

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOROTHY C. MOTLEY,
individually,
on behalf of all wrongful death
beneficiaries of
Anthony Marquis Franklin

Plaintiff,

Civil Action No. 1:23-cv-276

v.

KELBY RADFORD, individually;
RYAN RAWLINS, individually;
and JACOB BOWMAN, individually,

Defendants

COMPLAINT FOR DAMAGE

Plaintiff DOROTHY C. MOTLEY, through and by her undersigned attorneys,
files this action against Defendant KELBY RADFORD, individually; RYAN
RAWLINS, individually; and JACOB BOWMAN, individually, and would show
the Court and Jury the following in support thereof:

INTRODUCTION

“He was reaching.... right?”

Statement of Officer Jacob Bowman soon after firing on
Anthony Marquis Franklin



Anthony Marquis Franklin

JURISDICTION AND VENUE

1.

This Court has original subject matter jurisdiction under 28 U.S.C. § 1331 and § 1343(4) over Plaintiff's claims under the U.S. Constitution, which are brought both directly under 42 U.S.C. § 1983.

2.

This Court has supplemental jurisdiction over Plaintiff's state law claim pursuant to 28 U.S.C § 1367 because it is so related to the federal claims that it forms part of the same case or controversy under Article III of the U. S. Constitution.

3.

Venue is proper in this District under 28 U.S.C § 1391(b)(1)(2). All of the events giving rise to this Complaint occurred within this District.

PARTIES

4.

Plaintiff DOROTHY C. MOTLEY is the natural parent of Anthony Marquis Franklin (“Anthony or Mr. Franklin”), deceased. She is a resident of the State of Texas and sue in her capacity as statutory beneficiaries under the Texas Wrongful Death Act, on behalf of all statutory beneficiaries of Anthony Marquis Franklin. Anthony Marquis Franklin died having no surviving spouse.

5.

Defendant KELBY RADFORD (hereinafter “Defendant Radford”) was/is a resident of the State of Texas. At all times, Defendant Radford was acting under the color of state law in his capacity as a law enforcement officer employed by the Austin Police Department in Austin, Texas.

6.

Defendant RYAN RAWLINS (hereinafter “Defendant Rawlins”) was/is a resident of the State of Texas. At all times, Defendant Rawlins was acting under the

color of state law in his capacity as a law enforcement officer employed by the Austin Police Department in Austin, Texas.

7.

Defendant JACOB BOWMAN (hereinafter “Defendant Bowman”) was/is a resident of the State of Texas. At all times, Defendant Bowman was acting under the color of state law in his capacity as a law enforcement officer employed by the Austin Police Department in Austin, Texas.

FACTUAL ALLEGATIONS

Events that occurred on January 15, 2023

8.

On January 15, 2023, at approximately 11:43 pm, Defendants Radford, Rawlins, and Bowman, located Mr. Franklin, a 31-year-old black man, who they believe matched the description of a suspected shooter in the Austin, Texas downtown area.

9.

Defendants Radford, Rawlins, and Bowman approached Mr. Franklin and ordered him to drop a gun. At that time, Mr. Franklin began running away from the Defendants.

10.

Defendant Radford began chasing Mr. Franklin on foot, Defendants Rawlins, and Bowman proceeded to pursue Mr. Franklin in an Austin Police Department issued ATV.

11.

During the chase, Mr. Franklin ran onto the porch of O. Henry Hall, administrative headquarters for the University of Texas System, located at 601 Colorado Street.

12.

As Defendant Radford approached the porch, an unknown white male jumped off the porch and ran away with his hands in air. Subsequently, Mr. Franklin attempted to leap over the wall of the porch resulting in him falling to the sidewalk on his back. Notably, while Mr. Franklin was leaping over the hall and falling to the ground, Defendant Radford yelled to Mr. Franklin to “show me your hands now.”

13.

Less than a second from Mr. Franklin making impact with the sidewalk, and while Mr. Franklin was lying flat on his back, Defendant Radford discharged his firearm several times in the direction of Mr. Franklin.

14.

Less than a second from Mr. Franklin making impact with the sidewalk, and while Mr. Franklin was lying flat on his back, Defendant Radford began to shoot his firearm in the direction of Mr. Franklin. Defendant Radford continued to fire his weapon as Mr. Franklin rolled over into a fetal position not facing Defendant Radford. Defendant Radford fired his weapon over ten times at Mr. Franklin while Mr. Franklin was balled up in a fetal position.

15.

At the time, Defendant Radford began to fire his firearm in the direction of Mr. Franklin, Defendant Rawlins and Bowman, while riding in the Austin Police Department issued ATV, began to discharge their firearms several times in the direction of Mr. Franklin, while Mr. Franklin was balled up in the fetal position.

16.

At the time Mr. Franklin was shot by the Defendants, He did not pose an immediate threat to the public nor the Defendants. Mr. Franklin was gun down while balled in the fetal position. As a result of being shot by the Defendants multiple times, Mr. Franklin died.

17.

At all times relevant, the Defendants, were acting under color of state law and scope of his employment as a law enforcement officer employed by City of Austin, Texas.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

42 U.S.C. § 1983 – Excessive Force in Violation of the Fourth Amendment
(Against All Defendants)

18.

Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 17 of this Complaint.

19.

42 U.S.C. § 1983 provides that:

Every person, who under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceeding for redress.....

20.

The Defendants are persons for purposes of 42 U.S.C. § 1983.

21.

The Defendants, at all times relevant hereto, was acting under the color of state law in his capacity as a police officer for the City of Austin, Texas and their acts or omissions were conducted within the scope of their official duties or employment.

22.

At the time of the complained of events, Mr. Franklin had a clearly established constitutional right under the Fourth Amendment to be secure in his person from unreasonable seizure through excessive force.

23.

Mr. Franklin also had the clearly established Constitutional right under the Fourth Amendment to bodily integrity and to be free from excessive force by law enforcement.

24.

Any reasonable law enforcement officer knew or should have known of these rights at the time of the complained of conduct as they were clearly established at that time.

25.

The Defendants' actions and use of force, as described herein, were objectively unreasonable in light of the facts and circumstances confronting them and violated the Fourth Amendment rights of Mr. Franklin.

26.

The Defendants' actions and use of force, as described herein, were also malicious and/or involved reckless, callous, and deliberate indifference to Mr. Franklin's federally protected rights. The force used by the Defendants shocks the conscience and violated the Fourth Amendment rights of Mr. Franklin.

27.

The Defendants unlawfully seized Mr. Franklin by means of objectively unreasonable, excessive and conscious shocking physical force. The force used was deadly force and did cause the death of Mr. Franklin.

28.

The Defendants engaged in the conduct described by this Complaint willfully, maliciously, in bad faith, and in reckless disregard of Mr. Franklin's protected constitutional rights.

29.

The Defendants did so with shocking and willful indifference to Mr. Franklin's rights and with conscious awareness that it could cause Mr. Franklin severe bodily harm or death.

30.

The acts or omissions of the Defendants were the moving forces behind Mr. Franklin's death. The acts or omissions of the Defendants as described herein intentionally deprived Mr. Franklin of his constitutional rights and caused him other damages. The Defendants are not entitled to qualified immunity for their actions.

31.

As a proximate result of the Defendants' unlawful conduct, Mr. Franklin was killed. As a further result of the Defendants' unlawful conduct, Mr. Franklin has incurred special damages, including medical expenses and other special damages related expenses, in amounts to be established at trial.

32.

On information and belief, Mr. Franklin suffered lost future earnings and impaired earnings capacities from the not yet fully ascertained sequelae of his injuries, in amounts to be ascertained in trial. The Plaintiff is further entitled to attorneys' fees and costs pursuant to 42 U.S.C. §1988, pre-judgment interest and

costs as allowable by federal law. There may also be special damages for lien interests.

33.

In addition to compensatory, economic, consequential and special damages, the Plaintiff is entitled to punitive damages against all Defendants under 42 U.S.C. § 1983, in that the actions of the Defendants have been taken maliciously, willfully or with a reckless or wanton disregard of the constitutional rights of Mr. Franklin.

SECOND CLAIM FOR RELIEF
(Wrongful Death/Intentional)
(All Defendants)

34.

Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 17 of this Complaint.

35.

On January 15, 2022, the Defendants were employed and uniformed officers with the City of Austin, Texas who committed a battery when they discharged their weapons to intentionally strike Mr. Franklin that resulted in the untimely and unlawful death of Mr. Franklin.

36.

The aforementioned act of discharging their weapon at Mr. Franklin, was intentional and deliberate. The Defendants' acts were carried out in bad faith and with malicious intent to do grave bodily harm Mr. Franklin. As a direct and proximate result of their acts, Mr. Franklin was killed.

37.

The Defendants' intentional acts and omissions constitute proximate causes of the incident which resulted in injuries to and the death of Mr. Franklin, which the Plaintiff on behalf on behalf of all wrongful death beneficiaries of Mr. Franklin are entitled to recover damages under the Texas Wrongful Death Statute, Texas Statutes section 71.001, as more particularly described herein.

38.

WHEREFORE, Plaintiffs prays for the following relief:

1. Judgment for compensatory damages;
2. Judgment for exemplary or punitive damages against all Defendants;
3. Cost of suit;
4. The value of support and services the deceased person had provided to the surviving family member;
5. Loss of companionship, guidance, and protection provided by the deceased person;

6. Mental and emotional pain and suffering due to the loss of a child, and medical or funeral expenses any surviving family member has paid for the deceased person;

7. The deceased person's estate may also recover certain types of damages.

these include:

lost wages, benefits, and other earnings, including the value of lost earnings that the deceased person could reasonably have been expected to make if he or she had lived lost "prospective net accumulations" of the estate, or the value of earnings the estate could reasonably have been expected to collect if the deceased person had lived, and medical and funeral expenses that were paid by the estate directly.

Such other relief as this Honorable Court may deem just and appropriate.

THIRD CLAIM FOR RELIEF
(Assault and Battery)
(All Defendants)

39.

Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 17 of this Complaint.

40.

The Defendants pointed their firearm at Mr. Franklin and unjustifiably used deadly force against Mr. Franklin, such force was objectively excessive and unreasonable under the circumstances.

41.

The Defendants' intentional acts as described more fully hereinabove, put Mr. Franklin in actual, subjective apprehension of immediate harmful or offensive contact.

42.

Mr. Franklin's apprehension was objectively reasonable under the circumstances in that a person of ordinary care and prudence under the same or similar circumstances would have believed that harmful, or offensive contact was about to occur.

43.

The Defendants' actions against Mr. Franklin were unreasonable and unlawful. At the time Mr. Franklin was shot by the Defendants, Mr. Franklin did not pose any threat or harm to any law enforcement officers or others. The Defendants acted with a depraved indifference to human life and conscious disregard for the safety of the general public, constituted an intentional unwelcome and unprivileged touching of Mr. Franklin, and was undertaken in bad faith and with actual malice.

44.

As a further direct and proximate result of the conduct described above, Mr. Franklin died. Prior to his death Mr. Franklin suffered loss of his liberty and freedom,

bodily injury resulting in pain and suffering, mental anguish, and medical expenses for treatment and care. Mr. Franklin did not consent to contact from the Defendants.

PRAYER FOR RELIEF

Plaintiff prays that this Court enter judgment for the Plaintiff and against each of the Defendants and grant:

1. compensatory and consequential damages, including damages for emotional distress, humiliation, loss of enjoyment of life, and other pain and suffering on all claims allowed by law in an amount to be determine by a jury;
2. economic losses on all claims allowed by law;
3. special damages in an amount to be determined at trial;
4. punitive damages on all claims allowed by law against Defendant Doe in an amount to be determine by the jury;
5. attorneys' fees and the costs associated with this action under 42 U.S.C. § 1988, including expert witness fees, on all claims allowed by law;
6. pre- and post-judgment interest at the lawful rate; and,
7. any further relief that this court deems just and proper, and any other appropriate relief a law and equity.

PLAINTIFF REQUESTS A TRIAL BY JURY.

Respectfully submitted this 14th day of March 2023.

MACK INJURY ATTORNEYS

/s/Nathaniel Mack III

Nathaniel Mack III

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
DOROTHY C. MOTLEY
(b) County of Residence of First Listed Plaintiff
(c) Attorneys (Firm Name, Address, and Telephone Number)
Nathaniel Mack III 8023 Vantage Dr. Suite 690 San Antonio, Texas 78230P:(210) 333-6225

DEFENDANTS
KELBY RADFORD, et al.
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State 1 1
Citizen of Another State 2 2
Citizen or Subject of a Foreign Country 3 3
Incorporated or Principal Place of Business In This State 4 4
Incorporated and Principal Place of Business In Another State 5 5
Foreign Nation 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only) Click here for: Nature of Suit Code Descriptions.

Table with columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, INTELLECTUAL PROPERTY RIGHTS, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like 110 Insurance, 310 Airplane, 365 Personal Injury, etc.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. 1983
Brief description of cause:
Wrongful Death/Excessive Force by Law Enforcement

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$
CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):
JUDGE DOCKET NUMBER

DATE 3/14/2023 SIGNATURE OF ATTORNEY OF RECORD /s/Nathaniel Mack III

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

I. INTRODUCTION

1. On March 14, 2023, Plaintiff Dorothy C. Motley, proceeding through counsel, filed this lawsuit alleging three distinct causes of action seeking damages arising from the death of Anthony Marquis Franklin (“Franklin”). Plaintiff Motley is Franklin’s mother, and she claims that these Officers: **(1)** violated Franklin’s right to be free from excessive force under the Fourth Amendment pursuant to 42 U.S.C. § 1983;¹ **(2)** are liable to her for a Texas wrongful death claim² pursuant to “Texas Statutes section 71.001”;³ and **(3)** are liable for “assault and battery”—an intentional tort claim arising under Texas State law.⁴

2. The Officers now file this Partial Motion to Dismiss for Failure to State a Claim, because they are entitled to Statutory Immunity⁵ under the Texas Tort Claims Act for the wrongful death claim and the assault and battery claim. This motion does not challenge the Federal question claim under 42 U.S.C. § 1983. These Officers have filed an Original Answer to that claim concurrently with this Motion.⁶

II. LEGAL STANDARD

3. Rule 12(b)(6) provides for dismissal of an action for failure to state a claim upon which relief can be granted.⁷ Under Rule 8 of the Federal Rules of Civil Procedure, a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁸ To

¹ Pl. Orig. Compl, Dkt. # 1, pg. 7.

² Pl. Orig. Compl., Dkt. # 1, pgs. 11 – 12.

³ The undersigned presumes that Plaintiff is referring to Texas Civil Practices and Remedies Code §71.001 *et seq.*

⁴ Pl. Orig. Compl., Dkt. # 1, pg. 13.

⁵ Statutory Immunity and Official Immunity are different concepts that operate under differing standards. *See Matthews v. Harris Cnty.*, No. CV H-18-0014, 2018 WL 3818001, at **fn. 40** (S.D. Tex. Aug. 10, 2018).

⁶ *See* Defs.’ Orig. Answer, Dkt. # 22.

⁷ FED. R. CIV. P. 12(b)(6).

⁸ FED. R. CIV. P. 8(a)(2).

survive a motion to dismiss, a Plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.”⁹ The court must accept the factual allegations of the complaint as true, and view them in the light most favorable to the plaintiff.”¹⁰ However, the court does not accept as true any legal conclusions,¹¹ and “Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law.”¹²

III. ARGUMENTS & AUTHORITIES

A. **The Officers are entitled to Statutory Immunity for Plaintiff’s Wrongful Death Claim. However, Plaintiff is permitted to assert she is entitled to wrongful death damages pursuant to state law.**

4. Texas Civil Practices and Remedies Code § 71.002 provides an independent claim under state law for wrongful death. “To support a claim for wrongful death under Texas law, plaintiffs must allege that death resulted from the negligent or wrongful act of a person or his agent or servant.”¹³ However, these Officers are immune to this claim because they are statutorily barred by the Texas Tort Claims Act (TTCA).¹⁴

5. The Texas Supreme Court has made it clear that the election of remedies provision found in Texas Civil Practices and Remedies § 101.106(f) “foreclose[s] suit against a government employee in his individual capacity if he was acting within the scope of employment.”¹⁵ “The TTCA defines “scope of employment” as “the performance for a governmental unit the duties of

⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

¹⁰ *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

¹¹ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹² *Estate of I.C.D. v. Beaumont Indep. Sch. Dist.*, No. 1:18-CV-137, 2020 WL 1028073, at *4 (E.D. Tex. Mar. 2, 2020) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)).

¹³ *Carr v. City of Spring Valley Vill.*, No. CV H-18-2585, 2019 WL 1276100, at *12 (S.D. Tex. Mar. 20, 2019), *aff’d*, No. 19-20373, 2022 WL 1553539 (5th Cir. May 17, 2022).

¹⁴ TEX. CIV. PRAC. & REM. CODE §101.001 *et seq.*

¹⁵ *Carr*, 2019 WL 1276100, at *12 (citing *Franka v. Velasquez*, 332 S.W.3d 367, 381 (Tex. 2011)).

an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority."¹⁶

6. Specifically in regard to law enforcement officers, Texas law holds that "engaging in an arrest is conduct that is generally within an officer's scope of employment"¹⁷ and that an officer "who uses excessive force is still acting within the 'scope of employment' for purposes of the TTCA."¹⁸ Here, Plaintiff Motley concedes that the Officers were "acting under the color of state law in [their] capacity as...police officer[s] for the City of Austin, Texas..." when they fatally shot Franklin while trying to arrest him.¹⁹

7. Accordingly, as in *Carr*, "[b]ecause there is no dispute that plaintiffs have sued the defendant officers in their individual capacities for acts that occurred in the course and scope of their employment, [plaintiff's] claims for negligence, *wrongful death*, and survival claims are subject to dismissal under § 101.106(f)."²⁰ However, as noted in *Hutcheson*, there is a difference between pursuing a state law *claim* under § 71.002 and asserting entitlement to wrongful death damages "pursuant to 42 U.S.C. § 1983, as allowed pursuant to state law...".²¹ The latter permissibly provides the Plaintiff with damages should they succeed in their Federal excessive

¹⁶ *Matthews v. Harris Cnty.*, No. CV H-18-0014, 2018 WL 3818001, at *4 (S.D. Tex. Aug. 10, 2018) (citing TEX. CIV. PRAC & REM CODE § 101.001(5)).

¹⁷ *Id.* (citing *Fink v. Anderson*, 477 S.W.3d 460, 467 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

¹⁸ *Id.* (citing *Orr v. Copeland*, No. A-14-CV-212-LY, 2015 WL 3901654, at *2 (W.D. Tex. 2015)).

¹⁹ Pl. Orig. Compl., Dkt. #1, pg. 8 (cleaned up).

²⁰ *Carr*, 2019 WL 1276100, at *12 (emphasis added).

²¹ *Hutcheson v. Dallas Cnty., Tex.*, No. 3:17-CV-2021 BN, 2020 WL 1692950, at *19 (N.D. Tex. Apr. 7, 2020), *aff'd*, 994 F.3d 477 (5th Cir. 2021).

force claim. But “to the extent that [Plaintiff Motley does] assert a state law wrongful death *claim*...such a claim [must be] dismissed with prejudice.”²²

B. The Officers are entitled to Statutory Immunity for Plaintiff’s intentional tort claims of Assault and Battery, as they are explicitly not waived under the Texas Tort Claims Act.

8. The Officers are also entitled to Statutory Immunity for Plaintiff Motley’s state law assault and battery claims under Texas Civil Practice and Remedies Code § 101.106(f). As stated *supra*, “[t]he Texas Supreme Court has explained that the purpose of §101.106(f) was to foreclose suit against a government employee in his individual capacity if he was acting within the scope of employment.”²³ Instead, under the Texas Supreme Court’s precedent in *Franka*, “all tort claims, *including intentional torts*, ‘could have been brought against the governmental unit, regardless of whether the governmental unit’s immunity from suit is expressly waived by the TTCA for those claims.’”²⁴ Again, Plaintiff Motley concedes that the Officers were “acting under the color of state law in [their] capacity as...police officer[s] for the City of Austin, Texas...” when they fatally shot Franklin while trying to arrest him.²⁵

9. “The [TTCA] does not waive immunity for intentional torts.”²⁶ Texas Civil Practice and Remedies Code § 101.057 explicitly states:

²² *Id.* (cleaned up) (emphasis added); *see also Francis v. Cnty*, No. CV H-14-2943, 2016 WL 6662275, at *18 (S.D. Tex. Nov. 10, 2016), *aff’d sub nom. Francis v. Garcia*, 702 Fed. Appx. 218 (5th Cir. 2017).

²³ *Bailey v. Willis*, No. 4:17-CV-00276-ALM-CAN, 2018 WL 3321461, at *13 (E.D. Tex. Jan. 11, 2018), Report and Recommendation adopted, No. 4:17-CV-00276, 2018 WL 2126476 (E.D. Tex. May 8, 2018).

²⁴ *Id.* (citing *Franka*, 332 S.W.3d at 381) (emphasis added).

²⁵ Pl. Orig. Compl., Dkt. #1, pg. 8 (cleaned up).

²⁶ *Hatton v. Harris Cnty, Jail*, No. CV H-18-1948, 2019 WL 1858826, at *3 (S.D. Tex. Apr. 25, 2019).

This chapter does not apply to a claim...arising out of *assault, battery*, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities.²⁷

“This provision shields municipalities from suits arising out of intentional torts committed by governmental employees and [is] liberally construed to accomplish this objective.”²⁸

10. Accordingly, all of Plaintiff’s state law claims are barred. They cannot be brought against the individual Officers under the election of remedies provision articulated in § 101.106(f) and as interpreted by *Franka*.²⁹ Additionally, Plaintiff cannot replead these claims against the City of Austin, because the City would be entitled to governmental immunity under § 101.057 of the Texas Tort Claims Act.³⁰ These claims should therefore be dismissed with prejudice without permitting Plaintiff to replead.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants Kelby Radford, Ryan Rawlins, and Jacob Bowman respectfully request that this Court dismiss Plaintiff’s claims of Wrongful Death/Intentional and Assault and Battery against them, and for all other relief to which they may be entitled, whether in law or in equity.

Respectfully submitted,

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By: /s/ Stephen B. Barron

²⁷ TEX. CIV. PRAC. & REM. CODE § 101.057 (emphasis added).

²⁸ *Hatton*, 2019 WL 1858826, at *3 (citing *Gillum v. City of Kerrville*, 3 F.3d 117, 123 (5th Cir. 1993)).

²⁹ *Franka*, 332 S.W.3d at 381.

³⁰ *Pena v. City of Rio Grande City*, 870 F.3d 613, 625 (5th Cir. 2018); *see also Carr*, 2019 WL 1276100, at *13.

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**ATTORNEYS FOR DEFENDANTS
KELBY RADFORD, RYAN RAWLINS,
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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail and/or U.S. First Class Mail, in accordance with the Federal Rules of Civil Procedure, as follows:

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I. ORIGINAL ANSWER

A. Jurisdiction and Venue.

1. The Officers admit that this Court has Jurisdiction over the Federal Question Claims brought by Plaintiff pursuant to 42 U.S.C. § 1983 and the United States Constitution.
2. The Officers **deny** that this Court has supplemental jurisdiction over Plaintiff's State Law Claims, because these Officers are entitled to Statutory Immunity pursuant to the Texas Tort Claims Act and other applications of Texas state law. A Motion to Dismiss pursuant to Rule 12(b)(6) has been filed concurrently with this Answer.
3. The Officers admit that Venue is proper in the Western District of Texas.

B. Parties.

4. The Officers are without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraph 4 of Plaintiff's Original Complaint, as these Officers currently have no basis to affirm or dispute if Dorothy C. Motley is the mother of decedent Anthony Marquis Franklin ("Franklin"), if he had a spouse, or if she is otherwise entitled to recover damages.
5. The Officers admit the allegations contained within Paragraphs 5 – 7 of Plaintiff's Original Complaint.

C. Facts.

1. As it pertains to the factual allegations contained in Paragraphs 8 – 16 of Plaintiff's Original Complaint, the Officers admit that on January 15, 2023—they were on duty as Austin Police Department Officers, when they responded to numerous 911 calls that a man was firing a gun near Lavaca and 6th Street. These 911 callers reported that a person had been shot in the head as a result of the shooting. Witnesses provided a description of the suspect matching Franklin's appearance

in the company of a black female. A City-wide search accordingly began for that suspect with the firearm.

6. During the search, these Officers canvassed the area in an ATV¹ that was equipped with flashing lights and was clearly marked as a police vehicle. Eventually, the Defendants located Franklin on the corner of West 6th Street and Colorado Street and began observing him as he walked away with one hand in his pocket. Suddenly, they saw that Franklin had a gun. All of the Officers yelled “gun” and Officer Radford and Officer Bowman yelled for Franklin to drop the gun. Franklin disobeyed these commands, and instead bolted around the corner and began running Northbound up Colorado Street.

7. Officer Radford chased Franklin on foot while Officers Bowman and Rawlins pursued in the ATV. While running, Franklin darted up some stairs and onto the stoop of O’Henry Hall at 601 Colorado. Officer Radford again yelled for Franklin to drop the gun. While on the stoop, Franklin menaced an uninvolved male who fled in terror by jumping over the stone banister. While this was occurring, Officer Radford again yelled “show me your hands” at least twice. The uninvolved man then fled with his hands above his head.

8. Then—just as Officer Radford yelled “show me your [expletive] hands” for the *third time*—Franklin again disobeyed this command and took the following action: while firmly grasping his handgun in his right hand, Franklin vaulted over the stone banister and flipped over to land on his back on the pavement. While on his back, Franklin pointed the handgun directly at Officer Radford. Faced with a split-second decision in the face of potentially deadly force—from: (1) a man who had refused commands to disarm at least three times; (2) had allegedly shot someone

¹ Short for “All-Terrain Vehicle.”

in the head earlier that night, and; (3) had just leaped from a railing instead of submitting to arrest—all three Officers made the decision to shoot Franklin.

9. Franklin then threw his handgun a short distance away and it landed on the street in between the wheel of a parked car and the curb. The Officers ceased fire, and Franklin spun around while on the ground and began crawling toward the curb where his handgun landed. He then reached his hands down the curb towards the gun, and Officer Bowman yelled “don’t get the gun.” Simultaneously, Officer Rawlins repeatedly yelled “do not move” and Franklin responded “ok, I don’t have nothin’.”

10. Backup then arrived and Franklin was secured in handcuffs. While aid was being rendered to Franklin, Officer Bowman pointed out Franklin’s gun next to the curb to an arriving officer, saying that “he was reaching right...you can see it right there.” **It was a statement, not a question.** Otherwise, the Officers deny the factual allegations contained in Paragraphs 8 – 16 inconsistent with these facts articulated *supra*.

11. As to the allegations contained within Paragraph 17 of Plaintiff’s Original Complaint, the Officers admit that they were acting under the color of law during the incident that forms the basis of this lawsuit.

D. Causes of Action.

i. Fourth Amendment Excessive Force Claim against all Defendants.

12. As to the allegations contained in Paragraph 18 of Plaintiff’s Original Complaint, the Officers adopt and incorporate their responses to the previous Paragraphs of the Complaint.

13. As to the allegations contained in Paragraphs 19 – 30 of Plaintiff’s Original Complaint, the Officers admit that they were acting under the color of law during the incident that forms the basis of this lawsuit. Otherwise, pursuant to Federal Rule of Civil Procedure 8(b), a defendant need not

respond to plaintiff's mere legal conclusions. To the extent a response is required, these Officers deny that they violated Franklin's civil rights. Instead, their actions were justified under clearly established law. They are entitled to Qualified Immunity and raise that defense *infra*. Otherwise, denied.

14. As to the allegations contained in Paragraphs 31 – 33 of Plaintiff's Original Complaint, no answer is necessary from these Defendants. To the extent any answer is deemed necessary, the Officers admit that Plaintiff seeks the relief requested therein, but they deny Plaintiff is entitled to it.

ii. Wrongful Death/Intentional Claim against all Defendants.

15. As to the allegations contained in Paragraph 34 – 38 of Plaintiff's Original Complaint, the Defense does not answer these Paragraphs, as they are the subject of the pending Partial Motion to Dismiss—filed concurrently with this Original Answer.

iii. Assault and Battery Claims against all Defendants.

16. As to the allegations contained in Paragraph 39 – 44 of Plaintiff's Original Complaint, the Defense does not answer these paragraphs, as they are the subject of the pending Partial Motion to Dismiss—filed concurrently with this Original Answer.

E. Damages, Relief Requested, Jury Demand, & Prayer.

17. As to the unnumbered allegations contained on page 15 of Plaintiff's Original Complaint, no answer is necessary from these Officers. To the extent any answer is deemed necessary, the Officers admit that Plaintiff seeks the relief requested therein, but deny that Plaintiff is entitled to this relief.

II. AFFIRMATIVE DEFENSES & IMMUNITIES

18. The Officers deny any deprivation under color of statute, ordinance, custom, or abuses of any rights, privileges, or immunities secured to the decedent by the United States Constitution, state law, or 42 U.S.C. § 1983, *et seq.*

19. The Officers hereby invoke the doctrine of Qualified Immunity, Official Immunity, and Statutory Immunity. Defendants discharged their obligations and public duties in good faith and would show that their actions were objectively reasonable in light of the law and the information possessed at that time, and that no clearly established law exists prohibiting them from using force against a person who is believed to have very recently used a deadly weapon, and was uncompliant with officer commands when those commands were given in order to secure the scene to make it safe for all persons involved.

20. Further and in the alternative, the incident in question and the resulting harm to Plaintiff were caused or contributed to by another persons' own illegal and/or violent or reckless conduct, including but not limited to the conduct of the decedent himself. To the extent legally applicable herein, the Officers invoke the comparative responsibility provisions of the Texas Civil Practice & Remedies Code.²

21. The Officers further plead that, in the unlikely event they are found to be liable, such liability be reduced by the percentage of the causation found to have resulted from the acts or omissions of other persons, including the decedent himself.

22. The Officers plead that they had legal justification for each and every action taken by them relating to this incident based on the information available to them at the time.

² See TEX. CIV. PRAC & REM. CODE ANN. § 33.001.

23. The Officers assert the limitations and protections of Chapter 41 of the Texas Civil Practice & Remedies Code, and the Due Process Clause of the United States Constitution.

24. The Officers assert the limitations and protections of Chapter 101 of the Texas Civil Practice & Remedies Code.

25. The Officers reserve the right to assert additional affirmative defenses throughout the development of this case.

26. To the extent the Officers did not address any specific averment made by Plaintiff in her Original Complaint, they expressly deny all such averments.

III. JURY DEMAND

27. Pursuant to Federal Rule of Civil Procedure 48, these Defendant Officers hereby request a jury trial.

IV. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendants Kelby Radford, Ryan Rawlins, and Jacob Bowman pray that upon a final hearing of this cause, the Court dismiss all of Plaintiff's claims with prejudice, that all costs of court be assessed against Plaintiff, that they be awarded attorney fees incurred in the defense of this suit, and for all further relief to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail and/or U.S. First Class Mail, in accordance with the Federal Rules of Civil Procedure, as follows:

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