ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CHARLENE LEATHERMAN, ET AL., Petitioner v. TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, ET AL.

CASE NO: 91-1657

PLACE: Washington, D.C.

DATE: Tuesday, January 12, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLENE LEATHERMAN, ET AL., :

Petitioners :

v. : No. 91-1657

TARRANT COUNTY NARCOTICS :

INTELLIGENCE AND COORDINATION :

UNIT, ET AL. :

- - - - - - - - - - - - - - - - - - - X

Washington, D.C.

Tuesday, January 12, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

RICHARD GLADDEN, ESQ., Denton, Texas; on behalf of the Petitioners.

BRETT A. RINGLE, ESQ., Dallas, Texas; on behalf of the Respondents.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 91-1657, Charlene Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit.

Mr. Gladden.

ORAL ARGUMENT OF RICHARD GLADDEN

ON BEHALF OF THE PETITIONERS

MR. GLADDEN: Mr. Chief Justice, and may it please the Court:

In this case, the petitioners challenge what's known as the Fifth Circuit's heightened pleading requirement, which that court applies in civil rights cases brought pursuant to 42 U.S.C., section 1983 with respect to allegations against local governmental entities wherein plaintiffs allege that the local governmental entity has failed to adequately train, allegations similar to those presented in City of Canton v. Harris.

It's the petitioners' contention that the heightened pleading requirement violates the system of notice pleading set out in rule 8(a)(2) of the Federal Rules of Civil Procedure, and alternatively, to the extent that a heightened pleading requirement is permissible under rule 8, petitioners go further and state that they believe that that violates the rule's enabling act, title

28 U.S.C., section 2072(b).

Before going much further, I would like to briefly outline for the Court the procedural and factual background which led to this case.

The case originally arose out of a search of the Leatherman residence which occurred in May of 1989. In that case, governmental officers, under the control of the Tarrant County narcotics task force, secured a search warrant for their premises and upon entering the premises shot and killed two of their dogs, and after discovering, just within moments, that there was no narcotics laboratory within the premises, proceeded to lounge about in the front of the yard, basically just kind of enhancing and aggravating the anxiety that the family was already experiencing.

Mrs. Leatherman and her son Travis were there on the premises at the time the dogs were shot -- or at the end of the driveway, some 100 feet away. They filed a lawsuit in State court pursuant to section 1983 alleging a violation of the Fourth Amendment with respect to the manner in which the search was conducted by the officers and the shooting of their dogs, which they considered to be an unreasonable seizure of their effect, the dog being the effect in question.

The petitioner -- the Leatherman petitioners'

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former counsel filed the case in State court and was unable, prior to filing it in State court, to get access to any documents to identify the individual officers. He made numerous attempts to try to secure documents which would more particularly describe what customs they may have and what prior incidents might have occurred similar to this. He was unable to do so.

Following the filing of his complaint and our petition in State court, the respondents immediately removed the case to Federal court, and immediately thereafter filed a motion to dismiss on 12(b) or for summary judgment.

The petitioner -- the Leatherman petitioners' former counsel had not been admitted to practice in Federal court and while he was trying to locate other counsel to handle the case, the court initially acted on the motion to dismiss and dismissed the case.

Following my becoming involved in the case, I moved the court to vacate the dismissal and allow the petitioners to replea their complaint, if possible to conform to the technical pleading requirements that the court in the Fifth Circuit or courts in the Fifth Circuit apply, specifically the heightened pleading requirement.

During the course in time in which we were drafting the amended complaint, our office became aware of

another incident also involving the Tarrant County drug task force wherein the officers had displayed similar lack of supervision with respect to the entry of the residence unannounced, clubbing of an elderly gentleman, remaining on the premises some hour and a half to 2 hours after determining that there was no drugs on the premises or drug laboratory on the premises.

I came to the conclusion that there was a consistent pattern there, and for that reason, pursuant to 20(a), rule 20(a), I added this separate incident, together with the Leathermans' lawsuit.

QUESTION: Rule 20(a) of the Rules of Civil Procedure?

MR. GLADDEN: Yes, Chief Justice.

QUESTION: What does that provide?

MR. GLADDEN: Chief Justice, if I recollect, it says that you have a common transaction in question element. If you have a pattern of actions by the same identified source and you have common legal questions or common factual questions, the rules permit a joinder of what would otherwise seem to be separate incidences if you have a common factual question or a common legal question.

QUESTION: This was a motion to --

MR. GLADDEN: Well, it was -- we just amended the complaint. I know the district court was uncertain at

the time it acted or entered its decision as to what legal authority. The issue had never been raised by the respondents, and therefore it had never been briefed.

In any event, following the amended complaint being filed, the respondent, TCNICU, who I'll just call the drug task force, filed virtually the identical motion to dismiss or for summary judgment, and at that time attached some unverified police reports and such like that that allowed us to get a little bit more information, but still not enough to recognize on an evidentiary basis sufficient facts to perhaps defend a motion for summary judgment.

At that time, I filed a motion to stay action on the motion for summary judgment pursuant to rule 56(f) because there had not been sufficient discovery from my position to feel comfortable with the court acting on it at that time, and that was also briefed in the district court in response to their motion for summary judgment.

In response -- discovery or motion for -- excuse me -- production of documents, the respondent drug task force filed a motion for a protective order, and they claimed, I believe, four different privileges, including executive privilege, why they shouldn't have to disclose any documents in connection with the operation of their drug task force. As a result, the court, the district

court, entered a protective order and prevented me from getting any other documents other than those voluntarily provided by the drug task force. Some -- and I had also asked for a hearing on that, and the hearing was denied.

Some 3 weeks later, the court granted their motion to dismiss based on the heightened pleading requirement, but went further and acted on the motion for summary judgment. And, however, on appeal the Fifth Circuit only affirmed on the basis of the heightened pleading requirement. That pretty much concludes the procedural posture of the case.

It's the petitioners' position that there are several reasons why the heightened pleading requirement is inconsistent with the notice pleading that this Court set out in Conley v. Gibson. In Conley v. Gibson, the Court said that fair -- that a plaintiff under rule 8 -- and that was yet again a case where the people, the respondents, had said that you had to have specific allegations to support your claims, and the Court in response to that said that under rule 8 a plaintiff only need show fair notice of their claim and the grounds upon which it rests.

We believe that in this case, the respondent certainly had fair notice of both the legal and factual basis of the claim with respect to the constitutional

allegation and certainly had an understanding that the theory of relief was pursuant to City of Canton v. Harris. They were so able to understand the allegations that they were able to file a motion for summary judgment.

However, they didn't provide any documentation with respect to what their training was or whether there had been prior incidences. Yet again, because the protective order had been entered, I was unable to get such documents.

It's our position that not only does rule 8 and Conley v. Gibson preclude any understanding of rule 8 to allow a heightened pleading requirement, but we also believe that rule 9(b) certainly read in harmony with rule 8 would negate the possibility of a heightened pleading requirement.

QUESTION: Well, is there some indication or do you believe, I -- do you think the district judge would have allowed you the discovery that he previously didn't allow you if he had denied the motion to dismiss?

MR. GLADDEN: I have no way of knowing.

QUESTION: Because --

MR. GLADDEN: That would be just speculation.

QUESTION: You know, one of the things you're telling us about is how you couldn't get any information through discovery, and I'm wondering how that is related

to the heightened pleading requirement.

MR. GLADDEN: Well, Your Honor, I think the court denied the discovery, and it's my impression that he denied the discovery on the basis that the heightened pleading requirement foreclosed the lawsuit proceeding further to discovery because under a heightened pleading requirement, you wouldn't be allowed discovery unless you could get through a motion to dismiss.

QUESTION: So, then perhaps your answer to my question should be yes, that had the district court denied the motion to dismiss, it would have been more lenient about allowing discovery.

MR. GLADDEN: I certainly think so. I think in the absence of a heightened pleading requirement, he would have been more lenient. Most of the case law that he cited in support of denying discovery was connected or intertwined with cases involving the heightened pleading requirement.

Back to rule 9(b), another suggestion we have or argument we have is that 9(b) sets out what kinds of claims there are that require particularity in pleading complaints. It's limited to fraud and mistake. Nowhere is there any mention of a heightened pleading requirement for civil rights cases or some unidentified other class of cases.

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And then it goes on to say that allegations involving knowledge, malice, intent, or other condition of mind, which I think in this case deliberate indifference on the part of the municipal policymaker would certainly be a condition of mind -- rule 9(b) says that only general allegations are required with respect to pleading.

Now, it seems to me that throughout this litigation, both the respondents and the lower courts, not necessarily Judge Goldberg, but they have concluded -- or they have confused the difference between a rule for summary judgment where evidence has to be pled and presented and a motion to dismiss where you are only required to give fair notice of the claim that you're presenting.

I would say again the respondents in this case had fair notice of what the factual basis of the constitutional allegation was, and they had fair notice, at least to my ability to plead it, that we were challenging the inadequacy of their training and that we believed, on information and belief, that there were other incidences that would support our claim.

Justice Scalia has, on more than one occasion, stated that we should apply the text to the rules and not improve upon them. It seems to me that the lower courts who have imposed the heightened pleading requirement have

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done so in an effort to improve upon what they consider to be a problem with the Federal rules in protecting municipalities. The City of Owen -- or Owen v. City of Independence addressed the question of whether municipalities are entitled to qualified immunity, and the Court ruled that it wasn't.

This heightened pleading requirement originally derived out of the need to protect individual defendants who had a right to assert qualified immunity from broad ranging discovery. I don't think that there's necessarily a problem with limiting broad ranging discovery in any case under rule 16. I think a district judge certainly could isolate issues and allow discovery to go forward on that basis.

QUESTION: How about a heightened pleading rule where you're dealing with individuals who will claim qualified immunity?

MR. GLADDEN: Well, I don't think that -- first of all, I don't think that issue is presented to the Court, but I would take the position in Anderson v. Creighton, Justice Scalia noted that when you do have issues of fact involved, that you can have discovery limited to the fact issue involved go forward. And that would not be inconsistent with qualified immunity.

QUESTION: Well, who wrote the opinion in

Anderson? Justice O'Connor?

MR. GLADDEN: No. Justice Scalia.

QUESTION: Justice Scalia.

And so, you think that Anderson requires what answer to my question?

MR. GLADDEN: I think Anderson would suggest that qualified immunity or not would -- there is no need for a heightened pleading requirement or it would be inconsistent to apply a heightened pleading requirement at the same time that you said before that you could allow discovery to go forward where qualified immunity has been raised, only limited to the specific issue. That way we could eliminate this threat or exaggerated threat of over-ranging and overbroad discovery.

QUESTION: So, the discovery in a case would be only limited to facts bearing on qualified immunity.

MR. GLADDEN: In the district courts -- well, now, for local governmental entities, they don't --

QUESTION: No. But when I say a case like --

MR. GLADDEN: Okay. Yes, okay.

QUESTION: -- that, I meant one where there are individuals involved who can claim qualified --

MR. GLADDEN: Oh, certainly. I think that would be in the district court's discretion, and certainly he would have discretion to do so. And I wouldn't be here to

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argue to the contrary.

QUESTION: Now, I take it -- maybe I'm wrong. Is it correct that you're going to go on to say that qualified immunity is not involved here?

MR. GLADDEN: That's correct. And as I pointed out a moment ago, that issue -- Siegart v. Gilley I believe was going to address that, and I recall your concurring opinion. The Court didn't reach that issue in Siegart v. Gilley, and that is not presented in this case although I recognize that the outcome of this case may have some bearing on a subsequent case that would address that issue.

QUESTION: Is the municipality's claim here just characterized as a defense?

MR. GLADDEN: It's their position that the heightened pleading requirement is a substantive form of immunity. We take the contrary position. We don't believe -- we think that Owen v. City of Independence disposed of the issue of whether or not local governmental entities are entitled to qualified immunity. By allowing a cause of action to exist under section 1983, that disposes of any absolute immunity.

And so, what we're talking about here is whether or not the limitations on discovery should be addressed through a limitation, like a rule 56(f) motion, whether or

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not -- or rule 16 limitation on discovery at the summary judgment stage, not at the initial pleading stage because rule 8 expressly was intended to only provide fair notice to defendants in these cases. Unless there's a legitimate claim of not having notice, I don't think it's appropriate to impose this pleading requirement, and in this case, no one filed a motion for more definite statement because in my view there was never any question about notice involved.

QUESTION: Mr. Gladden, can I ask you, is there -- what in the Federal rules, if anything -- and if your theory is adopted -- would prevent a plaintiff routinely, whenever there has been any malfeasance on the part of a police officer, for example, to file a lawsuit claiming that it is a policy of the city? You know, the policeman shoots a fleeing miscreant who's committed a misdemeanor.

MR. GLADDEN: I think there's --

QUESTION: And you just file a complaint saying this is a policy of the city and then it can't be dismissed on the pleadings, so you get to the summary judgment stage. But you're entitled to discovery for summary judgment. So, in other words, you don't really know when you file the suit that you have a proper cause of action, and you're using the suit as a means of investigation, which doesn't seem to me is proper.

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MR. GLADDEN: Okay, well --

QUESTION: What stops it?

MR. GLADDEN: Yes. I'll respond to that by saying, first of all, we do have rule 11, which imposes upon plaintiff's counsel an obligation to make a reasonable inquiry into a prefiling investigation into the facts and law.

QUESTION: Yes, but that only applies to the facts that are asserted in the complaint, doesn't it?

MR. GLADDEN: Well, it doesn't say that they have to plead the facts, but it says they do have an obligation to make a reasonable investigation into the facts. And --

QUESTION: I assume that means the facts pleaded.

MR. GLADDEN: Well, not necessarily. You can have someone fail to do a reasonable investigation and have a boiler plate allegation like you have, or you could have someone who had done a reasonable investigation. The threat of sanctions would foreclose some --

QUESTION: Do you have to find something in that reasonable investigation? Suppose I do a reasonable investigation and I cannot identify any municipal policy, but I still file the lawsuit. Have I complied with rule 11?

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MR. GLADDEN: I don't think you would necessarily have to find something, but you'd have to have good reason to believe that discovery would bring forth factual specifics to support your claim. I believe you've said in Lujan v. Defenders of Wildlife and in another case also involving Lujan --

QUESTION: You don't want to keep attributing this to me. This was the Court that said this.

(Laughter.)

MR. GLADDEN: Okay.

QUESTION: I don't always speak for the whole Court.

MR. GLADDEN: Yes, I understand.

QUESTION: Often -- I often don't.

MR. GLADDEN: But under 12(b)(6), general allegations, unlike a summary judgment motion -- under 12(b)(6) general allegations are presumed to have particular facts supporting them. I think that it would certainly be sanctionable conduct for someone, without conducting a reasonable prefiling investigation, to just without doing an investigation file a boiler plate complaint and then cause it to go forward to the summary judgment motion stage. I think that someone would have a good argument to file for sanctions.

Then again, we would have a very limited amount

of litigation involved where the sanctions would not be that enormous, and you would have to impose sanctions limited to the specific event that caused, as the Court has said in the rule 11 cases.

QUESTION: What would the significance under rule 11 be in a case in which the plaintiff did all the prefiling investigation he could do and just couldn't find out anything? I think that's what you are saying happened in this case. And yet, based on the behavior of the police officers, he thinks there's at least a reasonable possibility that there was a policy of inadequate training and so on. So, he goes ahead and files based upon generalized allegations and then hopes for discovery. Would there be a rule 11 sanction imposable there?

MR. GLADDEN: I don't think so. I think if he did everything reasonably -- every reasonable effort to discover -- in this case, we had naturally an intelligence organization, by the very name, who were very secretive of the information they had in their files and elsewhere. Rule 9(b), of course, does isolate two cases for mistake and fraud, but you'd have to have particular allegations.

We think it's different in this case because in fraud cases you're going to have a course of dealing and you're going to have some reliance of the person who's the victim of the fraud. Mistake would be similar. That's a

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different category.

A case like this, you've got agents of a local governmental entity who are causing damage to the victim and then because we don't have respondeat superior, we've got the supervisors or the policymaker somewhere else. And the victims themselves never have -- necessarily have direct contact with the policymakers. And that's why we have a problem in the absence of respondeat superior, which of course we don't have.

QUESTION: What was the basis for the knowledge, information, or belief in this case that this was a municipal policy?

MR. GLADDEN: It had been my experience -- mostly a lot of rumors, of course. We did have these two incidences that are about 3 and a half months apart with officers remaining on the premises for some 2 hours after determining there was no drugs or contraband on the premises, the shooting of the dogs, which certainly disclosed -- the location of the dogs was such that it indicated that the officers had no reason to be shooting the dogs.

QUESTION: That doesn't show a policy. I mean, it just shows --

MR. GLADDEN: Well, of course, there was a statement that was made to the plaintiff in that case,

Mrs. Leatherman, by one of the officers. Why did you shoot my dog? Standard procedure, lady. Okay? Now, he didn't say -- you know, as Judge Goldberg noted in the court of appeals, that doesn't indicate under what circumstance the procedure allowed them to shoot dogs, but it did create the inference in my mind and certainly in her mind that it was completely unreasonable, the manner in which they executed their dogs. That was -- that's part, but not all of the inference that was created in my mind.

MR. GLADDEN: Is it relevant too that you had a -- I don't know the number, but you had a multiplicity of officers here -- I don't know how many there were -- as opposed simply to one officer? If one officer goes in and shoots the dog, I suppose you can't draw much of an inference from that. But if 10 are participating in what seems to you to be outrageous conduct, that is more probative, isn't it, on the face of it that there's something more than just individualized caprice at work here?

MR. GLADDEN: I certainly think that would add to it. I know there's a First Circuit case -- I forget the name of it -- that actually has applied that theory, that when you have a number of officers together, like in a Rodney King incident, for instance, there's -- to have

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an isolated act by one officer is completely different than to have 15 officers out there hanging around for 2 hours drinking beer, shooting people's dogs, using obscene language towards the plaintiffs. I think certainly that should be considered as to whether or not there was a reasonable basis to believe that there was a lack of supervision.

QUESTION: So, in any case, in theory you could win this case and still leave open the question as to whether the -- an allegation of unreasonable conduct against one officer in one incident would be sufficient under rule --

MR. GLADDEN: Yes, but I think for future plaintiffs that have to file these cases, it's going to excruciating for them to determine how the Court has ruled and what's going to be specific enough or particular enough. And I think that really we ought to just interpret the rules as they're written and not stretch the rules to try to incorporate, outside of the rules' enabling act, a particularity in the pleading requirement under section 1983. It seems to me that that's a policy oriented decision that shouldn't be made by the Court. It should be made through the rules' enabling act if it's going to be made.

QUESTION: Counsel, did you allege in the

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complaint a policy of the city to -- or the county to always shoot dogs, or was the allegation really a failure to train?

MR. GLADDEN: It was -- our allegation was more or less loosely patterned on Tennessee v. Garner.

QUESTION: I read it as a failure to train allegation --

MR. GLADDEN: It was a failure to train. It was a failure to --

QUESTION: -- not a municipal policy allegation.

MR. GLADDEN: Okay. I interpreted the failure to train cases, such as City of Canton v. Harris, as being another way of pleading a policy under section 1983.

QUESTION: I think that's sort of a strange way to plead a policy, but in any event, I wanted to clarify what it was you've alleged.

MR. GLADDEN: Okay. I can elaborate if you'd like.

Our allegation was is that we identified who we knew to be the policymaker. We felt like the policy with respect to the shooting of dogs and under what circumstances it was reasonable to be shooting dogs reflected or evidenced a deliberate indifference by the policymaker which had resulted or caused -- was a substantial factor or cause in the constitutional

violation that had been visited upon the plaintiffs by the agents of the governmental entity.

QUESTION: Yes. I read allegations of failure to train and deliberate indifference.

MR. GLADDEN: Yes, that's correct, as well as an allegation of who the policymaker was and causation and under color of law.

QUESTION: And the court below alternatively ruled for the defendants on a summary judgment motion?

MR. GLADDEN: The district court did.

QUESTION: The district court did.

MR. GLADDEN: Yes, the district court did.

QUESTION: And the court of appeals did not address that.

MR. GLADDEN: That's correct.

QUESTION: And the court of appeals did not address the collateral estoppel question.

MR. GLADDEN: No. I don't believe that had been raised in the court of appeals.

QUESTION: So, those would be open in any event.

MR. GLADDEN: I believe so, certainly.

However, with respect to the collateral estoppel, I would mention that the case, Andert v. Bewley, which is referred to by the respondents, is currently on appeal. The verdict in that case did not address the

constitutional violations. So, we are dealing with a situation different than City of Los Angeles v. Heller. That case involved a situation where the constitutional violation had actually been acted upon or a decision had been rendered by the court.

That has not occurred here. The officers in question -- 2 of the officers of the 15 that were sued, the 2 officers in Andert v. Bewley -- well, first of all, only 2 of the officers there. Secondly, they were let out of the lawsuit on the basis of qualified immunity under the --

QUESTION: There's no issue before this Court about collateral estoppel, is there?

MR. GLADDEN: Well, I believe it was raised in terms of mootness. Some people can construe it as collateral estoppel and some people construe it as mootness. I know City of Los Angeles v. Heller dealt with it in terms of mootness. But I don't think there's anything moot in this case. We're dealing with different defendants and several other reasons why I think that's not applicable.

If there's no further questions, Mr. Chief Justice, I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Yes, very well, Mr. Gladden.

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Mr. Ringle.

ORAL ARGUMENT OF BRETT A. RINGLE

ON BEHALF OF THE RESPONDENTS

MR. RINGLE: Mr. Chief Justice, and may it please the Court:

The respondents in this case, various municipalities in Tarrant County, ask that the Fifth Circuit's opinion -- judgment be affirmed, and that this Court embrace a heightened pleading requirement in cases arising under section 1983 against municipalities alleging that officers have not been properly trained or what has been known as failure to train cases.

This is especially critical in cases against municipalities. Until and unless there is a demonstration of a municipal policy at issue, the case amounts to nothing more than an allegation of vicarious liability for which municipalities are not and have never been liable either at the common law or under 1983. This Court has consistently reaffirmed that proposition, having stated in Monell that municipalities may not be sued under a theory of respondeat superior.

This case is more than just a Monell case. This case is actually governed by City of Canton v. Harris.

In a failure to train case, the heightened pleading requirement we submit should contain three

requirements. First, the plaintiff should be required to allege a clearly established constitutional violation for without such an allegation, there is, indeed, no policy.

This is not a case like Monell where all the plaintiff should have to demonstrate is the presence of a policy of the municipality and that policy caused harm. By definition, in a case like this, there is no policy unless there is deliberate indifference. It is only when a failure to train arises to the level of deliberate indifference that a policy, which is actionable under 1983, has even been identified.

Secondly, the plaintiff should be required to plead sufficient facts to indicate a pattern of similar allegedly unconstitutional acts. More than a single act is clearly necessary for liability, as this Court has taught us in Oklahoma City v. Tuttle.

Similarly, a failure to train case at bottom is a case alleging that municipal policymakers responsible for the training of police officers have not responded to a concern or a problem of which they have notice.

QUESTION: Mr. Ringle, this is a fairly elaborate heightened pleading requirement that you're suggesting. And I would think that perhaps before, in our deliberations, we got to what the content of such a requirement should be, we would get to whether it's

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authorized at all under the rules in view of the plain statement language in rule 8 and the fact that certainly some sort of expressio unius argument derives from the fraud and mistake special pleading requirement in rule 9. I hope fairly soon in your argument, you will address that, what I see as a kind of a preceding question to the content of a heightened pleading requirement.

MR. RINGLE: First, rule 8 has been represented not in the terms that it's written. I think the petitioners want the Court to put the word notice as the only requirement of rule 8. Rule 8 is more than a requirement of giving factual notice. Rule 8 requires notice of a claim. So, even if you have a case where all of the facts that could conceivably be known are laid out -- in essence, there is attached to the pleading, as an exhibit, a videotape which contains every fact upon which the claim is asserted -- rule 8 is still not met unless it states a claim.

For example, let's use the pleading in this case as an example. I suggest that the pleading in this case is nothing more than a case of individual responsibility of an officer to which is attached a boiler plate allegation that there is failure to train and deliberate indifference. Nothing more is alleged.

QUESTION: Well, did the court of appeals

suggest that the complaint was deficient under rule 8? The court of appeals invoked the heightened pleading requirement, did it not?

MR. RINGLE: The court did not address that question. Rule 8 --

QUESTION: So, I think we take the case on the assumption that it's the heightened pleading requirement that's the defect in the pleading.

MR. RINGLE: Yes, that's correct. But the point I'm making is for there to be a claim stated, under City of Canton v. Harris, there has to be a policy present, and unless there's some basis to suggest that there is deliberate indifference, it doesn't even state a policy. Deliberate indifference in a City of Canton v. Harris case is part of the definition of a policy unlike in other cases against municipalities.

And as -- rule 8 is not controlling in a situation if what that procedural rule permits would violate a substantive right. And I believe the right of a municipality to be free from liability for what is nothing more than a respondeat superior or vicarious liability theory is going to be thwarted. That right will cease to exist if municipalities must defend cases where on the bare allegation of the existence of a policy and the bare allegation of deliberate indifference, the municipality

must defend that case.

QUESTION: Well, we would really be opening a big door if we bought that argument because every defendant in the country would be here saying that we have a right not to be held liable just on an allegation of negligence. I mean, almost every tort action in the country you could find some reason to say that it should be more specifically pleaded than rule 8 requires or we'll be deprived of a substantive right, to wit, the right to keep our money until we're found liable by a jury.

MR. RINGLE: There is no question that this is not and could not be an across-the-board rule, nor do I suggest that it should be. The result --

QUESTION: Why is your client, which is a municipal corporation, more entitled to a heightened pleading requirement than a railroad such as we heard this morning -- a heightened pleading requirement at a crossing accident?

MR. RINGLE: I assure you I won't suggest that the pattern requirement I'm suggesting has anything to do with RICO as an analog either.

The fact of the matter is what we have is a case involving intrusion into municipal governmental affairs. That distinguishes this case from others, and we have a case where a defendant enjoys an immunity from liability

which, as this Court has reiterated as recently as this morning, also involves an immunity from suit. This is a case in which the same factors --

QUESTION: Are you talking about the municipality has immunity from suit?

MR. RINGLE: The Puerto Rico Aqueduct case --

QUESTION: No, but we don't have a State here or a territory.

MR. RINGLE: No, that's correct.

QUESTION: What is the immunity you're referring to?

MR. RINGLE: The immunity is the immunity from respondeat superior liability.

QUESTION: Oh.

MR. RINGLE: That was an immunity which I think was recognized at the common law. It was clearly an immunity then which was protected in Monroe v. Pate, and it was an immunity which was not affected by this Court's decision in Monell.

QUESTION: But they're not suing on a respondeat superior theory, are they?

MR. RINGLE: Well, that is our problem. The complaint alleges nothing more than that. It is on its face --

QUESTION: We're back to whether the complaint

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states a cause of action now without a heightened pleading requirement. I thought we took the case to decide whether there's a heightened pleading requirement when someone brings a 1983 action alleging the municipality is liable for its own conduct.

MR. RINGLE: That's correct, and this is the perfect example of why that heightened pleading is necessary because if there isn't a heightened pleading requirement, we get what we have in this case, a case asserting allegedly unconstitutional activities by police officers without the barest determination or factual support that it is pursuant to a policy.

QUESTION: Well, how many officers were involved?

MR. RINGLE: Well, there were two officers perhaps who were involved in the shooting of the dogs.

QUESTION: And how many were sitting on the lawn afterwards?

MR. RINGLE: That I do not know.

In the other situation, in the Andert case, only one officer is involved. Multiple officers, of course, made the entry, but only one officer was alleged to have actually struck Mr. Andert.

QUESTION: Weren't other officers present?

MR. RINGLE: Certainly other officers were

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present.

QUESTION: How many officers were present in the two combined incidents?

MR. RINGLE: I don't know the answer to that, Your Honor.

QUESTION: How big is this entire police force?

MR. RINGLE: Well, they are both small police forces. That is --

QUESTION: Maybe we have 75 percent of the police force involved?

MR. RINGLE: No, not in either situation. I would suggest that if, in fact, you had 75 percent of the police force involved in one instance, that certainly there would be some indication there it's a policy.

QUESTION: Some inference of policy.

MR. RINGLE: Absolutely. If we have a --

QUESTION: How large did you say the police force is?

MR. RINGLE: I don't know how large the police force in these two municipalities are. They are both -- one of them is a fairly good size municipality, Grapevine. The other, Lake Worth, is not so large.

QUESTION: How big are they?

MR. RINGLE: I don't know --

QUESTION: You don't know.

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MR. RINGLE: -- the population of --

QUESTION: 100,000 or 5,000?

MR. RINGLE: Grapevine is over 100,000.

QUESTION: You claim that something more was necessary to state a cause of action than was stated in the amended complaint.

MR. RINGLE: Yes, I do, Your Honor.

QUESTION: And you say the amended complaint did not allege a failure in training?

MR. RINGLE: It only stated that there was a failure to train. There's nothing --

QUESTION: Well, it's -- as I read it, it says the defendant City of Lake Worth failed to formulate and implement an adequate policy to train its officers on the proper manner in which to respond.

MR. RINGLE: That is correct, Justice White.

QUESTION: Now, you say that -- why is that inadequate?

MR. RINGLE: Because that is nothing more than a boiler plate assertion of the conclusion, and under rule 12, certainly the facts that are alleged in a complaint must be --

QUESTION: What more should it have said?

MR. RINGLE: I think what more it has to do is first state clearly the constitutional violation, and we

have two different circumstances here.

Secondly, I think it must clearly allege that the conduct engaged in was conduct engaged in by officers of the same municipality, and there must be some allegation that the first incident could somehow, as a factual basis, put a reasonable policymaker on notice that the first incident should tell you that there's something wrong with the training that should be corrected prior to the first incident.

This gets directly to what the problems are that are illustrated in this complaint. What we really have are not two allegations of conduct against one police force.

QUESTION: So, you think that they should have recounted in the complaint various other acts, similar acts --

MR. RINGLE: I think that there needs --

QUESTION: -- and that they would have to prove perhaps at trial to show that there was a deliberate indifference --

MR. RINGLE: Precisely.

QUESTION: -- to the training.

But you think you have to state those underlying facts in the complaint.

MR. RINGLE: I think that something beyond --

QUESTION: Yes. Your answer is yes.

MR. RINGLE: Yes. My answer is absolutely yes.

QUESTION: Well, beyond the policy reasons that you have given us for your yes answer, is there any textual basis in the rules for a yes answer because we're considering a question under the rules?

MR. RINGLE: There is certainly a textual basis under rule 11. Rule 11 does not --

QUESTION: Well, why don't -- may I just start with the contrast between 8 and 9? 8 and 9, in effect, sets up a kind of a dichotomy: a plain statement in 8, statement with particularity in cases of fraud and mistake in 9. The Chief Justice suggested a moment ago that the -- that rule 9 sets up a kind of exclusio alterius argument. Isn't that correct?

MR. RINGLE: Only to an extent. Rule 8 does recognize that notice pleading is sufficient, but rule 8 has no authority behind it unless that authority can be found in the rule's enabling act. The rule's enabling act specifically provides that a rule of procedure cannot be used to abrogate a substantive right.

Now, rule 9 sets out a policy. In a fraud case, for example, more particularity must be alleged.

QUESTION: Well, you're suggesting that on your sort of analysis that this case is involving a kind of

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municipal immunity, that the immunity is being abrogated by the failure to demand the heightened pleading.

MR. RINGLE: That is correct.

QUESTION: Well, then what do you do about Anderson and Creighton? So, that must have been wrongly decided.

MR. RINGLE: No. Anderson --

QUESTION: Because Anderson and Creighton assumes that before the resolution of the immunity issue, there may be some discovery. Does Anderson and Creighton, therefore, imply that there is an abrogation of the substantive immunity?

MR. RINGLE: No, I don't believe it does at all.

QUESTION: Well, if Anderson and Creighton doesn't imply that, why would it be implied by a rule of pleading or the recognition of a rule of pleading here that may allow some discovery of fact, i.e., leading -- prior to and leading to summary judgment before you resolve what you refer to as the immunity to any municipal liability beyond respondeat superior?

MR. RINGLE: Because I believe that rule 11 requires more than a plaintiff to just have done an investigation and have found nothing, and having found nothing, that plaintiff is then free to allege a cause of action. That's not what rule 11 requires. Rule 11

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requires that after an investigation, the pleader has a reasonable belief that the claim has a basis in fact. And absent some additional pleading which would establish either a pattern of similar behavior that would put a policymaker on notice or absent some fact that would show deliberate indifference or perhaps a fact that would show that the person who was actually responsible for providing and setting up the policy was involved in the illegal act, without something that shows that the municipality is involved as opposed to simply being a case dealing with a wrongful conduct of an individual --

QUESTION: May I just ask one question? Isn't the answer to that impose rule 11 sanctions? Don't impose pleading requirements that aren't in the pleading rules.

MR. RINGLE: The problem with rule 11 sanctions typically is they're assessed at the end of the case, and if in fact there's an immunity or protection for a municipality to be free from both liability and suit in a context that would otherwise allege only vicarious liability, it seems like that municipality has lost the benefit of that immunity if they must, in fact, defend the suit and rely on rule 11 sanctions down the road after the municipality --

QUESTION: Well, you --

MR. RINGLE: -- has gone through all of the

defense, costs, and potentially even costs of settlement.

QUESTION: You seem to be positing in a rhetorical way a full-blown trial. I presume these kinds of issues are going to be generally resolvable, if resolvable in your favor they may be, on summary judgment.

MR. RINGLE: Well, they could be resolvable on summary judgment if the --

QUESTION: Well, and this very case was.

MR. RINGLE: It's exactly what I was going to say, if the summary judgment is something that is ruled on prior to discovery. The district court relied on two grounds. First was the complaint was dismissed under 12(b)(6) and summary judgment was granted. Contrary to what the petitioners are suggesting, the petitioners before the amended complaint was dismissed had access to all of the information that would have solved the problems they have here.

Let me recount, if I may, the problems with the pleading --

QUESTION: If that's true, why did you oppose discovery? Or did you? I think he said you did oppose discovery.

MR. RINGLE: It was additional discovery. What was provided to the plaintiffs was information that gave a clear indication of which police forces were involved.

The police --

QUESTION: Did you give the names of the officers and their rank and all the rest?

MR. RINGLE: The police --

QUESTION: Did you do that?

MR. RINGLE: Yes. The police reports signed by the officers and identifying the conduct engaged in were provided, and indeed, the agreement that set up the Tarrant County narcotics intelligent coordination unit was given to them. That is key. We do not have in this case two incidents of actions by the same municipality.

QUESTION: You claim that the complaint should have stated these details, and I thought the complaint was dismissed based on the fact that the complaint itself was inadequate.

MR. RINGLE: The complaint was dismissed on that grounds and the district court also, as an alternative ground for his holding, granted summary judgment.

QUESTION: Well, what's the -- what was the affirmance based on?

MR. RINGLE: The affirmance was based on the dismissal under rule 12(b)(6).

QUESTION: Exactly, and that's the issue we got before us.

MR. RINGLE: Yes, it is.

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QUESTION: Well, if there's any other ground that judgment could be affirmed on, it's not before us right now.

MR. RINGLE: That's --

QUESTION: We got to rule on the 12(b)(6) issue.

MR. RINGLE: That is correct, Justice White.

QUESTION: Getting back to your rule 11 point, it seems to me that rule 11 doesn't inform rules 8 and 9. It works the other way around. Rule 11 is a certification that you've complied with rules 8 and 9. That's all it is. It's a very surprising contention to me that by enacting rule 11, it was intended to alter or modify rules 8 and 9.

MR. RINGLE: I don't think it did alter rules 8 or 9.

QUESTION: Well, then that's the issue, whether or not rules 8 or 9 are complied with.

And you refer to the city as having an immunity. I thought our Owen case indicated that it does not. The city doesn't have an immunity. It just has non -- it just has a defense against liability.

MR. RINGLE: Even if the protection of a municipality from a vicarious liability case is judged to be predicated upon a construction of section 1983, and the fact that Congress in enacting the Ku Klux Klan Act did

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not grant a claim for vicarious liability, the result I suggest is the same as whether that protection from suit arises from an actual immunity. The fact of the matter is there is no claim stated because no cause of action was ever granted to sue a municipality for anything other than a case in which its policies were the moving factor behind allegedly unconstitutional actions of its agents.

QUESTION: Well, it's true if there had been respondeat superior, there would be no need to sue the city for negligent training.

MR. RINGLE: Well, except there is no --

QUESTION: But given the fact that there is no respondeat superior liability, the Court has said that the city is directly liable for failure of training. So, it's not an immunity.

MR. RINGLE: It's directly liable for failure to train, but not for negligence in doing so. This is not a situation where a bare allegation of negligence should suffice.

A municipality in a failure to train case is liable only if there is a policy amounting to failure to train, and there is a policy only if the failure to train was consciously indifferent. It's not a two-pronged test. It's not an issue of is there a policy of failure to train, and if that's answered yes, the Court then asks --

answers the question was failing to train deliberately indifferent. The test set out by this Court in City of Canton v. Harris is there isn't even a policy unless the failure to train amounts to deliberate indifference of the rights of those with whom the police come into contact.

And the result which we are asking this Court for I think is also counseled by the Court's decision in Harlow v. Fitzgerald. Yes, that was a case involving qualified immunity, but I believe the same factors that counseled the Court in Harlow in suggesting that these issues of immunity or freedom from suit should be resolved sooner rather than later also apply in a case against a municipality when there is nothing more in the complaint than a bare allegation that there is a municipal policy.

For example, a municipality is faced with the same expenses of litigation as an individual officer if it must defend a case which it should not be defending because a claim is not stated against it. Indeed, in that case, rather than being free from suit, the municipality is going to be required to direct its resources to the defense of the case or to settlement.

QUESTION: Mr. Ringle, you keep referring to this as immunity from liability. It's a strange way to put it. The fact is the city is simply not liable unless you prove a certain thing. I guess you can call that

immunity from liability, but it certainly is not -- it certainly is not -- immunity from suit.

MR. RINGLE: I think it is a protection from suit. I think the Court said --

QUESTION: No. It's not a protection from suit. They can be sued till the cows come home. It's a protection against liability.

MR. RINGLE: Yes, but the point I think that we're looking at is we are going to be in a situation with municipalities that unless there is at least some allegation to indicate the implication of a municipal policy, then what we are really doing are defending the kinds of cases that whether it's because of immunity or because Congress never conferred the right to sue for vicarious liability under 1983 --

QUESTION: But that happens all the time, that people have to defend suits which turn out to be baseless.

MR. RINGLE: It does happen all the time, but not in the circumstances where there is an impact, an intrusion on the affairs of a municipal government. I think --

QUESTION: So, you're saying municipalities are different.

MR. RINGLE: I think municipalities, indeed --

QUESTION: That's what the case comes down to.

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Right?

MR. RINGLE: -- are different, and I would suggest --

QUESTION: It should have been in rule 9 then. I mean, you know, rule 9 could have read pleading special matters, A, municipalities.

MR. RINGLE: Well, there have been --

QUESTION: You could say, you know, when there's a municipality, you have to plead everything. It doesn't say that.

MR. RINGLE: There have been a variety of cases, though, where lower courts, and indeed this Court, seems to have sanctioned the possibility that something more than bare notice pleading is going to be required. In the Associated General Contractors case versus the plumbers in a footnote in that case, the Court indicated that in the context of a massive antitrust suit, maybe the court needs to step in early and require something more in the way of factual allegations before the parties are required to launch into a case that's going to involve massive expense, massive discovery, and massive disruption.

QUESTION: Mr. Ringle, take paragraph 25 of one of these complaints which appears on page 39 of the tan appendix, and reading midway through that, the allegation is that defendant City of Lake Worth failed to formulate

and implement an adequate policy to train its officers on the proper manner in which to respond when confronted by family dogs.

Why is that deficient?

MR. RINGLE: It's deficient --

QUESTION: Even under the approach you've been talking about, why is that deficient?

MR. RINGLE: It's not deficient perhaps to state a claim. It's just not deficient to state a claim against the municipality. These two events --

QUESTION: Well, what does it lack?

MR. RINGLE: Well, I think if that is held to state a constitutional violation, perhaps that allegation is sufficient to state a claim. It simply isn't sufficient to state a claim against the municipality. It's sufficient to state perhaps the claim that Congress granted to a potential plaintiff, and that is a lawsuit against the individual officer.

QUESTION: But I thought your complaint was that to go further and hold a municipality, you have to allege a policy.

MR. RINGLE: Yes.

QUESTION: Here they allege a policy.

MR. RINGLE: Yes, again without any basis in fact. It's just the statement. That kind of policy --

QUESTION: If the thing has no basis in fact, that's not a pleading problem. That's either a discovery problem, a summary judgment problem, or a trial problem. There are all sorts of complaints that comply fully with rule 8 that have no basis in fact.

MR. RINGLE: That's perhaps so as a factual basis, but there is some reason to believe when the claim is asserted that there is a factual basis for it.

The problem with these kinds of cases is if this pleading is held to be appropriate and satisfactory under rule 12, every case that involves the potential qualified immunity of an officer, every case of allegedly wrongful or unconstitutional activities by a lower level officer of a municipality will state a claim under City of Harris -- City of Canton v. Harris.

And that is, I would submit, an anomalous result that these kinds of pleadings could state a cause of action under City of Canton v. Harris even though we are counseled by that opinion that a policy can't even be established unless there can be some demonstration of deliberate indifference. Deliberate indifference seems to me to be cast in the notion of disregard --

QUESTION: Well, they also alleged deliberate indifference.

MR. RINGLE: I'm sorry, Your Honor.

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QUESTION: The amended complaint also alleges deliberate indifference.

MR. RINGLE: Again without basis. Everything that's alleged with respect to the municipal policy is simply cut and pasted from this Court's opinion in City of Canton v. Harris. There's no basis for it. The only allegations of conduct -- there is nothing in the pleading --

QUESTION: Wouldn't you also agree these facts are a little bit unusual?

MR. RINGLE: I think the facts are highly unusual, but I don't think the facts are sufficient to put a policymaker on notice of --

QUESTION: They don't give rise to any suggestion that anybody might have trained these officers a little bit better? They argue it's so obvious that there was a failure to train that you don't need anything more than this. That's one of their allegations.

MR. RINGLE: That is an allegation. I don't believe that's the situation here.

QUESTION: It's fairly routine to go out shooting dogs and hanging around afterwards talking on the lawn and all that? That does seem to be a rather obvious lack of training if your officers behave in that manner.

MR. RINGLE: Well, standing around and doing the

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things they're alleged to do may, indeed, be outrageous, perhaps even wrongful behavior, but --

QUESTION: And also somewhat indicative of not well disciplined, professional officers. That's the notion that I get from the complaint. Now, maybe the facts aren't true, of course. I can't --

MR. RINGLE: That, indeed, could be something that is assumed. Again, that can be assumed from any allegation of a wrong by an officer.

QUESTION: Oh, no, it couldn't because these are rather -- these -- you say any allegation, but these are rather unusual facts. They're not a -- this is not a typical complaint at all.

MR. RINGLE: The fact --

QUESTION: At least I don't think it is. I haven't seen one quite like this before.

MR. RINGLE: The facts are bizarre, but I'm not sure that the facts are egregious, Justice Stevens.

QUESTION: Well, as soon as you say they're bizarre, they're not typical.

MR. RINGLE: They are not typical. There's no question about that.

But what we have in one instance is the shooting of dogs. We don't know what the circumstances are. The police reports, which are attached to the affidavits that

were filed in the district court, indicate that in both instances the officers were attacked by the dogs. Now, if that is the fact and, indeed, this was a German shepherd dog and a Doberman which were unleashed, uncaged, I'm not sure that that is outrageous conduct.

As far as the fact that the officers may have been -- let me assume they were -- standing around the premises after the search, that again may be inappropriate conduct. Whether it's illegal I question. Whether it's --

QUESTION: Sitting around in lawn chairs drinking beer, as I got it.

MR. RINGLE: That is, indeed, the allegation. And I think that sometimes a conduct, for example, the shooting of a fleeing felon, can be so outrageous, it's the kind of outrageous conduct that counsels there must be a failure of training.

Now, if we really have a lot of police officers sitting around in lawn chairs drinking beer, I suggest that doesn't counsel that -- a failure of training. I think there the outrageous conduct is the outrageous conduct of the officers.

QUESTION: But if all -- if they had just said that, well, and last week and the week before they did the same thing or something very similar, you wouldn't be here

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I suppose.

MR. RINGLE: Absolutely not. If there had been some indication to let the policymaker know, the person who is responsible for establishing the policy --

QUESTION: Thank you, Mr. Ringle. Your time has expired.

Mr. Gladden, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF RICHARD GLADDEN

ON BEHALF OF THE PETITIONERS

MR. GLADDEN: Thank you, Mr. Chief Justice.

I think we've pretty much covered everything there is to cover. If the Court has no further questions, I'm prepared to go ahead and stop at this point.

CHIEF JUSTICE REHNQUIST: Please do so.

The case is submitted.

(Whereupon, at 1:56 p.m., the case in the above-entitled matter was submitted.)

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Charlene Leatherman, et al., Petitioner v. Tarrant County Narcotics

Intelligence and Coordination Unit, et al. Case No: 91-1657

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lora M. May

(REPORTER)