible property that lacked an integral safety component: a fence meant to protect passers-by from vicious dogs, but which, because of defects, failed to serve its basic purpose.") (internal citations omitted).

[95] 124 S.W.3d 216(Tex. App.—Fort Worth 2003, pet. filed). In *University of North Texas v. Harvey*, the Fort Worth Court found proximate cause when a University failed to include an ice scoop at a drill team's water station, which contributed to the transmission of E. coli bacteria. The scoop itself was not a direct cause of the injury. Rather, the failure to provide a scoop led to bacteria getting into the ice and contaminating it, which led to an E. coli outbreak that caused plaintiffs' injuries.

[96] *Bossley* at 343 ("The Hillside Center cannot be said to lack an integral safety component because its interior doors were unlocked in accordance with its open door policy.").

*APD Investigator*:[97] What you're explainin' to them . . . that [your gun belt] will fall off [and] that's the reason that you carry keepers and you have 'em on" (cleaned up).

*Officer Spradlin*: That's why we wear 'em, yeah.

*APD Investigator*: . . . because if you don't have 'em they'll fall.. . .

*Officer Spradlin*: . . . yeah, if it comes undone like mine did it will fall off.

*Officer Spradlin*:[98] [When my gun belt fell off, I was thinking] I need to get him but I gotta get my belt.. . . [I didn't tell him to stop as he left restraint] because I'm focused on trying to find my gun belt.

*Officer Spradlin*:[99] I still like to have my keepers, cause [I'll tell you] for this reason.

The alleged wrongful act in *Bossley* was the County leaving its door unlocked, which is what the County's "open door policy" required. Spradlin, on the other hand, chose to use a piece of equipment without required safety components, which violated multiple APD policies that were put in place "for this reason."

The cases are distinguishable.

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[97] C.R. at 204-206.

[98] C.R. at 203.

[99] C.R. at 204.

*iii. Spradlin's property malfunction was temporally, geographically, and causally close to Johnathon's killing – the property at issue in Bossley wasn't.*

Before Spradlin's gun belt malfunctioned, Spradlin was subdued and restrained after violently attacking a man with a weapon. And after the gun belt malfunctioned, Woodburn immediately entered an adjoining business and killed Johnathon – all of which took less than 3 minutes.[100]

The harm in *Bossley* was too attenuated[101] from the unlocked door to warrant TTCA applicability because the plaintiff[102] "ran half a mile and then attempted to hitchhike on both sides of a freeway[,. . . before] leap[ing] in

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[100] C.R. at 201-207.

[101] Justice Abbott's dissent in *Bossley* better states the test for cause-in-fact and highlights why the City's argument should fail:

> While it is true that the doors did not injure Bossley by actually physically striking him, that is not the test. The test is simply whether the doors were a proximate cause of Bossley's injury. Fact issues clearly exist concerning whether the use or condition of the doors was a substantial factor in bringing about Bossley's injury. Absent the use or condition of the doors, Bossley would still be in the hospital—he would have never escaped and would not have had the opportunity to jump in front of a truck.
>
> The Court's claim that the suicide was too attenuated from the use or condition of the doors is weak, at best. It is not as if the suicide occurred later in the day or would not have occurred but for some intervening cause.. . .
>
> In a fast-paced and continuous sequence, the suicide occurred directly and shortly after Bossley eloped through the doors. It seems that he killed himself with the first available instrumentality of death.

*Bossley*, at 342-346 (J. Abbott, dissenting).

[102] *Bossley*, at 343.

front of an oncoming truck" while County employees pursued. Woodburn killed Johnathon less than 3 minutes after the belt malfunctioned and only yards away from where the property failed.

The cases are distinguishable, and the City's reliance on *Bossley* is misplaced.

**Response to Issue II.**
**The public duty doctrine does not warrant dismissal.**

Appellees do not claim that the City is liable for Officer Spradlin's decision to arrest (or not arrest) Woodburn, nor do Appellees claim that Officer Spradlin's method of arrest was negligent.

Johnathon was not killed because of Officer Spradlin's arrest decisions – he was killed because Spradlin used defective property that resulted in Woodburn's escape and Johnathon's immediate killing. Thus, § 101.021(2) of the TTCA – rather than the Public Duty Doctrine – is implicated, and Appellees' claims against the City should survive.

The City's Public Duty Doctrine argument should be rejected because, (A) it is not ripe for interlocutory review and (B) the Doctrine is not implicated by Appellees' claims.

## A. Applicable Legal Standards.

### 1. Ripeness.

Cases discussing the Public Duty Doctrine – whether police officers owe a civil duty to the public at large by virtue of their policing function – do so in the context of the general elements of negligence.[103] In other words, the issue in Public Duty Doctrine cases is not whether a governmental unit is immune from suit because of the Public Duty Doctrine; "instead, the issue is whether a claim of negligence fails because, as a matter of law, [the plaintiffs] cannot prove an element of the claim."[104] As such, whether the Public Duty Doctrine results in an immunity-based dismissal should be reviewed after a final judgment is entered – "it cannot be reviewed in [an] accelerated appeal."[105]

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[103] *See City of Lancaster v. Chambers,* 883 S.W.2d 650, 653 (Tex. 1994); *see also Vaquera v. Salas,* 810 S.W.2d 456, 461 (Tex. App.-San Antonio 1991, writ denied).

[104] *Gonzalez v. Saenz*, No. 04-05-00525-CV, 2006 WL 622578, at *3 (Tex. App. – San Antonio Mar. 15, 2006).

[105] *See Gonzalez v. Saenz*, No. 04-05-00525-CV, 2006 WL 622578, at *3 (Tex. App. – San Antonio Mar. 15, 2006) (governmental unit's claim of immunity under Public Duty Doctrine not subject to interlocutory appeal), *and Tex. State Tech. Coll. v. Cressman,* 172 S.W.3d 61, 65 (Tex. App. – Waco 2005, pet. filed) (holding that the scope of interlocutory appeal from denial of motion for summary judgment based on official immunity was limited to immunity question and, thus, the appellate court did not address whether the plaintiffs' allegations stated a claim for illegal eavesdropping).

**2. The Doctrine.**

The existence of a legal duty under a given set of facts and circumstances is a question of law for the courts to decide.[106] Negligence cannot exist unless there is a duty owed to the injured person – and where no duty is owed to that person, no legal liability can arise on account of negligence.[107]

The Public Duty Doctrine, as described by the City, addresses the duty element of negligence and establishes that law enforcement has no general duty to protect the public by choosing to arrest – or not arrest – a criminal.[108] And although that Doctrine has no applicability here, two cases highlight how and where it applies:

In *Dent v. City of Dallas,*[109] the Dallas Court of Appeals held that the police owed no duty to a person injured by someone being chased by the police. In that case, an officer stopped a driver he had probable cause to

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[106] *Abalos v. Oil Dev. Co.*, 544 S.W.2d 627, 631 (Tex. 1976); *Producers Grain Corp. v. Lindsay,* 603 S.W.2d 326, 329 (Tex. Civ. App.—Amarillo 1980, no writ).

[107] *Abalos,* 544 S.W.2d at 631.

[108] *See, e.g., South v. Maryland*, 59 U.S. 396, 403, 15 L. Ed. 433 (1856); *Stinnett v. City of Sherman*, 43 S.W. 847, 850 (Tex. Civ. App. 1897).

[109] 729 S.W.2d 114 (Tex. App.—Dallas 1986, writ ref'd n.r.e.), *cert. denied,* 485 U.S. 977, 108 S.Ct. 1272, 99 L.Ed.2d 483 (1988).

arrest.[110] While waiting for backup, the driver fled, officers pursued, and a person was injured after being struck by the fleeing driver.[111]

The plaintiffs in that case sought to hold the City of Dallas liable for the officer's "discretionary decisions as to if, how, and when to arrest a person suspected of attempting to pass a forged prescription."[112] Reasoning that allowing for liability for these decisions would require officers "to *arrest all persons* stopped by them for whatever reason (be it jaywalking, expired license tags, etc.) lest these persons attempt escape and cause injury to somebody during their flight from justice,"[113] the Dallas Court of Appeals held that officers had no duty to make an arrest decision to prevent such an accident.[114]

This rule was tempered in *Travis v. City of Mesquite*,[115] where the Texas Supreme Court reasoned that the "'no duty' and 'no proximate cause as a

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[110] *Id.* at 115.

[111] *Id.* at 115.

[112] *Id.* at 115.

[113] *Id.* at 115.

[114] *Id. See also Munoz on Behalf of Martinez v. Cameron Cnty*.725 S.W.2d 319, 320 (Tex. App. – Corpus Christi 1986) (Affirming the dismissal of the suit on summary judgment grounds after an arrest warrant was issued against a defendant on the charge of aggravated assault, the warrant was cancelled after the defendant's lawyer reported that the defendant would turn himself in, the defendant was not arrested, and the defendant killed his wife just 10 days later.)

[115] 830 S.W.2d 94 (Tex. 1992).

matter of law' rationales of older cases which insulated police from liability" was not a bright line. Instead, the Supreme Court recognized that law enforcement's actions in that case raised a fact issue on duty – thus rejecting the City's no duty argument.[116]

Based upon the principles discussed in the above cases, a governmental entity has no civil duty arising from its decision to provide – or not provide – police protection or services. However, governmental entities owe a duty to not negligently use property and to not use property missing essential safety components – which are common-law principles embedded within the TTCA.[117] Although the City "would construe [the Public Duty Doctrine] to be a general exclusion for any act or omission that occurs while an officer is providing police or fire protection to the public," the Texas Supreme Court reasoned that "the Legislature did not intend to create such a broad [liability] exclusion."[118]

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[116] *Travis*, 830 S.W.2d at 99.

[117] Tex. Civ. Prac. & Rem. Code § 101.055(a)(3) ("[t]his chapter does not apply to a claim arising . . . from the failure to provide or the method of providing police or fire protection.").

[118] *State v. Terrell*, 588 S.W.2d 784, 787–88 (Tex. 1979).

### B. The City is wrong: the Public Duty Doctrine does not warrant dismissal.

The City's Public Duty Doctrine argument should be rejected because it is not ripe and inapplicable.

#### 1. The City's no-duty argument is inappropriate until after judgment.

As discussed above, the City's no-duty argument "cannot be [raised] in [an] accelerated appeal."[119] Thus, the City's Public Duty Doctrine argument is untimely and should be rejected.

#### 2. The Public Duty Doctrine is inapplicable.

The present case is distinguishable from the Public Duty Doctrine cases decided by Texas Courts, which address whether law enforcement officers have a general civil duty to protect the public by making arrest decisions. Because Appellees' claims against the City center on Officer Spradlin's deficient gun belt and not on Spradlin's decision to arrest (or not arrest) Woodburn, the City's Public Duty Argument fails.

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[119] *See Gonzalez v. Saenz*, No. 04-05-00525-CV, 2006 WL 622578, at *3 (Tex. App. – San Antonio Mar. 15, 2006) (governmental unit's claim of immunity under Public Duty Doctrine not subject to interlocutory appeal), *and Tex. State Tech. Coll. v. Cressman*, 172 S.W.3d 61, 65 (Tex. App. – Waco 2005, pet. filed) (holding that the scope of interlocutory appeal from denial of motion for summary judgment based on official immunity was limited to immunity question and, thus, the appellate court did not address whether the plaintiffs' allegations stated a claim for illegal eavesdropping).

Johnathon was killed because Officer Spradlin used property missing an essential safety component (a gun belt without keepers). Officer Spradlin admitted that he was required to use keepers, that keepers were an essential safety component, that wearing keepers would have prevented his belt from falling off, and that Woodburn would not have escaped and killed Johnathon had he worn keepers.[120] Plainly, had Officer Spradlin had and used the correct equipment, Woodburn would have remained restrained, and Johnathon would still be alive. Officer Spradlin's decision to use the non-standard gun belt without keepers – not his decision to arrest or not arrest Woodburn – is the negligent act giving rise to the City's liability. As a result, the Public Duty Doctrine is inapplicable.

## PRAYER FOR RELIEF

Appellees request that the Court of Appeals deny the City's appeal and affirm the decision of the district court.

**RESPECTFULLY SUBMITTED,**

**SUMPTER & GONZALEZ L.L.P.**
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[120] C.R. at 203-207. Spradlin stated that his belt "completely fell off because [he] didn't have his keepers on that day," that failing to wear keepers was a "safety concern," that the belt "would have realistically stayed where it [was supposed to]" had he worn keepers, and that the purpose of wearing a belt with keepers was "cause, I'll (tell you) – for this reason."

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This brief was prepared using Microsoft Word. Relying on the word count function in that software, I certify that this response contains 7,982 words (excluding the sections exempted by Tex. R. App. P. § 9.4(i)(1)).

*/s/Worth D. Carroll*
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CAUSE NO. D-1-GN-21-007467

| | | |
|---|---|---|
| AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR AND NANETTE MOJICA, INDIVIDIALLY, *Plaintiffs,* | § | IN THE DISTRICT COURT OF |
| v. | § | TRAVIS COUNTY, TEXAS |
| TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN, *Defendants.* | § | 201ST DISTRICT COURT |

**DEFENDANT CITY OF AUSTIN'S MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED PETITION DUE TO AUTOMATIC STAY OF CASE PENDING APPEAL AND MOTION TO ENFORCE THE STAY UNDER §51.014(B) PENDING APPEAL**

TO THE HONORABLE JUDGE:

Defendant City of Austin files this Motion to Strike Plaintiffs' First Amended Petition and Motion to Enforce the Stay due to the current automatic stay of the entire case pending the City's appeal under Section 51.014(b) and respectfully shows the Court as follows:

## INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs brought suit against the City of Austin ("City") and other co-defendants alleging negligent use of property on the part of the City that fell within the waiver of immunity in Texas Tort Claims Act. The City filed a Plea to the Jurisdiction on May 17, 2022. This plea argued that the City retained governmental immunity from the claims the Plaintiffs asserted against it. Judge Guerra Gamble heard and denied the plea on June 28, 2022. *Exhibit 1*. The City timely filed a

notice of appeal giving notice that it was appealing the denial of the plea under Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). *Exhibit 2*. Then the City filed its appeal on September 20, 2022. The Plaintiffs filed their response on October 24, 2022. The City's plea was filed and set for hearing within 180 days from when the City filed its original answer on February 22, 2022. Tex. Civ. Prac. & Rem. Code § 51.014(c)(2). Thus, the appeal "stays all…proceedings in the trial court pending resolution of that appeal." Tex. Civ. Prac. & Rem. Code § 51.014(b). Plaintiffs' filing of a First Amended Petition while the appeal is pending violates the automatic stay. This motion seeks to enforce the automatic stay.

## EXHIBITS

Exhibit 1: Order Denying City's Plea to the Jurisdiction

Exhibit 2: City's Notice of Appeal

## ARUGMENT AND AUTHORITIES

Section 51.014(b) provides that an interlocutory appeal filed under § 51.014(a)(8) "stays the commencement of a trial in the trial court pending the resolution of the appeal" and "also stays all other proceedings in the trial court pending resolution of that appeal." The stay in section 51.014 is statutory and allows no room for discretion. *In Re Texas Educ. Agency*, 441 S.W.3d 747, 750 (Tex. App.—Austin 2014) (citing *Sheinfield, Maley & Kay, P.C. v. Bellush*, 61 S.w.3d 437, 439 (Tex. App.—San Antonio 2001 no pet.); *Tarrant Reg'l Water Dist. v. Gragg*, 962 S.W.2d 717, 718 (Tex. App.—Waco 1998, no pet.)). "Mandamus relief is the appropriate remedy when a trial court refuses to recognize or enforce the automatic stay provided by §51.014(b)." *Swanson v. Town of Shady Shores*, No. 02-15-00351-CV, No. 02-15-00356-CV, 2016 WL 4395779, at *4 (Tex. App.—Fort Worth Aug. 18, 2016) (citing *In re Univ. of the Incarnate Wood*, 469 S.W.3d 255, 259-60 (Tex. App.—San Antonio 2015). "By mandating a stay of 'all other proceedings in the trial

court' during certain interlocutory appeals, the legislature chose to protect parties in those cases from further trial-court litigation until the appeal is resolved." *In Re Geomet Recycling LLC*, 578 S.W.3d 82, 90 (Tex. 2019). Texas appellate courts have found that signing a severance order during a stay, considering a motion for non-suit, and signing an order compelling discovery all violate a stay. *See In re Bliss & Glennon, Inc.*, No. 01-13-00320-CV, 2014 WL 50831, at *4 (Tex. App.—Houston [1st Dist.] Jan. 7 2014, orig. proceeding) (granting mandamus based on signing severance order during stay); *see Oryx Capital Int'l, Inc. v. Sage Apts., L.L.C.*, 167 S.W.3d 432, 438 (Tex. App.—San Antonio 2005, no pet.) (prohibiting trial court from considering a motion to nonsuit during stay); *see In re Univ. of the Incarnate Wood*, 469 S.W.3d at 259 (holding that discovery proceedings could not be compelled by the trial court during the stay).

Actions taken by parties during the stay rather than the court also violate the stay and are voidable. *San Jacinto River Authority v. Lewis*, 629 S.W.3d 768, 775 (Tex. App.—Houston [14th Dist.] 2021, no pet.) (citing *In Re Univ. of Tex. MD Anderson Cancer Ctr.*, No. 01-19-00202-CV, 2019 WL 3418568, at *3 (Tex. App.—Houston [1st Dist.] July 30, 2019, orig. proceeding). Houston Court of Appeals in the 1st District found that allowing the filing of an amended petition violated the stay under §51.014(b). *City of Houston v. Swinerton Builders, Inc.*, 233 S.W.3d 4, 9 (Tex. App.—Houston [1st Dist.] 2007, no pet.). While the holding that the amended petition was automatically void was called into question by the same court in its later decision in *In Re Univ. of Tex. MD Anderson Cancer Ctr.*, the court in *MD Anderson* did find that motions that were filed during a stay under §51.014(b) were stayed and ineffective until the disposition of the interlocutory appeal. 2019 WL 3418568 at *3. The El Paso Court of Appeals held that an amended petition by a plaintiff "filed in violation of the automatic stay [under §51.014(b)] is a nullity without force." *Hernandez v. Sommers*, 587 S.W.3d 461, 467 (Tex. App.—El Paso 2019, pet. denied). The

Houston Court of Appeals, 14th District also held that an amended petition filed in violation of the stay was voidable through a motion to strike by the party seeking to enforce the stay. *Lewis*, 629 S.W.3d at 775) ("[The Appellant] did not seek to enforce the stay by moving to strike the amended petition…).

Here the City is objecting to the Plaintiffs' violation of the stay under §51.014(b) through the filing of the First Amended Petition. Because the City timely filed an interlocutory appeal of a denial a plea to the jurisdiction, this case is automatically stayed under §51.014(b). The City seeks to enforce this stay and requests that Plaintiffs' First Amended Petition be struck with the option to refile an amended petition once the automatic stay is lifted. In the alternative the City requests that the First Amended Petition be held in abeyance and that any further action in response to the First Amended Petition be stayed until the disposition of the interlocutory appeal, including responsive pleadings, initial disclosures, and additional discovery. Furthermore, the City requests an order acknowledging that this case is fully stayed pending the outcome of the interlocutory appeal.

## PRAY AND RELIEF

The City prays that the Court will issue an order acknowledging and enforcing the automatic stay under §51.014(b) of the Texas Civil Practice and Remedies Code, prohibiting all proceedings in this lawsuit from continuing including but not limited to pleadings, motions, and discovery. The City also prays that Court will strike Plaintiffs' First Amended Petition with the allowance for it to be refiled once the automatic stay is lifted at the conclusion of the pending interlocutory appeal. In the alternative, the City requests that the First Amended Petition be stayed during the pendency of the appeal, with all actions flowing from the filing stay as well including but not limited to, any responsive pleadings, initial disclosures, and other forms of discovery.

RESPECTFULLY SUBMITTED,

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**ATTORNEYS FOR DEFENDANT SAFARILAND, LLC**

*/s/ Sara Schaefer*
Sara Schaefer

# EXHIBIT 1

21

CAUSE NO. D-1-GN-007467

| | | |
|---|---|---|
| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,** | § | **IN THE DISTRICT COURT OF** |
| **Plaintiffs,** | § | |
| **v.** | § | |
| **TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN,** | § | |
| **Defendants.** | § | **201st DISTRICT COURT** |

**ORDER DENYING DEFENDANT CITY OF AUSTIN'S PLEA TO THE JURISDICTION**

The Court has considered Defendant City of Austin's Plea to the Jurisdication, responses and other papers properly on file with the Court and the arguments of counsel if any. The Court finds that Defendant City of Austin's Plea to the Jurisdiction should be DENIED.

SIGNED this 28th day of June, 2022.

PRESIDING JUDGE

MAYA GUERRA GAMBLE
459th DISTRICT COURT

# EXHIBIT 2

CAUSE NO. D-1-GN-21-007467

| | | |
|---|---|---|
| AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR AND NANETTE MOJICA, INDIVIDUALLY, *Plaintiffs,* | § | IN THE DISTRICT COURT OF |
| v. | § | TRAVIS COUNTY, TEXAS |
| TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN, *Defendants.* | § | 201ST DISTRICT COURT |

**DEFENDANT'S NOTICE OF APPEAL**

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

Pursuant to Tex. R. App. P. 25.1, Defendant City of Austin hereby gives notice that it desires to appeal the Order Denying Defendant City of Austin's Plea to the Jurisdiction signed June 28, 2022 to the Third Court of Appeals. The appeal is from the 459th District Court, Travis County, Texas, which presided over the hearing on the City's plea.

The appeal is accelerated pursuant to Tex. R. App. P. 28.1(a) because it is an interlocutory appeal of the denial of a plea to the jurisdiction by a governmental unit under Tex. Civ. Prac. & Rem. Code § 51.014(8). The case is not a parental termination or child protection case, as defined in Rule 28.4.

The City's plea to the jurisdiction was filed and requested for hearing not later than the 180th day after the date the City filed its original answer. Tex. Civ. Prac. & Rem. Code § 51.014(c)(2). Accordingly, appeal "stays the commencement of a trial in the trial court pending resolution of the appeal" and "also stays all other proceedings in the trial court pending resolution of that appeal." Tex. Civ. Prac. & Rem. Code § 51.014(b). The City hereby invokes its right to the automatic stay under Section 51.014(b).

RESPECTFULLY SUBMITTED,

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

*/s/ Hannah M. Vahl*
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## CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing pleading on counsel of record in compliance with the Texas Rules of Civil Procedure on July 18, 2022, as follows:

**Via e-Service to:**

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*/s/ Hannah M. Vahl*
Hannah M. Vahl

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Briana Nicholson on behalf of Sara Schaefer
Bar No. 24086598
briana.nicholson@austintexas.gov
Envelope ID: 69621994
Status as of 11/1/2022 8:44 AM CST

Associated Case Party: SAFARILAND LLC

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Kathryn Moore | | kathryn.moore@kellyhart.com | 10/27/2022 10:24:26 AM | SENT |
| Krystal Moran | | krystal.moran@kellyhart.com | 10/27/2022 10:24:26 AM | SENT |
| Tyson Lies | | tyson.lies@kellyhart.com | 10/27/2022 10:24:26 AM | SENT |
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Associated Case Party: TAVISTOCK FREEBIRDS LLC

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| Ruth Blackwelder | | ruth.blackwelder@austintexas.gov | 10/27/2022 10:24:26 AM | SENT |
| Hannah Vahl | | Hannah.Vahl@austintexas.gov | 10/27/2022 10:24:26 AM | SENT |
| Zachary Burnett | | zburnett@kslaw.com | 10/27/2022 10:24:26 AM | SENT |

Associated Case Party: AMY-MARIE HOWARD

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|

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briana.nicholson@austintexas.gov
Envelope ID: 69621994
Status as of 11/1/2022 8:44 AM CST

Associated Case Party: AMY-MARIE HOWARD

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Associated Case Party: CITY OF AUSTIN

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Hannah Vahl | | Hannah.Vahl@austintexas.gov | 10/27/2022 10:24:26 AM | SENT |

**CAUSE NO. D-1-GN-21-007467**

| | | |
|---|---|---|
| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY** | § | **IN THE DISTRICT COURT OF** |
| ***Plaintiffs,*** | § | |
| **V.** | § | **TRAVIS COUNTY, TEXAS** |
| **TAVISTOCK FREEBIRDS, LLC GALLS, LLC, SAFARILAND, LLC, THE CITY OF AUSTIN, DJ INTERESTS, LTD., and DT LAND GROUP, INC.** | § | |
| ***Defendants.*** | § | **201st JUDICIAL DISTRICT** |

**DEFENDANTS DJ INTERESTS, LTD. AND DT LAND GROUP, INC.'S ORIGINAL ANSWER**

NOW COME Defendants DJ Interests, Ltd. and DT Land Group, Inc. ("Defendants") and file this their Original Answer to Plaintiffs' First Amended Petition and would respectfully show unto the Court as follows:

## I.
## GENERAL DENIAL

1.01 Defendants hereby exercise their rights under the law wherein they may file a general denial and require the Plaintiffs to prove their cause of action by a preponderance of the evidence. Defendants therefore deny each and every, all and singular, the allegations contained in Plaintiffs' First Amended Petition and Jury Demand and any amendments or supplements thereto,

for the sole purpose of requiring Plaintiffs to prove their cause of action to a fair and impartial jury. Defendants hereby reserve the right to amend their answer before the trial of this cause.

## II.
## AFFIRMATIVE DEFENSES

2.01 Defendants would show that the Plaintiffs' damages, if any, were caused in whole or in part by the negligent acts, omissions and/or conduct of other Defendants, Responsible Third Parties, and/or third parties over whom these Defendants had no control, and that those acts, omissions, conditions, or tangible items were the proximate, producing, contributing, sole, new and independent, and/or subsequent intervening and superseding cause of Plaintiffs' damages, if any.

2.02 Defendants deny that Plaintiffs' injuries and damages, if any, proximately resulted from any act or omission on the part of these Defendants.

2.03 Defendants affirmatively assert that Plaintiffs' claims are barred by the applicable statute of limitations.

2.04 Defendants affirmatively invoke the provisions of §41.001, et seq, of the Texas Civil Practice & Remedies Code with respect to the limitation of Plaintiffs' recovery of economic and non-economic damages.

2.05 Defendants affirmatively invoke the provisions of Chapters 32 and 33 of the Texas Civil Practice and Remedies Code with respect to a determination of comparative responsibility or contribution from Plaintiffs, Defendants, any Responsible Third-Party or settling party and claims the right to make such election of credit for settlements as is permitted by statute.

2.06 Defendants further allege that Plaintiffs' injuries, if any, were the result of unforeseen, extraneous events which constitute the sole proximate cause, producing cause, and/or new and independent intervening and/or superseding cause of the alleged injuries to Plaintiffs.

2.07. Further, Defendants would respectfully show the court that Plaintiffs are not entitled to any award of exemplary damages. Defendants respectfully allege that if exemplary damages are awarded, any award should be subject to the limits imposed by the TEXAS RULES OF CIVIL PROCEDURE and TEXAS CIVIL PRACTICE AND REMEDIES CODE. Any award of exemplary damages violates the due process clause of the Fifth Amendment and Fourteenth Amendment to the United States Constitution, in addition to Article 1, Section 19, of the Texas Constitution, in that:

a. Such punitive damages are intended to punish and deter Defendants and thus this proceeding becomes essentially criminal in nature.

b. Defendants are being compelled to be a witness against themselves in a proceeding that is essentially and effectively criminal in nature, in violation of Defendants' right to due process, and in violation of the Constitutions of the United States and of the State of Texas;

c. Plaintiffs' burden of proof to establish punitive damages in this proceeding, which is effectively criminal in nature, is less than the burden of proof required in all other criminal proceedings, and thus violates Defendants' rights to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and the rights of Defendants under Article 1, Section 19, of the Texas Constitution; and

d. Inasmuch as this proceeding is essentially and effectively criminal in nature, Defendants are being denied the requirements of adequate notice of the elements of the offense, and that such statutory and common law theories purportedly authorizing punitive damages are sufficiently vague and ambiguous, and Plaintiffs' Petition purporting to invoke such statutory and/or common law theory is so vague and ambiguous as to be in violation of the due Process Clause of the Fourteenth Amendment to the United States Constitution and in violation of Article 1, Section 19, of the Texas Constitution.

2.08. Defendants respectfully allege that Plaintiffs' claim for punitive or exemplary damages violates Defendants' right to protection from being subjected to excessive fines, as provided in Article 1, Section 13, of the Texas Constitution.

2.09 Defendants reserve the right to request that any submission to the jury on questions concerning gross negligence, malice and/or exemplary or punitive damages be made in accordance with Chapter 41 of the Texas Civil Practice and Remedies Code. Defendants specifically reserve the right to request a bifurcated trial pursuant to Texas Civil Practice and Remedies Code § 41.009.

2.10 Defendants invokes Chapter 304 of the Texas Finance Code and Section 41.007 of the Texas Civil Practice and Remedies Code restricting recovery of prejudgment interest.

## III.
## STATEMENT REGARDING PRODUCTION OF DOCUMENTS

3.01 Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, Defendants intend to use any and all documents produced by all parties in response to written discovery, attached to depositions as exhibits, or produced at any hearings, pre-trial or at trial, against the party that produced such documents as authenticated.

## IV.
## JURY DEMAND

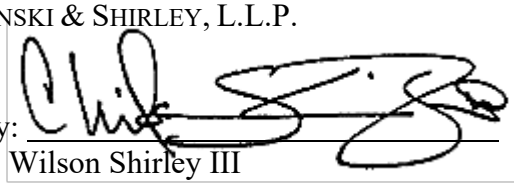
4.01 Defendants demand a trial by jury and hereby tender the appropriate fee.

## PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants DJ Interests, Ltd. and DT Land Group, Inc. pray that Plaintiffs take notice of their Original Answer, that Plaintiffs recover nothing, that Defendants recover their costs of court, and all other relief, in law or equity, to which they may be entitled.

Respectfully submitted,

SAVRICK SCHUMANN JOHNSON MCGARR KAMINSKI & SHIRLEY, L.L.P.



By: _____
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**ATTORNEYS FOR DEFENDANTS DJ INTERESTS, LTD. AND DT LAND GROUP, INC.**

## CERTIFICATE OF SERVICE

Pursuant to Texas Rules of Civil Procedure 21 and 21a, a true and correct copy of the foregoing has been served via e-filing upon all counsel of record on this the 7th day of November 2022:

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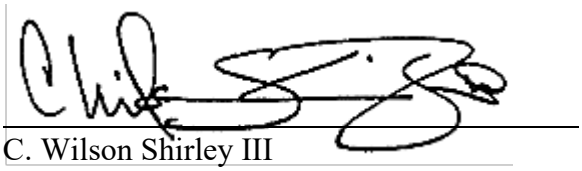

C. Wilson Shirley III

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| Worth Carroll | | worth@sg-llp.com | 11/7/2022 9:52:44 AM | SENT |

Associated Case Party: CITY OF AUSTIN

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
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Case Contacts

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Associated Case Party: DJ INTERESTS, LTD.

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ACCEPTED
03-22-00439-CV
70165759
THIRD COURT OF APPEALS
AUSTIN, TEXAS
11/14/2022 6:23 PM
JEFFREY D. KYLE
CLERK

**No. 03-22-00439-CV**

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**IN THE THIRD COURT OF APPEALS**
**AUSTIN, TEXAS**

---

THE CITY OF AUSTIN,
*Appellant*,

v.

AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF D. A., A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR AND NANETTE MOJICA, INDIVIDUALLY,
*Appellees*.

---

Appeal from Cause No. D-1-GN-21-007467
201st District Court, Travis County, Texas

---

# REPLY BRIEF OF APPELLANT

---

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**COUNSEL FOR APPELLANT**

**ORAL ARGUMENT REQUESTED**

## IDENTITY OF PARTIES AND COUNSEL

| | |
|---|---|
| **APPELLANT:** | City of Austin |
| **TRIAL AND APPELLATE COUNSEL FOR APPELLANT:** | Hannah M. Vahl<br>Sara Schaefer<br>Anne L. Morgan, City Attorney<br>Meghan L. Riley, Chief, Litigation<br>City of Austin - Law Department<br>P. O. Box 1546<br>Austin, Texas 78767-1546<br>anne.morgan@austintexas.gov<br>meghan.riley@austintexas.gov<br>hannah.vahl@austintexas.gov<br>sara.schaefer@austintexas.gov |
| **APPELLEES:** | AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF D. A., A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR AND NANETTE MOJICA, INDIVIDUALLY |
| **TRIAL AND APPELLATE COUNSEL FOR APPELLEES:** | Worth D. Carroll<br>State Bar No. 24091192<br>David M. Gonzalez<br>State Bar No. 24012711<br>SUMPTER & GONZALEZ L.L.P.<br>3011 N. Lamar Blvd, Suite 200<br>Austin, Texas 78705<br>Telephone: (512) 381-9955<br>Facsimile: (512) 485-3121 |

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| **TRIAL COURT DEFENDANT** | Tavistock Freebirds, LLC |
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TO THE HONORABLE THIRD COURT OF APPEALS:

## INTRODUCTION

The Appellant City of Austin ("City") argued in its initial appellate brief that the trial court erred in denying the City's Plea to the Jurisdiction because 1) a use or condition of property under Section 101.021(2) of the Texas Tort Claims Act ("TTCA") did not proximately cause Mr. Aguilar's death; and 2) the Public Duty doctrine prevents the City from having owed a duty to Mr. Aguilar, bringing the case outside the waiver of Section 101.021(2) of the TTCA. Appellees' responsive briefing fails to demonstrate that proximate cause can be established from such an attenuated chain of events and fails to establish that the City's immunity can be waived for what amounts to a failure to provide police protection to Mr. Aguilar. This case is tragic, yet the City retains immunity.

## ARGUMENT

### I. Appellees are still unable to show that Jonathan Aguilar's death was proximately caused by a use or condition of the duty belt.

Section 101.021(2), the waiver of immunity under the Texas Tort Claims Act Appellees rely upon, only waives immunity for personal injury or death caused by a condition or use or tangible personal or real

property. Tex. Civ. Prac. & Rem. Code §101.021(2). Appellees' responsive briefing fails to establish a waiver of immunity as Officer Spradlin's use of the duty belt did not proximately cause the tragic death of Mr. Aguilar. No cases relied on by Appellees contain the type of attenuated causal chain present here. The City retains immunity.

### A. The cases cited by Appellees to show acceptable attenuation of the causal chain are not analogous to the plead facts here.

Appellees argue that a variety of cases establish that Texas Courts often support a finding of a TTCA waiver even when the condition or use of property is merely a trigger that creates a causal chain. Appellees' Brief, pg. 24-26; *Michaels v. Travis Cnty Housing Auth.*, 995 S.W.2d 909 (Tex. App.—Austin 1999, no pet.); *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297 (Tex. 1976); *Robinson v. Central Tex. MHMR Center*, 780 S.W.2d 169 (Tex. 1989); *Overton Mem'l Hosp. v. McGuire*, 518 S.W.2d 528 (Tex. 1975); *Univ. of N. Tex. v. Harvey*, 124 S.W.3d 216 (Tex. App.—Fort Worth 2003 pet. filed); *Tex. Dept. of MHMR v. McClain*, 947 S.W.2d 694 (Tex. App.—Austin 1997, pet. denied). However, all the cases cited by the Appellees have pronounced differences with the facts plead relating to the condition or use of the duty belt.

*Michaels*, *Lowe*, *Robinson*, *McGuire*, and *Harvey* all notably involve an injury resulting from a defect in property specifically designed to prevent such an injury from occurring.[1] *Michaels* involves a defect in a fence designed to prevent pit bulls from escaping. *Lowe* involves a coach ordering the removal of a knee brace designed to prevent a knee injury. *Robinson* involved the failure to provide a life jacket designed to prevent drowning. *McGuire* involved the failure to use bed rails designed to prevent someone from falling out of bed. *Harvey* involved failure to provide an ice scoop designed to prevent bacterial contamination of ice.

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[1] Appellees also rely on *McClain* support their argument that immunity is waived under Section 101.121(2) even if defective property only triggers a casual chain, rather than causing the injury directly. *Tex. Dept. of MHMR v. McClain*, 947 S.W.2d 694, 698 (Tex. App.—Austin 1997, pet. denied); Appellee's Brief, pg. 24-26. This case also has significant factual differences from the present case, making it less than helpful, though in a different way than the other cases relied on. In *McClain*, a patient at the state hospital beat another patient with a removable locker rod and a removable wheelchair pedal. In this case, the analysis turned on the state having custody over the violent patient and not taking any steps to secure objects that could be used as weapons. This differs from the case here, as Woodburn was never successfully taken into custody and he is not alleged to have used the duty belt or other City property to facilitate his criminal act. This differentiating factor—that the duty belt was not used in the criminal act—is noted in the *Scott* case. *Scott v. Prairie View A&M Univ.*, 7 S.W.3d 717, 721 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). *Scott* involved a youth program participants who were sexually assaulted in a state owned dormitory room and a hotel room paid for by state money. *Id.* at 719-20. The youth claimed their injuries were caused by the use or condition of tangible property—namely the dorm room and the money. *Id.* Distinguishing the facts in *McClain*, the court stated unlike the metal rod and foot pedal in *McClain* "the money and room did not cause the appellants' injuries although they did provide the unfortunate backdrop for their assaults." *Id.* At 721. So too here. The duty belt was not used in the attack—it merely was the unfortunate backdrop.

In all of these cases the injury directly related to the lack of a safety component specifically designed to prevent that sort of injury. *Michaels*, 995 S.W.2d at 911 (children mauled by pit bulls due to fence failure); *Lowe*, 540 S.W.2d at 298 (knee injured without knee brace), *Robinson*, 780 S.W.2d at 169 (patient drowns without life jacket); *McGuire*, 518 S.W.2d at 528 (person falls out of bed without rails); *Harvey*, 124 S.W.3d 216 at 220-22 (food poisoning resulting from contaminated ice).

The Texas Supreme Court elaborated on the application of this line of cases in *Clark* stating "[t]he precedential value of these cases is therefore limited to claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and that lack of this integral component led to the plaintiff's injuries." *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584-85 (Tex. 1996). While Appellees attempt to shoehorn the plead facts of this case into this line of cases, this fails. Here, Officer Spradlin's duty belt fell off allegedly due to the lack of keepers, which the Appellees now argue is a missing integral safety component. However, for the facts of this case to match the fact pattern of the *Michaels*, *Lowe*, *Robinson*, *McGuire*, and *Harvey* the purpose of the duty belt or the missing keepers would need to be to restrain Woodburn,

leading to Woodburn's injury. Instead, the keepers (or lack thereof) and the duty belt were not designed to restrain Woodburn, as for example bed rails are designed to prevent a fall out of bed. The duty belt falling merely furnished the condition that allowed Woodburn to escape. There are no allegations that the duty belt itself was being used to restrain Woodburn and that a lack of a safety component caused his escape.[2] Appellees are truly complaining of the failure to restrain Woodburn, for which the TTCA does not waive immunity.

### B. Appellees assert *Dallas Cnty. Mental Health & Mental Retardation v. Bossley* is inapplicable, but it is the closest case on point.

As described in the discussion above, the key cases Appellees seek to rely on to establish proximate cause are either quite factually distinct or do not include an immunity analysis that shows how a condition or use of property caused the injury. Appellees seek to discount the *Bossley* case by arguing that the present case is more like the cases involving missing safety components, which were just discussed. Appellees' Brief, pg. 30-32; *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968

[2] Notably, the facts of the present case are further attenuated than the line of cases Appellees rely on as Woodburn himself is not alleging an injury caused by the missing safety component.

S.W.2d 339 (Tex. 1998). Further, they argue that the present case is different because in includes a policy violation[3] and that the harm in *Bossley* is more distant from the use or condition of property. Appellees' Brief, pg. 34-36.

In brief, *Bossley* involves a psychiatric patient who escaped from a treatment facility through an existing unlocked door and a door in the process of being unlocked by a staff member. *Bossley*, 968 S.W.2d at 340-41. The patient ran a half mile to an interstate, attempted to hitchhike, and then finally threw himself in front of a truck, ultimately committing suicide. *Id*. at 341. The Texas Supreme Court held that neither unlocked door could be said to have caused the patient's suicide. *Id*. at 343. "The unlocked doors permitted [the patient's] escape but did not cause his death." *Id*.

[3] It is not clear from Appellees' briefing how a policy violation affects the determination of proximate cause from a use or condition of property. Appellees simply state this is a factual distinction between *Bossley* and the current case. They do not discuss how this affects the legal analysis of proximate cause and immunity. Furthermore, there is no immunity waiver for negligent implementation of government policy. *City of Dallas v. Hillis*, 308 S.W.3d 526, 536 (Tex. App.—Dallas 2010, pet. denied). In *Hillis*, the court disagreed with an attempt to allege a negligent implementation of policy when there is not a separate clear waiver of immunity already. *Id*.

*Bossley* specifically discusses *Lowe*, *McGuire*, and *Robinson* and distinguishes the *Bossley* facts from the scenarios in those three cases. *Id*. The *Bossley* court notes that in *McGuire*, where the patient fell out of the bed without rails, the injury was immediate and directly related to the absence of rails. *Id*. (citing *McGuire*, 518 S.W.2d 528). As already noted above, this is same for *Lowe* and *Robinson*—the injuries were directly caused by a missing safety component designed to prevent a specific injury which then occurred. *Lowe*, 540 S.W.2d at 300; *Robinson*, 780 S.W.2d at 171. The doors in *Bossley* were not missing safety components designed to prevent suicide or even escape, just as the duty belt here was not missing a safety component designed to prevent murder or Woodburn's escape. *Bossley*, 968 S.W.2d at 343. As in *Bossley*, where the true complaint was the failure to restrain the patient, here the true complaint is Officer Spradlin's failure to restrain Woodburn. *Id*. The TTCA does not waive immunity from such a complaint. *Id*.

Finally, Appellees assert the belt malfunction in the present case is much closer temporally, geographically, and causally to Mr. Aguilar's death than the door in *Bossley*. This is inaccurate. While *Bossley* involved a geographic distance of a half mile, the patient's suicide still occurred

temporally close to when he fled the facility. It is the causal distance between the act of suicide on a highway and the use of the unlocked doors of the facility that preserves immunity and destroys the causal nexus, as well as the intervening acts of running, attempting to hitchhike, and locating a passing truck to use as an instrumentality of suicide. Here, while the time period before the belt falling off and the murder of Mr. Aguilar was minutes, the act took place in a separate business. C.R. 10-11. Additionally, there were several more elements of the causal chain that had to take place to get from the belt falling off to the murder. *Id*. After the belt fell off, Woodburn had to escape, go across the shopping complex, enter Freebirds through an unlocked door that happened to be left open, locate a knife that had been left out by a knife sharpening vendor, and then kill Mr. Aguilar. *Id*.

### C. Except for factually involving a belt, *Texas Department of Corrections v. Jackson* bears little similarity in the type of causal chain or in legal reasoning to the present case.

Appellees argue that *Jackson*, a case also involving a belt, has a similar causal chain and establishes that immunity under the TTCA is waived in the present case. *Tex. Dept. of Corrections v. Jackson*, 661 S.W.2d 154 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.);

Appellees' Brief, pg. 19. This is inaccurate. While both cases involve a belt, the similarities end there.

First, the causal chain is actually quite different. As Appellees explain in their briefing, *Jackson* involved a prison inmate, who alleged a state-provided tool belt slipped, which caused him to feel a falling sensation and reach up to grab a live wire. *Id.* at 155-56. The prison inmate wearing the allegedly faulty belt was the individual who suffered an injury due to the belt. *Id.* at 155. Here, of course, that is not the case. Officer Spradlin's duty belt did not cause injury to himself, but instead furnished a condition that allowed Woodburn to escape and then commit a criminal act against Mr. Aguilar. C.R. 10-11. Regardless of the whether the *Jackson* case also involves a few steps between the faulty belt and the injury, the causal chain still differs dramatically from the present case. In *Jackson*, the causal chain involves one person reacting to his belt and causing injury to himself, rather than a fully series of events involving the subsequent actions of numerous individuals.

Furthermore, the legal reasoning regarding the waiver of immunity in the *Jackson* case is not helpful for the present case. The case does not provide an analysis of proximate cause when there is an attenuated chain

of events stemming from an alleged use or condition of property under Section 101.021(2). *Jackson*, 661 S.W.2d at 158. In response to the state's argument that immunity had not been waived the courted stated:

> The appellant's contention that the negligence of state employees does not constitute a waiver of governmental immunity created by the Texas Tort Claims Act is not the issue in the instant case. The issue is whether the appellant furnished and failed to replace a tool belt which was insufficient or inappropriate for the purpose for which it was used. We hold that the appellee's pleadings and proof were sufficient to bring him within the waiver of governmental immunity created by the Texas Tort Claims Act.

*Id.* Instead the court mostly focused on whether sufficient evidence had been presented that an issue with the tool belt is what caused the electrocution, since no one saw the accident, and the plaintiff himself did not remember what happened and was simply speculating that the slipping tool belt had caused the issue. *Id.* at 155–56. The court rendered a take-nothing judgment for the government on the ground that there was insufficient evidence the belt proximately caused the plaintiff's injury. *Id.* at 157–58. While the court found a waiver in the *Jackson* case it did not complete an analysis about proximate cause stemming from the use or condition of the belt. *Id.* at 158. Rather, it focused on if there was

sufficient evidence to prove proximate cause when there was no witness testimony beyond speculation on the sequence of events. *Id.* at 157.

### D. While *Travis v. City of Mesquite* provides a helpful analysis of proximate cause, it is not instructive here as it does not address the narrower issue of condition or use under the TTCA.

Appellees argue that *Travis* controls on the issue of proximate cause when there is a causal chain that includes the criminal conduct of a third party. *Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992); Appellee's Brief, pg. 27-28. While *Travis* does provide guidance on proximate cause generally, it also fails to analyze the immunity waiver question of whether a use or condition of property actually caused the accident. *Id.* at 98-99. *Travis* involves a police pursuit of a fleeing suspect. *Id.* at 96. The suspect ended up entering a highway at a high rate of speed going the wrong way to avoid capture and crashed into an uninvolved car. *Id.* The Texas Supreme Court found enough evidence to support an inference of proximate cause to survive summary judgement. *Id.* at 98-99. The suspect only sped the wrong way because the police were chasing him. *Id.* at 98. This conduct, though criminal, was foreseeable. *Id.* Thus, the two elements of proximate cause were met. *Id.* at 98-99.

When analyzing proximate cause, *Travis* does not analyze the TTCA or how proximate cause interplays with the requirement here that the injury be *caused* by a use or condition of property. *Id.* at 100 ("Because the issue is not presented, we express no opinion regarding respondents' arguments concerning state law immunity…"). The Dallas Court of Appeals stated in *Hillis*:

> it appears the defendants in *Travis* did not argue immunity as a separate defense on appeal…Thus, the *Travis* court considered only the broad question of whether general police negligence caused the accident in question; it did not consider the narrower issue of whether the *use* of the police car was the actual cause of the accident in question.

*City of Dallas v. Hillis*, 308 S.W.3d 526, 535 (Tex. App.—Dallas 2010, pet. denied). *Hillis* involved a police pursuit that ended in the death of the suspect being pursued. *Id.* at 529. The *Hillis* court declined to follow *Travis* as the use of the police car in *Hillis* was sufficiently attenuated from the suspect's death. *Id.* at 534-35. The court stated that the police officer did not hit the suspect's motorcycle or use his car to force the suspect off the road. *Id.* at 534. Due in part to the distance between the police car and the suspect when the fatal accident occurred, the court "conclude[d] as a matter of law that [the officer's] use of his patrol car

was too attenuated from [the suspect's] conduct for that use to constitute a cause" of the suspect's injuries. *Id.* The analysis in *Hillis* is more applicable to the factual scenario in the present case as neither Officer Spradlin nor Woodburn used the duty belt to cause Mr. Aguilar's death.

Furthermore, in the *Travis* court's analysis of the cause in fact element of proximate cause, the court explains that the fleeing suspect drove at a high rate of speed and the wrong way in direct reaction to the police chasing him—establishing the police chase as the cause in fact of the collision. *Travis*, 830 S.W.2d at 98. However, here, while the duty belt falling down allowed Woodburn to escape, he did not stab Mr. Aguilar as a direct reaction or response to the duty belt falling. In other words, the *only* reason the suspect in *Travis* was driving recklessly was get away from the police chase. Whereas, here, the stabbing did not occur as a reaction to the duty belt or any police action. Thus, the finding of proximate cause in *Travis* is not especially applicable to the present case.

## II. The City retains immunity under the Public Duty Doctrine for the claim that the City failed to protect Mr. Aguilar.

While Appellees claim they bring suit because Officer Spradlin negligently used property causing death to Mr. Aguilar, they are truly

claiming that the City failed to restrain Woodburn and failed to protect Mr. Aguilar from Woodburn. Immunity is not waived for such a claim.

The Public Duty Doctrine implicates immunity as immunity is only waived in this case if personal injury or death is "so caused by a condition or use of tangible personal property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code § 101.021(2). The Austin Court of Appeals has specifically interpreted what "so caused" means, substituting the phrase "proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment" for "so caused" in the statute to show how the court interprets Section 101.021(2) to be read. *Mitchell v. Shepperd Memorial Hosp.*, 797 S.W.2d 144, 146 (Tex. App.—Austin 1990, writ denied). To prevail on a negligence cause of action, a claimant must establish a duty and a breach of that duty. *Western Investments, Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). Appellee here is unable to establish a duty.

"Courts have generally held that the victim of the crime does not have recourse against the individual policeman for failing to take action to prevent or stop the commission of a crime." *Munoz on behalf of Martinez*

*v. Cameron Cty.*, 725 S.W.2d 319, 321-22 (Tex. App.—Corpus Christi-Edinburg 1986, no writ). In *Dent*, as Appellees explain, the court found no duty to the third-party victim of the car accident caused by suspect fleeing the police. *Dent v. City of Dallas*, 729 S.W.2d 114, 116 (Tex. App.—Dallas 1986, writ refused n.r.e.). While this ruling was implicitly overruled in *Chambers* due to the decision in *Travis v. Mesquite* the *Chambers* court explained that this was specifically relating to two state statutes about driving. *Chambers v. City of Lancaster*, 843 S.W.2d 143, 147 (Tex. App.—Dallas 1992) *rev'd on other grounds* 883 S.W.2d 650 (Tex. 1994) (reversing decision based on official immunity grounds). There are two specific statutes that require police and emergency vehicles to drive with due regard for the safety of others. *Travis*, 830 S.W.2d at 98. Here, there is no such statute specifically creating a duty relating to restraining suspects or using a duty belt.

## CONCLUSION AND PRAYER

This Court should reverse the trial court's denial of the City's plea to the jurisdiction and render judgement dismissing Appellees' the claims against the City for want of subject matter jurisdiction.

RESPECTFULLY SUBMITTED,

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing documents contains 3,545 words, in compliance with Rule 9.4 of the Texas Rules of Appellate Procedure.

*/s/ Sara Schaefer*
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## CERTIFICATE OF SERVICE

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**CAUSE NO. D-1-GN-21-007467**

| | | |
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| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,** | § | **IN THE DISTRICT COURT OF** |
| **Plaintiffs** | § | |
| | § | |
| **v.** | § | **TRAVIS COUNTY, TEXAS** |
| | § | |
| **TAVISTOCK FREEBIRDS, LLC, GALLS, LLC, SAFARILAND, LLC, AND THE CITY OF AUSTIN,** | § | |
| **Defendants.** | § | **201ST DISTRICT** |

**PLAINTIFFS' RESPONSE TO**
**DEFENDANT CITY OF AUSTIN'S PLEA TO THE JURISDICTION**

Three cases are dispositive in denying the City of Austin's Plea to the Jurisdiction:

(1) *Texas Dept. of Corrections v. Jackson*, 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.) (TTCA waiver when a defective belt fell off and caused a chain of events ending with the plaintiff getting electrocuted),

(2) *Michael v. Travis County Housing Authority*, 995 S.W.2d 909 (Tex. App. – Austin 1999) (TTCA waiver when 2 dogs escaped through holes in a fence and attacked a plaintiff on a sidewalk), and

(3) *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992) (TTCA proximate cause established when the City's failure to follow policy caused an injury, even though the ultimate harm was directly caused by a fleeing criminal).

These cases place Plaintiffs' allegations against the City squarely within the Texas Tort Claims Act's ("TTCA") waiver of immunity, and as a result (and for the reasons below), the City's Plea to the Jurisdiction ("Plea") should be denied.

## I.
## INTRODUCTION AND EXECUTIVE SUMMARY

The reason the City mandates such strict requirements for police officer equipment is because of its importance during critical moments. And when police equipment fails (as it did in this case), the City spends time and effort investigating the cause of the failure (as it did in this case) – so to prevent injuries and dangerous conditions from occurring in the future. Plainly, it is foreseeable to the City that equipment failures can cause injuries (like in *Texas Dept. of Corrections v. Jackson*, 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.), and when equipment failures occur, the City knows that its failure to follow standards and regulations can constitute a waiver of the Texas Tort Claims Act (as it did in *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992)).

Johnathon Aguilar would be alive today if Officer Spradlin followed City policy and used a duty belt that had necessary and integral safety components (known as belt "keepers"). The City's use of a duty belt without keepers caused Officer Spradlin's belt to fall off of his waist while attempting to restrain Woodburn, thereby allowing him – a known dangerous and violent person – to walk away from restraint, enter a connecting business, and stab Johnathon to death just moments after the belt's malfunction.

Plainly, had the City provided and used a duty belt with keepers (which are an essential integral safety component for duty belts), Officer Spradlin's belt would not have fallen off his waist and Woodburn – the killer – would not have immediately walked away to murder Johnathon in the adjacent business.

Based upon these allegations and the below reasons, Plaintiffs' suit against the City fits squarely within the TTCA's waiver of immunity, and the City's plea should be denied:

1. **Plaintiffs have alleged a valid waiver under the TTCA.** Plaintiffs have pleaded facts that affirmatively demonstrate jurisdiction by alleging a valid waiver of immunity,[1] as Plaintiffs' claim that a condition of the City's duty belt (the fact that it did not have appropriate and necessary keepers) caused Spradlin's belt to fall off and allowed Woodburn to escape next door and kill Johnathon. *Texas Dept. of Corrections v. Jackson*[2] addressed an almost identical theory and found it to fall within the TTCA's waiver.

2. **The City's reliance on *Bossley* is misplaced: a condition allowing a dangerous actor to escape and injure a person has been deemed to fall within the TTCA's waiver.** *Michael v. Travis County Housing Authority*[3] is controlling regarding the City's *Bossley* argument. In *Michael*, the Third Court of Appeals expressly rejected the City's argument that *Bossley* requires the property itself to directly inflict the injury. Rather, *Michael*, along with *Mesquite* and a litany of proximate cause cases, hold that multiple negligent actors may be proximate causes of an injury when they each contribute to the injury.

3. **Given the facts of this case, the City's proximate cause argument is more appropriately analyzed at the Summary Judgment stage – when the Court can weigh the facts to determine whether Plaintiffs can meet their factual burden.** The Court has wide discretion to – and should – deny the City's plea to allow a factual record to be developed.

## II.
## FACTUAL SUMMARY

### A. *Facts alleged in Plaintiffs' Petition*

Given the requirement for the Court to take as true Plaintiffs' allegations and to "liberally construe the pleadings, taking all factual assertions as true and looking to [the Plaintiffs'] intent,'"[4] the following facts alleged in Plaintiffs' Petition are relevant for the Court's analysis:

- On January 3, 2020, Austin Police Department ("APD") received a "suspicious person" call related to a man – later determined to be Dylan Woodburn – inside

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[1] *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003).

[2] 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.).

[3] *Michael v. Travis County Hous. Auth.*, 995 S.W.2d 909, 913 (Tex. App.—Austin 1999, no pet.).

[4] *Tex. Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020) (quoting *City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015)).

Bennu Coffee ("Bennu"), disturbing customers, holding a large rock, and threatening customers.[5]

- After the call to police, Woodburn attacked a Bennu customer with a large object and was eventually wrestled to the ground and restrained by multiple Bennu customers.[6]

- The City's employee, Officer Spradlin, was the first APD officer to respond to the "suspicious person" call at Bennu.[7]

- When Spradlin arrived at Bennu, multiple Bennu customers were restraining Woodburn by holding him on the ground and preventing his escape (or any additional violent actions).[8]

- When Spradlin approached Woodburn, he directed the Bennu customers that were restraining Woodburn to release Woodburn.[9]

- The Bennu customers complied with Spradlin's order, and Spradlin attempted to continue to restrain Woodburn by placing him into handcuffs. However, during the exchange, Spradlin's duty belt came loose, Spradlin put his handcuffs down and, with both hands, attempted to put his duty belt back on.[10]

- While Spradlin attempted to re-secure his duty belt, Woodburn was able to stand up and walk from restraint – ultimately gaining access to Freebirds and killing Johnathon.[11]

***B. Facts disclosed in the City's recent production***

The City recently provided the results of an internal investigation into Johnathon's death and Spradlin's duty belt malfunction,[12] which provided Plaintiffs additional facts that

[5] Petition at ¶ 21.

[6] Petition at ¶ 22.

[7] Petition at ¶ 23.

[8] Petition at ¶ 24.

[9] Petition at ¶ 25.

[10] Petition at ¶ 26.

[11] Petition at ¶ 27.

[12] On January 6, 2020, City of Austin employee (and former APD Chief of Police), Brian Manley, stated that, "[o]bviously, [Spradlin's duty belt coming loose] is something that we do not expect to have happened. We expect to provide our officers with the best equipment, and we expect our equipment to perform appropriately." The City produced the results of this investigation, but has

will be included in a subsequent amendment. Because the Court is instructed to look to the Plaintiffs' intent and to liberally construe the facts alleged in determining whether to deny a plea to the jurisdiction, the Court should consider the following recently learned facts, which Plaintiffs intend to plead in an amended petition:

- On January 3, 2020, Officer Spradlin was not wearing an approved duty belt, but – instead – was wearing a duty belt provided by his prior APD supervisor. He was not wearing keepers on the non-approved and non-standard belt.

- After Johnathon was killed, the City of Austin conducted an internal review to determine whether Officer Spradlin violated APD policy, or any laws, during his involvement in Johnathon's death. During that internal review, Officer Spradlin gave three interviews.

***The First Interview: Spradlin admits that him not wearing keepers caused his belt to malfunction and allowed Woodburn to escape.***

- During the first interview, Officer Spradlin recounted that, when he attempted restrain Woodburn, Spradlin "realized his belt's not there [,] his taser's not there[, and his] belt's gone," and Woodburn was "able to get up and run out the door" as a result.

- In reality, Woodburn did not run out the door, he walked out – while Spradlin stood, distracted by and buckling his belt. Further, Spradlin did not attempt to chase after Woodburn and did not even tell him to stop – all because he was

marked the results confidential. Although Plaintiffs contest and object to this designation, Plaintiffs will file this response under seal.

distracted while trying to reattach his belt.

CHANCELLOR: 'Kay. Did you lose a little bit of focus on him when the incident happened with your belt?

SPRADLIN: When I realized that my taser wasn't there I did.

CHANCELLOR: Okay. And walk me through what was going on in your mind at that point.

SPRADLIN: My belt's not here. Where did it go? And I need to get him but I gotta get my belt.

CHANCELLOR: 'Kay. So Mr. Woodburn, he - he stood up and left the coffee shop. He actually walked out, got to the door, and then ran, right?

SPRADLIN: He ran out as far as I remember.

CHANCELLOR: 'Kay. Did you give him any commands to, "Stop?"

SPRADLIN: I don't recall telling him to, "Stop," once he stood up.

CHANCELLOR: Okay. And why was that?

SPRADLIN: Uh, I n- probably because I'm focused on trying to find my gun belt.

– Spradlin stated that his belt "completely fell off because [he] didn't have his keepers on that day." He stated that he realized he did not have his keepers on his belt before the incident with Woodburn and that he was concerned about his lack of keepers for safety reasons.

CHANCELLOR: Okay. Was that concerning to you?

SPRADLIN: Yes. Uh, my belt stays pretty tight. Um, once you get it locked in it - it - it's a tight belt but I still like to have my keepers 'cause I'll (tell you) - for this reason.

CHANCELLOR: And what is the purpose of keepers?

SPRADLIN: In case it does c- the buckle does come undone the keepers will help hold it to your hand belt so it doesn't come completely off your waist.

– Spradlin further admitted that failing to wear keepers was a "safety concern" and that, had he been wearing keepers, the belt "would have realistically stayed where it [was supposed to]."

– Spradlin believes that he violated APD policy by not wearing "keepers that day," and that he brought discredit upon the City due to his actions.

CHANCELLOR: Mm-kay, so you don't think that being in there with your belt coming loose and everyone seeing that and this guy getting away - and I'm not - we're not gonna go into the rest of it because what - what happens after that, um, a- to that point s- is the next step in it. But just off what happened in the coffee shop with you going in there going to put hands on this guy, th- they've got him held down. You loose your belt. You're having to put equipment back on. You're not out there to chase after him. You don't believe that that would tend to destroy public confidence or respect for our department?

SPRADLIN: I can see that. Yes, sir.

CHANCELLOR: 'Kay. So I g- I'll ask it one more time. Do you believe that you could have violated or brought discredit or destroyed public confidence to our...

SPRADLIN: Yes, sir.



- Spradlin stated that he was embarrassed about the incident, and that because of his belt coming undone, he "wasn't able to control Woodburn, and [he] feels bad for everybody that's involved."

- During the interview, when asked about whether he typically wears keepers, Officer Spradlin stated that he had only not worn keepers one other time in his career, and that he always wears keepers otherwise.

***The Second Interview – Spradlin lies about his use of keepers.***

- After the first interview, APD conducted a review to determine whether Spradlin was being truthful in his first interview. To test some of Spradlin's claims, APD reviewed a collection of Spradlin's body cam recordings to determine whether Spradlin typically wore keepers.

- Based upon that audit, APD did not find any evidence that Spradlin wore keepers on his duty belt and showed Officer Spradlin screenshots of body cam recordings where keepers were clearly not visible on Spradlin's duty belt.

- When confronted with those screenshots, Officer Spradlin stated that APD could not see his keepers, because he wore them in a hyper-specific way that made them invisible to the eye, and that he had been wearing his keepers that way for years.

- When asked to demonstrate, Spradlin had difficulty recreating the way he had been purportedly wearing his belt for "13 years." Regardless of his difficulty and the multiple screenshots of him plainly not wearing keepers, Spradlin insisted that he was being truthful.

– Spradlin again confirmed that he always wore keepers due to keepers being an essential safety component:

| | |
|---|---|
| WILSON: | But I'm sayin', you - so but based on what you're sayin', I'm just askin' you this question, just an open question. What you're explainin' to them is because you know that it'll fall off that's the reason why you - you carry keepers and you have 'em on (unintelligible)? |
| SPRADLIN: | That's why we wear 'em, yeah. |
| WILSON: | Okay. And that was - that was what you were meanin' at that particular time, because if you don't have 'em they'll fall , that why you? |
| SPRADLIN: | The- that will come - yeah, if it comes undone like mine did it will fall off. |

***The Third Interview – Spradlin lies again and, when caught, retires.***

– Because of the difficulty Spradlin had while putting on his belt, APD allowed Spradlin another chance to showcase him placing his keepers on his belt in the way that he reported to APD. To ensure fairness, Spradlin was asked to wear his full duty uniform.

– During the demonstration, Spradlin appeared to get sick, canceled the demonstration, and "retired while under investigation" days later.

***The APD Investigation establishes that Spradlin's duty belt malfunction was a proximate cause of Johnathon's death.***

– During its investigation, APD determined the following timeline regarding Spradlin's duty belt malfunction.

– At 7:50am, APD first received a call from Bennu coffee regarding Woodburn threatening people in Bennu and Freebirds' parking lot.

– 20 minutes later, at 8:10, Spradlin arrived to Bennu/Freebirds' shared parking lot.

– 10 seconds after Spradlin's arrival (but before Spradlin left his car), Woodburn assaulted a man in Bennu, and Bennu customers subdued Woodburn by tackling him to the ground.

– A few seconds later while Spradlin was still sitting in his car, a Bennu coffee employee opened the front door and motioned for Spradlin to come into Bennu to help.

- Spradlin entered Bennu, pointed his taser at one of the men restraining Woodburn, and told him to "stop." The bystanders complied and let go of Woodburn as Spradlin knelt to arrest him.

- Four seconds later, Spradlin's duty belt came off and, when he attempted to reattach it to his waist, Woodburn stood up and walked out of Bennu.

- Spradlin did not chase after Woodburn – he did not even tell him to stop, due to the fact that he was distracted while trying to reattach his duty belt. Given his distraction, it took him twelve seconds to exit the store after Woodburn walked out.

- During the time that Spradlin was attempting to reattach his belt after its malfunction, it took Woodburn less than 30 seconds to enter into Freebirds, which is located across the small parking lot from, and in the same building as, Bennu. Once inside, Woodburn stabbed Johnathon multiple times.

- From the time the duty belt malfunction caused Woodburn's release to the time Woodburn was seen leaving Freebirds after killing Johnathon, only **two minutes and 48 seconds elapsed**.

## III.
## LEGAL STANDARDS

In Texas, a governmental unit is generally immune from tort liability unless the legislature has waived immunity.[13] Waivers to sovereign immunity are generally dependent on statute – which is the TTCA in Texas.[14] The TTCA only waives governmental immunity in a limited number of circumstances, one of which is "personal injury and death so caused by a condition or use of tangible personal or real property."[15]

[13] See *Harris County v. Dillard*, 883 S.W.2d 166, 168 (Tex. 1994).

[14] *See Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex.), *cert. denied*, 525 U.S. 1017 (1998).

[15] *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994) (quoting Tex. Civ. Prac. & Rem. Code § 101.021).

The party suing a governmental unit bears the burden of pleading facts that affirmatively demonstrate[s] jurisdiction by alleging a valid waiver of immunity.[16] And although resolution of a plea to the jurisdiction may be determined on (1) the pleadings or (2) an evidentiary record,[17] the City's plea should be denied if the Plaintiffs have alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause,[18] because the City's Plea only argues dismissal under the first theory.[19]

In determining whether the Plaintiffs have met their burden, trial courts should "liberally construe the pleadings, taking all factual assertions as true and looking to [the Plaintiffs'] intent.'"[20] And although a trial court may rule on a preliminary plea to the jurisdiction when "the pleadings affirmatively negate the existence of jurisdiction,"[21] a trial court has broad discretion to defer the decision on a plea to the jurisdiction to allow additional facts to be developed and discovered.[22]

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[16] *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003).

[17] *Tex. Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020) (quoting *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018)).

[18] *Tex. Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020).

[19] Plea, at fn. 1 ("The City is not challenging the existence of jurisdictional facts at this stage and is only challenging whether Plaintiffs have, and can, plead a claim against it that comes within the Texas Tort Claims Act's limited immunity waiver.").

[20] *Id.* (quoting *City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015)).

[21] *Tex. Dep't of Transp. v. Self*, No. 02-21-00240-CV, 2022 WL 1259094, at *6 (Tex. App.—Fort Worth Apr. 28, 2022, no pet. h.), reh'g denied (June 9, 2022).

[22] *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("[w]hether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion.").

## IV.
## ARGUMENT AND AUTHORITIES

### A. Plaintiffs alleged a valid waiver under the TTCA.

Woodburn – an aggressive and violent person – was able to walk from restraint and kill Johnathon just moments after he escaped due to Spradlin's duty belt malfunctioning, which occurred because Spradlin used his duty belt without integral and necessary keepers. Had Spradlin worn keepers, Woodburn would not have been able to escape from restraint and kill Johnathon less than three minutes later.

These allegations clearly fall within the TTCA's waiver of immunity,[23] as Plaintiffs' suit alleges that (a) Johnathon was stabbed and killed (b) as a direct result of (c) the defective condition or use of the City's belt.

An analogous factual scenario was previously held to fall within the TTCA's waiver of immunity in *Texas Dept. of Corrections v. Jackson*.[24] In that case, the plaintiff was injured after a tool belt he was provided by the State slipped and caused a chain of events that led to him being shocked by electricity.[25] Under the plaintiff's theory, the tool belt slipped because it contained an improper attachment that caused it to bind, which further caused him to have a sensation of falling, which further caused him to instinctively reach up and grab the electrical wires above him.[26]

Although the plaintiff in that case failed to meet his proximate cause burden *at trial* when he did not provide any evidence that the belt malfunctioned, that the belt malfunction

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[23] Namely that Johnathon's injuries were "caused by a condition or use of tangible personal [] property." Tex. Civ. Prac. Rem. Code § 101.121(2).

[24] 661 S.W.2d 154 (Tex. App. — Houston [1st Dist.] 1983, writ ref'd n.r.e.)

[25] *Id.* at 154-156.

[26] *Id.* at 156-157.

was caused by the condition of the belt, or that the belt malfunction was the cause of him reaching up and being shocked, the Court of Appeals found that the *allegations* were enough to bring the claim within the TTCA's waiver.[27]

The similarity is striking between the allegations in *Jackson* and the facts here.

| | ***Jackson*** | ***Howard*** |
|---|---|---|
| **Type of Equipment** | Belt | Belt |
| **Equipment Defect** | *Wrong* safety component | *Missing* safety component |
| **Defect Result** | Belt fell *down* | Belt fell *off* |
| **Did the equipment directly inflict the injury?** | No. Equipment defect → the belt fell → plaintiff had a sensation of falling → plaintiff instinctively reached up → plaintiff grabbed the electrical wire → the wire shocked him. | No. Equipment defect → the belt fell → Woodburn escaped moments later and killed Johnathon. |
| **TTCA Waiver?** | Immunity waived. | Immunity waived. |

*Jackson* is dispositive: Plaintiffs' petition alleges a valid liability theory under Tex. Civ. Prac. Rem. Code § 101.121(2), and, as a result, the City's plea should be dismissed.

**B. The City's reliance on *Bossley* is misplaced: a condition allowing a dangerous actor to escape and injure a person has been deemed to fall within the TTCA's waiver.**

The City argues that *Bossley* and its progeny yield dismissal in this case because the TTCA requires that the property itself – rather than some other force – actually inflict a plaintiff's injury to validly state a claim under the TTCA.[28]

[27] *Id.* at 158.

[28] Plea at pp. 4-6.

This argument is wrong and has previously been rejected by the Third Court of Appeals.

1. *Michael v. Travis County Housing* is controlling and contradicts the City's argument.

In *Michael v. Travis County Housing Authority*,[29] the Third Court of Appeals expressly rejected the City's argument that *Bossley*[30] requires the property itself to directly inflict the injury. In that case, the Third Court of Appeals found a valid TTCA waiver when a governmental actor negligently maintained a fence, which allowed two dogs to escape and maul a child on a nearby sidewalk.[31] In that case, the plaintiff was mauled by two pit bulls after they escaped through a hole in a fence maintained by the County.[32]

Like the City here, the County in *Michael* argued that *Bossley's* analysis required dismissal, because "the injury was caused by the dogs, not the fence, and therefore it cannot be said that a condition or use of property proximately caused the injury."[33] The Austin Court rejected the County's (and the City's) argument, reasoning that *Bossley* does not "require that [the] property causing injury must be the device that directly inflicts the injury.. . . as long as there is a reasonably close causal relation between the property and the resulting injury." The similarities – once again – are striking:

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[29] *Michael v. Travis County Hous. Auth.*, 995 S.W.2d 909, 913 (Tex. App.—Austin 1999, no pet.).

[30] 968 S.W.2d 339, 343 (Tex. 1998).

[31] *Michael* at 913.

[32] *Id.* at 911.

[33] *Id.* at 913.

| | *Michael* | *Howard* |
|---|---|---|
| **Did the equipment actually inflict the injury?** | No.<br>Property: Fence<br>Injuring thing: Dog | No.<br>Property: Belt<br>Injuring thing: Person |
| **Causal Link** | Dangerous dogs (not owned by the County) escaped because of a defective fence, which allowed them to run down the street and attack a third party. | Dangerous person escaped because of a defective belt, which allowed him to run across a parking lot and attack a third party. |
| **Temporal and Geographic Connection** | "The attack occurred on a nearby sidewalk in close proximity to the fence" and happened "immediately" after the dogs' escape. | The attack occurred in a nearby business close in proximity to where the belt malfunctioned. The attack happened less than 3 minutes after the belt allowed Woodburn's escape. |
| **TTCA Waiver?** | Immunity waived. | Immunity waived. |

Unlike the injury in *Bossley* but like the plaintiffs' injuries in *Michael*, Johnathon's stabbing was not "distant geographically, temporally, and causally" from the property malfunction.[34] Rather, the ultimate attack occurred at the same address that the property malfunctioned and occurred only moments after the defective property allowed Woodburn to escape – placing the Plaintiffs' allegation firmly within the TTCA's waiver.

2. <u>The actual injury need not be directly caused by the defective property – it need only be proximately caused by the property.</u>

The City's plea attempts to place a heightened causal standard than what is currently required of injured plaintiffs. But, because the Texas Supreme Court has "consistently construed the causation requirement in section 101.021(2) to be one of proximate cause, not

[34] *Michael* at 914.

a different standard such as immediate cause, direct cause, or sole cause,"[35] the City's argument should be rejected and its plea denied.

Whether it's the removal of a knee-brace that allowed a prior injury to resurface during a football game,[36] the failure to provide life jackets that allowed a swimmer to drown,[37] the failure to install beds with rails that allowed a patient to fall,[38] the failure to provide an ice scoop that allowed an environment for E.coli to grow in an ice receptacle,[39] or the failure to appropriately secure parts of a wheelchair that allowed a mentally ill person

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[35] *Michael* at 912-913, *citing Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 299 (Tex.1976), *and Bossley*, 968 S.W.2d at 342 ("Section 101.021(2) requires that for immunity to be waived, personal injury or death must be proximately caused by the condition or use of tangible property."), among other cases.

[36] *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex.1976). In *Lowe v. Texas Tech Univ.,* Lowe alleged that he injured his knee while playing football for the university. The injury allegedly occurred when a coach ordered him to remove his knee brace, which he wore because of a previous knee injury, and reenter a game without it. The Texas Supreme Court concluded that Lowe's injury was proximately caused by the removal of the brace, even though playing football – rather than the brace itself – was the direct cause of the injury.

[37] *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169, 171 (Tex. 1989). In *Robinson v. Central Texas MHMR Center*, MHMR took several patients, including Robinson, swimming. Knowing that Robinson was epileptic, MHMR and its employees failed to provide Robinson with a life preserver, and he subsequently drowned while swimming. And even though it was the plaintiff's epilepsy – and not the life preserver – that directly caused him to lose consciousness and drown while swimming, the Texas Supreme Court held that the failure to provide life preservers was a proximate cause of the plaintiff's injuries.

[38] *Overton Mem'l Hosp. v. McGuire*, 518 SW2d 528 (Tex. 1975). In *Overton Memorial Hospital v. McGuire,* the City owned and operated hospital waived immunity by failing to install rails on a bed of a patient, who fell from the bed while receiving postoperative. The Texas Supreme Court found that the "injuries were proximately caused by negligently providing a bed without bed rails," even though the rails themselves were not the direct cause of the plaintiff's injuries.

*See also, Hampton v. Univ. of Tex.- M.D. Anderson Cancer Ctr.*,6 S.W.3d 627, 631 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (where the court determined that a bed provided by hospital with bed rails that were not activated lacked an integral safety component, and this condition of tangible personal property triggered waiver of immunity.

[39] *Univ. of N. Tex. V. Harvey*, 124 S.W.3d 216(Tex. App.—Fort Worth 2003, pet. filed). In *University of North Texas v. Harvey*, the Fort Worth Court found proximate cause when a University failed to include an ice scoop at a drill team's water station, which contributed to the transmission of E.coli bacteria. The scoop itself was not a direct cause of the injury. Rather, the failure to provide a scoop led to bacteria getting into the ice and contaminating it, which led to an E.coli outbreak that caused plaintiffs' injuries.

to assault another patient,[40] Texas Courts have found valid TTCA waivers even when the defective property at issue only triggers the causal chain-of-events that leads to the plaintiff's injury.

This is because Texas Courts have long held that there can be more than one proximate cause of an injury,[41] so long as a more recent cause does not "intervene[] between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause."[42] And absent an intervening cause,[43] an event proximately causes an injury if the breach at issue is (a) a cause in fact of the harm[44] and (b) if the injury was foreseeable.[45]

Specifically relevant here, foreseeability "does not require that a person anticipate the precise manner in which injury will occur once he has created a dangerous situation through his negligence."[46] Further, although the criminal conduct of a third party *may* be a

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[40] *Texas Dept. of MHMR v. McClain*, 947 S.W.2d 694, 698 (Tex. App – Austin 1997, pet. denied). In *Texas Dept. of MHMR v. McClain*, a patient at a State hospital was assaulted and killed by a fellow patient when the patient attacked the other patient with a wheelchair part that the State did not secure. Even though it was the patient's violence and aggression that directly injured the victim and the State's actions only provided the opportunity for the patient to assault the other, the Third Court of Appeals concluded that plaintiff's injuries fell within the TTCA because there was a direct causal connection between the property supplied by the state and the injury that occurred.

[41] *See Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992).

[42] *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450 (Tex. 2006) (plurality op.).

[43] *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009).

[44] *Id.* Cause in fact requires "proof that (1) the negligent act or omission was a substantial factor in bringing about the harm at issue, and (2) absent the negligent act or omission ('but for' the act or omission), the harm would not have occurred."

[45] *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). A plaintiff proves foreseeability of the injury by establishing that "a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission."

[46] *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992); *Brown v. Edwards Transfer Co.,* 764 S.W.2d 220, 222 (Tex. 1988); *El Chico Corp. v. Poole,* 732 S.W.2d 306, 313 (Tex. 1987).

superseding cause which relieves the negligent actor from liability, the actor's negligence will not be excused when the criminal conduct is a foreseeable result of such negligence.[47]

These proximate cause principles requiring rejection of the City's plea are evident in *Travis v. City of Mesquite*.[48] In that case, third parties sued the City of Mesquite after they were injured when a fleeing driver crashed into their vehicles.[49] There, off-duty Mesquite police officers attempted to detain a driver for suspicious activities at a truck stop where the City employees worked security, but the driver fled the off-duty officers' request.[50] After the driver fled, the off-duty officers pursued the driver down the wrong-way, while on-duty officers responded and gave chase from the opposite direction.[51] After only 2-minutes, the high-speed car chase ended with the fleeing driver crashing into – and killing – the plaintiffs.[52]

Ultimately, the Texas Supreme Court held that the plaintiffs appropriately met their summary judgment burden on the proximate cause element[53] because the foreseeability and cause in fact elements were met – even though the actual injuries resulted from the actor fleeing from the police, driving recklessly, and crashing into the plaintiffs' vehicle, rather than the officers' decision to pursue the driver. But because the driver fleeing while driving

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[47] *Mesquite* at 98; *Poole,* 732 S.W.2d at 314; *Nixon,* 690 S.W.2d at 550; RESTATEMENT (SECOND) OF TORTS § 448 (1965).

[48] 830 S.W.2d 94, 96 (Tex. 1992).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

recklessly was a foreseeable result of the officers' decision to chase, the driver's subsequent negligent and criminal conduct did not relieve the officers from liability.

Here, Spradlin knew that keepers on a duty belt are safety features that prevent duty belts from creating a safety hazard and falling off. Further, Spradlin had knowledge before the event that his non-use of keepers created a safety hazard – yet he chose to proceed with his response to the Woodburn incident while knowing that he was using defective equipment.

And when the belt failed, as Spradlin knew it could, the belt's malfunction led to Woodburn – who was previously restrained and incapacitated – fleeing from restraint. Spradlin was so preoccupied and distracted by his belt falling off that he did not chase after Woodburn or even command Woodburn to stop. This allowed a dangerous and aggressive Woodburn the opportunity to run next-door and stab Johnathon to death – all of which occurred less than 3 minutes after Woodburn fled from his restraint.

As highlighted by *Mesquite* and the cases cited above, Spradlin's actions proximately caused Johnathon's death, and the City is liable – along with all persons and entities whose negligent conduct contributed to Johnathon's and Plaintiffs' injuries.[54]

### C. The City's proximate cause argument depends on factual development and requires additional time to complete discovery.

"Whether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be

[54] *Mesquite* at 98; *Poole,* 732 S.W.2d at 313; *Strakos v. Gehring,* 360 S.W.2d 787, 789 (Tex.1962); *McAfee v. Travis Gas Corp.,* 137 Tex. 314, 323, 153 S.W.2d 442, 447 (1941).

left largely to the trial court's sound exercise of discretion."[55] Because Plaintiffs have validly pleaded a TTCA waiver, and because the proximate cause analysis will depend on the development of a factual record, the Court should deny the City's plea until jurisdictional facts can be established through the adversarial process.

## V.
## CONCLUSION AND PRAYER FOR RELIEF

Because Plaintiffs have alleged sufficient facts to establish that the City does not enjoy immunity for Spradlin's use of a defective duty belt, the City's plea to the jurisdiction should be denied.

Respectfully submitted,

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[55] *Tex. Dep't of Transp. v. Self*, No. 02-21-00240-CV, 2022 WL 1259094, at *6 (Tex. App.—Fort Worth Apr. 28, 2022, no pet. h.), *reh'g denied* (June 9, 2022), *citing Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this document has been served on counsel of record pursuant to Tex. R. Civ. P. 21 and 21a on this 27th day of June, 2022.

*/s/ Worth D. Carroll*
Worth D. Carroll

# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-22-00439-CV**

**The City of Austin, Appellant**

**v.**

**Amy-Marie Howard, Individually and as Next Friend of D. A., a Minor, and as a Representative of The Estate of Johnathon Aguilar, and on Behalf of All Those Entitled to Recover Under the Texas Wrongful Death Act For The Death of Johnathon Aguilar and Nanette Mojica, Individually, Appellees**

**FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY**
**NO. D-1-GN-21-007467, THE HONORABLE MAYA GUERRA GAMBLE, JUDGE PRESIDING**

## D I S S E N T I N G  O P I N I O N

For the reasons explained below, I respectfully dissent from the Court's analysis of the causation issue and its conclusion that the appellees' pleadings do not sufficiently allege proximate cause.

In a case in which the sufficiency of the pleadings is challenged, the plaintiffs are required to establish only that they have "*alleged facts* that affirmatively demonstrate the court's jurisdiction to hear the cause." *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (emphasis added). When determining whether the plaintiffs have met this burden, we liberally construe their pleadings, taking all factual assertions as true, and look to the plaintiffs' intent. *Texas Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020). If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not

affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend. *Miranda*, 133 S.W.3d at 226-27. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *Id.*

I disagree that the City has shown that the appellees' pleadings affirmatively negate the existence of jurisdiction. As the Court acknowledges, proximate cause is generally a question for the factfinder unless reasonable minds could not differ about whether it exists. *Arkansas Fuel Oil Co. v. State*, 280 S.W.2d 723, 729 (Tex. 1955) (holding that State's antitrust case should be dismissed because State's pleading, which pleaded all its evidence, did not present fact issue when State's pleading of circumstantial evidence could not establish existence of artificial price structure). Here, the City has presented no evidence to contradict the appellees' allegations that Aguilar's death was caused by former Officer Spradlin's use of a noncompliant duty belt lacking keepers—an integral safety component—which failed to work properly, causing Spradlin to interrupt his restraint of Woodburn, a violent suspect, who then escaped and killed Aguilar in less than three minutes. Instead, the City attempts to analogize to other cases to establish as a matter of law that the condition or use of the duty belt did not cause Aguilar's death.

When viewing the alleged facts in the appellees' favor, as we must, I would conclude that those facts are more analogous to cases where courts concluded that the plaintiffs alleged sufficient facts to allow a factfinder to make the ultimate determination on both foreseeability and cause in fact. Although the Court focuses its analysis primarily on foreseeability, it first concludes that "[a] reasonable person could not conclude that Aguilar's death was the natural and probable result of the duty belt's failure to stay put," meaning that the appellees have not sufficiently alleged cause in fact. (Slip op. at 6.) I disagree with this conclusion. The

City does not dispute that Woodburn was an aggressive and violent person who had attacked one of the coffee shop's customers and had then been restrained by multiple other customers until Spradlin arrived and began to handcuff Woodburn. Spradlin admitted during the City's internal investigation that the purpose of keepers is to keep the belt from coming completely off the waist and that without them it will fall off.[1] He admitted that he lost his focus on Woodburn when his belt fell off and did not attempt to stop Woodburn from leaving the coffee shop. Woodburn went next door and killed Aguilar within three minutes of Spradlin's belt falling off. Thus, I would conclude that the appellees have adequately alleged that the condition or use of the duty belt "serve[d] as 'a substantial factor in causing the injury and without which the injury would not have occurred.'" *Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922, 929 (Tex. 2015) (quoting *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 774 (Tex. 2010) (citation omitted)). "Cause in fact is essentially but-for causation." *Id.* For example, in *Ryder*, the pleadings alleged that a vehicle collision would not have occurred but for a deputy sheriff's driving his cruiser toward oncoming traffic during a traffic stop, which caused the cruiser's lights to blind and distract another driver, who then crashed into the stopped vehicle. *Id.* The Texas Supreme Court concluded these allegations easily satisfied the standard for alleging the cause-in-fact prong of proximate cause. *Id.* Here, but for the duty belt's failure, there would have been no interruption of Spradlin's restraint of Woodburn, whose escape resulted almost immediately in Aguilar's death. To me, the appellees have sufficiently alleged facts that support the cause-in-fact prong of proximate cause.

[1] As the Court notes, the appellees included additional facts in their response to the City's plea to the jurisdiction that they had obtained from the City's production of documents related to the City's internal investigation of the incident. The appellees indicated their intent to plead these additional facts in an amended petition.

I also disagree with the Court's conclusion that a reasonable person could not foresee that the duty belt's "failure might cause the kind of harm that Aguilar suffered." (Slip op. at 6.) The keepers on a duty belt are designed to keep a police officer's belt containing his taser, gun, and other equipment around his waist. If that belt falls off during an officer's restraint of a suspect, especially a violent suspect, in my opinion, it is easily foreseeable that the suspect may escape and harm or kill someone while the officer is distracted by the loss of the belt, not to mention that the suspect could take control of the officer's belt and use the gun or taser to injure or kill the officer or another innocent bystander. The law does not require foreseeability of the exact sequence of events that cause the harm. "Foreseeability requires only 'that the injury be of such a general character as might reasonably have been anticipated; and that the injured party should be so situated with relation to the wrongful act that injury to him or to one similarly situated might reasonably have been foreseen.'" *Ryder*, 453 S.W.3d at 929 (quoting *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 551 (Tex. 1985)).

Similarly to the City here, the defendant in *Ryder* argued that the officer's use of his vehicle when turning around merely furnished the condition that made the death possible. *Id.* There the pleadings alleged that "a reasonable peace officer could have foreseen that driving westbound near an eastbound shoulder at night—with headlights and emergency lights illuminated—might confuse drivers, disrupt traffic, and lead to a collision much like the one that ultimately occurred." *Id.* The Texas Supreme Court concluded that "the alleged harm is of the very character that might reasonably have been anticipated," and thus "[u]pon consideration of these allegations, a reasonable juror might find the requisite nexus between the use of [the deputy's] vehicle and any injuries suffered . . . ." *Id.* I would reach the same conclusion in this case—that the alleged harm is of the very character that might have reasonably been anticipated

and thus a reasonable juror might find the requisite nexus between the use of the duty belt and Aguilar's death.

The Court concludes that as a matter of law Aguilar's death is an injury that is too causally attenuated from the alleged condition or use of the duty belt for the duty belt's condition or use to be a proximate cause of Aguilar's death. (Slip op. at 7.) In all the condition-or-use cases that the Court relies upon to support this conclusion, the courts concluded that the condition or use of property at issue merely furnished the condition that made the injury possible, and all involved the death or injury of someone whose own actions were also a cause of their injury or death, which is not the case here. *See, e.g.*, *City of Dallas v. Sanchez*, 494 S.W.3d 722, 727 (Tex. 2016) (malfunctioning 9-1-1 system that contributed to misidentified apartment number was not proximate cause of overdose death); *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998) (unlocked door at mental-health center was not proximate cause of escaped patient's suicide by stepping in front of truck on freeway half mile away); *City of Austin v. Anam*, 623 S.W.3d 15, 19 (Tex. App.—Austin 2020, no pet.) (officer's failure to fasten seatbelt on handcuffed suspect in vehicle was not proximate cause of suspect's shooting himself with gun in his possession); *Pakdimounivong v. City of Arlington*, 219 S.W.3d 401, 412 (Tex. App.—Fort Worth 2006, pet. denied) (improper application of handcuffs and leg restraints on suspect being transported in police vehicle was not proximate cause of his kicking out car's window and throwing himself through window and onto highway). While I do not disagree that there are some cases in which a defendant's conduct may be too causally attenuated from a plaintiff's injury to constitute proximate cause, *see Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477-78 (Tex. 1995) (affirming summary judgment in favor of defendant because Boys Club proved as matter of law that its failure to investigate, screen, or supervise volunteer with criminal record for

driving while intoxicated was not proximate cause of volunteer's sexual assault of plaintiffs), I disagree that the City has established as a matter of law that the duty belt's failure is too causally attenuated in this case. *See Ryder*, 453 S.W.3d at 929-30 (concluding that "the allegations suggest that [the deputy's] operation of his cruiser might not have been attenuated from the alleged injuries" and thus disagreeing with appellate court's conclusion that deputy's use of cruiser merely furnished condition that made injury possible). To me, the facts alleged in this case are most similar to the facts alleged in *Michael v. Travis County Housing Authority*, 995 S.W.2d 909, 914 (Tex. App.—Austin 1999, no pet.). In *Michael*, this Court found that the facts alleged—that two pit bulls escaped through a defective fence and immediately attacked the plaintiff on a nearby sidewalk in close proximity to the fence—differed from the type of attenuated causal relationship that the Texas Supreme Court determined in *Bossley* does not satisfy the requirement to allege that the use and condition of property is the proximate cause of an injury. *Id.* at 913-14 (citing *Bossley*, 968 S.W.2d at 343).

Moreover, the Court is only able to reach its conclusion that the injury is too causally attenuated from the condition or use of the belt by recasting the appellees' allegations to center them on Spradlin's "decision to resecure the belt instead of continuing to handcuff Woodburn or otherwise attempt to apprehend him." (Slip op. at 8.) But if we construe the pleadings in the appellees' favor, looking to their intent, as we must, the real substance of their claim is that it was the condition or use of the noncompliant duty belt that lacked keepers (an integral safety component), which resulted in the foreseeable consequence of the belt falling off when Spradlin was attempting to handcuff Woodburn, distracting Spradlin from the continued restraint of a violent suspect who then escaped and in less than three minutes killed someone. In my opinion, the appellees have sufficiently alleged the foreseeability of this type of harm resulting

from the duty belt's failure while Spradlin was restraining a violent suspect to allow the case to proceed so that a factfinder may make the fact-specific determination of whether proximate cause has been established.

In addition, the City asserts in its second issue, which the Court does not reach, that it retains immunity for the appellees' claims under the public-duty doctrine, which does not provide "recourse against the individual policeman for failing to take action to prevent or stop the commission of a crime." *Munoz v. Cameron County*, 725 S.W.2d 319, 321-22 (Tex. App.—Corpus Christi–Edinburg 1986, no writ). I would conclude this doctrine has no application here because when we construe the pleadings in the appellees' favor as required, the real substance of their allegations is that the duty belt's failure is a proximate cause of Aguilar's death because it interrupted Spradlin's restraint, not that Spradlin violated his duty to prevent or stop the commission of a crime. At most, they allege that Spradlin violated his duty to use a belt that was compliant with City policy.

Therefore, because I would affirm the trial court's order denying the City's plea to the jurisdiction, I respectfully dissent.

Gisela D. Triana, Justice

Before Justices Baker, Triana, and Kelly

Filed: February 10, 2023

# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**JUDGMENT RENDERED FEBRUARY 10, 2023**

**NO. 03-22-00439-CV**

**The City of Austin, Appellant**

**v.**

**Amy-Marie Howard, Individually and as Next Friend of D. A., a Minor, and as a Representative of The Estate of Johnathon Aguilar, and on Behalf of All Those Entitled to Recover Under the Texas Wrongful Death Act For The Death of Johnathon Aguilar and Nanette Mojica, Individually, Appellees**

**APPEAL FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY**
**BEFORE JUSTICES BAKER, TRIANA, AND KELLY**
**REVERSED AND RENDERED -- OPINION BY JUSTICE BAKER**
**DISSENTING OPINION BY JUSTICE TRIANA**

This is an appeal from the interlocutory order denying appellant's plea to the jurisdiction signed by the trial court on June 28, 2022. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the order. Therefore, the Court reverses the trial court's interlocutory order and renders judgment granting appellant's plea to the jurisdiction and dismissing appellees' claims against appellant. Appellees shall pay all costs relating to this appeal, both in this Court and in the court below.

# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-22-00439-CV**

**The City of Austin, Appellant**

**v.**

**Amy-Marie Howard, Individually and as Next Friend of D. A., a Minor, and as a Representative of The Estate of Johnathon Aguilar, and on Behalf of All Those Entitled to Recover Under the Texas Wrongful Death Act For The Death of Johnathon Aguilar and Nanette Mojica, Individually, Appellees**

**FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY**
**NO. D-1-GN-21-007467, THE HONORABLE MAYA GUERRA GAMBLE, JUDGE PRESIDING**

## M E M O R A N D U M  O P I N I O N

The City of Austin appeals from the trial court's denial of its plea to the jurisdiction. *See* Tex. Civ. Prac. & Rem. Code § 51.014(8). This suit arises from the tragic death of Johnathan Aguilar at the hands of Dylan Woodburn, who stabbed and killed Aguilar minutes after fleeing impending restraint by a City police officer. Appellees[1] sued the City, and other parties not before us on appeal, to recover damages for Aguilar's death. For the following reasons, we reverse the trial court's order and render judgment granting the City's plea to the jurisdiction and dismissing appellees' claims against the City.

[1] Appellees are Amy-Marie Howard, in her capacities as Aguilar's wife, next friend for the couple's minor child, and representative of Aguilar's estate; and Aguilar's mother, Nanette Mojica.

## BACKGROUND

Seeking to recover damages for the death of Aguilar, appellees filed suit against the City, the restaurant where Aguilar was killed, and the manufacturer and seller of the duty belt worn by the police officer involved in the incident.[2] The following narrative derives from the factual allegations in appellees' original petition.[3]

The morning of January 3, 2020, Austin Police Department (APD) received a "suspicious person" call related to a man—later determined to be Woodburn—inside Bennu Coffee disturbing customers, holding a large rock, and threatening customers. After the call to the police, Woodburn attacked a Bennu customer with a large object and was eventually wrestled to the ground and restrained by multiple Bennu customers. Officer Patrick Spradlin was the first APD officer to respond to the call and entered Bennu, approached Woodburn, and directed the Bennu customers restraining Woodburn to release him. The customers complied with Officer Spradlin's order.

Officer Spradlin attempted to restrain Woodburn by placing him into handcuffs. However, during the exchange, Officer Spradlin's duty belt came loose, and the officer put his handcuffs down and, with both hands, attempted to resecure his duty belt. While Officer Spradlin attempted to resecure his duty belt, Woodburn stood up and left the coffee shop. Upon exiting Bennu, Woodburn entered an adjacent restaurant (Freebirds) through a door that its

[2] For reasons unexplained in the record, appellees did not file suit against Woodburn.

[3] In their response to the City's plea to the jurisdiction, appellees represented that they would be filing an amended petition containing further factual allegations gleaned from recent documents produced by the City, including the results of an internal investigation of the incident. Their response cited some of the further details. However, the record contains no amended petition, and we therefore cite the factual allegations contained in appellees' live (original) petition.

general manager, Ryan Bramlett, had left unlocked, despite earlier noticing Woodburn acting strangely and erratically while peering through the restaurant's door. Bramlett had initially locked the door behind him when he first arrived at work at 7:50 a.m. to help Freebirds employee Aguilar prepare the business for the day but, shortly thereafter, Bramlett unlocked the door to allow a knife-sharpening vendor access to the business. The knife vendor placed the freshly sharpened knives on the counter and was accompanied to the door by Bramlett, who did not lock the door after the vendor left. Moments later Woodburn entered through the unlocked door, picked up a knife from the counter, and stabbed Aguilar multiple times. Aguilar died from the stab wounds.

A few days after the incident, APD chief Brian Manley stated that an officer's duty belt coming loose "is something that we do not expect to have happened. We expect to provide our officers with the best equipment, and we expect our equipment to perform appropriately." Appellees allege that the failure of Officer Spradlin's duty belt to have "keepers"[4] or other "integral safety components," the duty belt's failure to comply with APD policy, and the duty belt's use or misuse proximately caused Aguilar's death.

## DISCUSSION

The City, as a political subdivision of the State, is immune from suit and liability unless the State consents. *See City of Watauga v. Gordon*, 434 S.W.3d 586, 589 (Tex. 2014). Governmental immunity defeats a court's jurisdiction. *Dallas Area Rapid Transit v. Whitley*,

[4] Appellees allege that "keepers" are "safety devices intended to prevent gun belts from failing (falling off) at critical moments." Wikipedia explains that keepers "wrap around the duty belt and trouser belt, ensuring that the belt stays in place, even when the officer is taking something from the belt or engaging in an altercation with a suspect." *Police Duty Belt*, *Wikipedia*, https://en.wikipedia.org/wiki/Police_duty_belt (last visited Jan. 31, 2023).

104 S.W.3d 540, 542 (Tex. 2003). Where a government entity challenges jurisdiction on the basis of immunity, the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity. *Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922, 927 (Tex. 2015). To determine if the plaintiff has met that burden, we consider the facts alleged by the plaintiff and, to the extent it is relevant to the jurisdictional issue, the evidence submitted by the parties. *Whitley*, 104 S.W.3d at 542. When a plea to the jurisdiction challenges the sufficiency of the claimant's pleadings, as here, we determine whether the pleadings contain enough facts to demonstrate jurisdiction. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent. *Id.* If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend. *Id.* at 226–27. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *Id.* at 227.

The asserted source of waiver in this case is the Texas Tort Claims Act (TTCA), which waives governmental immunity in a limited number of circumstances including, relevant here, "personal injury and death so caused by a condition or use of tangible personal or real property." *See* Tex. Civ. Prac. & Rem. Code § 101.021. That is, the plaintiff must show that personal injury or death was "proximately caused by the condition or use of tangible property" at issue. *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998).

Proximate cause, in turn, requires both cause in fact and foreseeability. *Ryder*, 453 S.W.3d at 929. For a condition or use of property to be a cause in fact, the condition or use must "serve as a substantial factor in causing the injury and without which the injury would not have occurred." *Id.* Further, the condition or use "must have actually caused the injury." *City of Dallas v. Sanchez*, 494 S.W.3d 722, 726 (Tex. 2016) (per curiam) (quoting *Dallas County v. Posey*, 290 S.W.3d 869, 872 (Tex. 2009)). Causation is lacking if the tangible property "does no more than furnish the condition that makes the injury possible," *Bossley*, 968 S.W. 2d at 343, and the use of property that "simply hinders or delays treatment . . . does not constitute a proximate cause of an injury," *Sanchez*, 494 S.W.3d at 726. To constitute cause in fact, the alleged negligent act or omission must "justify the conclusion that [the] injury was the natural and probable result thereof." *Doe v. Boys Club of Greater Dall., Inc.*, 907 S.W.2d 472, 477 (Tex. 1995) (citations omitted).

Foreseeability requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission. *Id.* The danger of injury is foreseeable if its "general character might reasonably have been anticipated . . . and the injured party should be so situated with relation to the wrongful act that injury to him or to one similarly situated might reasonably have been foreseen." *Ryder*, 453 S.W.3d at 929. The question of foreseeability, and proximate cause generally, involves a practical inquiry based on "common experience applied to human conduct." *Doe*, 907 S.W.2d at 477. It asks whether the injury "might reasonably have been contemplated" as a result of the defendant's conduct, *id.*, or—by extension to claims under the TTCA—as a result of the condition or use of tangible property, *see* Tex. Civ. Prac. & Rem. Code § 101.021. Proximate cause is generally a question for the factfinder unless reasonable minds could not differ about whether it exists, and thus we must

determine whether the pleaded facts, taken as true, create a fact question regarding the causal relationship between the condition or use of property and the injury or death. *See Ryder*, 453 S.W.3d at 927, 929 (noting that we review trial court's ruling on plea to jurisdiction de novo).

Viewing the facts alleged in favor of appellees, as we must, we conclude that there is no fact question on either foreseeability[5] or cause in fact. Aguilar's death cannot be said to have been the natural and probable result of the duty belt's failure to stay put, and it was not reasonably foreseeable that the belt's failure might cause the kind of harm that Aguilar suffered. *See Ryder*, 453 S.W.3d at 929; *Doe*, 907 S.W.2d at 477. Instead, Aguilar's death was preceded by an alleged extraordinary sequence of events too causally attenuated from the alleged use or condition of the duty belt to demonstrate anything more than the duty belt's mere furnishment of a condition that made Aguilar's death possible: on January 3, 2020, Officer Spradlin's duty belt either lacked an "integral safety component" such as keepers or was not in compliance with APD policy when the officer wore it to respond to a report of a man threatening Bennu customers with a weapon. Officer Spradlin arrived on the scene and entered the coffee shop. He ordered the customers who had wrestled Woodburn to the floor and were holding him down to release him. Officer Spradlin began handcuffing Woodburn but ceased doing so when his duty belt came loose, instead attempting to resecure his duty belt. Woodburn exited the coffee shop and entered the adjacent Freebirds through an unlocked door before regular business hours, picked up from

[5] Although in its brief the City focuses on the cause-in-fact prong of proximate cause, we nonetheless may review whether the alleged facts create a fact issue on the foreseeability prong because that subsidiary question is fairly included within the City's issue statement, "Was Mr. Aguilar's death proximately caused by a condition or use of the police officer's duty belt?" *See City of Austin v. Anam*, 623 S.W.3d 15, 19 (Tex. App.—Austin 2020, no pet.). Furthermore, jurisdictional issues relating to sovereign immunity may be raised by a court sua sponte. *See id.*

a counter a recently deposited and newly sharpened knife, and repeatedly stabbed to death Freebirds employee Aguilar.

Even assuming that the duty belt lacked an "integral safety component" or was not in compliance with APD policy, the cases appellees cite involving tangible personal property that lacked integral safety components are distinguishable because the injuries therein were the reasonably foreseeable and direct consequence of the failure to use or provide such safety components. *See, e.g.*, *Robinson v. Central Tex. MHMR Ctr.*, 780 S.W.2d 169, 171 (Tex. 1989) (plaintiff known to have epilepsy drowned after mental health center allowed him to swim without life preserver); *Overton Mem'l Hosp. v. McGuire*, 518 S.W.2d 528, 529 (Tex. 1975) (plaintiff injured from falling out of hospital bed that lacked bed rails); *see also Michael v. Travis Cnty. Hous. Auth.*, 995 S.W.2d 909, (Tex. App.—Austin 1999, no pet.) (passerby injured by pit bulls that escaped through hole in fence). The same cannot be said for the facts alleged here.

Although the determination of proximate cause is necessarily fact specific, we believe that the facts alleged here are analogous to the cases cited by the City, wherein this Court and others have determined that when injuries are too attenuated—either temporally, physically, or causally—from the alleged condition or use of tangible personal property, the property's condition or use is not the proximate cause as a matter of law. *See, e.g.*, *Sanchez*, 494 S.W.3d at 727 (malfunctioning 911 system that contributed to misidentified apartment number was not proximate cause of overdose death); *Bossley*, 968 S.W. 2d at 343 (unlocked door at mental health center was not proximate cause of escaped patient's suicide by stepping in front of truck on freeway half mile away); *City of Austin v. Anam*, 623 S.W.3d 15, 19 (Tex. App.—Austin 2020, no pet.) (officer's failure to fasten seatbelt on handcuffed suspect in vehicle was not proximate

cause of suspect's shooting himself with gun in his possession); *Pakdimounivong v. City of Arlington*, 219 S.W.3d 401, 412 (Tex. App.—Fort Worth 2006, pet. denied) (improper application of handcuffs and leg restraints on suspect being transported in police vehicle was not proximate cause of his kicking out car's window and throwing himself through window and onto highway).

The real substance of appellees' complaint is that Aguilar's death was caused not by the condition or use of the duty belt but by Officer Spradlin's decision to resecure the belt instead of continuing to handcuff Woodburn or otherwise attempt to apprehend him. In our recent *Anam* case, this Court determined that there was no proximate cause under alleged facts with analogous causal attenuation. *See Anam*, 623 S.W.3d at 15. In that case, the plaintiffs alleged that a police officer was negligent in failing to refasten the seatbelt of an arrestee after discovering that his seatbelt had come undone. *See id.* at 17. Having undone his seatbelt, the arrestee was able to—and did—access a handgun in his waistband and use it to kill himself. *See id.* This Court determined that the plaintiffs had not alleged any facts demonstrating foreseeability—"i.e., that a person of ordinary intelligence should have anticipated that the failure to refasten the seatbelt of a handcuffed occupant of the vehicle would create the danger of suicide by gunshot." *Id.* at 19. Instead, their pleadings asserted "in a conclusory manner" only that it was foreseeable that failing to use the seatbelt properly would cause injury to the arrestee. *Id.* Furthermore, this Court concluded that the plaintiffs *could not* allege any facts demonstrating foreseeability because the "reasonably anticipated danger or harm created from an unfastened seatbelt is not suicide by gunshot wound to the head" but injury or death resulting from a vehicle collision or abrupt stop. *See id.*

Similarly here, the reasonably anticipated danger or harm from an officer's duty belt falling off is the officer's resulting inability to quickly grab his gun, taser, or other equipment if needed or, in certain circumstances, a suspect's opportunity to grab such items. But one would not reasonably anticipate that the duty belt's falling off would create the danger of a suspect leaving the officer's presence, entering another business, and stabbing a person with a freshly sharpened knife recently dropped off at the establishment's counter. While those harms could reasonably be anticipated from an officer's negligent *decision* to resecure his duty belt instead of attempting to apprehend a dangerous suspect, the TTCA waives immunity only when the use or condition of the personal property at issue "actually caused the injury." *See Sanchez*, 494 S.W.3d at 726. "[T]hat some [personal] property is merely involved [in the injury] is not enough." *Texas Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 588 (Tex. 2001) (holding that hospital's alleged use of medications on patient, which allegedly "masked" his symptoms of meningitis, did not actually cause patient's death; rather, his death was caused by alleged failure to timely diagnose him) (citing *Bossley*, 968 S.W.2d at 342).

We conclude that the real substance of the plaintiffs' claim is that Officer Spradlin made a negligent decision or failed to act as a reasonable officer would in the same circumstances, and we thus follow those cases finding no waiver of immunity when the plaintiff's injuries are too causally attenuated from the alleged but-for cause. *See, e.g.*, *Bossley*, 968 S.W.2d at 343 ("The real substance of plaintiffs' complaint is that [Bossley's] death was caused, not by the condition or use of property, but by the failure of Hillside's staff to restrain him once they learned he was still suicidal."); *Anam*, 623 S.W.3d at 15 ("[T]he real substance of the Anams' claim is that Zachary's suicide was caused not by the failure to refasten his seatbelt or the condition of the seatbelt but by the fact that Wall failed to detect and remove Zachary's

gun before putting him in the patrol car."); *Pakdimounivong*, 219 S.W.3d at 412 (improper application of leg restraints and handcuffs did not cause injury but "at most created a condition, a lack of restraint, that allowed Vattana to cause his own death"); *see also Doe*, 907 S.W.2d at 477 (noting that connection between but-for cause and plaintiff's injuries "simply may be too attenuated to constitute legal cause").

Guided by the above-cited precedents, we conclude that the use or condition of Officer Spradlin's duty belt is too causally attenuated from Woodburn's stabbing of Aguilar to constitute a proximate cause of Aguilar's death. *See Bossley*, 968 S.W.2d at 343; *Anam*, 623 S.W.3d at 19. While Aguilar's death was tragic, we cannot agree with the trial court's determination that the pleaded facts create a fact issue concerning proximate cause. Furthermore, we conclude that the alleged facts demonstrate incurable defects in jurisdiction, conclusively negating the existence of jurisdiction, and thus plaintiffs need not be afforded an opportunity to amend their petition.[6] *See Miranda*, 133 S.W.3d at 226–27. We accordingly sustain the City's first issue.[7]

---

[6] We so conclude despite the alleged additional facts appellees cite in their response to the City's plea to the jurisdiction, which facts they contend derive from recent document production related to the City's internal investigation of the incident. The additional alleged facts include (1) a more exact timeline of the events preceding Aguilar's death, indicating that less than three minutes elapsed from the time Officer Spradlin's duty belt came loose to when Woodburn was seen leaving Freebirds after stabbing Aguilar; (2) Officer Spradlin's admissions that (a) he knew he was not wearing keepers or an APD-approved duty belt but responded to the call nonetheless, despite knowing that his duty belt posed a safety concern, and (b) he was distracted when his belt fell off completely and thus did not attempt to stop Woodburn from leaving the coffee shop or give him any verbal commands; and (3) Officer Spradlin's opinion that had he been wearing keepers, his duty belt would have stayed put. These facts do not change our conclusion that the causal relationship between the use or condition of the belt and Aguilar's death is too attenuated.

[7] Because we have sustained the City's first issue, we need not address its second issue, in which it contends that it also enjoys governmental immunity under the so-called "public duty

## CONCLUSION

Having sustained the City's first issue, we reverse the trial court's order and render judgment granting the City's plea to the jurisdiction and dismissing appellees' claims against the City.

Thomas J. Baker, Justice

Before Justices Baker, Triana, and Kelly
Dissenting Opinion by Justice Triana

Reversed and Rendered

Filed: February 10, 2023

doctrine," which provides that generally a police officer is not liable for failing to take action to prevent or stop the commission of a crime. *See, e.g.*, *Munoz v. Cameron County*, 725 S.W.2d 319, 321–22 (Tex. App.—Corpus Christi-Edinburg 1986, no writ).

FILE COPY

# COURT OF APPEALS

THIRD DISTRICT OF TEXAS
P.O. BOX 12547, AUSTIN, TEXAS 78711-2547
www.txcourts.gov/3rdcoa.aspx
(512) 463-1733



April 24, 2023

Ms. Lana Kay Varney
King & Spalding LLP
500 W. 2nd St., Ste. 1800
Austin, TX 78701-4684
* DELIVERED VIA E-MAIL *

Ms. Shauna Wright
Kelly Hart & Hallman LLP
201 Main St., Ste. 2500
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* DELIVERED VIA E-MAIL *

Ms. Hannah Vahl
City of Austin - Law Department
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Austin, TX 78767-1546
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Mr. Worth D. Carroll
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Mr. William R. Moye
Thompson, Coe, Cousins & Irons, L.L.P.
1 Riverway, Ste. 1400
Houston, TX 77056-1934
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 03-22-00439-CV
Trial Court Case Number: D-1-GN-21-007467

Style: The City of Austin
v. Amy-Marie Howard, Individually and as Next Friend of D. A., a Minor, and as a Representative of The Estate of Johnathon Aguilar, and on Behalf of All Those Entitled to Recover Under the Texas Wrongful Death Act For The Death of Johnathon Aguilar and Nanette Mojica, Individually

Dear Counsel:

Appellees' motion for en banc reconsideration was denied by this Court on the date noted above.

Very truly yours,

JEFFREY D. KYLE, CLERK

BY: Chris Knowles
Chris Knowles, Deputy Clerk

FILE COPY

# COURT OF APPEALS

THIRD DISTRICT OF TEXAS
P.O. BOX 12547, AUSTIN, TEXAS 78711-2547
www.txcourts.gov/3rdcoa.aspx
(512) 463-1733



Tuesday, July 25, 2023

The Honorable Velva L. Price
Civil District Clerk
Travis County Courthouse
P. O. Box 1748
Austin, TX 78767
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 03-22-00439-CV
Trial Court Case Number: D-1-GN-21-007467

Style: The City of Austin
v. Amy-Marie Howard, Individually and as Next Friend of D. A., a Minor, and as a Representative of The Estate of Johnathon Aguilar, and on Behalf of All Those Entitled to Recover Under the Texas Wrongful Death Act For The Death of Johnathon Aguilar and Nanette Mojica, Individually

Dear Ms. Price:

Enclosed, with reference to the above cause, is the mandate of this Court. Please file and execute in the usual manner. Your cooperation in this regard is appreciated.

In addition, as required by Texas Government Code, Sec. 51.204(d), the trial court clerk is notified that we will destroy all records filed in respect to this case with the exception of indexes, original opinions, minutes and general court dockets no earlier than six (6) years from the date final mandate is issued.

Very truly yours,

Jeffrey D. Kyle, Clerk

cc: Ms. Lana Kay Varney
Ms. Hannah Vahl
Mr. William R. Moye
Ms. Shauna Wright
Mr. Worth D. Carroll

FILE COPY

# M A N D A T E

THE STATE OF TEXAS

TO THE 201ST DISTRICT COURT OF TRAVIS COUNTY, GREETINGS:

Trial Court Cause No. D-1-GN-21-007467

Before our Court of Appeals for the Third District of Texas on February 10, 2023, the cause on appeal to revise or reverse your judgment between

The City of Austin

No. 03-22-00439-CV v.

Amy-Marie Howard, Individually and as Next Friend of D. A., a Minor, and as a Representative of The Estate of Johnathon Aguilar, and on Behalf of All Those Entitled to Recover Under the Texas Wrongful Death Act For The Death of Johnathon Aguilar and Nanette Mojica, Individually

Was determined, and therein our Court of Appeals made its order in these words

This is an appeal from the interlocutory order denying appellant's plea to the jurisdiction signed by the trial court on June 28, 2022. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the order. Therefore, the Court reverses the trial court's interlocutory order and renders judgment granting appellant's plea to the jurisdiction and dismissing appellees' claims against appellant. Appellees shall pay all costs relating to this appeal, both in this Court and in the court below.

Wherefore, we command you to observe the order of our Court of Appeals in this behalf and in all things have the order duly recognized, obeyed, and executed.

COURT OF APPEALS ★ OF THE STATE OF TEXAS ★

Witness the Honorable Darlene Byrne, Chief Justice of the Court of Appeals for the Third District of Texas, with the seal of the Court affixed in the City of Austin on Tuesday, July 25, 2023.

JEFFREY D. KYLE, CLERK

**B**y: Courtland Crocker, Deputy Clerk

# BILL OF COSTS

## TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

No. 03-22-00439-CV

**The City of Austin**

**v.**

**Amy-Marie Howard, Individually and as Next Friend of D. A., a Minor, and as a Representative of The Estate of Johnathon Aguilar, and on Behalf of All Those Entitled to Recover Under the Texas Wrongful Death Act For The Death of Johnathon Aguilar and Nanette Mojica, Individually**

(No. D-1-GN-21-007467 IN 201ST DISTRICT COURT OF TRAVIS COUNTY)

| Type of Fee | Charges | Paid | By |
|---|---|---|---|
| MOTION FEE | $15.00 | E-PAID | WORTH CARROLL |
| FILING | $10.00 | E-PAID | CODI FOSTER |
| SUPPLEMENTAL CLERK'S RECORD | $0.00 | UNKNOWN | UNKNOWN |
| SUPPLEMENTAL CLERK'S RECORD | $0.00 | UNKNOWN | UNKNOWN |
| FILING | $10.00 | E-PAID | CODI FOSTER |
| FILING | $10.00 | E-PAID | BRIANA NICHOLSON |
| CLERK'S RECORD | $240.00 | UNKNOWN | UNKNOWN |
| INDIGENT | $25.00 | E-PAID | CAROL SMITH |
| SUPREME COURT CHAPTER 51 FEE | $50.00 | E-PAID | CAROL SMITH |
| STATEWIDE EFILING FEE | $30.00 | E-PAID | CAROL SMITH |
| FILING | $100.00 | E-PAID | CAROL SMITH |

**Balance of costs owing to the Third Court of Appeals, Austin, Texas: 0.00**

***Court costs in this cause shall be paid as per the Judgment issued by this Court.***

I, **JEFFREY D. KYLE, CLERK** OF THE THIRD COURT OF APPEALS OF THE STATE OF TEXAS, do hereby certify that the above and foregoing is a true and correct copy of the cost bill of THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS, showing the charges and payments, in the above numbered and styled cause, as the same appears of record in this office.


**IN TESTIMONY WHEREOF,** witness my hand and the Seal of the **COURT OF APPEALS** for the Third District of Texas on July 25, 2023.

**JEFFREY D. KYLE, CLERK**

**By**: Courtland Crocker, Deputy Clerk

**CAUSE NO. D-1-GN-21-007467**

| | | |
|---|---|---|
| **AMY-MARIE HOWARD, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL AGUILAR, A MINOR, AND AS A REPRESENTATIVE OF THE ESTATE OF JOHNATHON AGUILAR, AND ON BEHALF OF ALL THOSE ENTITLED TO RECOVER UNDER THE TEXAS WRONGFUL DEATH ACT FOR THE DEATH OF JOHNATHON AGUILAR, AND NANETTE MOJICA, INDIVIDUALLY,** | § | **IN THE DISTRICT COURT OF** |
| **Plaintiffs,** | § | |
| | § | |
| **v.** | § | |
| | § | |
| **TAVISTOCK FREEBIRDS, LLC, SAFARILAND, LLC, GALLS, LLC, DJ INTERESTS, LTD, AND DT LAND GROUP, INC,** | § | |
| **Defendants.** | § | **TRAVIS COUNTY, TEXAS** |
| | § | |
| | § | **201st DISTRICT COURT** |

**PLAINTIFFS' SECOND AMENDED PETITION AND JURY DEMAND**

**TO THE HONORABLE DISTRICT JUDGE**:

Plaintiffs, Amy-Marie Howard, individually and as next friend of Daniel Aguilar, a minor, and as a representative of the estate of Johnathon Aguilar, and on behalf of all those entitled to recover under the Texas Wrongful Death Act for the death of Johnathon Aguilar ("Ms. Howard"), and Nanette Mojica ("Ms. Mojica") (collectively, "Plaintiffs"), file this Original Petition and Jury Demand against Defendants, Tavistock Freebirds, LLC ("Freebirds"), Safariland, LLC ("Safariland"), DJ Interests, Ltd. ("DJ Interests"), and DT Land Group, Inc. ("DT Land"), (collectively, "Defendants"), and respectfully show the following:

## I.
## INTRODUCTION

1. By October 2019, DT Land and DJ Interests – the entities that owned and managed the shopping center at 515 S. Congress – knew that 515 S. Congress needed increased security to keep people on the premises safe.

2. In fact, the owner of Bennu Coffee, LLC ("Bennu"), at 515 S. Congress, specifically told DT Land that Bennu had been "getting a slew of complaints about . . . how unsafe people feel" at the premises DT Land and DJ Interests owned and managed. Bennu's owner requested additional security measures to increase its visitors' safety and "secure the patio."

3. Frankly, the people feeling "unsafe" were not exceptions – as 515 S. Congress had a history of safety issues occurring on and near the premises, including various acts of criminal activity, criminal trespassing, assaultive conduct, graffiti, aggression, aggressive panhandling, illegal camping, and homicide.

4. And by January 3, 2020, DT Land and DJ Interests still had not heeded its tenants' warnings – the safety issues on the premises remained because DT Land and DJ Interests chose to not increase security measures to keep their patrons and tenants safe.

5. Remarkably, rather than introducing effective security measures to prevent the foreseeable criminal conduct occurring at 515 S. Congress, DT Land and DJ Interests chose to let its tenants use whatever means they could muster to deal with the dangerous condition on the property.

6. Bennu's security means? A baseball bat behind the counter.

7. Freebirds'? A larger-statured employee.

8. Johnathon Aguilar ("Johnathon") was stabbed to death by Dylan Woodburn because DT Land and DJ Interests chose not to address or remediate the dangerous condition that persisted on the property it owned and managed – frequent criminal conduct that scared patrons and tenants' employees and created a safety risk for people on the premises.

9. Johnathon's stabbing occurred after an emotionally disturbed person, Dylan Woodburn, remained at 515 S. Congress and created disturbances and committed crimes at the precise location where Bennu requested additional security measures: Woodburn threatened people in the parking lot with a rock, attempted to open patrons' car doors, attempted to steal Bennu's merchandise, refused to leave after multiple requests by Bennu's staff, and refused to leave after being confronted with Bennu's baseball-bat-security-system. But instead of leaving, Woodburn locked himself in Bennu's bathroom, continued to try to steal merchandise, and continued to walk in-and-out of the store – all while being shoeless and generally appearing emotionally disturbed and intoxicated. Ultimately, Woodburn assaulted a Bennu patron with a coffee cup by striking him in his head and then stabbed Johnathon to death less than 3-minutes later.

10. If DT Land and DJ Interests would have used reasonable security measures to reduce foreseeable criminal conduct occurring at 515 S. Congress, Johnathon would not have been killed while preparing for his work shift.

11. In addition, Johnathon's killing was caused by the following grievous errors of the Defendants:

12. DT Land Group and DJ Interests failed to provide adequate security measures to protect people against foreseeable criminal conduct occurring at their shopping center, despite having direct knowledge of persistent, aggressive, and violent behavior by people on and around their property.

13. The responding police officer's – Patrick Spradlin ("Spradlin") – duty belt failed, which allowed Woodburn to escape from restraint and stab and kill Johnathon moments later. Spradlin's duty belt failed due to its defective design – it was designed and marketed by Safariland to be used without "keepers," which are essential safety components that prevent duty belts from failing in the precise way that Spradlin's failed.

14. Freebirds was grossly negligent when its general manager failed to lock Freebirds' door after having direct knowledge that Woodburn (who appeared emotionally disturbed and intoxicated) was attempting to access the business while Freebirds was closed, and after having direct knowledge of violent acts on and around the property by trespassers.

15. As a direct result of these failures, Johnathon was stabbed multiple times and killed.

## II.
## DISCOVERY CONTROL PLAN

16. This case is being conducted under Level 3 of Rule 190.3 of the Texas Rules of Civil Procedure, and the Court has entered a Docket Control Order establishing all applicable deadlines in this case.

## III.
## CLAIMS FOR RELIEF

17. Plaintiffs seek monetary relief of over $1,000,000.00 in damages. Tex. R. Civ. P. § 47(c)(4).

18. This Court has jurisdiction because the amount in controversy exceeds the minimum jurisdictional limits of this Court.

## IV.
## JURISDICTION AND VENUE

19. **Venue is Proper –** Venue is proper in Travis County because a substantial part of the events or omissions giving rise to the claim occurred there. TEX. CIV. PRAC. REM. CODE § 15.002(a)(1).

20. **This Court has Subject Matter Jurisdiction –** This Court has subject matter jurisdiction because the amount in controversy exceeds the minimum jurisdictional limits of this Court.

21. **This Court has Personal Jurisdiction over Defendants –** This Court has personal jurisdiction over Defendants because Defendants (1) committed some or all of the tortious acts that are the basis of this action within the state of Texas; (2) are residents and/or citizens of the state of Texas; (3) engage in foreseeable, intentional, continuous, and/or systematic contacts within the state of Texas; and/or (4) maintain a registered

agent for service of process in Texas. Thus, there is both general and specific personal jurisdiction, and exercising jurisdiction over Defendants does not offend the notions of fair play and substantial justice.

## V.
## PARTIES

22. Plaintiff Amy-Marie Howard sues in the following capacities, and can be served with process through the undersigned attorney:

a. Ms. Howard sues in her individual capacity as Johnathon's spouse. Ms. Howard has standing to bring suit for Johnathon's death under Tex. Civ. Prac. & Rem. Code § 71.004(a) and Tex. Labor Code § 408.001(b). Ms. Howard and Johnathon were informally married. Neither Johnathon or Ms. Howard were married to a third party, the couple agreed to be married, and – after the agreement to be married – the couple lived together in Texas as husband and wife and held themselves out as married in Texas. At all times pertinent to this action, Ms. Howard and Johnathon were residents of Travis County, Texas.

b. Ms. Howard also sues in her capacity as a representative of the estate of Johnathon, and on behalf of all those entitled to recover under the Texas Wrongful Death Act for the death of Johnathon. At the time of his death, Johnathon did not have a will. No administration of his estate is pending. No administration of Johnathon's estate is necessary because Johnathon's estate held fewer than two debts, and Ms. Howard and their biological son, Daniel Aguilar, are the only surviving heirs entitled to the estate. Further, a partition is not necessary because there is a family agreement regarding any distribution of the estate. Further, at all times pertinent to this action, Ms. Howard and Johnathon were residents of Travis County, Texas.

c. Ms. Howard also sues as next friend of Daniel Aguilar, a minor. Daniel is Johnathon and Ms. Howard's only biological child and has standing to bring suit for Johnathon's death under Tex. Civ. Prac. & Rem. Code § 71.004(a) and Tex. Labor Code § 408.001(b). At all times pertinent to this suit, Johnathon, Ms. Howard, and Daniel were residents of Travis County, Texas.

23. Plaintiff Nanette Mojica sues in her individual capacity as Johnathon's mother. Ms. Mojica has standing to bring suit for Johnathon's death under Tex. Civ. Prac. &

Rem. Code § 71.004(a). Ms. Mojica is a resident of Travis County, Texas, and she may be served with process through the undersigned attorney.

24. Defendant Tavistock Freebirds, LLC ("Freebirds"), is a limited liability company that owns and operates the premises where Johnathon was killed. Freebirds' principal office is located in Travis County, at 13620 N FM 620, Building C, Suite 175, Austin, TX, 78717. Freebirds may be served with process through its registered agent, Corpdirect Agents, Inc., at 1999 Bryan St., Ste. 900 Dallas, TX, 75201.

25. Defendant Safariland, LLC ("Safariland"), is a limited liability company authorized to conduct business in the State of Texas. Defendant Safariland manufactured the duty belt at issue in this case. Safariland may be served with process through its registered agent, C T Corporation System, at 1999 Bryan St., Ste. 900 Dallas, TX 75201.

26. Defendant DJ Interests, Ltd., is a business entity in the State of Texas. Defendant DJ Interests owns and controls the retail center at 515 South Congress where Johnathon was killed. DJ Interests may be served with process through its registered agent, Belva Green, 2414 Exposition Blvd., Suite D-200, Austin, Texas 78703.

27. Defendant DT Land Group, Inc., is a business entity in the State of Texas. Defendant DT Land is the property manager of the retail center at 515 South Congress where Johnathon was killed. DT Land Group may be served with process through its agent, Belva Green, 2414 Exposition Blvd., Suite D-200, Austin, Texas 78703.

## VI.
## FACTS

28. On January 3, 2020, Johnathon was stabbed to death by Woodburn while Johnathon was preparing to open Freebirds for business.

29. Woodburn was able to enter Freebirds and kill Johnathon because (a) DT Land and DJ Interests failed to implement reasonably prudent and necessary security measures to properly safeguard the premises to prevent foreseeable crimes, (b) Spradlin's duty belt failed, which allowed Woodburn to escape restraint and kill Johnathon, due to a defective design or manufacture, and (c) Freebirds' general manager did not appropriately secure Freebirds, knowing that Woodburn was attempting to access the property while it was closed and knowing that Woodburn was intoxicated or emotionally disturbed.

### A. DT Land and DJ Interests failed to implement reasonable security measures to prevent crime.

30. During the 3 years preceding Johnathon's stabbing, DT Land and DJ Interests received multiple complaints about – and thus acquired direct knowledge of – the risk of violent criminal activity occurring at 515 S. Congress.

31. For instance, DT Land and DJ Interests received reports of aggressive panhandling, camping, and criminal trespassing occurring on the premises, and a person was murdered in the adjacent parking lot in 2017.

32. These occurrences were common: Freebirds' manager – Ryan Bramlett – told police officers that "we deal with people every day. . . there's always people that are not

their right mind . . . so it's not out of the ordinary to see people [like Woodburn] that are disturbed around Freebirds' patio."

33. Likewise, a Bennu employee reported that she was expecting that Woodburn would start "demolishing [Bennu's] bathroom, because that has happened before."

34. And just under 3-months before Johnathon was killed, Bennu's owner specifically told DJ Interests and DT Land that its patrons felt unsafe on the premises and that additional safety measures were needed to make the premises safe.

35. Yet, on January 3, 2020, those increased security measures were not started – and the safety issues at 515 S. Congress remained. Because of these failings, Woodburn was allowed to remain on the premises for nearly-an-hour – his behavior becoming more erratic as time passed.

36. For instance, Woodburn threatened customers with a rock in the parking lot outside of Bennu and Freebirds. He tried to open car doors in the parking lot without permission. He tried to steal food from Bennu – even after being physically confronted by Bennu's staff. And he was otherwise behaving erratically, walking around shoeless, filming patrons with a camera, locking himself in the bathroom, and otherwise menacing customers and employees as he entered and exited Bennu multiple times after being instructed to leave.

37. Multiple people immediately recognized that Woodburn was potentially dangerous:

a. Bramlett described to police that "he was worried about [Woodburn]," and "he had this look in his eye that I've seen before and he just looked crazy."

b. A Bennu customer reported to police that Woodburn was "barefoot . . . and close to me . . . and he immediately gets behind me . . . and he b-lines it [after he saw me looking at him]." Because of his erratic behavior, the customer told his co-workers to be careful of Woodburn, because he looked like "he was tweaking."

c. Bennu's manager reported to police that "he was in-and-out of the store . . . pacing through the parking lot . . . and just by his movements and things [I could tell] this guy was having some sort of mental issue of some sorts."

d. A Bennu employee reported to police that "we thought he was going to throw a rock through the window."

38. Yet, due to DT Land's and DJ Interests' inadequate security measures, Woodburn was permitted to remain on the premises and ultimately assault and kill Johnathon.

B. Spradlin's duty belt failed – allowing Woodburn to escape from restraint and kill Johnathon.

39. On January 3, 2020, Austin Police Department ("APD") received a "suspicious person" call related to a man (later determined to be Woodburn) who was outside Bennu Coffee ("Bennu"), disturbing customers, holding a large rock, and threatening customers. Importantly, Woodburn presented the precise safety risk, in the precise location, that Bennu's owner complained to DT Land about in October 2019.

40. After the call to police, Woodburn attacked a Bennu customer with a large object and was eventually wrestled to the ground and restrained by multiple Bennu customers.

41. Spradlin was the first APD officer to respond to the "suspicious person" call at Bennu.

42. When Spradlin arrived at Bennu, multiple Bennu customers were restraining Woodburn by holding him on the ground and preventing his escape (or any additional violent actions).

43. When Spradlin approached Woodburn, he directed the Bennu customers that were restraining Woodburn to release Woodburn.

44. The Bennu customers complied with Spradlin's order, and Spradlin attempted to continue to restrain Woodburn by placing him into handcuffs. However, during the exchange, Spradlin's duty belt (manufactured by Defendant Safariland) malfunctioned and fell off, Spradlin put his handcuffs down and, with both hands, attempted to put his duty belt back on.

45. While Spradlin attempted to re-secure his duty belt, Woodburn was able to stand up and flee from restraint – ultimately gaining access to Freebirds and killing Johnathon just minutes after the duty belt's failure.

C. Freebirds was grossly negligent in failing to lock the door that Woodburn used to kill Johnathon.

46. After Spradlin's duty belt failure allowed Woodburn the ability to escape from restraint, Woodburn entered Freebirds' business through a door that Freebirds' general manager – Ryan Bramlett ("Bramlett") – left unlocked.

47. Around 7:50am, Bramlett arrived at work to help Johnathon prepare the business to open. Before entering, Bramlett witnessed Woodburn behaving erratically and peering into the main entrance door of the Freebirds restaurant (the same door that he later used to enter Freebirds and kill Johnathon).

48. Based upon Woodburn's actions (which were erratic and strange), Bramlett believed that Woodburn was either intoxicated or emotionally disturbed.

49. After noticing the clearly emotionally disturbed Woodburn peering into Freebirds, Bramlett entered the store – where Johnathon was working to prepare the business to open – and locked the door behind him.

50. Minutes later, Bramlett unlocked the door to allow a knife sharpening vendor access to the business – where the vendor set out freshly-sharpened cooking knives on the counter.

51. After accompanying the vendor out of the building, Bramlett chose not to re-lock the closed business's door – where Bramlett witnessed Woodburn peering into minutes earlier.

52. Moments later, Woodburn entered the door Bramlett left unlocked, picked up a knife from the counter, and stabbed Johnathon multiple times.

53. Leaving the door unlocked was unreasonable for multiple reasons. For instance, Bramlett had actual knowledge that Woodburn – a clearly emotionally disturbed and potentially intoxicated person – was peering into, and attempting to access, the door he thereafter chose not to lock. Further, Bramlett and Freebirds' management had direct knowledge of emotionally disturbed individuals previously causing violent and destructive disturbances inside the business.

D. Safariland provided the City of Austin a defective duty belt.

54. The City of Austin provided Spradlin the duty belt that allowed Woodburn to escape from restraint and kill Johnathon. The duty belt was created and manufactured by Defendant Safariland.

55. Safariland created and participated in the design and manufacture of the duty belt, yet breached its duty of care with respect to the creation, design, and manufacture of the duty belt by failing to incorporate elements which would have resulted in a safer alternative design of the duty belt and which would have prevented Johnathon's death.

56. Specifically, Safariland failed to incorporate design or manufacture elements to prevent the duty belt from sagging, loosening, or becoming unfastened during normal use. Additional design elements, such as required keepers, stronger Velcro, or requiring additional pieces of Velcro would have prevented the unexpected loosening of the duty belt, which ultimately caused Woodburn to escape from restraint and kill Johnathon.

57. If Safariland would have incorporated these design or manufacture elements to prevent sagging or unanticipated loosening, Spradlin would have been able to restrain Woodburn and would have prevented Johnathon's stabbing and death.

## VII.
## RESPONDEAT SUPERIOR AND VICARIOUS LIABILITY

58. At all times pertinent to this action, the agents, servants, and employees of the Defendants were acting within the course and scope of their employment and official duties. Therefore, Safariland, DT Land, DJ Interests, and Freebirds are responsible for all damages resulting from the negligent acts and omissions of their agents, servants, and employees pursuant to the doctrine of *respondeat superior*.

59. Wherever in this petition it is alleged that any defendant (or the Defendants) did any act or thing, it is meant that the defendant's or Defendants' agents, officers, servants, borrowed servants, employees, or representatives did such act or thing and that the time such act or thing was done, it was done with the full authorization or ratification of the defendant or Defendants or was done in the normal and routine course and scope of employment of defendant's or Defendants' officers, agents, servants, borrowed servants, employees, or representatives.

60. The principal is vicariously liable for the acts of the agent because of an employer/employee status, agency by estoppel, ostensible agency, or borrowed-servant doctrine.

## VIII.
## CAUSES OF ACTION

### COUNT 1:
### GROSS NEGLIGENCE – PREMISES LIABILITY

*Amy-Marie Howard, individually and as next friend of Daniel Aguilar, a minor, and as a representative of the estate of Johnathon Aguilar, and on behalf of all those entitled to recover under the Texas Wrongful Death Act for the death of Johnathon Aguilar v. Freebirds*

61. Plaintiff, Amy-Marie Howard, individually and as Daniel Aguilar's next friend, incorporates the paragraphs above as if fully set forth herein.

62. Freebirds is liable for failing to use ordinary care to protect Johnathon from the foreseeable and unreasonable risk of injury to Johnathon.

63. At all times relevant and material to this lawsuit, Bramlett was working in the course and scope of his employment with the Freebirds as its general manager. Accordingly, Freebirds is vicariously liable for the acts and omissions of Bramlett through the application of *respondeat superior*.

64. As a result, Freebirds is liable for Bramlett's gross negligence in failing to lock Freebirds' door, which proximately caused Johnathon's death.

65. Freebirds is the owner and possessor of the premises where Johnathon was stabbed and killed.

66. Johnathon was an invitee on the premises, as he was Freebirds' employee.

67. Freebirds knew or reasonably should have known of the general danger to Johnathon and the risk of violence to its employees, as – upon information and belief – there had been multiple instances of aggression, violence, and trespass in and around the business within the two years before Johnathon was killed.

68. Further, Freebirds' general manager – Bramlett – had actual knowledge that Woodburn represented a risk of harm to Johnathon, as Bramlett believed that Woodburn was emotionally disturbed and witnessed Woodburn acting erratically and peering into Freebirds just minutes before Woodburn entered Freebirds through an unlocked door and killed Johnathon.

69. Because the general danger to Johnathon was both foreseeable and unreasonable, Freebirds had a duty to use ordinary care to protect Johnathon from the danger and risk of being assaulted on Freebirds' premises, a duty to take whatever action was reasonably prudent under the circumstances to reduce or to eliminate the unreasonable risk of harm to Johnathon (including locking the doors while the business was closed to the public), and to otherwise make the premises reasonably safe for Johnathon.

70. Freebirds breached each of these duties.

71. Freebirds' breaches were a proximate and producing cause of Johnathon's stabbing and death.

72. **Exemplary Damages:** Freebirds' conduct constitutes gross negligence as set out in Tex. Civ. Prac. & Rem. Code § 41.003. Therefore, Plaintiffs seek exemplary damages.

**COUNT 2:**
**GROSS NEGLIGENCE – NEGLIGENT UNDERTAKING AND AFFIRMATIVE COURSE OF ACTION**

*Amy-Marie Howard, individually and as next friend of Daniel Aguilar, a minor, and as a representative of the estate of Johnathon Aguilar, and on behalf of all those entitled to recover under the Texas Wrongful Death Act for the death of Johnathon Aguilar v. Freebirds*

73. Plaintiff, Amy-Marie Howard, individually and as Daniel Aguilar's next friend, incorporates the paragraphs above as if fully set forth herein.

74. At all times relevant and material to this lawsuit, Bramlett was working in the course and scope of his employment with Freebirds as its general manager. Accordingly, Freebirds is vicariously liable for the acts and omissions of Bramlett through the application of *respondeat superior*.

75. As a result, Freebirds is liable for Bramlett's gross negligence in failing to lock Freebirds' door, which proximately caused Johnathon's death.

76. Freebirds was grossly negligent by affirmatively undertaking a duty to protect Johnathon and other employees from the risks of assault to workers on its premises and by failing to use reasonable care in carrying out its duty.

77. Specifically, Freebirds undertook an affirmative course of action by attempting to secure the premises from trespassers while the business was closed.

78. For instance, upon information and belief, Freebirds either had a policy or a practice of locking the business's doors while Freebirds was closed to prevent intruders from entering the business without the employees' knowledge.

79. As a result, employees – like Johnathon – relied on Freebirds' affirmative course of action to keep them safe from intruders entering the premises. Indeed, employees relied on the locked door policy or practice to keep intruders out of the closed business, as employees typically worked in the back office or kitchen while the business was closed and did not monitor the doors. Due to this policy and practice of locking the doors while the business was closed, Freebirds owed Johnathon a duty to implement and maintain proper safety and security measures while the business was closed (including keeping the doors locked or otherwise alerting employees to intruders entering the premises).

80. Freebirds therefore undertook a duty keep employees' safe while the business was closed. Freebirds failed to exercise reasonable care in carrying out its duty when – contrary to its practice and policy – its general manager left the door unlocked while the business was closed. As described herein, Freebirds knew (or had reason to know) that there was an unreasonable risk of harm to its employees due to prior instances of trespass and criminal mischief occurring within (and around) its business.

81. Further, Freebirds' general manager – Bramlett – had actual knowledge that Woodburn represented a risk of harm to Johnathon (just minutes before Johnathon was stabbed and killed), as Bramlett believed that Woodburn was emotionally disturbed and witnessed Woodburn acting erratically and peering into Freebirds just minutes before Woodburn entered Freebirds through an unlocked door and killed Johnathon.

82. Freebirds breached its duty to Johnathon when Bramlett failed to lock the door after recognizing that Woodburn represented a risk of harm to Johnathon. Any reasonably competent general manager would have attempted to ensure the safety of their employees by choosing to secure the premises by locking the doors.

83. As a result of Freebirds' failure to use ordinary care in performing its duties, Johnathon was stabbed and killed by an intruder while Freebirds was closed.

84. **Exemplary Damages:** Freebirds' conduct constitutes gross negligence as set out in Tex. Civ. Prac. & Rem. Code § 41.003. Therefore, Plaintiffs seek exemplary damages.

**COUNT 3:**
**GROSS NEGLIGENCE**

*Amy-Marie Howard, individually and as next friend of Daniel Aguilar, a minor, and as a representative of the estate of Johnathon Aguilar, and on behalf of all those entitled to recover under the Texas Wrongful Death Act for the death of Johnathon Aguilar v. Freebirds*

85. Plaintiffs hereby incorporate by reference the paragraphs above as if fully set forth herein.

86. At all times relevant and material to this lawsuit, Bramlett was working in the course and scope of his employment with Freebirds as its general manager. Accordingly, Freebirds is vicariously liable for the acts and omissions of Bramlett through the application of *respondeat superior*.

87. Freebirds knew or reasonably should have known of the general danger to Johnathon and the risk of violence to its employees, as – upon information and belief –

there had been multiple instances of aggression, violence, and trespass in and around the business within the two years before Johnathon was killed.

88. Further, Freebirds' general manager – Bramlett – had actual knowledge that Woodburn represented a risk of harm to Johnathon, as Bramlett believed that Woodburn was emotionally disturbed and witnessed Woodburn acting erratically and peering into Freebirds just minutes before Woodburn entered Freebirds through an unlocked door and killed Johnathon.

89. As a result, Freebirds is liable for Bramlett's gross negligence in failing to lock Freebirds' door, which proximately caused Johnathon's death.

90. Freebirds had – and breached – the following duties, which proximately caused Johnathon's stabbing and death:

a. The duty to avoid a foreseeable risk of harm to Johnathon by securing the premises and locking the business's doors, knowing that trespassers (generally) and Woodburn (specifically) represented an unreasonable risk of harm to employees;

b. Given Freebirds' policy and practice of keeping the doors locked while the business was closed, the duty to ensure the doors remained locked while the business was closed;

c. The duty to take affirmative action to control or avoid increasing the danger that Woodburn presented to Johnathon, given that Bramlett and Freebirds created the condition (the unlocked door) that caused Johnathon's stabbing and death; and

d. The duty to use ordinary care in (by locking the door) not placing Johnathon in harm's way of foreseeable criminal activity (an emotionally disturbed person attempting to access the closed business).

91. Freebirds breached these duties to Johnathon when Bramlett failed to lock the door, after recognizing that Woodburn represented a risk of harm to Johnathon. Any reasonably competent general manager would have attempted to ensure the safety of

their employees by choosing to secure the premises by locking the doors while the business was closed.

92. As a result of Freebirds' failure to use ordinary care in performing its duties, Johnathon was stabbed and killed by an intruder while Freebirds was closed.

93. **Exemplary Damages:** Freebirds' conduct constitutes gross negligence as set out in Tex. Civ. Prac. & Rem. Code § 41.003. Therefore, Plaintiffs seek exemplary damages.

**COUNT 4:**
**PREMISES LIABILITY**
***Plaintiffs v. DT Land and DJ Interests***

94. Plaintiffs incorporate the paragraphs above as if fully set forth herein.

95. DT Land and DJ Interests are liable for failing to use ordinary care to protect Johnathon from a foreseeable and unreasonable risk of injury.

96. At all times relevant and material to this lawsuit, DT Land and DJ Interests owned and operated the retail center where Woodburn's criminal behavior began (Bennu) and where Johnathon was ultimately stabbed and killed (Freebirds).

97. Johnathon was an invitee on the premises as an employee of DT Land's and DJ Interests' tenant, Freebirds.

98. DT Land and DJ Interests knew or reasonably should have known of the general danger to Johnathon and the risk of violence to its tenants, as there had been multiple reported instances of aggression, vandalism, violence, and criminal trespass in and around the retail center before Johnathon was killed.

99. Because the general danger to Johnathon was both foreseeable and unreasonable, DT Land and DJ Interests had a duty to use ordinary care to protect Johnathon from the

danger of being assaulted on the premises, a duty to take whatever action was reasonably prudent under the circumstances to reduce or to eliminate the unreasonable risk of harm to Johnathon (including providing an on-site security guard, surveillance, access control, door alarms, increased lighting, or exterior doors that remain auto-locked until opening hours), and to otherwise make the premises reasonably safe for Johnathon.

100. DT Land and DJ Interests breached each of these duties.

101. DT Land and DJ Interests' breaches were a proximate and producing causes of Johnathon's stabbing and death.

102. Plaintiffs have been damaged as a result of these breaches. Such damages are in excess of the minimum jurisdictional limits of this Court.

103. **Exemplary Damages:** DT Land and DJ Interests' conduct constitutes gross negligence as set out in Tex. Civ. Prac. & Rem. Code § 41.003. Therefore, Plaintiffs seek exemplary damages.

**COUNT 5:**
**DESIGN AND MANUFACTURE DEFECTS**
***Plaintiffs v. Safariland***

104. Plaintiffs hereby incorporate by reference the paragraphs above as if fully set forth herein.

105. Safariland created and/or participated in the design of the duty belt at issue in this case.

106. On information and belief, Safariland breached its duty of care with respect to the creation, design, and manufacture of the duty belt, when it failed to incorporate elements that would have resulted in a safer alternative design for the duty belt, including design

elements (such as additional keepers and stronger Velcro) to prevent the duty belt from sagging, becoming unfastened, or unexpectedly loosening during normal use.

107. Implementing stronger Velcro, or additional required keepers, on the duty belt would have been reasonable from a financial and technological standpoint, and the addition of these additional safety features would have kept the product's use and utility, while reducing risk of failure and injury.

108. Due to Safariland's design or manufacture failure, Johnathon was stabbed and killed as a result of Spradlin's duty belt unexpectedly loosening while he attempted to restrain Woodburn.

109. Plaintiffs have been damaged as a result of these breaches. Such damages are in excess of the minimum jurisdictional limits of this Court.

110. **Exemplary Damages:** Safariland's conduct constitutes gross negligence as set out in Tex. Civ. Prac. & Rem. Code § 41.003. Therefore, Plaintiffs seek exemplary damages.

## IX.
## JURY DEMAND

111. Plaintiffs demand a trial by jury. Plaintiffs have tendered – or will tender – the fee of $40.00, as required by Tex. Gov. Code § 51.604(a).

## X.
## DAMAGES

A. Wrongful Death Damages

112. As a result of Johnathon's death, Plaintiffs seek monetary damages to compensate them for the following elements of damages:

a. Past and future pecuniary loss;

b. Past and future loss of companionship and society;

c. Past and future mental anguish; and

d. Exemplary damages.

B. Estate of Johnathon

113. As a result of Johnathon's death, his estate seeks monetary damages to compensate for the following elements of damages:

a. Johnathon's pain and suffering;

b. Johnathon's mental anguish; and

c. Johnathon's medical, funeral, and burial expenses.

114. Plaintiffs request that the Court enter judgment for their actual damages, consequential damages, special damages, punitive and exemplary damages, interest and costs. Plaintiffs also pray for such other and further relief to which they may be justly entitled in both law and equity.

## XI.
## TEX. R. CIV. P. 193.7 NOTICE

115. Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, Plaintiffs hereby give notice that documents produced by Defendants will be used at pretrial proceedings or at trial of this matter.

## XII.
## CONDITIONS PRECEDENT

116. Pursuant to Rule 54 of the Texas Rules of Civil Procedure, all conditions precedent to Plaintiffs right to recover herein and to Defendants' liability have been performed or have occurred.

## XIII.
## CONCLUSION AND PRAYER

Wherefore, premises considered, Plaintiffs pray that Defendants be cited and required to appear herein, and that upon final judgment, Plaintiffs be awarded their actual damages, exemplary damages, lawful prejudgment interest, lawful interest on the judgment, costs, and all other relief, at law or in equity, to which they are otherwise entitled.

Filed: November 14, 2023.

Respectfully submitted,

**SUMPTER & GONZALEZ L.L.P.**
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By: */s/ Worth D. Carroll*

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this document has been served on counsel of record pursuant to Tex. R. Civ. P. 21 and 21a on this 14th day of November, 2023.

*/s/ Worth D. Carroll*
Worth D. Carroll

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Envelope ID: 81637274
Filing Code Description: Amended Filing
Filing Description: PLAINTIFFS' SECOND AMENDED PETITION AND JURY DEMAND
Status as of 11/22/2023 12:11 PM CST

Associated Case Party: AMY-MARIE HOWARD

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Associated Case Party: SAFARILAND LLC

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