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7
8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10

11 ANTHONY MORALES,)	CASE NO.: 01-04121 CBM (AJWx)
)	(Complaint Filed: 5/4/01)
12 Plaintiff,)	
)	
13 vs.)	PLAINTIFF'S MEDIATION BRIEF
)	
14 COUNTY OF VENTURA, and TONYA)	
HERBST,)	DATE: June 13, 2002
)	TIME: 1:00 P.M.
15 Defendants.)	PLACE: Moorhead Mediations
)	Wilmington, CA
16)	
17)	

18 In order to clarify the issues relevant to this action and for the aid and convenience of the Mediator,
19 Plaintiff, ANTHONY MORALES, submits the following Mediation Brief:

20 INTRODUCTION

21 Plaintiff, ANTHONY MORALES, is a 53-year old former police officer who recently resided in the
22 City of Fillmore, California. On the night of May 20, 2000, while attending a wedding reception and
23 dance for his nephew at the Veterans Memorial Building in Fillmore, plaintiff was shot in the back by
24 defendant, TONYA HERBST, under color of law and while in the course and scope of her employment
25 as a Deputy Sheriff with the Ventura County Sheriff's Department. Plaintiff committed no crime. Plaintiff
26 has never been accused of committing any crime. As a result of being shot in the back by Deputy Herbst
27 Plaintiff suffered and continues to suffer painful and debilitating injuries. Plaintiff's primary treating
28 physicians consider his injuries to be permanent.

1 PLAINTIFF’S CONTENTIONS

- 2 1. Plaintiff was shot after he had subdued and disarmed his son;
- 3 2. Plaintiff was shot after he told the police that his son had been disarmed and was not a
- 4 threat;
- 5 3. Plaintiff was shot after the risk of danger had passed;
- 6 4. Plaintiff’s constitutional rights were violated because Deputy Herbst intended to shoot him
- 7 and being shot in the back is tantamount to a seizure under the Fourth Amendment; and
- 8 5. Plaintiff’s constitutional rights were violated because shooting an innocent citizen under these
- 9 circumstances “shocks the conscience” under the Fourteenth Amendment.

10 Contrary to the defense interpretation, Mr. Morales had gained control of the gun before he was
11 shot by Officer Herbst.

12 Most of the contentions offered by the defense are irrelevant to what happened at the moment of
13 the shooting, relating instead to events which had transpired earlier that day. For example, Chad Morales’
14 blood alcohol level is not material to the shooting of plaintiff because Chad had already been subdued and
15 under control when the shooting occurred. Chad was not a threat when plaintiff was shot.

16 STATEMENT OF FACTS

17 On the evening of May 20, 2000, plaintiff attending a wedding reception and dance for his nephew
18 at the Veterans Memorial Building located on 2nd Street in the City of Fillmore. Sometime after 8:00 p.m.,
19 plaintiff was informed that his son, Chad Morales (hereinafter “Chad”), who was intoxicated had been
20 forcibly removed from the Veterans Building by several security guards.¹ At that time, plaintiff did not
21 know what had happened to cause his son to be forcibly removed from the building. Chad eventually left
22 the wedding reception and began to walk to his home approximately one-half mile away. Plaintiff asked his
23 ex-wife, Denise Grimes (who was also an invited guest at the reception), to drive to Chad’s home to make
24 sure he arrived safely. Denise accompanied by Kelly Morales, Chad’s wife, drove back to the house. As they
25 entered the house, they saw Chad coming out of his bedroom. Chad had put on his U.S. Army dress jacket²

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27 ¹ By all accounts, Chad Morales was an infrequent drinker who rarely drank alcoholic beverages.

28 ² The U.S. Army dress jacket was dark green in color and covered by an assortment of pins and medals, some of which
were metallic and shinny.

1 and armed himself with a handgun. Chad did not say what he intended to do but Denise assumed he was
2 going to return to the Veterans Building. Denise described his demeanor as that of a zombie. His only
3 stated words to her were "Get out of my way!"

4 Denise drove back to the Veterans Building and informed plaintiff that Chad was on his way back.

5 Plaintiff waited for Chad to return to the Veterans Building. A few minutes later, he saw Chad
6 walking across an adjacent Junior High School parking lot towards the Veterans Building. He approached
7 Chad in the hope of convincing his son to give up the weapon. Plaintiff began to calmly talk to his son.
8 Chad's hands were at his sides. Plaintiff did not immediately see any weapon because the parking lot was
9 dimly lit and he was focused on Chad's face. Plaintiff continued to talk with his son but got no verbal
10 response.

11 After a few minutes, Chad brushed past his father and resumed walking towards the rear of the
12 Veterans Building. Chad entered the driveway at the rear of the building and mounted the steps of the
13 eastern most stairway. At this point, plaintiff noticed a handgun in Chad's right hand. At all times, the
14 weapon remained at Chad's side and was never raised or pointed at or in plaintiff's direction. Chad never
15 threatened his father and at no time did plaintiff ever fear for his life. Plaintiff continued to talk to his son
16 in an effort to take control of the weapon. Chad walked down the steps and when he did so, plaintiff
17 grabbed the weapon with his left hand in an effort to take it away from Chad. As he reached out with his
18 left hand in attempt to grab the weapon, his thumb became entangled in the trigger guard and he accidentally
19 pulled the trigger. The weapon discharged facing downward. The spent shell jammed in the weapon
20 causing a condition known as "stove piping." The weapon could not be fired again unless the jammed spent
21 shell was removed from the weapon. Plaintiff had not seen any Deputy Sheriffs at the time the weapon
22 discharged. Plaintiff took control of the weapon and never relinquished possession of it until moments
23 before he was shot. Both men moved underneath the western most staircase. They knelt down facing each
24 other no more than six inches (6") apart. It was extremely dark underneath the staircase. Plaintiff
25 continued to talk to his son with his right arm around Chad's shoulder. Plaintiff placed the weapon under
26 his left knee and held it there with his left hand.

27 Both men remained kneeling underneath the western staircase for several minutes. Plaintiff first
28 became aware of the presence of Sheriff's Deputy approximately 5-10 minutes after Chad's weapon

1 accidentally discharged. Plaintiff recalls seeing only male Deputies. In an effort to make the Deputies aware
2 that he had gained control of Chad’s weapon and defused the situation, he yelled out: : “I’ve got the gun!
3 Everything is ok! Everything is under control! Don’t shoot!” Plaintiff recalls repeating this statement
4 three (3) different times during a period of approximately one minute. As he was yelling out to the Deputies
5 a 3rd time, he removed the weapon from under his left knee and slid it to his left across the concrete.
6 Approximately 2-3 minutes later, plaintiff heard a gunshot and felt a burning sensation in his left upper back.
7 He realized he had been shot, although he did not know by whom.

8 HERBST’S VERSION OF EVENTS IN NOT CREDIBLE

9 Deputy Herbst offers her version of the events, painting a picture of an apparent threat to her safety
10 in which her actions in self-defense appear justified. Plaintiff has provided a radically different version of
11 the events that transpired. This version of the facts is supported, in critical respects, by the testimony of
12 Deputies Horton and Welty, as well as Denise Grimes. Perhaps, more importantly, plaintiff’s version of
13 events is supported by physical evidence.

14 1. Herbt’s location at the time of the accidental discharge:

15 Herbst testified that she was between two of the parked trucks in the driveway on the north side of
16 the Veterans Building approximately 10 feet away from Chad and plaintiff when Chad’s weapon discharged.
17 She claims that when the weapon fired, she was startled and feared that she might be shot by Chad. Herbst
18 claims that because she was so close to the area where the gun fired, she feared for her life as well as the life
19 of plaintiff and Denise Grimes.

20 Two of Herbst’s fellow Deputies dispute her claim that she was 10 feet away from Chad and plaintiff
21 when the weapon discharged. Deputy Horton gave a statement to Detective J. Panza of the Ventura
22 County Sheriff’s Robbery-Homicide Division on May 21, 2000, the day after this incident.³ In his
23 statement, Deputy Horton claims that he kicked open the door at the north-eastern of the Veterans
24 Building. Horton came out of the door and did a “quick peek” to make sure nobody was over there. At this
25 point, Horton believes he heard Deputy Welty put out “shot fired” (he was not sure whether he heard this
26 over his radio or verbally). Horton explained: “I didn’t hear a shot. I just heard him say ‘shot
27 fired’.” When asked where Herbst was, Horton replied: “She was right behind me.” Horton clearly
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³ See Excerpts of Deputy Horton’s statement attached to plaintiff’s evidentiary submission as Exhibit “3”.

1 disputes Herbst version of events and places Herbst just exiting the north-eastern door of the Veterans
2 Building when Chad's weapon discharges. If Horton did not hear the shot, how could Herbst have heard
3 the shot if she was still behind him?

4 Deputy Welty also gave a statement to Detective Panza on May 21, 2000. The following exchange
5 between Panza and Welty took place:

6 "Q. At the point that you heard the first shot, Horton and Herbst had not come out of the door
7 yet, is that correct? The very first shot you heard?

8 A. Yeah. I did not see Horton."

9 2. Plaintiff's body position at the time he was shot:

10 Deputy Herbst claims that plaintiff and Chad were standing up under the western staircase at the
11 time she fired her weapon at Chad.⁴ By placing Chad and plaintiff in a standing position, she is able to
12 claim that Chad was in a better position to aim his weapon at her thereby increasing the risk that either
13 herself or someone else would be shot. Deputy Herbst places herself in the space between two of the parked
14 trucks in the driveway squatting in almost a kneeling position. Conversely, plaintiff claims he was kneeling
15 facing his son at the time he was shot.

16 Tonya Herbst is approximately 5'5" tall. Plaintiff is approximately 5'11" tall but was wearing
17 cowboy boots on the night of the shooting increasing his height to approximately 6' tall. Plaintiff was shot
18 in the back below the left shoulder blade. The bullet passed through plaintiff's body without hitting any
19 internal organs or bone and exited just below his right armpit. As will be demonstrated at the Mediation
20 using a mannequin, the trajectory of the bullet through plaintiff's body was almost completely parallel to the
21 ground.

22 Herbst's claim that she was squatting and plaintiff was standing upright at the time he was shot is
23 inconsistent with the physical evidence. The positioning of plaintiff's body according to Herbst' version
24 would require a steep upward trajectory of the bullet's path through plaintiff's body. However, this clearly
25 was not the case. If Herbst was in fact squatting (as she stated in her sworn testimony), plaintiff would have

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27 ⁴ Whether plaintiff and his son could actually stand under the stairway given the height of the space is doubtful. See
28 the scene photographs attached to plaintiff's evidentiary submission collectively as Exhibit "2". Regardless, Deputy Horton
positioned both men on the ground thus contradicting Deputy Herbst once again.

1 had to have been kneeling or squatting as well in order for the bullet's trajectory to be parallel to the ground.
2 This physical evidence is more consistent with plaintiff's version of events. If both Chad and plaintiff were
3 kneeling at the time of the shooting, Chad could not have been in a position to point his weapon at Deputy
4 Herbst.

5 3. Herbst denies that she heard plaintiff yell out that he had possession of the weapon:

6 Deputy Herbst denies that she heard plaintiff make any statements prior to the time that she shot
7 him. Plaintiff testified that when he became aware of the presence of Deputy Sheriffs at the scene, he yelled
8 out approximately three times that he had the gun, that the situation was under control and not to shoot.

9 These statements were heard by Denise Grimes who was standing to the rear of Herbst's position.
10 Plaintiff's statements were also heard by Deputy Horton. Horton was also further away from plaintiff and
11 Chad's position than Deputy Herbst. In his statement to Detective Panza, Horton explained that he heard
12 plaintiff yelling: "I've got the gun, I've got the gun" prior to hearing the shot fired by Herbst.

13 Deputy Horton also offered the following testimony under cross-examination at Chad Morales'
14 Preliminary Hearing:⁵

15 "Q. During this time period of the two fellas being underneath the stairwell, did you ever hear
16 the father shout anything?

17 A. Yes, I did.

18 Q. What did you hear him say?

19 A. At one point, I heard him say, "got the gun. I got the gun."

20 Q. Okay. And were they still, in terms of their physical contact, what was their status when you
21 heard the father make that statement?

22 A. I couldn't say because I couldn't hear them ---- see them when I heard the father's statement.

23 Q. Okay. Now can you ---- do you know whether or not the son took the gun away from the
24 father?

25 A. No, I do not.

26 Q. Okay. Is there anything that you saw in their struggle that suggested the son could have
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28 ⁵ The pertinent excerpts of Deputy Horton's preliminary hearing testimony are attached to plaintiff's evidentiary submission as Exhibit "4".

1 taken the gun away from the father?

2 A. No.

3 If Horton heard the statements made by plaintiff to the effect that he had possession of the weapon,
4 why didn't Herbst who was closer to plaintiff than Horton. Her denial that she heard plaintiff's exclamation
5 that he had control of the gun and not to shoot simply is not credible. And firing her weapon after plaintiff
6 yelled that he had gained control of the weapon violated plaintiff's 4th and 4th Amendment rights.

7 4. The movement of plaintiff's body after Herbst fired her weapon:

8 Deputy Herbst claims that she had Chad in her "sight picture" at all times including the moment
9 she fired her weapon. She insists that she aimed at Chad using the 3 sights on her 9mm Sigsower semi-
10 automatic service revolver and intended to shoot Chad. Incredibly, she claims that at the exact moment
11 she fired her service revolver at Chad, plaintiff moved to his left into the path of the speeding bullet. She
12 offers this explanation as to why plaintiff was shot rather than Chad.

13 Deputy Herbst was approximately 10 feet from Chad and plaintiff when she fired her weapon. She
14 claims she could clearly see Chad who was facing towards her. The right side of Chad's chest from the
15 midline of his chest to his right arm were visible to her. Plaintiff had his back towards her with his left arm
16 aligned with the center of Chad's chest. She fired her weapon at Chad's chest and in the time it took the
17 bullet to travel 10 feet, Chad moved plaintiff at least 6" to plaintiff's left to block the shot.

18 A bullet from a gun such as that fired by Deputy Herbst travels approximately 1,000 feet per second.⁶
19 Therefore, in the span of 1/100 of a second, plaintiff was moved at least 6". To put this time frame in
20 perspective, it takes an average person 3/4's of a second to apply his/her brakes in a car when recognizing
21 danger ahead. Accordingly, it would be physically impossible for plaintiff to have moved in the manner
22 described by Deputy Herbst in the span of 1/100 of a second.

23 Once again, the physical evidence does not support Deputy Herbst's version of events. A jury could
24 reasonably conclude that she intended to shoot plaintiff.

25 5. Herbst violated the Ventura County Sheriff's Department Use of Force policy:

26 The Use of Force Policy of the Ventura County Sheriff's Department states in pertinent part as
27 follows:

28 _____

⁶ According to several ballistic's experts consulted by plaintiff's counsel.

1 “Regardless of the nature of the crime or the justification for firing at a suspect, officers must
2 remember that their basic responsibility is to protect the public. **Officers shall not fire**
3 **under conditions that would subject bystanders or hostages to death or possible**
4 **injury**, except to preserve life or prevent serious bodily injury.” (emphasis added)

5 At least four Deputy Sheriffs were present at the time plaintiff was shot in the back. Only one —
6 Deputy Herbst — fired her weapon. The remaining three Deputies, with much more experience than
7 Herbst, did not perceive a threat and showed restraint in holding their fire. By all accounts, plaintiff and
8 his son were in close proximity to each other underneath the western staircase. The area underneath the
9 staircase was dimly lit. Deputy Herbst estimated the distance between plaintiff and Chad at 6" or less. A
10 clear shot was not available to anyone without risking harm to plaintiff who was never considered to be a
11 suspect. Deputy Horton was in the best position to fire his weapon at Chad. He had the best line of sight.
12 Yet, he did not fire his weapon.

13 Deputy Herbst fired her weapon in clear violation of the Ventura County Sheriff's Department Use
14 of Force Policy because she **subjected plaintiff to death or possible injury**. No threat to her existed
15 because plaintiff had gained control of the weapon prior to her shooting. Serious injury was caused to
16 plaintiff as a result of Herbst's reckless and unjustified behavior

17 STATEMENT OF LAW

18 Anthony Morales' seeks vindication of important constitutional rights. The Civil Rights Act under
19 42 U.S.C. § 1983 was aimed at redressing “[m]isuse of power, possessed by virtue of state law and made
20 possible only because the wrongdoers are clothed with the authority of state law.”⁷ Claims brought under
21 Section 1983 are uniquely important “for enforcement is placed in the hands of the people.”⁸

22 Under Section 1983, individual liability lies where (1) the conduct complained of was committed
23 by a person acting under color of state law and (2) the conduct deprived a person of rights, privileges, or
24 immunities secured by the Constitution of the United States.⁹

25 Here, there is no dispute that Officer Herbst's conduct was under color of state law. The primary

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27 ⁷ United States v. Classic (1941) 313 U.S. 299, 326, 61 S. Ct. 1031, 1043

28 ⁸ Wood v. Breier (E.D. Wisc. 1972) 54 F.R.D. 7, 10

⁹ Smith v. City of Fontana (9th Cir. 1987) 818 F.2d 1411, 1415 n.5

1 issue for jury determination is whether the shooting of plaintiff after he had subdued his son was
2 unreasonable and excessive. Assaults and batteries by persons acting under color of law are actionable in
3 Section 1983 suits. The constitutional right involved is the right “to be secure in one's person.”¹⁰

4 An unwarranted shooting of an innocent citizen by a police officer gives rise to Section 1983
5 liability.¹¹

6 The Fourteenth Amendment substantive due process analysis is applicable in cases where a free
7 citizen is denied his constitutional right to liberty through means other than a law enforcement official's
8 arrest, stop or seizure.¹² In Black v. Stephens¹³ the court affirmed liability under Section 1983 in
9 language applicable here:

10 “[Defendant] Stephens argues that the jury could not have found that he violated any
11 constitutional rights of the Blacks. We disagree. A law enforcement officer's infliction of
12 personal injury on a person by the application of undue force may deprive the victim of a
13 fourteenth amendment “liberty” without due process of law. (Citation.) As this court stated
14 in Rhodes v. Robinson (3rd Cir 1979) 612 F.2d 766, 772, ‘The protection of fundamental
15 liberties by the due process clause and the Eighth Amendment extends to protection from
16 an official’s abusive exercise of his powers to inflict grossly undue harm.’ Not all common
17 law torts committed by police officers, however, rise to the level of a constitutional harm
18 actionable under section 1983. (Citations.) The test under the due process clause is whether
19 the police officer’s conduct ‘shocks the conscience.’ (Citations.)”

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22 ¹⁰ Meredith v. Arizona (9th Cir. 1975) 523 F.2d 481; Gregory v. Thompson (9th Cir. 1974) 500 F.2d 59; Allison
23 v. Wilson (9th Cir. 1970) 434 F.2d 646; Reed v. Philadelphia Housing Authority (ED Pa. 1974) 372 F. Supp. 686 [“It is beyond
24 question that a private citizen who is assaulted by a police officer can state a claim for relief under 42 U.S.C. § 1983.”].

25 ¹¹ Gutierrez-Rodriguez v. Cartagena (1st Cir. Puerto Rico 1989) 882 F.2d 553

26 ¹² Pleasant v. Zamieski (9th Cir. 1990) 895 F.2d 272; cf. Helsley v. County of Kern (1974) 42 Cal. App.3d 97, 104,
27 116 Cal. Rptr. 518 [“In our view, it was gross negligence for respondent to aim and fire his gun, deliberately, at the man lying
28 on the ground without being reasonably certain that the man he was shooting at was not the undercover agent.”]

¹³ 662 F.2d 181,188 (3rd Cir. 1981)

1 The shooting in this case is actionable because discharging her revolver after plaintiff had already
2 subdued and disarmed his son was the use of excessive force with shockingly deliberate indifference or
3 reckless disregard. Officer Herbst, consistent with her training and department practices, acted with gross
4 negligence and deliberate indifference to plaintiff's rights by shooting after he had subdued and disarmed
5 his son, after he had informed the police that the situation was under control, and after the risk of danger
6 had passed. These facts "shock the conscience." The police have no constitutional right to shoot innocent
7 citizens after a suspect has been subdued and disarmed — after all danger and threats have ceased.

8 Liability against the County under Section 1983 may not be imposed "solely" on the basis of
9 respondeat superior.¹⁴ Liability may be imposed, however, if plaintiff's constitutional rights were violated,
10 in substantial part, because of one or more "customs or policies" of the County.

11 Liability based upon custom or policy has been proven in a variety of ways, including:

- 12 (1) a practice of covering up misconduct;¹⁵
- 13 (2) a single, flagrant incident evidencing a policy or custom of a police department;¹⁶
- 14 (3) failure to adequately train employees with respect to a particular subject matter;¹⁷
- 15 (4) failure to adequately discipline officer misconduct or to take remedial action or deliberate
16 indifference to constitutional violations;¹⁸

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18 ¹⁴ Irwin v. City of Hemet (1994) 22 Cal. App.4th 507, 525-526, 27 Cal. Rptr. 2d 433, citing Monell v. New York
19 (1978) 436 U.S. 658, 98 S. Ct. 2018, 2030

20 ¹⁵ Kirkpatrick v. City of Los Angeles (9th Cir. 1986) 803 F.2d 485, 492; Webster v. City of Houston (1984) 735 F.2d
21 838; Anela v. City of Wildwood (3rd Cir. 1986) 790 F.2d 1063

22 ¹⁶ Aaitui v. Grande Properties (1994) 29 Cal. App.4th 1369, 1379-1380, 35 Cal. Rptr. 2d 123, citing Pembaur v.
23 Cincinnati (1986) 475 U.S. 469, 106 S. Ct. 1292

24 ¹⁷ Aaitui v. Grande Properties, supra, 29 Cal. App.4th at p.1380, 35 Cal. Rptr. 2d 123, citing City of Canton v. Harris
25 (1989) 489 U.S. 378, 109 S. Ct. 1197; Chew v. Gates (9th Cir. 1994) 27 F.3d 1432, 1445

26 ¹⁸ Heffington v. County of Stanislaus, supra, 143 Cal. App.3d at p. 843, 192 Cal. Rptr. 202, citing Turpin v. Maillet
27 (2d Cir. 1980) 619 F.2d 196, cert. den. 449 U.S. 1016 [city's failure to discipline sufficient to entitle plaintiff to a trial on the
28 merits: "We reject at the outset appellant's suggestion that an 'official policy' within the meaning of Monell cannot be inferred
from informal acts or omissions of supervisorial municipal officials."]; Chew v. Gates (9th Cir. 1994) 27 F.3d 1432, 1445

- 1 (5) through ratification or inaction by police supervisors or municipal decision makers;¹⁹
2 and
3 (6) failure to adequately supervise subordinates.²⁰

4 SUMMARY OF INJURIES

5 Plaintiff was taken from scene of the shooting and transported by ambulance to Santa Paula
6 Memorial Hospital where he was treated in the emergency room by Logan Bundy, M.D.²¹ Dr. Bundy
7 diagnosed plaintiff as having a gunshot wound to the left posterior chest, approximately 0.5 cm to 0.75 cm
8 in size, with an exit wound to the right axilla. At that time, plaintiff complained of shortness of breath, as
9 well as a burning sensation in the right upper quadrant epigastric region. Further examination of plaintiff
10 revealed decreased breath sounds in the right chest area. Chest x-rays revealed pneumothorax on the
11 right.

12 Dr. Bundy consulted Scott Davis, M.D., the general surgeon on call, regarding plaintiff's condition.
13 Dr. Davis inserted a No. 32 chest tube in the mid axillary line at the level of the 5 - 6th rib space. Plaintiff
14 was admitted into the intensive care unit ("ICU") where he remained until May 26, 2000.

15 Plaintiff's primary care was taken over by Gosta Iwasiuk, M.D. while in ICU. Dr. Iwasiuk ordered
16 serial x-rays and blood work which revealed subcutaneous emphysema on both sides of the chest. Dr.
17 Iwasiuk recommended that plaintiff remain in ICU until the chest tube drainage was sufficiently decreased
18 so that it could be removed.

19 The chest tube was removed On May 26, 2000, with no evidence of re-accumulation of

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21 ¹⁹ Chew v. Gates (9th Cir. 1994) 27 F.3d 1432, 1445 ["[I]f the city in fact permitted departmental policy regarding
22 the use of canine force to be designed and implemented at lower levels of the department, a jury could, and should, nevertheless
23 find that the policy constituted an established municipal "custom or usage" regarding the use of police dogs for which the city
24 is responsible."]

25 ²⁰ Wanger v. Bonner (5th Cir. 1980) 621 F.2d 675 [The court properly instructed the jury that the sheriff could be
26 held liable for his deputies' actions if the jury found "he failed to adequately supervise or train his deputies, thus causing a
27 violation of plaintiffs' civil rights," or "if he knew, or should have known the acts were taking place and acquiesced in them."]

28 ²¹ The medical reports, records and bills of Santa Paula Memorial Hospital are attached to plaintiff's evidentiary
submission as Exhibit "6".

1 hemopneumothorax. Plaintiff was discharged from Santa Paula Memorial Hospital and urged to seek
2 follow-up treatment with Dr. Iwasiuk as an out-patient. Plaintiff was also instructed to return to the
3 Hospital in a week.

4 Upon further follow-up with Dr. Iwasiuk, plaintiff complained of severe spasms of pain in his neck
5 and back, constant headaches, sharp burning pain at the bullet entry and exit sites, numbness in the right
6 chest area, as well as pain and tenderness in and around the right armpit area. Plaintiff also experienced
7 intermittent sharp pains radiating right to left along the back, as well as severe anxiety, depression and
8 psychological problems. Dr. Iwasiuk recommended that plaintiff seek psychological counseling with Dr.
9 Beamer and/or Dr. Amorteguy to try to work through some of his emotional problems. Plaintiff had never
10 received psychological or psychiatric treatment prior to this incident.

11 Due to the severity of physical complaints plaintiff continued to experience, he began treating with
12 Ramon Gomez, M.D.²² Over the course of his treatment with Dr. Gomez (which continues to the present),
13 Plaintiff was diagnosed with chronic thoracic costalgia (T-2 - T-8); residual thoracic muscle spasm;
14 hypertension; severe depression and situational anxiety; hyperlipidemia; primary hyperparathyroidism;
15 tobacco dependence; homelessness, and elevated blood pressure. Dr. Gomez treated plaintiff with various
16 medications and dietary changes until June 17, 2001, with no success in stabilizing or improving plaintiff's
17 medical conditions. It is Dr. Gomez' opinion that Plaintiff's medical conditions are permanent.

18 On April 11, 2001, Plaintiff consulted with psychologist Patrick C. Barker, Ph.D.²³ Plaintiff
19 underwent PAI and SCL-90-R tests on April 18, 2001. Dr. Barker noted elevated scores on multiple clinical
20 levels, including depression, fearfulness, alienation, stress, negative relations, traumatic stress, somatization,
21 and hyper-vigilance. Plaintiff tried to work through his emotional problems with Dr. Barker during a series
22 of counseling sessions. Plaintiff conveyed to Dr. Barker his anger at the officer that shot him. He felt that
23 the officer had taken everything away from him, including his future. Plaintiff's feelings of hopelessness
24 improved somewhat during the time he treated with Dr. Barker. However, he also experienced severe
25 setbacks due to his inability to work which increased his feelings of worthless. During this time, plaintiff
26 became homeless which caused him to suffer further setbacks as well. He began to isolate himself which

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28 ²² Dr. Gomez' medical reports, records and bills are attached to plaintiff's evidentiary submission as Exhibit "7".

²³ Dr. Barker's medical reports, records and bills are attached to plaintiff's evidentiary submission as Exhibit "8".

1 would bring on deeper depression. Plaintiff's was only able to treat with Dr. Barker until September 10,
2 2001 when he stopped the treatment due to financial considerations. Dr. Barker felt that plaintiff was in
3 need of further psychological counseling and recommended that such treatment be provided to him in the
4 future.

5 On April 26, 2001, Plaintiff consulted with Roger V. Bertoldi, M.D., a Board Certified Neurologist
6 specializing in clinical neuro-physiology.²⁴ Dr. Bertoldi conducted a comprehensive neurological
7 examination of plaintiff which revealed decreased pin-prick and light touch along the thoracic spine in the
8 T-2 through T-7 dermatomes anteriorly and T-10 dermatome posteriorly. On June 14, 2001,
9 electromyogram and nerve conduction studies were performed on plaintiff's upper and lower extremities.
10 The tests were considered within normal limits which were not unexpected findings. Dr. Bertoldi
11 recommended that plaintiff switch his medication from Neurontin to Zonogram. However, Plaintiff was
12 unable to obtain the Zonogram for financial reasons, so Dr. Bertoldi increased the Neurontin to 600mg
13 three times a day. This did not seem to help with plaintiff's continued severe pain. It is significant to note
14 that Dr. Bertoldi believes that no further nerve regeneration of the damaged thoracic nerves can be expected
15 and that the nerve damage is permanent. The numbness, tingling and spasms are permanent and may even
16 get worse in the future if not treated aggressively with medication. Unfortunately, plaintiff cannot afford
17 the medication that is necessary to treat his condition due to lack of money and lack of medical insurance.

18 At the present time, plaintiff is completely disabled. He is in constant pain, from the left side of his
19 back extending across his back to an area just below the right arm pit. He has numbness in the right chest
20 area. He continues to experience severe muscle spasms in the aforementioned areas. Plaintiff is frustrated
21 by the fact that his symptoms have not improved and, at present, he has little or no ability to properly treat
22 his condition. His feelings of hopelessness and worthlessness continue unabated due to his inability to work
23 and earn a living. He is unable to support himself and cannot afford a place to live. He mostly lives on the
24 largess of friends and family who occasionally give him small amounts of money and let him stay with them
25 for brief periods of time. He is currently homeless living in his car. This incident has had a devastating
26 effect on plaintiff's life. His prospects for the future are dismal.

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²⁴ Dr. Bertoldi's medical reports, records and bills are attached to plaintiff's evidentiary submission as Exhibit "9".

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ITEMIZED LIST OF SPECIAL DAMAGES

(a)	American Medical Response	\$ 982.50
(b)	Santa Paula Memorial Hospital	\$ 12,232.75
(c)	Computerized Management Services (Radiology)	\$ 389.28
(d)	Dr. Scott Davis, M.D. (Consultation)	\$ 145.00
(e)	Dr. Gosta Iwasiuk	No charge
(f)	Santa Paula Memorial Hospital (Out-Patient)	\$ 124.00
(g)	Dr. Ramon Gomez, M.D.	\$ 4,460.50
(h)	Ventura County Medical Center	\$ 271.00
(i)	Isaac Regev, M.D.	\$ 2,025.00
(j)	Northridge Diagnostic Center	\$ 1,330.00
(k)	Patrick C. Barker, Ph.D.	\$ 1,435.00
(l)	Roger Bertoldi, M.D.	<u>\$ 2,920.00</u>
	TOTAL MEDICAL SPECIALS TO DATE	\$ 26,855.03

LOSS OF EARNINGS/EARNING CAPACITY

At the time of this incident, plaintiff had just made arrangements to purchase a 18-wheel tractor/trailer in pursuit of his own long-haul trucking business which he began in 1999. Because he was just starting his own business, he earned only \$16,039.00 in income in 1999. However, prior to 1999, plaintiff had worked as a private investigator. In 1998, plaintiff earned \$69,737.00 from his private investigations business. In 1997, plaintiff earned \$76,409.00.²⁵

Plaintiff has not been able to work since this incident. Dr. Bertoldi has opined that plaintiff should be excluded from employment as a long-haul trucker because long periods of time spent in a sitting position will further exacerbate the pain and spasms in plaintiff's thoracic spine.

To date, plaintiff has lost approximately 2 years worth of work. Taking his last three years of income, plaintiff has averaged \$54,062.00 per year in income. Plaintiff claims loss of earnings to date in the amount \$108,123.00 and \$648,744.00 for twelve (12) additional years in loss of future earning

²⁵ Tax returns for 1999, 1998 and 1997 are attached to plaintiff's evidentiary submission as Exhibit "5" .

1 capacity.

2 STATUS OF SETTLEMENT NEGOTIATIONS

3 Plaintiff's current demand to settle this case is \$1,250,000.00. This demand is fair and reasonable
4 in light of the severity of Mr. Morales' permanent injuries and inability to work as long-haul trucker.
5 Defendants have made no offer as yet to settle plaintiff's claim.

6 DATED: June 10, 2006

7 Respectfully submitted,

8 WILLIAMSON & KRAUSS

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11 By: _____
12 PETER M. WILLIAMSON
13 Attorneys for Plaintiff
14 ANTHONY MORALES
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