

1 PETER M. WILLIAMSON, State Bar # 97309  
2 WILLIAMSON & KRAUSS  
3 13915 Panay Way, Suite One  
Marina del Rey, CA 90292  
(310) 822-3377

4 Attorneys for Plaintiff  
5 ANTHONY MORALES

6  
7  
8 UNITED STATES DISTRICT COURT  
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 ANTHONY MORALES,	)	CASE NO. 01-04121 PJW
12 Plaintiff,	)	
13 vs.	)	PRE-TRIAL CONFERENCE
14 COUNTY OF VENTURA, TONYA	)	ORDER
15 HERBST, et al.,	)	
16 Defendants.	)	Trial Date: July 14, 2003
17	)	Pre-Trial Conference: July 3, 2003
	)	Time: 1:30 P.M.
	)	Courtroom: 827-A

18  
19 Following Pre-Trial proceedings, pursuant to Federal Rules of Civil Procedure, Rule  
20 16, and Local Rule 16-6, IT IS ORDERED:

21 1. The parties are: Plaintiff, ANTHONY MORALES and Defendants, COUNTY  
22 OF VENTURA and Sheriff's Deputy TONYA HERBST.

23 Each of the above-mentioned parties has been served and has appeared. All other  
24 parties named in the pleadings and not identified in the preceding paragraph are now  
25 dismissed.

26 The pleadings which raise the issues are: Plaintiff's Complaint, Plaintiff's 1<sup>st</sup>  
27 Amended Complaint, Defendants' Answer to the Complaint, and the February 7, 2003  
28 order permitting plaintiff to file the First-Amended Complaint.

1           2.     Federal jurisdiction and venue are invoked upon the following grounds:  
2 Federal jurisdiction is invoked under 42 U.S.C. § 1983. This is a civil case which involves  
3 alleged civil rights violations by a Deputy Sheriff of the Ventura County Sheriff's  
4 Department acting under color of law in her official capacity as a law enforcement officer.

5           3.     The trial is estimated to take 10 court days.

6           4.     The trial is to be a jury trial. At least 5 court days prior to the trial date,  
7 counsel shall deliver to the Court, if they have not already done so:

8                 (a)    A joint set of jury instructions comprised of annotated instructions.  
9 Objections by counsel to the instructions will be indicated in the annotated instructions.

10                (b)    A joint set of un-annotated instructions.

11                (c)    Any special questions requested to be put to prospective jurors during  
12 voir dire.

13           5.     The following facts are admitted and require no proof:

14                 (a)    The incident which is the subject of this action, occurred on May 20,  
15 2000, between approximately 8:45 p.m. and 9:15 p.m.

16                 (b)    The incident occurred at the Veterans Memorial Building located at 2<sup>nd</sup>  
17 Street and Shiells Avenue in the City of Fillmore, California.

18                 (c)    The Ventura County Sheriff's Deputies involved in the incident were  
19 Tonya Herbst, Scott Horton, Todd Welty and Bernard Furlong.

20                 (d)    Deputy Tonya Herbst fired her gun striking plaintiff, Anthony Morales.

21  
22                 (e)    Deputy Tonya Herbst was acting under color of law at the time of the  
23 shooting.

24                 (f)    All four Deputies involved in this incident were in uniform at the time  
25 of the shooting.

26                 (g)    Plaintiff Anthony Morales was not charged with a criminal offense as a  
27 result of this incident.

28 //////////////

1 (h) On May 20, 2000, between approximately 8:45 p.m. and 9:15 p.m.,  
2 Chad Morales was in possession of a handgun.

3 (i) On May 20, 2000, between approximately 8:45 p.m. and 9:15 p.m., the  
4 handgun in the possession of Chad Morales accidentally discharged.

5 (j) Plaintiff, Anthony Morales, was struck in the back below the left  
6 shoulder blade by a bullet fired by Deputy Tonya Herbst.

7 (k) As a result of the gunshot wound, plaintiff Anthony Morales has incurred  
8 \$26,855.03 in medical expenses to date.

9 6. The following facts are admitted to be true but their admissibility is disputed  
10 and subject to evidentiary objection:

11 (a) Chad Morales pled guilty to a violation of Penal Code, § 417(c) —  
12 exhibition of a firearm in the presence of a peace officer.

13 (b) Chad Morales had a blood-alcohol content of .15 on the night of the  
14 incident.

15 7. The claims being asserted by the Parties are as follows:

16 Plaintiff's First Claim against Defendant Tonya Herbst for 4<sup>th</sup> Amendment  
17 Violation – Excessive Use of Force:

18 (a) The ultimate facts required to prove such claim under the applicable legal  
19 standard is that the force used by Deputy Tonya Herbst was objectively unreasonable.

20 (b) The evidence relied upon to prove each element of the claim is:

21 (1) That at all times during this incident, Defendant Tonya Herbst,  
22 acted under color of law as a Deputy of the Ventura County Sheriff's Department.

23 (2) That in her capacity as a Deputy of the Ventura County Sheriff's  
24 Department on May 20, 2000, defendant Tonya Herbst, intentionally deprived plaintiff of  
25 his 4<sup>th</sup> Amendment constitutional rights to be free from unreasonable seizure by subjecting  
26 plaintiff to excessive use of force — inflicting a gun shot wound upon plaintiff.

27 (3) That there were no objectively reasonable basis to subject plaintiff  
28 to the amount of force utilized by defendant, Tonya Herbst. Plaintiff was shot after he had

1 subdued and disarmed his son, after he told the police that he had possession of his son's  
2 firearm and not to shoot, after his son had been disarmed and was no longer a threat, and  
3 after the risk of danger had passed.

4 (4) Defendant, Tonya Herbst, by using such unreasonable force,  
5 caused injury and damage to plaintiff.

6 (5) That as a proximate cause of said deprivation of constitutional  
7 rights, the plaintiff suffered damages in the form of medical and hospital expenses, lost  
8 earnings, future loss of earning capacity, emotional distress and pain and suffering, for which  
9 he seeks compensatory damages against the defendant in her official as well as individual  
10 capacity.

11 Plaintiff's Second Claim against Defendant Tonya Herbst for 14<sup>th</sup> Amendment  
12 Violation – Excessive Use of Force:

13 (a) The ultimate facts required to prove such claim under the applicable legal  
14 standard is that the force used by Deputy Tonya Herbst "shocks the conscience".

15 (b) The evidence relied upon to prove each element of the claim is:

16 (1) That at all times during this incident, Defendant Tonya Herbst,  
17 acted under color of law as a Deputy of the Ventura County Sheriff's Department.

18 (2) That in her capacity as a Deputy of the Ventura County Sheriff's  
19 Department on May 20, 2000, defendant Tonya Herbst, deprived plaintiff of his 14<sup>th</sup>  
20 Amendment constitutional rights to be free from unreasonable seizure by subjecting plaintiff  
21 to excessive use of force by inflicting a gun shot wound upon plaintiff.

22 (3) That the shooting of plaintiff by defendant, Tonya Herbst, shocks  
23 the conscience because plaintiff was shot after he had subdued and disarmed his son, after  
24 he told the police that he had possession of his son's firearm and not to shoot, after his son  
25 had been disarmed and was no longer a threat, and after the risk of danger had passed.

26 (4) Defendant, Tonya Herbst, by using such unreasonable force,  
27 caused injury and damage to plaintiff.

28 (5) That as a proximate cause of said deprivation of constitutional

1 rights, the plaintiff sustained the damages set forth in Claim One, for which he seeks  
2 compensatory damages against the defendant in her official as well as individual capacity.

3 Plaintiff's Third Claim against Defendant County of Ventura — Failure to

4 Train:

5 (a) The ultimate facts required to prove such claim under the applicable legal  
6 standard is that the training program of the defendant, County of Ventura, was inadequate  
7 to train Deputy Tonya Herbst in how and when to use firearms, in the use of force  
8 specifically as it applies to the use of deadly force, and in the use of proper tactics to subdue  
9 and disarm a criminal suspect.

10 (b) The evidence relied upon to prove each element of the claim is:

11 (1) During defendant, Tonya Herbst's Sheriff's Academy training, she  
12 repeatedly failed to show competency and/or proficiency with a firearm while on the shooting  
13 range and during a live fire shooting simulation in which she accidentally fired her weapon  
14 without knowing it. During the same live fire shooting simulation, she showed poor  
15 judgement and used improper tactics by approaching a suspect too closely and failing to use  
16 available cover to shield herself from the risk of harm by the suspect. Despite these shooting  
17 deficiencies and improper use of tactics, the County of Ventura failed to terminate her  
18 employment with the Sheriff's Department, permitted defendant to graduate from the  
19 Sheriff's Academy and allowed her to be sworn as a Ventura County Sheriff's Deputy.  
20 Deputy Herbst continued to show a lack of competency and/or proficiency with a firearm  
21 after she became a sworn Deputy. Deputy Herbst was required to periodically qualify on  
22 the Sheriff's Department shooting range. However, on several occasions, she failed to qualify  
23 on the shooting range on her first attempt and was required to retest in order to meet her  
24 basic shooting qualification. Despite her lack of competency and/or proficiency with a  
25 firearm, no action was taken by the County of Ventura to terminate the employment of  
26 Deputy Herbst.

27 (2) The defendant, County of Ventura, was deliberately indifferent  
28 to the need to adequately train deputies, such as Deputy Herbst, in the use of firearms, the

1 use of force policy of the Ventura County Sheriff's Department specifically as it relates to the  
2 use of deadly force, and the proper tactics to utilize in order to subdue and detain criminal  
3 suspects.

4 (3) The failure to provide training was the proximate cause of the  
5 deprivation of the plaintiff's rights protected by the 4<sup>th</sup> Amendment of the Constitution, as  
6 set forth in Claim One.

7 (4) That plaintiff sustained the damages set forth in Claim One as a  
8 proximate result of defendant County's failure to properly train defendant Deputy Tonya  
9 Herbst.

10 Plaintiff's Fourth Claim against Defendant Tonya Herbst — State Claim for  
11 Battery:

12 (a) The ultimate facts required to prove such claim under the applicable legal  
13 standard is that Defendant intentionally did an act which resulted in a harmful or offensive  
14 contact with the plaintiff; the plaintiff did not consent to the contact, and the harmful or  
15 offensive contact caused injury to the plaintiff.

16 (b) The evidence relied upon to prove each element of the claim is:

17 (1) That in her capacity as a Deputy of the Ventura County Sheriff's  
18 Department on May 20, 2000, defendant Tonya Herbst, intentionally inflicted a gun shot  
19 wound upon plaintiff.

20 (2) Plaintiff did not consent to being shot by Deputy Herbst.

21 (3) That as a proximate cause of defendant Tonya Herbst's assault and  
22 battery, plaintiff sustained the damages set forth in Claim One, for which he seeks  
23 compensatory damages against the defendant in her official as well as individual capacities.

24 Plaintiff's Fifth Claim against Defendant Tonya Herbst — Negligence:

25 (a) The ultimate facts required to prove such claim under the applicable legal  
26 standard is that Defendant Tonya Herbst owed a duty of care to plaintiff, that she breached  
27 said duty by negligently shooting him in the back under circumstances that did not warrant  
28 or justify such action on her part and that such negligence was the proximate cause of injury

1 to the plaintiff.

2 (b) The evidence relied upon to prove each element of the claim is:

3 (1) That in her capacity as a Deputy of the Ventura County Sheriff's  
4 Department on May 20, 2000, defendant Tonya Herbst, owned a duty of care to plaintiff,  
5 a citizen of the County of Ventura, State of California.

6 (2) Deputy Herbst breached her duty of care owed to plaintiff by  
7 negligently inflicting a gun shot wound upon plaintiff without cause or justification.

8 (3) That as a proximate cause of defendant Tonya Herbst's negligence,  
9 plaintiff sustained the damages set forth in Claim One, for which he seeks compensatory  
10 damages against the defendant in her official as well as individual capacities.

11 Defendant's Defenses:

12 (a) The analytical framework of the shooting proceeds under the 14<sup>th</sup>  
13 Amendment because defendant, Deputy Tonya Herbst, intended to shoot Chad Morales but  
14 inadvertently shot plaintiff – the 14<sup>th</sup> Amendment conduct fault standard is conscience-  
15 shocking behavior which is not satisfied by the facts of this case because Deputy Herbst was  
16 defending herself and others from an exhibited handgun which had recently fired (Moreland  
17 vs. Las Vegas Metropolitan Police Department, 159 F. 3d 365, 371-373(9th Cir.  
18 1998)).

19 (b) Even if analyzed under the 4<sup>th</sup> Amendment reasonableness standard,  
20 Deputy Herbst's decision to shoot was justified by the proximity of the gun-wielding  
21 assailant under Graham vs. Connor.

22 (c) Defendant, Tonya Herbst, is entitled to the qualified immunity defense.

23 (d) Defendant, County of Ventura, is not liable both because there was no  
24 underlying constitutional violation by Deputy Herbst and because no entity policy maker  
25 was deliberately indifferent to the plaintiff's constitutional rights in the training, equipping  
26 and supervision of Deputy Herbst.

27 (e) The ancillary, supplemental state claims are precluded by the decision  
28 of the California Court of Appeal in Martinez v. County of Los Angeles, (1996) 47 Cal.

1 App. 4<sup>th</sup> 334, 349, because the shooting was a justifiable homicide. The plaintiff's action  
2 is likewise barred, or his recovery diminished, by his own comparative fault and failure to  
3 mitigate his damages, as well as by the third-party fault of Chad Morales. The entity  
4 defendant is exonerated because the individual state actor is not liable for reasons previously  
5 stated, in accordance with California Government Code § 815.2(b).

6 8. All discovery is complete except for the following:

7 (a) The depositions of the parties expert witnesses: Roger Clark and Dr.  
8 Cynthia Chabay.

9 9. All disclosures under Federal Rules of Civil Procedure, Rule 26(a)(3)(c) have  
10 been completed. The joint exhibit list of the parties has been filed herewith under separate  
11 cover as required by Local Rule 16-5. All exhibits may be admitted without objection,  
12 except those exhibits listed below:

13 (a) Evidence of the criminal conviction of Chad Morales.

14 (b) Radio/Traffic Tape of the Ventura County Sheriff's Department.

15 (c) Audio recording of incident by Deputy Todd Welty.

16 (d) Evidence of domestic violence complaints and reports filed by Deputy  
17 Tonya Herbst.

18 10. All disclosures under Federal Rules of Civil Procedure, Rule 26(a)(3)(a) and  
19 (b) have been made except for the report of plaintiff's expert, Roger Clark, which will be  
20 served on defendants on or before May, 13, 2003. Witness lists of the parties have been  
21 filed herewith under separate cover as required by Local Rule 16-4.

22 11. The parties intend to present evidence by way of video deposition testimony.  
23 Upon completion of these depositions, each party will mark such depositions in accordance  
24 with Local Rule 16-2.7(a). For this purpose, the following deposition transcripts shall be  
25 lodged with the Clerk as required by Local Rule 32-1:

26 (a) Deposition of Carl Wells.

27 (b) Deposition of Ingo Peterson.

28 ////////////////

1           12.   Evidentiary Matters: Following the Rule 7-3 Pre-Filing Conference held on  
2 August 7, 2002, the parties filed Motions in Limine seeking to exclude the following  
3 evidence:

4           Plaintiff filed the following Motions in Limine to be heard at the Final Pre-Trial  
5 Conference:

- 6                   (a)    Motion in Limine to exclude Chad Morales' criminal conviction.
- 7                   (b)    Motion in Limine to exclude the blood-alcohol content of Chad  
8 Morales.
- 9                   (c)    Motion in Limine to exclude the Ventura County Sheriff's Department  
10 Radio Traffic Tape of this incident.
- 11                  (d)    Motion in Limine to exclude the purported contemporaneous audio  
12 recording of the incident by Deputy Todd Welty.
- 13                  (e)    Motion in Limine in opposition to defendants' request for Bifurcation  
14 of Monel claim.

15           Defendants filed the following Motions in Limine to be heard at the Final Pre-Trial  
16 Conference:

- 17                   (a)    Motion in Limine to exclude evidence that Defendant Tonya Herbst,  
18 was or was not, a domestic violence victim or the accuracy of her police reports in that regard.
- 19                   (b)    Motion in Limine to exclude evidence of whether or not other deputies  
20 or Tonya Herbst have fired their weapons at suspects at other times and places and other  
21 conduct outside the time scope of the subject incident, such as Defendant Tonya Herbst's  
22 police academy records and class standing.
- 23                   (c)    Motion in Limine to exclude evidence of the policies of the Ventura  
24 County Sheriff's Department or any other administrative body, other than in the Monell-  
25 entity liability phase of the trial.
- 26                   (d)    Motion in Limine to exclude evidence of lesser intrusive alternatives to  
27 the use of force actually utilized.

28 ////////////////

1           14. Plaintiff does not wish to have any claims bifurcated. Defendants are requesting  
2 a bifurcation of the entity liability determination from a phase one determination of the  
3 liability or non-liability of Deputy Tonya Herbst (Quintanilla vs. City of Downey, 84 F.  
4 3d 353 (9<sup>th</sup> Cir., 1996)).

5           15. The foregoing admissions having been made by the parties, and the parties  
6 having specified the foregoing issues of fact and law remaining to be litigated, this Pre-Trial  
7 Conference Order shall supersede the pleadings and the previous Pre-Trial Conference Order  
8 and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

9  
10 DATED: \_\_\_\_\_  
11 \_\_\_\_\_ Honorable PATRICK J. WALSH  
Magistrate Judge

12 Approved as to form and content.

13  
14 DATED: May \_\_\_\_, 2007

15  
16 \_\_\_\_\_  
PETER M. WILLIAMSON, Esq.  
Attorney for Plaintiff  
17 ANTHONY MORALES

18 DATED: May \_\_\_\_, 2007

19 \_\_\_\_\_  
JEFFREY HELD, Esq.  
Attorney for Defendants  
20 COUNTY OF VENTURA and  
21 TONYA HERBST

22  
23  
24  
25  
26  
27  
28