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

11 JOSHUA KILZI,) CASE NO.: CV05-8233 DSF (RZx)
12 Plaintiff,)
13 vs.) PLAINTIFF'S MEMORANDUM
14 CITY OF WEST COVINA, POLICE) OF CONTENTIONS OF FACT
OFFICER DOUGLAS MURRAY and) AND LAW
15 DOES 1 through 10, inclusive,)
16 Defendants.) Pre-Trial Conf.: 10/30/06
Time: 3:00 P.M.
Courtroom: 750
Trial: 11/7/06
17

18 Plaintiff, JOSHUA KILZI, submits the following Memorandum of Contentions of
19 Fact and Law in compliance with Local Rule 16.3 of the Federal Rules of Court for the
20 Central District of California.

21 DATED: October 6, 2006

22 Respectfully submitted,
23 WILLIAMSON & KRAUSS

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26 BY: _____
27 PETER M. WILLIAMSON
Attorneys for Plaintiff
28 JOSHUA KILZI

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STATUTES:

United States Code	
42 U.S.C. § 1983	6, 8, 9
42 U.S.C. § 1988	10
California Constitution	
Article I, § 1	8
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Civil Code § 52.1	7
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1 I. FACTUAL CONTENTIONS

2 A. STATEMENT OF FACTS:

3 The plaintiff in this action is JOSHUA KILZI.

4 The defendants in this action are the CITY OF WEST COVINA and WEST
5 COVINA POLICE OFFICER DOUGLAS MURRAY.

6 On March 2, 2005, at approximately 10:30 p.m., defendant, West Covina Police
7 Officer DOUGLAS MURRAY, was on routine patrol in the City of West Covina when he
8 observed, what he believed to be, suspicious behavior inside a truck parked in front a
9 residence later identified as plaintiff's family home. When Officer Murray stopped to
10 investigate, a unidentified male subject exited the truck and began to run towards the front
11 door of the Kilzi home (the front yard consists of a steep upward slope). Officer Murray
12 followed in pursuit of the male subject based on his mere suspicion that a crime may have
13 been committed.

14 When the male subject (later identified as Joseph Kilzi - a juvenile and the brother of
15 the plaintiff) reached the front door of the home, he opened the door and quickly entered
16 the residence.

17 At the outset of this incident, plaintiff was inside the house lying on the living room
18 couch recovering from a bout of bronchitis. He had been home sick the entire day. While
19 dozing in and out, plaintiff heard an unknown voice shout "Stop!". Fearing that his brother
20 Joseph might be under attack outside the home (there was a long-standing history of
21 confrontations between the Kilzi brothers and other youth in the neighborhood), plaintiff
22 got up from the couch and went to the front door. As plaintiff reached the front door, the
23 door began to open and Joseph Kilzi quickly entered the house and rushed past plaintiff.
24 Believing that his brother was being chased by an unknown assailant and hearing no other
25 words spoken other than the initial "Stop!", plaintiff quickly closed the door to the house to
26 protect his brother.

27 After Joseph Kilzi entered the house, he stumbled and fell forward into a sunken living
28 room. Plaintiff turned away from the door and approached his brother in an attempt to

1 determine what was going on and the reasons why he had come running into the house.
2 Plaintiff was facing the interior of the house looking at his brother with his back to the front
3 door. Seconds later, the front door of the house suddenly swung open and Officer Murray
4 entered the house without announcing his presence. Hearing the sound of the door open,
5 plaintiff began to turn to his left towards the door. He turned approximately 90 degrees
6 towards the door when Officer Murray, suddenly and without warning or justification,
7 discharged his Taser Model M-26 into the plaintiff. The 50,000 volts of electricity from
8 the Taser caused plaintiff to immediately collapse to the ground. The Taser “darts” left two
9 distinct marks on plaintiff’s body — one on his left side approximately waist level and the
10 second on the left side of his mid-back. According to Officer Murray’s own sworn
11 testimony, at no time, during the entirety of this incident, did he identify himself as a police
12 officer to plaintiff or state his reasons for being present inside the Kilzi home.

13 After plaintiff was shot with the Taser by Officer Murray, he began to scream in agony
14 from the pain. However, he did not resist according to Officer Murray. These screams were
15 heard by his parents who immediately come down the adjoining stairs from their upstairs
16 bedroom. Mr. & Mrs. Kilzi observed Officer Murray continue to depress the trigger on the
17 Taser approximately 3 or 4 additional times in response to their son’s screaming, thereby
18 subjecting plaintiff to repeated electrical shocks of 50,000 volts.

19 Ultimately, plaintiff was arrested and charged with Resisting, Obstructing or Delaying
20 the Duties of a Police Officer in violation of California Penal Code § 148(a). The charges
21 filed against plaintiff were ultimately dismissed after a criminal trial resulted in a hung jury
22 (8-4 for acquittal).

23 As a result of being administered 50,000 volts of electricity by the Taser, plaintiff
24 suffered severe and excruciating pain. After he was taken into custody, he was transported
25 by police officers to Citrus Valley Hospital where he was evaluated for Taser burns. After
26 being released from custody, he sought further treatment from a personal physician for
27 ongoing pain to his left side and mid-back.

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

1 Plaintiff seeks damages for:

2 (1) deprivation of his constitutional right to be secure in his person against
3 unreasonable seizure;

4 (2) deprivation of his constitutional right not to be subjected to excessive
5 force;

6 (3) severe excruciating pain and suffering, and fear for his life;

7 (4) mental anguish and emotional distress;

8 (5) medical expenses to date; and

9 (6) costs and attorney's fees.

10 The liability of the defendant is predicated under the counts recited in the complaint,
11 as follows :

12 FIRST CAUSE OF ACTION: By plaintiff against defendants, CITY OF WEST
13 COVINA and POLICE OFFICER DOUGLAS MURRAY, for violation of 42 U.S.C. §
14 1983 for depriving the plaintiff, under color of law, of (1) his right to be secure in his person
15 against unreasonable seizure; (2) of his right not to be subjected to excessive force; and (3)
16 his right not to be deprived of life, liberty and property without due process of law.

17 Plaintiff further alleges that defendant CITY OF WEST COVINA, through its police
18 department, maintained, enforced, tolerated, permitted, acquiesced in, and applied policies,
19 practices, or customs and usages of, among other things;

20 a) Subjecting citizens to unreasonable uses of force against their persons;

21 b) Selecting, retaining, and assigning officers with demonstrable
22 propensities for excessive force, violence, and other misconduct;

23 c) Failing to adequately train, supervise, and control officers in the arts of
24 law enforcement, including, without limitation, the use of force and specifically the operation
25 and use of the Taser to effect detentions and arrests;

26 d) Failing to adequately discipline officers involved in misconduct; and

27 e) Condoning and encouraging officers in the belief that they can violate
28 the rights of persons such as the plaintiff in this action with impunity, and that such conduct

1 will not adversely affect their opportunities for promotion and other employment benefits.

2 SECOND CAUSE OF ACTION: By plaintiff against defendants, CITY OF WEST
3 COVINA and POLICE OFFICER DOUGLAS MURRAY, for violation of California
4 Civil Code § 52.1 for depriving the plaintiff, under color of law, of (1) his right to be
5 secure in his person against unreasonable seizure; (2) of his right not to be subjected to
6 excessive force; and (3) his right not to be deprived of life, liberty and property without due
7 process of law.

8 THIRD CAUSE OF ACTION: By plaintiff against defendant, POLICE OFFICER
9 DOUGLAS MURRAY, for his Assault and Battery on the plaintiff as a result of his use of
10 a Taser on plaintiff, causing plaintiff to suffer physical injuries.

11 FOURTH CAUSE OF ACTION: By plaintiff against defendants, CITY OF WEST
12 COVINA and POLICE OFFICER DOUGLAS MURRAY, for Negligence & Gross
13 Negligence in that defendants owed plaintiff a duty of due care, and that such duty was
14 breached by defendants' negligence and gross negligence, in failing to exercise due care in
15 dealing with the plaintiff on March 2, 2005.

16 B. PERSONAL INJURY INFORMATION:

17 1. Plaintiff, Joshua Kilzi, was 24-years old at the time of this incident on
18 March 2, 2005; he was born on March 17, 1980.

19 2. Plaintiff has suffered no significant out-of-pocket loss as a result of this
20 incident. Plaintiff did seek medical treatment from his own personal physician and paid
21 cash for this visit but declines to assert a claim for reimbursement of this minor medical bill.

22 3. a. Defendant deprived plaintiff, under color of law, (1) of his right
23 to be secure in his person against unreasonable seizure; (2) of his right not to be subjected
24 to excessive force; (3) his right not to be deprived of life, liberty and property without due
25 process of law and (5) his rights not to be deprived of equal protection of the laws.

26 b. Defendant deprived plaintiff of his rights under the California
27 Constitution, including, inter alia his inalienable rights of enjoying and defending life and
28 liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety,

1 happiness, and privacy (Art. I, § 1); his right not to be deprived of life, liberty, or property
2 without due process of law (Art. I, §7); his right to be secure in his person from
3 unreasonable seizures (Art. I, § 13); and his right to be free from infliction of cruel or
4 unusual punishment (Art. I, § 17).

5 C. COMPARATIVE FAULT:

6 Comparative fault is not an applicable standard under plaintiff's federal claims.

7 II. ISSUES OF LAW

8 A. LIABILITY:

9 Defendants' liability is founded, primarily, under 42 U.S.C. § 1983, which provides,
10 in relevant part:

11 "Every person who, under color of any statute, ordinance,
12 regulation, custom or usage, of any State... subjects, or causes to
13 be subjected, any citizen of the United States or other person
14 within the jurisdiction thereof to the deprivation of any rights,
15 privilege, or immunities secured by the Constitution and laws,
16 shall be liable to the party injured in an action at law, suit in
17 equity, or other proper proceeding for redress."

18 Defendant's use of excessive force on decedent is actionable under § 1983. (Monroe
19 v. Pape (1961) 365 U.S. 167)

20 One of the most important purposes of 42 U.S.C. § 1983 is to deter future abuses
21 of power by persons acting under color of law. (City of Newport v. Fact Concerts (1981)
22 453 U.S. 247, 101 S. Ct. 2748, 691 L. Ed. 2d 616)

23 Negligent deprivations are actionable under § 1983. (Parratt v. Taylor, (1981) 451
24 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420; Hirst v. Gertzen (9th Cir., 1982) 676
25 F.2d 1252)

26 Under Section 1983, individual liability lies where (1) the conduct complained of was
27 committed by a person acting under color of state law and (2) the conduct deprived a person
28

1 of rights, privileges, or immunities secured by the Constitution of the United States.¹

2 Here, there is no dispute that Officer Murray's conduct was under color of state law.
3 The primary issue for jury determination is whether the use of force against plaintiff who had
4 committed no crime, posed no threat to Officer Murray or anyone else for that matter, was
5 unreasonable and excessive. Assaults and batteries by persons acting under color of law are
6 actionable in Section 1983 suits. The constitutional right involved is the right "to be secure
7 in one's person."²

8 III. EVIDENTIARY PROBLEMS

9 Plaintiff perceives the following evidentiary problems which will be addressed by
10 Motions in Limine to be filed concurrently herewith under separate cover:

- 11 1. Motion in Limine to exclude evidence of hung jury result in plaintiff's
12 underlying criminal trial;
- 13 2. Motion in Limine to exclude evidence of prior arrest of plaintiff;
- 14 3. Motion in Limine to exclude adjudication of Joseph Kilzi arising from
15 this incident;
- 16 4. Motion in Limine to exclude statement of Joshua Kilzi referencing his
17 intention to hire a lawyer in the underlying criminal matter;
- 18 5. Motion in Limine to exclude cumulative testimony of police officers
19 involved in this incident;
- 20 6. Motion in Limine to exclude expert testimony of Andrew Hinz of Taser
21 International, Inc., and
- 22 7. Plaintiff filed a motion in limine to exclude portions of defense expert
23 Ron McCarthy's testimony.

25 ¹ Smith v. City of Fontana (9th Cir. 1987) 818 F.2d 1411, 1415 n.5

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

1 IV. JURY TRIAL

2 Timely demand for jury trial has been made by both the plaintiff and the defendant.

3 V. ATTORNEYS' FEES

4 Plaintiffs agree that the court reserve jurisdiction for the purpose of determining after
5 trial the amount of attorneys' fees to be granted to the prevailing party pursuant to 42 U.S.C.
6 § 1988.

7 DATED: October 6, 2006

8 Respectfully submitted,
9 WILLIAMSON & KRAUSS

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12 By _____
13 PETER M. WILLIAMSON
14 Attorneys for Plaintiff
15 JOSHUA KILZI
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