NO. 07-0199

IN THE

SUPREME COURT

OF TEXAS

PHILLIP K. POTEET, INDIVIDUALLY AND AS NEXT FRIEND FOR JEFFREY POTEET, A MINOR,

Petitioner,

V.

TOWN OF FLOWER MOUND, TEXAS,

Respondent.

BRIEF ON THE MERITS
of
Phillip K. Poteet, Individually and as Next Friend for Jeffrey Poteet, a Minor

Jimmy L. Verner, Jr.
Texas Bar No. 20549490
Verner & Brumley, P.C.
3131 TurtleCreek Blvd.
Penthouse Suite
Dallas, Texas 75219
214.526.5234
214.526.0957.fax
jverner@vernerbrumley.com
www.vernerbrumley.com

Attorney for Petitioner,
Phillip K. Poteet, Individually and as Next Friend for Jeffrey Poteet, a Minor

IDENTITY OF PARTIES & COUNSEL

Petitioner: Phillip K. Poteet and his minor son, Jeffrey Poteet

Respondent: Town of Flower Mound, Texas
Cpt. Byron Lake, Flower Mound Police Department
Sgt. Colin J. Sullivan, Flower Mound Police Department
Cpl. Henry Lucio, Flower Mound Police Department

Counsel for Petitioner:
Jimmy L. Verner, Jr.
Texas Bar No. 20549490
Verner & Brumley, P.C.
3131 TurtleCreek Blvd.
Penthouse Suite
Dallas, Texas 75219
214.526.5234 214.526.0957.fax

Counsel for Respondent:
Thomas P. Brandt
Texas Bar No. 02883400
John F. Roehm III
Texas Bar No. 17157500
Robert H. Fugate
Texas Bar No. 00793099
Fanning Harper & Martinson, P.C.
1300 Two Energy Square
4849 Greenville Avenue
Dallas, Texas 75206
214.369.1300 214.987.9649.fax

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STATEMENT OF THE CASE

Nature of the case. This is a suit for damages for violation of the federal civil rights of Phillip K. Poteet, who filed suit in behalf of himself and also as next friend for his minor son, Jeffrey Poteet, against the Town of Flower Mound, Texas, and three Flower Mound Police Officers, Cpt. Byron Lake, Sgt. Colin J. Sullivan and Cpl. Henry Lucio.

Proceedings in the trial court. The lawsuit was filed in the 367th Judicial District Court, Denton County, Texas, the Honorable Lee Gabriel presiding.

The judgments of the trial court. The Town and the three referenced police officers filed motions for summary judgment. In addition, Mr. Poteet filed a motion for partial summary judgment, as to liability, against the Town.

On January 4, 2005, Judge Gabriel signed an Order Granting Summary Judgment of Town of Flower Mound and Denying Plaintiff's Motion for Partial Summary Judgment. She also granted summary judgments to the three police officers. These judgments became final when Judge Gabriel dismissed the case as to the remaining defendants by orders signed August 15, 2005.

Proceedings in the court of appeals. On November 30, 2006, the Fort Worth Court of Appeals affirmed the trial court's judgment as to Cpt. Byron Lake and the Town. The Fort Worth Court of Appeals reversed the summary judgments with respect to Sgt. Colin J. Sullivan and Cpl. Henry Lucio. Mr. Poteet timely filed a Motion for Rehearing; the Fort Worth Court of Appeals denied that motion on February 1, 2007, and at that time issued is opinion and order on rehearing. The panel of the Fort Worth

Court of Appeals consisted of Justices Livingston, Holman and McCoy. Justice McCoy authored both the original opinion and the opinion on rehearing. The opinion on rehearing is published at 218 S.W.3d 780.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal because the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected. Tex. Gov't Code § 22.001(a)(6).

ISSUE PRESENTED

Did the Town of Flower Mound, Texas, violate Mr. Poteet's constitutional rights when, pursuant to the Town's policy, the Town's police officers helped to plan, and personally supervised, a "civil standby" during which Mr. Poteet's former lover, together with several family members, friends, and hired movers, entered Mr. Poteet's home against his wishes, emptied it of nearly all its contents, loaded those contents into a waiting U-Haul van and took them away?

STATEMENT OF FACTS

The opinion of the court of appeals correctly stated the nature of this case except that the following facts were omitted from the court's opinion.

When asked about what types of property might be seized during a civil standby, Flower Mound Chief of Police Kenneth G. Brooker testified at his deposition as follows:

> It varies from situation to situation. You know, when you have these types of relationships, and especially one that's gone on for a long period of time, there could be a lot of property involved. I mean, it's just no set amount of property that someone may want to retrieve that belongs to them. They just have to - they normally want what belongs to them.

(CR 2004-349 & CR 2005-211 at 14/9-16). A civil standby still would be appropriate, according to Chief Brooker, even if the property seized "were enough to fill a U-Haul truck . . . as long as there wasn't any type of violence involved." (CR 2004-349 & CR 2005-211 at 14/7-21).

Sgt. Colin J. Sullivan testified at his deposition that he had been involved in "well over a hundred" civil standbys during the course of his career with the Flower Mound Police Department. (CR 2005-228 at 13/7-10). He had supervised "multiple standbys" where "the person who was wanting to get the property had ten or twelve people to help and a U-Haul truck." (CR 2005-228 at 13/17-21). It is not uncommon for a civil standby to involve a U-Haul truck. (CR 2005-228 at 13/23-25). In perhaps a dozen of these civil standbys, the person seizing property brought a locksmith. (CR 2004-324 & CR 2005-230 at 18/1-6).

Chief Brooker did not participate in the civil standby at 2100 Water Oak Court on June 13, 2002, and he had no knowledge of the civil standby before it occurred. (CR 2005-207 at 8/11-16). Nevertheless, Chief Brooker reviewed the officers' affidavits and other materials and submitted an expert report that Sgt. Sullivan and Cpl. Lucio conducted the "civil standby . . . in accordance with the Flower Mound Police Department's practices and procedures for civil standbys." (CR 2005-244 ¶ 7).

In his deposition, Cpt. Byron Lake testified that the Flower Mound Police Department would honor a civil standby request by *Mr. Poteet* if in the future Mr. Poteet complained to the Department that he had been living with Ms. Chin at a new residence owned by her, that he had moved out four days prior to the requested civil standby (as had Ms. Chin from Mr. Poteet's home) and that Ms. Chin still had some of his property. (CR 2005-221 at 54/4 - 55/8). The Department would assist Mr. Poteet in a civil standby even though Ms. Chin denied that any of the property in her residence belonged to Mr. Poteet. Cpt. Lake testified: "Just like before. We would not get involved in the division of the property." (CR 2005-222 at 55/7-8).

SUMMARY OF ARGUMENT

The court of appeals erred in affirming the summary judgment in favor of the Town of Flower Mound, Texas, and in failing to grant Mr. Poteet a partial summary judgment against the Town as to liability. Accepting at face value the Chief of Police's description of the Town's civil standby policy, and the police officers' version of the facts as true, the Town's civil standby policy is unconstitutional.

The Town's civil standby policy is unconstitutional because it permits warrantless searches of a person's home, and seizure of himself and his property, in violation of the Fourth and Fourteenth Amendments. In particular, the Town's civil standby policy permits a police officer to enter a person's home at a time when the homeowner is present but does not give consent to entry, and then restrict the person's movements while his possessions are taken from his home.

The Town is liable to Mr. Poteet for damages because Mr. Poteet suffered injury by the Town's police officers while they implemented the Town's official civil standby policy as described by the Town's Chief of Police, who confirmed that the Town's police officers had followed the Town's civil standby policy correctly. The police officers' actions, under color of state law, were the moving force behind Mr. Poteet's injuries.

The Court should reverse the court of appeals' judgment as to the Town, render judgment against the Town for liability only, and remand this case to the trial court for determination of Mr. Poteet's damages.

ARGUMENT

Did the Town of Flower Mound, Texas, violate Mr. Poteet's constitutional rights when, pursuant to the Town's policy, the Town's police officers helped to plan, and personally supervised, a "civil standby" during which Mr. Poteet's former lover, together with several family members, friends, and hired movers, entered Mr. Poteet's home against his wishes, emptied it of nearly all its contents, loaded those contents into a waiting U-Haul van and took them away?

Mr. Poteet's argument is divided into two sections. In the first section, Mr. Poteet sets forth his Fourth and Fourteenth Amendment rights and establishes that, as a matter of law, they have been violated. In the second section, Mr. Poteet demonstrates that, as a matter of law, the Town is liable for Mr. Poteet's damages because the Town's civil standby policy was the moving force behind the violations of Mr. Poteet's civil rights.

I.

The Town's Police Officers Violated Mr. Poteet's Constitutional Rights

Under our Constitution, every person enjoys the right to be secure in his home and the right not to be deprived of his property without due process. Police officers who, without a warrant, invade a person's home and restrict his movements while his property is seized by others violate these constitutional rights.

A. Fourth and Fourteenth Amendment Rights

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

> Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is binding on the states by operation of the Fourteenth Amendment. *Ker v. California,* 374 U.S. 23 (1963).

It has long since been held that the Fourth Amendment

> protects two types of expectations, one involving "searches," the other "seizures." A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property.

United States v. Jacobsen, 466 U.S. 109, 113 (1984) (citations omitted).

The United States Supreme Court has "emphasized" that "at the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home." *Soldal v. Cook County,* 506 U.S. 56, 62 (1992) (citations omitted). This principle has been no better described than in *Payton v. New York,* 445 U.S. 573, 601 (1980), where the United States Supreme Court spoke of "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." Every person also enjoys constitutional protections under the Fourteenth Amendment, which states, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." *E.g., Soldal v. Cook County,* 506 U.S. 56, 70-71 (1992).

These rights are implemented by 42 U.S.C. § 1983, which states as follows:

> Every person who, under color of any statute, accordance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

State and federal courts have concurrent jurisdiction over section 1983 suits. *Howlett v. Rose,* 496 U.S. 356 (1990).

B. "Civil Standby" Case Law

A number of courts, including the United States Supreme Court, have considered the application of 42 U.S.C. § 1983 with respect to civil standbys. Most important is *Soldal v. Cook County,* 506 U.S. 56 (1992), in which the United States Supreme Court was asked to review a civil standby gone awry. In *Soldal,* a mobile home park owner ("Terrace Properties") had rented a lot to Mr. Soldal and his family. Mr. Soldal and his family lived in their mobile home on the lot. Terrace Properties filed suit against the Soldals over alleged past due rent. Unwilling to await trial, Terrace Properties and its local manager, Ms. Hale, decided to evict the Soldals. Ms. Hale "requested the presence of sheriff deputies to forestall any possible resistance." *Id.* at 58.

Later that day, a Cook County deputy sheriff arrived, and with sheriff in tow, two Terrace Properties employees went to the Soldals' home where they proceeded to disconnect the mobile home from its pad. The deputy sheriff explained to Mr. Soldal that "he was there to see that [Mr. Soldal] didn't interfere with [the] work." *Id.*

Two more deputy sheriffs arrived at the scene; Mr. Soldal told the deputies that he wanted to file a complaint for criminal trespass. They referred him to their lieutenant who told Mr. Soldal that this was a civil issue "between the landlord and the tenant . . . [and] they are going to go ahead and continue to move out the trailer." *Id.* at 58 - 59.

The deputies knew throughout this time that Terrace Properties did not have an eviction order and that its actions were unlawful. *Id.* at 59.

On review, the Supreme Court made short shrift of the argument that the deputies had committed neither a search nor a seizure of the Soldals' home. *Id.* at 62 - 63. The Supreme Court reiterated the familiar law that the Fourth Amendment to the United States Constitution permits police officers to engage in a lawful search or seizure "by either complying with the warrant requirement or satisfying one of its recognized exceptions - *e.g.,* through a valid consent or a showing of exigent circumstances." *Id.* at 65 - 66. The Court continued: "Thus, in the absence of consent or a warrant permitting the seizure of the items in question, such seizures can be justified only to meet the probable cause standard and if they are unaccompanied by unlawful trespass." *Id.* at 66 (citations omitted).

More recently, in an incident reminiscent of the case before this Court, the United States District Court for the Eastern District of Pennsylvania characterized a civil standby as a "don't ask, don't think policy" and granted a plaintiff a summary judgment on liability. *Open Inns, Ltd. v. Chester County Sheriff's Dep't,* 24 F. Supp. 410 (E.D. Pa. 1998).

Plaintiff Open Inns, Ltd., had leased a Holiday Inn from the property's owner, Cignature [*sic*] Hospitality, Inc. In 1995, Open Inns fell behind in its lease payments. Cignature sued Open Inns for monetary damages. Cignature sought no other form of relief. *Id.* at 414.

Cignature's attorneys requested the Chester County Sheriff's Department to

serve the complaint on Open Inns. They requested that the service take place late at night. In fact, service took place at about 3:00 a.m. The attorneys came along, bringing several deputies with them at that time. The attorneys and a number of Cignature personnel seized the hotel while the deputies stayed to "keep the peace." *Id.* at 415. The "don't think, don't tell policy" referred to by the district court related to the lack of curiosity displayed by the Sheriff's Department over the actions they were being asked to take and why they were being asked to take them. The deputies knew that a civil lawsuit had been filed but said that was between the attorneys. *Id.* at 415 n.7.

> At the time of the seizure, the chief deputy told the hotel's night manager:
>
> My job was to serve the complaint upon you. I cannot give you any legal information about what is going on. I would suggest you call someone, an attorney. If you can't get ahold of someone, I would suggest that you talk to these people here.

Id. at 416. During the two hours that the deputies stayed, the chief deputy remained in the hotel lobby near the front desk. Another deputy

> searched for and found the hotel bartender to tell him what was happening "so that he would not be alarmed," walked "from time to time" between the lobby, the bar, and the kitchen "just to make sure that everything was all right," and at one point helped one of [Cignature's] employees take an inventory of the contents of the freezer.

Id. at 416.

In granting plaintiffs a summary judgment, the court observed that the Sheriff's Department "went far beyond the ministerial act of serving process or doing their common law duty of keeping the peace." *Id.* at 420. The deputies knew there was no writ or order authorizing their actions.

> There is no doubt that the presence of [the deputies] gave the repossession a cachet of legality that had the (doubtless desired) effect of intimidating plaintiffs' staff and, thus, facilitated the repossession and converted it into state action. . . . [The deputes'] involvement was neither brief nor passive.

Id. at 421.

A third case involving civil standbys is *Thomas v. Cohen,* 304 F.3d 563 (6th Cir. 2002), *cert. denied,* 538 U.S. 1032 (2003). In contrast to *Soldal* and *Open Inns,* which relied on a Fourth Amendment analysis to find liability, *Thomas* relied upon the Fourteenth Amendment.

In *Thomas,* plaintiffs lived in the Augusta House, in Louisville, Kentucky, which was "a 'transitional shelter' for women attempting to acclimate themselves to mainstream society." *Id.* at 565. The Augusta House decided to evict the plaintiffs from the Augusta House for breaking some of the house rules. Before any eviction papers were obtained, an Augusta House employee called the Louisville police one evening to complain about the plaintiffs. The officer who responded refused to evict the plaintiffs because there was no court order. The officer advised the Augusta House employee "to seek redress through proper legal channels by filing eviction papers." *Id.* at 566.

The next day, the Director of the Augusta House called the police, again to request that the plaintiffs be removed. Different police officers responded to the call. They were informed that evicting tenants who had broken house rules was "standard procedure." *Id.* at 567. Still, the Augusta House had obtained no court order or other document authorizing or directing eviction. Although the plaintiffs told the police officers that they were paid up on their rent, and offered documents to prove it, the

police officers made the plaintiffs leave.

Two of the three judges on the Sixth Circuit's panel declined to find that merely escorting plaintiffs out the door constituted a Fourth Amendment seizure, but the panel ruled that the defendant police officers had deprived plaintiffs of their Fourteenth Amendment rights, both procedural and substantive:

> In the case at bar, Defendants have neither claimed, nor have they pointed to any evidence that would tend to prove, that exigent circumstances existed to justify Plaintiffs' eviction. Yet, the officers "unceremoniously dispossessed" Plaintiffs of their place of residence without affording them an opportunity to be heard at any type of predeprivation hearing.

Id. at 577 (citing *Soldal,* 506 U.S. at 62). As to substantive due process, the Court stated:

> Defendants seem to misconstrue the distinction between procedural and substantive due process analyses. While procedural due process ensures that citizens have procedural safeguards prior to deprivation of rights, substantive due process limits the impingement of certain fundamental rights regardless of process.

Id. at 578. The court held the eviction constituted a violation of "clearly established Fourteenth Amendment rights." *Id.* at 582.

Finally, in *Pepper v. Village of Oak Park,* 430 F.3d 805 (7th Cir. 2005), the Seventh Circuit provided an example of a civil standby properly conducted because there was no state action and because the Oak Park police officer involved, Officer Donaire, took great care to determine that the person requesting the civil standby actually owned the property he claimed and that he had the right to enter the house in question.

Ms. Pepper and Mr. Redd, who were married, lived in a house leased by Ms. Pepper in Oak Park, Illinois. The couple had a falling out. Mr. Redd refused to leave the residence. Ms. Pepper called the police who, upon inspecting her lease and seeing that it was in her name only, ejected Mr. Redd from the premises. Mr. Redd asked the police officers how he could collect his property from the residence. One of the officers told Mr. Redd to request a police escort to remove his property.

The following month, Mr. Redd went to the residence with another man when Ms. Pepper was at work. He called the Oak Park Police Department to request a police escort. Officer Donaire came to the residence. The officer found that the men had entered the residence

> through an open door with no sign of forced entry. Redd identified himself to Donaire and said that he was in the process of getting a divorce from his wife. Redd explained that he wanted to retrieve certain items he had rented from a facility in Arizona. Redd showed Donaire several documents, including an Arizona marriage certificate, a driver's license showing the Oak Park residence as his address, an itemized rental agreement, and a typed "lease."

Id. at 807. Officer Donaire inspected the rental agreement and found that, in fact, it listed a number of items of personal property that Mr. Redd had rented in Arizona. The lease for the residence showed the names of both Mr. Redd and Ms. Pepper and the correct address. Unknown to Officer Donaire, the lease turned out to be forged.

Officer Donaire then accessed the Illinois State Police's database from his police car and confirmed that the information on Mr. Redd's driver's license was correct. He also learned that Ms. Pepper had telephoned the police department earlier that day to complain that Mr. Redd allegedly had threatened to burn down the house and shoot out

the windows. Officer Donaire also ran a license plate check on the men's vehicle and further verified that there were no outstanding wants, warrants or orders of protection against Mr. Redd.

Mr. Redd and his friend then moved the items shown on the Arizona rental agreement from the house into a trailer. Officer Donaire took an inventory of the items and confirmed that most of them were on the list of items shown on the Arizona rental agreement. Mr. Redd told Officer Donaire that a second television set also belonged to him. During this time, Officer Donaire stayed in front of the house, much of the time in his police car, in case Ms. Pepper should appear and a dispute ensue.

Ms. Pepper sued Officer Donaire and the Village of Oak Park under § 1983, claiming that Officer Donaire had seized her property from her residence. But the Seventh Circuit ruled that Officer Donaire had not been sufficiently involved with Mr. Redd's actions to constitute state action. Ms. Pepper alleged that Officer Donaire served as a "lookout" for Mr. Redd and allowed him to steal and damage her property. The Seventh Circuit affirmed a summary judgment in favor of the defendants, noting that Officer Donaire did not participate in a constitutional deprivation. *Id.* at 810.

Of Officer Donaire, the court said:

> Because there was nothing under the circumstances to indicate to Donaire that Redd was not entitled to enter the residence, did not own the television set, or would vandalize the apartment, Donaire was not on notice of any apparent wrongdoing. Donaire took reasonable measures to verify Redd's identity, address, and claim of ownership to the property he removed from Pepper's apartment. The documentation Redd provided Donaire was more than sufficient

> to assuage any concern which Donaire might reasonably have had that Redd'sactions were wrongful. That Redd produced any proof of ownership at all for personal household items is above and beyond what the rightful owner would reasonably be expected to produce for property of this type.

Id. at 811-12.

These cases demonstrate that Mr. Poteet enjoyed constitutional protections from police entry into his home against his wishes. The Town's police officers conceded that Mr. Poteet did not consent to their entry into his home. The police officers did not take any of the steps that Officer Donaire took in *Pepper* to check that Ms. Chin had a right to enter Mr. Poteet's home or that she owned any of the property she and her group took from Mr. Poteet's home. In fact, the police officers had actual knowledge that Mr. Poteet owned the home, that Ms. Chin no longer lived there, that Mr. Poteet and Ms. Chin were not married and that Mr. Poteet claimed ownership of the items remaining in his home. The police officers testified that they followed Ms. Chin - who at that moment became a trespasser - into Mr. Poteet's home, a place she had no right to go. The police officers further conceded that they restricted Mr. Poteet's movements while in his own home. The police officers egregiously violated Mr. Poteet's constitutional rights.

C. The Town's "Community Caretaking" Arguments

The Town previously has argued that its police officers needed no warrant to invade Mr. Poteet's home and to seize him because they were exercising their "community caretaking" function. The Town has contended that the officers met with Ms. Chin at Mr. Poteet's home merely to keep the peace while Ms. Chin and her cohorts

emptied the house. According to the police officers, their presence was required to prevent possible violence. But the "community caretaking" exception to the Fourth Amendment's warrant requirement simply does not apply to this situation, any more than it did in *Soldal, Open Inns* or *Thomas.*

The community caretaking function arises from a police officer's duty to "serve and protect." *Wright v. State,* 7 S.W.3d 148, 151 (Tex. Crim. App. 1999) (discussing *Cady v. Dombrowski*, 413 U.S. 433 (1973)). The purpose of the community caretaking function is to allow an officer to "seize" and assist an individual whom the officer reasonably believes "*is in need of help*." *Corbin v. State,* 85 S.W.3d 272, 276 (Tex. Crim. App. 2002) (citing *Wright v. State,* 7 S.W.3d 148, 151 (Tex. Crim. App. 1999)) (emphasis in original). Clearly, Mr. Poteet was in no need of help from anyone until Ms. Chin and her group, under the watchful eye of the Town's police officers, invaded his home.

In *Georgia v. Randolph,* 547 U.S. 103 (2006), the United States Supreme Court discussed the community caretaking function in the context of domestic violence. The Court held a search unconstitutional as to a husband even though his wife consented to police entry into the couple's home after the police responded to a domestic disturbance call. Had the wife been inside the house and in need of police assistance, then of course the police would have had the right to enter the residence to protect her.

The Court wrote:

> No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or

> to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected.

Id. at 118. But Ms. Chin was not a tenant, and she was neither a victim nor in danger: Ms. Chin already had moved out of Mr. Poteet's house. The Town admitted that previously, Mr. Poteet had called the police to complain about Ms. Chin's repeated attempts to enter his home and said "something big would happen" if anyone returned and tried to break in again. Ms. Chin, her group and the police officers entered Mr. Poteet's home without his consent. But there would have been no turmoil at all if the police had not entered Mr. Poteet's home against his will or facilitated Ms. Chin's entry. Had Ms. Chin still been living there, been within the house, and the police called to prevent harm to her, then of course the officers' warrantless entry would have been constitutionally permissible. But that was not the case.

In further support of its community caretaking argument, the Town cites two Texas statutes that set forth police duties and liabilities when responding to a domestic violence call. The first statute, Tex. Code Crim. Proc. Art. 5.04(a), states:

> The primary duties of a peace officer who investigates a family violence allegation or who responds to a disturbance call that may involve family violence are to protect any potential victim of family violence, enforce the law of this state, enforce a protective order from another jurisdiction as provided by Chapter 88, Family Code, and make lawful arrests of violators.

The other statute is Tex. Code Crim. Proc. Art. 5.045(a), which states:

> In the discretion of a peace officer, the officer may stay with a victim of family violence to protect the victim and allow the victim to take the personal

> property of the victim or of a child in the care of the victim to a place of safety in an orderly manner.[1]

Although these statutes add little to a police officer's community caretaking function as otherwise described in case law, they do explicitly set forth an officer's duties when confronted with family violence.

The statutes do not, however, apply to this case. None of the police officers involved in the civil standby claimed to be "investigating a family violence allegation" or "responding to a disturbance call that may involve family violence." Sgt. Sullivan and Cpl. Lucio came to Mr. Poteet's house in response to Ms. Chin's request for a civil standby to "keep the peace." The officers did not come to Mr. Poteet's house to investigate anything. They were not summoned in response to a disturbance call. Cpt. Lake had not sent the police officers to Mr. Poteet's home to investigate domestic violence or to quell a disturbance but only to conduct a civil standby. In fact, had the officers never arrived, there would have been no disturbance.

Like Article 5.04(a), Article 5.045(a) does not apply to this case because Ms. Chin was not "a victim of family violence." Further, Article 5.045(a) could not grant Ms. Chin - and therefore the police officers - a right to go into Mr. Poteet's home in violation of the Fourth Amendment. As noted in *Soldal,* Fourth Amendment seizures can be justified "only if they are unaccompanied by unlawful trespass." *Soldal,* 506 U.S. at 66 (citing *Horton v. California,* 496 U.S. 128, 136-37 (1990)). Ms. Chin had no ownership interest in Mr. Poteet's house, and she had no right to go upon the premises because

[1] Subsection (b) of this statute purports to immunize peace officers from civil liability for any actions taken during a civil standby. This issue will be addressed in response to the the Brief to be submitted to this Court by Sgt. Sullivan and Cpl. Lucio.

Mr. Poteet had forbidden her to return, a fact known to the Flower Mound Police Department. Had Mr. Poteet and Ms. Chin been married, then Ms. Chin would have had the right to enter onto the premises because the house at least presumptively would have been community property. But Mr. Poteet and Ms. Chin were not married, a fact known to the Flower Mound Police Department from its first contact with Ms. Chin.

D. Summary

The United States Constitution grants every person the right to be free of unreasonable and warrantless searches and seizures as well as deprivation of liberty or property absent due process of law. In the civil standby context, these rights mean that police officers may accompany an individual to keep the peace, but they may not accompany an individual where that individual has no right to go. Further, without a warrant or other court order, police officers may not assist a person in obtaining property from the home of another person. As a matter of law, the Town's police officers violated Mr. Poteet's constitutional rights because the officers accompanied Ms. Chin and other persons into Mr. Poteet's home, obstructed Mr. Poteet from preventing the seizure of most of his possessions, and supervised and assisted with the invasion and seizure.

II.

The Town Is Liable to Mr. Poteet for Violations of Mr. Poteet's Constitutional Rights

A municipality may not be held liable for the unconstitutional actions of its police officers unless the officers acted pursuant to an official municipal policy which was known to municipal policymakers, and the officers' actions were the moving force behind the deprivation of constitutional rights. As a matter of law, the Town is liable to Mr. Poteet because its police officers followed the Town's civil standby policy, established by its police chief, and Mr. Poteet suffered injury by execution of that policy.

A. Requirements for Municipal Liability

Unlike individual defendants, municipalities may not invoke qualified immunity as a defense to a federal civil rights claim. *Owen v. City of Independence,* 445 U.S. 622 (1980). In *Monell v. Department of Social Servs.,* 436 U.S. 658, 694 (1978), the United States Supreme Court held that although a municipality could not be held liable to a plaintiff under the doctrine of respondeat superior, it could be held liable for its own violations of 42 U.S.C. § 1983 committed through its agents and employees.

Following *Monell,* the United States Court of Appeals for the Fifth Circuit set forth the elements a plaintiff must prove to obtain a judgment of liability against a municipality:

> Proof of municipal liability sufficient to satisfy *Monell* requires: (1) an official policy (or custom), of which (2) a policy maker can be charged with actual or

> constructive knowledge, and (3) a constitutional violation whose "moving force" is that policy (or custom).

Pineda v. City of Houston, 291 F.3d 325, 328 (5th Cir. 2002), *cert. denied,* 537 U.S. 1110 (2003) (citing *Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir.), *cert. denied,* 534 U.S. 820 (2001)). There is no requirement of scienter: A municipality can be held liable for a federal civil rights violation even when it acted in good faith. *Owen v. City of Independence,* 445 U.S. 622 (1980).

The uncontradicted evidence shows that *Monell's* requirements have been fulfilled, such that the Court should reverse the summary judgment granted to the Town and render judgment that Mr. Poteet is entitled to partial summary judgment against the Town, as a matter of law, on liability.

B. Official Policy or Custom

It is beyond dispute that the Town, acting through its police department, has an official policy or custom, as required by *Monell* and the Fifth Circuit case law following it, concerning civil standbys. Although the Flower Mound Police Department's official policy or custom with respect to civil standbys is not in written form, Chief Brooker and his subordinates described it in detail. In short, the Flower Mound Police Department will provide police officers to "keep the peace" while a person removes personal property from a home owned solely by another person on a verbal, unsworn representation to the police that the person seeking the property owns it. The Department requires nothing in writing from anyone, no written statement under oath, and no warrant, despite the Fourth Amendment's expressed prohibitions. The

Department's policy or custom asserts that ownership of both the property to be seized and the home from which it is to be seized is "a civil matter" in which the Department has "no interest."

Most of the cases that discuss whether there is an unconstitutional policy, custom or practice have addressed that issue because the municipality had no official policy. In such cases, the question becomes what proof is necessary to show a policy, custom or practice that violates a person's constitutional rights. It is clear that a single instance of unconstitutional conduct cannot prove the existence of a municipality's policy, custom or practice. In the lower courts, the Town has conflated these points to argue that it cannot be held liable for its police officers' violations of Mr. Poteet's constitutional rights because the Town violated his constitutional rights only once.

In support of this contention, the Town previously has cited *Monell v. Department of Social Servs.,* 436 U.S. 658 (1978), where the Supreme Court set out alternative ways of proving a policy, practice or custom in the absence of an official policy. Yet in *Monell* itself, defendants admitted that they had implemented a

> citywide policy of forcing women to take maternity leave after the fifth month of pregnancy unless a city physician and the head of an employee's agency allowed up to an additional two months of work. . . . The defendants did not deny this, but stated that this policy had been changed after suit was instituted.

Id. at 661 n.2. Just as in *Monell,* there is no question what the Town's civil standby policy is. Accordingly, there is no need to show repeated instances of constitutional violations to spell out the Town's policy, custom or practice: The Town's police chief explained the Town's official civil standby policy in detail and confirmed that Sgt.

Sullivan and Cpl. Lucio followed that policy when they entered Mr. Poteet's home against his wishes and supervised the taking of Mr. Poteet's property.

The Town's position in this case is like that of the City of Cincinnati in *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986). In *Pembaur,* city and county officials obtained capiases for two employees of a physician. When law enforcement personnel came to the doctor's office to serve the capiases, the doctor refused them entry. The officials broke down the door and entered anyway. The Supreme Court found "no question" that there had been a constitutional deprivation. *Id.* at 477 n.5. Although the official defendants testified that they could recall no instance where it had been necessary to break down a door to serve a capias, nevertheless, the police chief testified "that it was the policy of his Department to take whatever steps were necessary, including the forcing of doors, to serve an arrest document." *Id.* at 476 n.3. The Court remarked:

> With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body - whether or not that body had taken similar action in the past or intended to do so in the future - because even a single decision by such a body unquestionably constitutes an act of official government policy.

Id. at 480.

Pembaur distinguished *Oklahoma City v. Tuttle,* 471 U.S. 808 (1985), upon which the Town also relied in the lower courts:

> The opinion below also can be read as holding that municipal liability cannot be imposed for a single incident of unconstitutional *conduct* by municipal

> employees whether or not that conduct is pursuant to municipal *policy*. Such a conclusion is unsupported by either the language or reasoning of *Monell,* or by any of our subsequent decisions. As we explained last Term in *Oklahoma City v. Tuttle,* 471 U.S. 808 (1985), once a municipal policy is established, "it requires only one application . . . to satisfy fully *Monell's* requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy."

Id. at 478 n.6 (emphasis in original).

Fifth Circuit case law reinforces the point that a plaintiff need offer evidence of a policy, custom or practice only when there is no official one. In *Bennett v. City of Slidell,* 728 F.2d 762 (5th Cir. 1984) (en banc), *cert. denied,* 472 U.S. 1016 (1985), the Fifth Circuit set forth circumstantial methods of proving a policy, practice and custom. Before describing these methods, *Bennett* explained that they became important only in the absence of any official policy:

> In both *Monell* and *Owen* there was no question but that the objectionable conduct was city policy. No one challenged the assertion, in *Monell,* that the City of New York had maintained a policy which compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.

Bennett at 766. In *Bennett,* city officials had harassed a liquor permit applicant, which clearly was not city policy, so defendants prevailed.

Most recently, in *Pineda v. City of Houston,* 291 F.3d 325 (5th Cir. 2002), the Fifth Circuit explained that circumstantial evidence of a policy, practice or custom is required only when there is no "smoking gun." *Id.* at 328. The court found no liability when a Houston police officer shot and killed a man after an unconstitutional, warrantless entry into his residence because the city had no municipal policy of making unconstitutional,

warrantless entries. The court found statistical evidence of other warrantless entries inadequate to show a policy, practice or custom of making warrantless entries. Here, of course, Chief Brooker explained, in detail, the Town's unconstitutional policy of sending police officers on civil standbys to accompany persons while those persons trespass into others' homes and remove the homes' contents. The existence of this policy simply is not in dispute.

C. Knowledge of Policymaker

The "knowledge of the policymaker" requirement exists to prevent municipalities from being sued over the wrongful acts of rogue employees. In *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986), the Supreme Court explained:

> The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality" - that is, acts which the municipality has officially sanctioned or ordered.

Id. at 479-80 (emphasis in original) (footnote omitted). In this case, no "rogue employee" issue exists. Chief Brooker laid out the Flower Mound Police Department's policy and stated that Sgt. Sullivan and Cpl. Lucio followed it.

Under the Town's Charter, the Chief of Police is the "chief administrative officer" of the Town's police department. (CR 2005-472). In affidavits submitted in support of the Town's Motion for Summary Judgment, Chief Brooker described the Town's policy on civil standbys at some length. In his deposition, Chief Brooker made clear that civil standbys are conducted with respect to both married and unmarried individuals:

> You know, when you have these types of relationships, and especially one that's gone on for a long period of time, there could be a lot of property involved. I mean, it's just no set amount of property that someone may want to retrieve that belongs to them. They just have to - they normally want what belongs to them.

(CR 2004-349 & CR 2005-211 at 14/9-16). Chief Brooker also made clear that the police department has "no interest" in who owns the house where the property is located. (CR 2004-350 & CR 2005-212 at 15/10-20). It is astonishing that a law enforcement officer finds it unimportant who owns the property onto which the Town's policy allows a warrantless entry against the wishes of the property's owner.

D. Constitutional Violation Whose "Moving Force" is Policy or Custom

Under *Monell,* a municipality can be held liable for a federal civil rights violation only when the "moving force" causing the constitutional deprivation was the municipality's unconstitutional policy or custom. In *City of Canton v. Harris,* 489 U.S. 378 (1989), the Court treated as synonyms for "moving force" the phrases "direct causal link," "closely related" and "actually caused." There has been little other case law describing this requirement.

Monell's articulation of the "moving force" requirement is based upon the Court's concern that a municipality could be held liable under the theory of respondeat superior. The Court made this point clear when it said:

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

436 U.S. at 694. In *Monell,* the New York City Board of Education's Department of

Social Services decided that female employees must take unpaid leaves of absences from their jobs before such leaves were medically required. The *Monell* Court held that "this case unquestionably involves official policy as the moving force of the constitutional violation." *Id.* at 694.

Cases in which the Court has found no moving force behind constitutional violations have featured employees who failed to act in accordance with a municipality's policy. For example, in *Board of County Commissioners v. Brown,* 520 U.S. 397 (1997), the Court reviewed a judgment against Bryan County, Oklahoma, brought by a plaintiff who claimed that a county police officer used excessive force in arresting her. The Court voiced its concern that "Congress did not intend to impose liability on a municipality unless *deliberate* action attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights." *Id.* at 400 (emphasis in original). The Court reversed the case because it was not the Sheriff's policy that his police officers use excessive force while arresting persons suspected of committing crimes. Similarly, in *Oklahoma City v. Tuttle,* 471 U.S. 808 (1985), in which a widow sued Oklahoma City after an Oklahoma City police officer shot her husband outside a bar, the Court found no "moving force" behind any constitutional violation. The plaintiff did not claim "that Oklahoma City had a 'custom' or 'policy' of authorizing its police force to use excessive force in the apprehension of suspected criminals." *Id.* at 820. Instead, her claim "was that the 'policy' in question was the city's policy of training and supervising police officers, and that this 'policy' resulted in inadequate training." *Id.* The plaintiff's claim could be successful only if she proved that

"policymakers deliberately chose a training program which would prove inadequate." *Id.* at 823. The Court reversed a jury verdict in favor of the plaintiff.

Monell governs this case: Under the Town's civil standby policy, to obtain police assistance while taking property from another's home, a person simply makes an unsworn, verbal request to the Flower Mound Police Department. A request is accepted at face value; no procedures exist to prevent anyone from falsely representing to the police department that the person owns property located in another person's home. Further, the police department has "no interest" in who actually owns the home or the personal property within it. These issues are irrelevant to the Town's civil standby policy because, under the civil standby policy, these issues are considered irrelevant, civil matters.

The civil standby policy does not limit the type or amount of property a person may take from another's home. The property taken can be enough, as here, to fill a U-Haul truck. If a homeowner is not at home, or refuses to open the door to his home, the civil standby policy includes allowing the person who requested the civil standby to employ a locksmith to unlock the homeowner's door.

The Town's sole concern under the civil standby policy is to prevent any breach of the peace. In accordance with the policy, police officers may enter an individual's home over his objections and without a warrant. The police officers may follow a trespasser into the home - as the police officers testified they did here, following Ms. Chin as she entered Mr. Poteet's home. The policy even allows police officers to restrict the movements of the homeowner within his own home if the homeowner

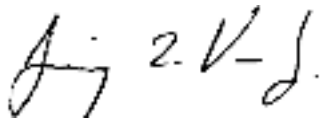
becomes angry over the intrusion into his home. The Town's police officers coordinate a time to conduct the civil standby with the person who requested it. There is no requirement that the police department notify the homeowner that a request for a civil standby has been received or that a civil standby will be conducted. As part of the civil standby, police officers determine, as here, how long the civil standby will last and when it will end.

The civil standby at Mr. Poteet's home complied with the Town's civil standby policy, according to Flower Mound Police Chief Brooker. The police officers followed the Town's civil standby policy. Mr. Poteet's constitutional rights were violated because the police officers executed the Town's official policy governing civil standbys. There simply is no question that the Town's unconstitutional civil standby policy was the moving force behind the deprivation of Mr. Poteet's constitutional rights, as a matter of law.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Phillip K. Poteet prays that the Court reverse the summary judgment of the trial court in favor of the Town of Flower Mound, Texas, and then render its decision that the Town is liable, as a matter of law, to Mr. Poteet for violation of Mr. Poteet's constitutional rights, remanding the case for a trial on the extent of damages. Alternatively, Mr. Poteet prays that the Court reverse the summary judgment of the trial court in favor of the Town and remand this case for trial. Mr. Poteet prays for general relief.

Respectfully submitted,

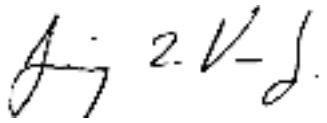


Jimmy L. Verner, Jr.
SBN 20549490
Verner & Brumley, P.C.
3131 TurtleCreek Blvd.
Penthouse Suite
Dallas, Texas 75219
214.526.5234
214.526.0957.fax
jverner@vernerbrumley.com
www.vernerbrumley.com

CERTIFICATE OF SERVICE

I certify that on this 22nd day of October, 2007, I served, by facsimile, a true and correct copy of the above and foregoing Brief, upon:

Thomas P. Brandt
Fanning Harper & Martinson, P.C.
1300 Two Energy Square
4849 Greenville Avenue
Dallas, Texas 75206



Jimmy L. Verner, Jr.