UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

J. PEARL BUSSEY-MORICE, as
Personal Representative of the
Estate of PRESTON D. BUSSEY III

Plaintiff,

CASE NO.: 6:11-CV-970-ORL-35-GJK
Judge Honeywell
Magistrate Kelly

v.

PATRICK KENNEDY; et. al.,

Defendants.

PLAINTIFF'S SECOND AMENDED MOTION FOR SUMMARY JUDGMENT & MEMORANDUM OF LAW AGAINST ALL DEFENDANTS

Plaintiff, through counsel, files her Second Amended Motion for Summary Judgment against all Defendants seeking a ruling at law that they individually, & in concert violated the 4th Amendment and federal rights of Preston D. Bussey, III as per 42 U.S.C. § 1983. The Plaintiff's Amended Statement of Undisputed Material Facts, hereinafter "ASUMF", is filed in support of this Motion

FACTS

In the early morning hours of the night of December 19, 2009, Preston D. Bussey, III walked into the emergency room of Wuestoff Hospital in Rockledge, Florida on his own power (ASUMF, Section III, #14-Hewatt's deposition). The basis of his medical complaint was his belief that he had a worm crawling around underneath the skin of his arm. In his presentation to the hospital's triage nurse Donna Payna, he had a wound to both his finger and elbow. He wanted their help getting the worm out of his skin, and though he was hallucinating and was suffering from delusions, the cause of these delusions was not be determined at that point in time as to whether it was mental illness

caused by head injury, or medication/drugs. He wanted Nurse Payna's help, but would not let her touch him or his arm to examine the area of his complaint (ASUF, Section VIII, #42-Kennedy's deposition). The same thing occurred when the hospital's only emergency room doctor, Dr. Edward Mallory, saw him. He desired help, but would not let Dr. Mallory touch his arm. Dr. Mallory decided to Baker Act him as these delusions and hallucinations made him a risk to himself and possibly others. After the Baker Act medical order was given, it was not possible to convince Preston Bussey to follow the hospital's nurses or security guards to the Baker Act ward. Instead, he started wandering around the hospital's lobby area and parking lot, all the while with his shirt off. The hospital called the Rockledge Police Department and requested their assistance in getting their wandering shirtless-Baker Act patient who they described as a thin black man, from their parking lot. The police dispatcher advised them to use caution (ASUMF, Section IX, #49, specifically pg.71 Deposition of Kennedy).

The named Defendants, all Rockledge, Florida police officers heard their own dispatcher regarding this Baker Acted patient wandering around in the parking lot, and they proceeded towards the hospital. Defendant Matthew Leverich was the first officer on the scene, and as he was arrived, he met the hospital's awaiting security guards. Defendant Ivette Gomez arrived just seconds behind Defendant Leverich and in as she was stopping her police cruiser, she sent out a radio communication that the Baker Act patient "**is attacking**" the security guards (ASUMF, Section XVIII, #103, numerous defendants provide testimony to this effect). This statement on the part of Defendant Ivette Gomez was 100% false. Aside from the idea that Defendant Gomez must be a compulsive liar who was looking to create her own opportunity to taser some unfortunate

mentally disturbed Black man, her lie is baffling. Defendant Gomez testified that either hospital security guard William Davis or Frank Valpetti told her upon exiting her vehicle that Mr. Bussey had been attacking them prior to the arrival of the police department. After taking the depositions of all of the named police officer defendants, her statement to this effect has never been corroborated by any of her fellow officers in the 2 years since Mr. Bussey's death. To shut down the likelihood that testimony will magically appear within the context of heated litigation, this Court will note that both security guards made it clear that at no time prior to the arrival of the Rockledge Police Department did Preston Bussey ever attack, hit, or harm them(**Plaintiff's Exhibit 1**, Florida Department of Law Enforcement Statements of William Davis and Frank Valpetti, December 19, 2009) In fact, if this matter is about points assigned to reasonable objectivity, the security guards made it clear that the "worms" that Mr. Bussey believed were in his blood, was something that he was expressly warning the security guards about and told them to stay away from touching him because he did not want them to acquire his problem, i.e., Preston's kindness.

Defendant Gomez could never have seen Mr. Bussey actively fighting with the hospital's security guards who were waiting and met Defendant Leverich, Defendant Herberner, and herself outside the hospital's ER entrance, because Mr. Bussey was inside the hospital. The surveillance video as filed in this matter shows Preston meeting the officers at the ER entrance/exit, and immediately backing up as they walked towards him. They are walking into the hospital, and he met them on his way towards the door seemingly to walk past or exit it. Defendant Leverich, who arrived first and in his own car, and Defendant Herberner who was with Defendant Gomez as her "trainee rookie",

would have known that Defendant Gomez's radio dispatch was a lie. Defendants Leverich and Herberner had a duty to tell the other officers who later arrived (Defendants Owens, Kennedy, Hewatt, and Williams) that Defendant Gomez lied about this violence on the part of Preston Bussey. Instead, they kept this secret to themselves. Is it any wonder why so many people do not trust or like police officers? Case law says that officers are not allowed to escalate a situation to give themselves a basis for next using abusive and excessive force. That is what Gomez, Herberner, and Leverich did by keeping Gomez' secret to themselves. To the other officers arriving later, they interpreted her radio communication as suddenly being a very dangerous and serious matter (ASUMF, Section XVIII, #109, **Plaintiff's Exhibit 4(a**)). The hospital's surveillance video shows Defendant Gomez entering the hospital with her taser drawn and pointed in anticipation of tasering Preston 4 times for the violent crime she had just created for him that would soon result in his sad & violent death.

The dvd shows that Defendant Hewatt walked into the hospital using the same door, saw Defendants Leverich and Gomez with their tasers out, aimed at Mr. Bussey, and they were yelling at him. Defendant Hewatt took over the command of the matter as the ranking Sergeant in charge (ASUMF, Section XII, specifically, #64, depo pgs 56-57 of Leverich & Depo of Gomez pgs. 23-24). Defendant Hewatt ordered him to get down on his knees and put his hands behind his back while the same two (2) tasers remained pointed at him. Preston did not hesitate, did not argue, did not use profanity, nor resist these police commands, but rather the hospital's surveillance video shows that he complied. Moreover, the other Defendants acknowledged that he complied with their orders (ASUMF, Section IX-several defendants corroborate this point). Preston asked

Defendant Hewatt if he could call his Mother while down on his knees. Defendant Hewatt denied this request (ASUMF, Section IX, #47).

Mr. Bussey was not thought by any of the named Defendants to have been committing, nor to have committed **any** crime (ASUMF, Section III). Mr. Bussey had no shirt on, and it was apparent and understood by all named Defendants that he was not armed (ASUMF, Section II). Other than the malicious, sadistic, and evil lie against him by Defendant Ivette Gomez to inspire the collective harm of her and her co-workers against him, the Defendants agree that he had not attacked, harmed, hit or hurt anyone, nor had he ever tried to hurt or attack anyone (AUMF, Section I). He had not destroyed or caused damage to any of the hospital's property. (ASUMF, Section IV).

The Defendants knew from their radio dispatcher routing them to assist in the handling of a Baker Act patient; their interrogatory answers; and their own personal observations of Mr. Bussey that his mental coherence and sanity was unsound, imbalanced, and significantly compromised (ASUMF, Section V). Due to the numerous named Defendants on the scene in the hospital's lobby; the hospital's (2) male security guards, and the complete absence of patients in the lobby, the area was secured. No threat, or danger existed to the public (ASUMF, Section VI). Because there were no patients in the lobby, because the hospital was not on fire, there was no life or death issue at hand, and because Mr. Bussey had been compliant to all of their directions, the situation did not have to be rushed or hurried. The Defendants could have calmly spoken to Preston and taken all the time they ever needed to coax him with word offerings and unthreatening actions (ASUMF, Section VII). The Defendants were in large force with weapons, with the area secured, opposed to an unarmed emotionally disturbed man who

had not been linked to anything foul other than his own mental incoherence. Yet the Defendants did not try to consult with the nurse or physician with this time at their disposal to get a better picture of Preston's mental/medical issue. They admit that they did not try to do so for no apparent reason (ASUMF, Section VIII).

Instead, the named Defendants decided to rush the situation. Defendant Herberner, the most **inexperienced** officer (less than 30 days on force as a full time officer, and still in phase 1 of his rookie training), was directed by Defendant Leverich (an officer not in charge of the scene, nor even second in command) to handcuff Preston. Preston was never told by any of the named Defendants that he was going to be handcuffed, arrested, or physically taken into their custody. Hewatt, Gomez, and Herberner failed to tell Preston that they were going to arrest him; take him into custody; or that they intended to handcuff or even grab him (ASUMF, Section IX, #48). They just continued to all yell a chorus of various commands at him while he was down on the floor, on his knees, obviously confused/scared with his hands behind his back. They knew nothing about him not wanting to be touched, because **they spent no time** trying to calm him down with conversation, social skills, or taking the time to talk to the medical staff at the hospital. When Defendant Herberner grabbed his arm in this unexpected threatening manner without any advanced information to Preston that he was going to be grabbed by Herberner, this touch on Preston's arm caused him to pop up from off his knees, to his feet, and he took 2-3 steps backing away from the out reached hands of Defendant Herberner and Officer Moore/Kelso. The video clearly shows that Preston did NOT turn to run, flee, or escape. In simply standing up, and pulling away from the grasp of Officer Herberner, same thing he did when the nurse and physician tried touching him,

the named Defendants became angry at him. They interpreted his action much differently than the nurse and physician. He stood up, did not flee or try to escape, but rather he looked right at them and begged them not to shoot him (ASUMF, Section IX, #51). Instead, Defendant Gomez and Defendant Hewatt took this as adequate and appropriate grounds to spend the next 33 seconds giving him 27 full seconds of painful body electrocution. Attached as **Exhibit 2** is the Florida Department of Law Enforcement Report showing that Defendant Gomez tasered him four (4) times and that Defendant Hewatt tasered him two (2) times. The time stamps on their numbers are not in sync, but the hospital surveillance video shows the near simultaneous release of their tasers. The "seconds" showing the time of the taser is the point when the actual taser round ended. It is therefore necessary to take the intial taser time of Defendant Gomez as well as Defendant Hewatt and place them at even in terms of then being able to count the duration and pauses. In doing so, this Court will see that Defendant Hewatt's initial taser to the chest was a full ten (10) second electrical shock in the one area expressly ruled out by both Taser International and by the Rockledge Police Department's own memo of October, 2009 (ASUMF, Sections X & XI). When Hewattt's 10 seconds to Preston's chest ended, Gomez's five seconds had already ended, but she started her second round into Mr. Bussey's back at the 7th second of Hewatt's first round, thereby linking her next 5 second round onto Hewatt's by 2 seconds (12 full seconds of electrocution for simply pulling back from the grasp of Defendant Herberner). The first round lasted 12 full seconds, followed by 4 seconds off, then 10 full seconds of electrical shock, followed by 4 seconds off, and then an immediate last blast from Gomez of an additional 5 seconds. 27 seconds of electrical shock in a 33 second window. This is what a compliant mentally

incoherent, un-armed, non-violent, non-criminal got while in the hospital on his own power seeking medical help for himself that he knew that he needed. 6 rounds of tasering in the span of 33 seconds, and no effort to EVER go **"hands on"** by the other named defendants enjoying the spectacle of this modern day Southern style lynching. Every document from the manufacturer of this taser weapon expressly cautions against the manner Defendants Gomez and Hewatt used their weapons against Preston. These are the same documents warnings and expressions that the Honorable District Court Judge Gregory Presnell and Circuit Court Judge Stanley Marcus reviewed and relied upon in the case of Oliver v. City of Orlando, 574 F. Supp. 2d 1279 (M.D. Fla. 2008, qualified immunity denied) Circuit Court affirmed Judge Presnell via Oliver v. Fiorino, 586 F. 3d. 898 (11th Cir. October 26, 2009); (ASUMF, Section XI). They were supposed to attempt to go hands-on during the first taser cycle. They did not. They would have all heard the sounds of 6 taser cycles, because the sound the taser weapon makes upon each cycle is loud, distinguishable, and apparent to all (**Exhibit 4(b), Deposition Excerpt of Defendant Donald Williams of 2/23/2012**). They knew to go hands-on during the first tasering, and they knew their employer's policy (the Rockledge Police Department): ONLY TASWER (2) times, and then move to something else. They dished out 6 taserings within the span of 33 seconds in violation and disregard of the Middle District's case law from Judges Presnell and Marcus; their employer's tasering policy (3 times over their policy limit); and the manufacturer's express written warnings about repeat, prolonged taserings and the need to go hands-on during the initial first cycle.

Knowing that they heard 6 cycles of tasering, knowing their own policy, and being equipped with their own tasers from their own individual trainings (except for 30

day new employee Herberner), the other Defendants did nothing to stop or intervene, or go HANDS-ON, but instead, watched as their two (2) over zealous supervisors tried to shock defenseless unarmed Preston to death. (ASUMF, Section XII, #70; & Section XV). Defendant Gomez (the most veteran officer in terms of actual years employed as a police officer) did not recognize the dangers of tasering an individual with excited delirium, because she described the training she received from the Rockledge Police Department to have occurred in approximately 2006, and it was "touched upon briefly". She further testified that she should have been better trained from her employer to have recognized the harms/dangers of repeatedly tasering a suspect with excited delirium (ASUMF, Section XIII, # 77).

Without tasering Mr. Bussey, the idea of just asking this un-armed, non-violent patient to just walk 100 feet with them to the room where they wanted him never occurred to them (ASUMF Section XIII, #61, Section XVIII, #89).

Deposition of Matthew Leverich pg. 96, line 25 thru pg.97 line 5

Q. Did it occur to you to ask him, he had gotten down on his knees, did it occur to you to say, well, if he's down on his knees, maybe we can just ask the guy to walk with us to the Baker Act ward, did it occur to you?
R. No, Sir.

Deposition of Robert Owens, pg. 118, line 22, thru pg. 119, line 6

Q. So prior to Officer Hewatt, or whoever was in charge, directing Herberner to go up there to try to hand cuff him while he was on his knees, would you agree with me, you, nor anyone amongst you, said to the man, while he was down on his knees, you know, just follow me and the other guys to a hundred feet away or to a certain location, we're going to help you, we just want you to walk with us. Did anybody say, walk with us, we'll walk you there?
R. While I was present, no.

After the merciless tasering of a man trying not to threaten anyone, asking to call his Mother, who had just been walking through the corridors of the hospital talking to

Nurse Payna as shown on the surveillance dvd, the man who begged them not to shoot him managed to aggravate Sergeant Hewatt. Defendant Hewatt could not stand the idea of Preston squirming around on his stomach/chest in utter and extreme pain with his hands ALREADY cuffed behind his back after 2 nearly uninterrupted **chest** taserings administered by him of 15 seconds. This belly-dance squirming as described by Hewatt would not be tolerated even after 6 taserings, so he next turned his officers, the other named Defendants, loose on Preston. They put a pillow case over his head (their tasering training and warnings from Taser International speak to difficulty and impaired breathing after repeat, prolonged, and chest taserings to the chest) suffocating him, kneeing his skull down into the hospital floor, and applied their collective body weights to his back and shoulders while he was already prone, cuffed, and on his stomach/chest. Defendant Hewatt allowed Defendant Kennedy to inflict intentional pain on Mr. Bussey. (ASUMF, Section XV).

This sort of gross incompetence, especially in the context of these officers sharing the same counsel, Robert Bonner, Esquire, the City of Rockledge's lead attorney, the same counsel for the Orlando police officers in the Oliver v. Fiorino case, should make all of these factual and legal matters readily apparent and ready for mutual resolution of this case. Instead, what this Court should get out of the presence of the same defense counsel is their entrenched and committed willingness to boldly return back to the 11th Circuit on a qualified immunity appeal in this most familiar factual regard. In addition to using the same re-treaded argument that was made in that case. The argument being the suggestion that a taser probe "might" have come out or not have gone in to the body of the subject, i.e., Preston Bussey, so therefore the Court should consider discounting the

pain and electrocution he suffered, as they want there to be some doubt as to whether he truly did suffer all the pain they intended to inflict upon him. Though there is a person dead from such excessive unreasonable use of their force, they want the benefit of the doubt to go their way that he suffered less than the cycles actually show were sent out to him to receive. The identical/verbatim angle tried in the Oliver case, and it did not materialize in this case until the City of Rockledge was added, named, and brought in as a Defendant, which brought about the appearance of the same defense counsel as in Oliver.

Ivette Gomez claimed that she did not see the pillow case pulled down over Preston's head, and/or the knee of Defendant Kennedy down on top of Mr. Bussey's skull/head, but stated that if such a thing DID occur (which it did as per the deposition testimony of the other named defendants) and if she had witnessed it, she would have known that to be excessive and abusive police force, and that she would have intervened to stop it. Defendant Gomez's admission makes this point valid for her duty to intervene as well as the other defendant officers present (**Exhibit 4c**, Deposition of Gomez pgs. 53-55). Preston Bussey died contemporaneously of being placed on the hospital gurney after a very long protracted struggle that lasted at least 10 minutes. As to the causation of his death, there is no dispute or doubt that despite his consumption and use of cocaine at some unknown point prior to his arrival at the hospital, he entered the hospital alive, complaining of hallucinations. He remained alive until the Rockledge Police Department, by way of the named defendants, sent 6-8 officers to handle the job that 1-2 calm, rational, reasonable, and sensible officers could have handled if they had remembered that their jobs often require them to be public servants and not overpaid thugs and bouncers. The deposition of Dr. Mallory will be filed when it arrives, but this

Court will see that Dr. Mallory agreed that there was no thought on his part that Preston would spontaneously die when he was talking to him. He described Preston as "animated". When forced by defense counsel to say that he had no opinion on causation of Preston's death, he did. However when the undersigned asked him of his experience in excited delirium and as to Preston's cause of death, he said that it would not be possible to take a medical position that Preston's heart attack and death was not caused by 27 seconds of tasering within 33 seconds time; 20 seconds of electrocution delivered to his chest wall; a pillow case over his head; and being forced down to the ground while handcuffed in a prone position on his stomach/chest by the weight of men. Board certified heart surgeon, Carl Adams' causation opinion is attached, **Plaintiff's Exhibit 3**.

LAW

Summary Judgment is authorized when there is no genuine issue of material fact. Federal Rule of Civil Procedure 56 C. The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. The party opposing the Motion for Summary Judgment may not simply rest upon mere allegations or denials of the pleadings: The non-moving party must establish the essential elements of its case (or defense) on which it will bear the burden of proof at trial. The non-movant must present more than a scintilla of evidence in support of the non-movant's position. A jury must be able to reasonably find for the non-movant. Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed. 2d 265, 106 S.Ct. 2548 (1986); To obtain this Court's ruling under 42 U.S.C. § 1983, the Plaintiff must prove that the force used by each individually named defendant was objectively unreasonable under the circumstances. Case law in this area has come to adopt and set forth 4-5 uniform factors that must be considered in

determining whether the level of force used by the police was objectively reasonable. The factors to be set forth by reference to existing & prevailing case law, will prove that the defendants in this case, cannot make a reasonable argument that would avail them to any of these uniform factors or qualified immunity.

Factors to Measure to Determine Objectively Necessary Force

Whether the force used is reasonable turns on the facts and circumstances of each particular case, including (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and whether he is actively resisting arrest or attempting to evade arrest by flight. Davis v. Williams, 451 F. 3d. 759, 767 (11th Cir. 2006). In order to determine whether the amount of force used by a police officer was proper, a court asks **whether a reasonable officer** would believe that this level of force is necessary in the situation at hand. Lee v Ferraro, 284 F. 3d 1188, 1197 (11th Cir. 2005). The Court also considers the (3) need for the application of force; (4) "the relationship between the need and the amount of force used"; and (5)"the extent of the injury inflicted. Draper v. Reynolds, 369 F. 3d. 1270, 1277-78 (11th Cir. 2004). Because the "objective standard" is the standard applicable to all circuits as per Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed. 2d 396 (1982); and Graham v. Connor, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L.Ed. 2d 443 (1989), cases prescribing these factors exist near and around the Eleventh Circuit. Therefore, case selection from the various circuits with similar facts, is perhaps the most useful tool for helping in this Court's consideration of the facts and the law. The issues in our case at bar are the following: police brutality against the back drop of an excessive number of police officers who confront and kill 1 unarmed man; who never had a weapon; never

committed any crime; no probable cause existed to escalate the situation as fraudulently done by Defendant Gomez; had been compliant to their orders; did not flee; the officers knowledge that he was emotionally and mentally of unsound mind; he was no threat to the public when the officers had him surrounded before the initial tasering; and they never told him that they were going to handcuff him/arrest him. These facts are established through the deposition of the named defendants, the hospital surveillance video, the Florida Department of Law Enforcement interviews, & the exhibits.

No Qualified Immunity

Oliver v City of Orlando, 574 F. Supp. 2d 1279 (M.D. Fla. 2008), On May 13, 2004, at approximately 3:17 p.m., Orlando Police officer Lori Fiorino noticed a man standing in the median on West Colonial Drive near Tampa Avenue waving his arms. When she pulled her cruiser up to him, he approached her vehicle before she could exit it, and began knocking on the windows and attempting to open the doors. With the use of her loud speaker, she told him to back away from her car, which he did. He then told her that people were shooting at him. He then began to walk quickly towards her to which she raised her taser and told him to step away from her, which he did. She described him as "very fidgety". Fiorino then called dispatch and requested back up. She received in the form of Orlando police officer David Burk. They both agreed that he appeared to be mentally unstable, and were considering taking him into custody to Baker Act him. Burk asked Oliver for his identification and name, to which Oliver complied with his request by giving Burk his identification. When the light turned red, Burk put his arm on Oliver's shoulder to guide him across the street, but in walking across the street Oliver stopped in the middle of the street and began to babble incoherently. As traffic began to

move towards them, Burk grabbed Oliver's shirt to try to get him out of the road, but Oliver resisted by pulling away, flailing his arms, and trying to push Burk off of him. For these actions that did not involve any crime, any weapon, any threats, profanity, violence, or attack against the officers, Fiorino tased Oliver. Fiorino's basis for tasering him more times than she knew (her weapon download showed it to be 8 times within the span of two minutes) was because he would not stay still on the ground after being repeatedly tasered. At no time did they attempt to go "hands-on" during any of these taser applications/deployment, though they can and are able to do so during the taser application. Other than pulling away from Burk's grasp, Oliver had not tried to escape. No other conventional means of physical restraint were attempted. "Under these circumstances, any reasonable officer would have known that the amount of force used against Oliver was excessive and, therefore, unconstitutional. The 11th Circuit affirmed Judge Presnell's denial of qualified immunity to these officers, Oliver v. Fiorino, 586 F. 3d 898 (11th Cir. 2009). Judge Marcus agreed that 8 shocks in a two minute span, of an unarmed man mentally unstable man whose only action was to pull away from the grasp of Defendant Burk was excessive and unconstitutional **(Preston's Bussey's only action leading to 6 taserings was to pull away from the grasp of Defendant Herberner)**. The Court acknowledged that taser shocks are intended to cause extreme pain, and do achieve this intended effect on the recipient of the shocks, at 903. The Court recognized that Oliver posed no immediate threat to the officers, and if there was any threat that Oliver posed, it was only to himself. The Court agreed that existing law has established that such quick fire succession taserings in this regard is prohibited.

Question: "Do you think that a 12 second cycle, followed by 4 seconds off, followed by another 10 on, followed by only 4 seconds off, followed by another

5 seconds on, do you consider that to be a lot of electrocution? 27 seconds of electrocution within a 35 second window. Does that seem like a lot of tasering electrocution?"
Answer: No. (her full answer with nothing beyond this one word)
Question: No?
Answer: No. **Deposition of Ivette Gomez, February 23, 2012, pg. 39 lines 6-19**

Powell v Haddock, 366 Fed. Appx. 29 (11th Cir. 2010), on May 20, 2006, Powell was involved in a family altercation on the side of a highway in Jackson County, Florida. Deputies arrived at the scene, and Deputy Stone grabbed Powell's arm as though to push her off the road as she was telling him what had occurred prior to their arrival. Powell told Deputy Stone to get his hands off of her, **and took a few steps away from Deputy Stone**. Deputy Rackard, the other deputy on the scene told Powell they would shoot her if she didn't listen or follow his lawful commands. Powell raised her hands about shoulder height and responded "what" or "you're going to do what?" At that point, Deputy Rackard deployed his taser and shot Powell in the chest area. After Powell was on the ground, Deputy Rackard deployed his taser a second time. The officers arrested Powell for resisting an officer without violence. There was no instruction given that Powell failed to obey. There was no probable cause for the arrest. Most importantly, Powell had done nothing to resist arrest other than simply taken steps back and away from Deputy Stone. There was no evidence the Powell's behavior was violent, aggressive, and prolonged. Florida federal law is clearly established that such force cannot constitutionally be used against a non-threatening suspect when the alleged crime of the suspect is a minor offense; In Lewis v. City of Albany Police Dept., 547 F. Supp. 2d 191 (N.D.N.Y. 2008), police officer did not have qualified immunity for his act of stepping on the head of an already-handcuffed, prone arrestee and grinding arrestee's

face into the pavement, no officer reasonably could have believed that such actions would not constitute excessive force (**Exactly what Defendant Kennedy did**).

Mann v. Darden, 670 F. Supp. 2d 1293 (M.D. Ala. 2009), On August 21, 2005, Sue Mann was brought to Prattville Hospital after she had ingested an excessive number of prescription pills. Following an examination, hospital physicians recommended that she be transferred to a psychiatric-treatment center for further evaluation. The county probate court ordered the transfer after she had spent the night at the hospital. The next day upon learning of the Court's ruling to transfer her, she became uncooperative, argumentative, and complained that she did not want to be transferred. Two officers then came to her intensive care unit room to assist in her discharge, James Darden and Camille Emmanuel. The facts are in dispute as to what then happened but Officer Darden then tasered Ms. Mann twice while she was in her hospital bed with an X-26 Taser Model (same as used by the Rockledge Police against Preston Bussey). According to Officer Darden's own admission, tasers "cause intense pain". Moreover, the Court relied upon the factual and legal holding about use of force, and the pain suffered by the subject/arrested person from the Oliver v Fioriono case. The second tasering of Mann was ruled to be excessive. Just like in the Orlando case, after the officers initial tasing of Mann, they made no effort in any regard to go hands-on. Moreover, the Court determined that it is not acceptable for officers to by-pass traditional physical take down methods of hands-on force with an unarmed, person who has committed no crime, and is not a threat to anyone. If traditional methods of restraint will be by-passed, then officers cannot continue to taser without trying to go hands-on as they know they must, choosing instead to let subjects to suffer intense pain; In Lee v. Metropolitan Government of

Nashville, 596 F. Supp. 2d 1101 (M.D. Tenn. 2009). Three police officers were sued in their involvement in the death of a man at a night club who was clearly in a disoriented and diminished mental state. Officer Cregan (much like Officer Kennedy in the instant case) remained on top of Lee though the undisputed facts show that he was already handcuffed and lying on his stomach. According to Cregan, he remained on Lee's back, for an unclear amount of time, because he wanted Lee to remain still, and this was his way of guaranteeing that Lee would remain as still as he wanted him to be. As the Court affirmed from a previous case, "creating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force. As the Court stated, "Cregan's justification in his deposition testimony that he felt that he needed to remain on top of Lee because Lee was moving from "side to side" and "bucking", has little merit. Further, the decision to remain on top of Lee out of an unjustifiable fear for officer or suspect safety was clearly inconsistent with directives of his own police department. As to the officers who operated the tasers, Mays & Scruggs, the Courts said that "multiple taser applications over a period of several seconds" can particularly, when coupled with other abuses, amount to excessive force. Mays testified that he fired his taser 8 times upon Lee within a period of 2 minutes. Scruggs fired his taser 3 times. The Court held the under appropriate circumstances, gratuitous, repeated applications of a taser over a short period of time can amount to excessive force. The circumstances in this case show that the force used against Lee via taser applications was against a suspect that at most had committed a minor and non-violent crime and he was unarmed, posed no threat to anyone, and was surrounded by numerous police officers. As per the opinion, **"The**

notion, advanced here by the defendants, that Lee needed to be violently subdued because he was a danger to himself is unpersuasive at best" (This is the exact argument being made by the defendants against Preston Bussey). After all, Lee had done nothing to harm anyone at the bar, nor tried attacking the officers upon their arrival. His actions as witnessed by the cops and as reported by the bar was that he was wandering around in the parking lot babbling incoherently about the sky, the universe, and other seemingly incomprehensible things caused by his prior use of LSD.

Arce v. Blackwell, 294 Fed Appx. 259 (9th. Cir. 2008), man in an agitated state of excited delirium was placed in a state of "compression asphysia" where prone and handcuffed individual had body weight of officers placed on his back while he was lying on his chest/stomach. Any reasonable officer would know that such circumstances would be excessive force given the many cases involving these same set of conditions. No qualified immunity. By now, reasonably competent officers know that an excited individual in an agitated state with his hands cuffed an already on his stomach/chest, will not going to be able to breathe if force and pressure is put on his back, especially when the person is crying out that they cannot breathe and trying to move around to re-position themselves from the life or death position being forced upon them by the officers that then does actually suffocate the person and/or causes them to expire and down; In Landis v. Baker, 297 Fed. Appx. 453 (6th Cir. 2008), on November 25, 2004, several motorists called the 911 dispatch to report that a bulldozer was blocking the two southbound lanes on US 23. Callers described the man responsible for placing the bulldozer their in the lanes, thereby obstructing public traffic, as a while male with long blond hair and a brown jacket running down the median in a southbound direction away from the

bulldozer. Upon Officer Cardoza approached spotted the subject upon arriving on the scene and discovered him to be 47 year old Charles Keiser. When asked by the officer to stop, Mr. Keiser "muttered something about God" and ran towards traffic heading northbound, eventually crossing the freeway toward a fence. Cardoza sprayed him in the face with pepper spray but Keiser managed to climb the fence and continue running away from Cardoza. Eventually, Cardoza caught up to Keiser and with the assistance of another officer, they tackled him, and according to the officers, Keiser began choking Officer Galarneau during the struggle. Keiser got free of the two officers and walked away from them, unarmed into a swampy wooded area at 8:48am in the morning. The two officers called for back up with an officer with a taser because they felt Keiser was on some kind of drug because they could not restrain him. Officers responding to the scene agree that Keiser looked completely out of it and oblivious to his surroundings as well as their commands to him. The officers agree he had no visible weapons on him. They recognized his mental illness at 461, and they nonetheless tasered him 5 times in the span of one minute and 37 seven seconds (1.37). The officers may have originally been justified in some force, but claiming that he was resisting their arrest and otherwise not being compliant because he was using one hand to hold his face out of the 10 inches of water below him, did not justify their continued use of the taser and more physical force. In acquiring this second arm, they allowed his face to stay immersed in the water that he was trying to keep his face above. They let him drown in the water.

Officers Prohibited from Escalating Matters & Probable Cause

Hastings v. Barnes, 252 Fed. Appx. 197 (10th Cir. 2007), Todd Hastings had contacted a suicide prevention hotline expressing his desire to kill himself through

running a hose from his car into his house. When officers arrived on the scene from a 911 dispatch, they knocked on Todd's door, he answered, and told them that he had called the suicide hotline number. The officers said that he was "real nervous", "agitated" and "a little evasive". They asked him if he would step outside and talk to them. He said he would first get his shoes, they told him that he could not do so. He then tried closing the door to his house, to which they stopped him from closing it, and forced their way into his house. They cornered him in a bed room of his own house, started yelling various commands at him while approaching him in a threatening aggressive manner. This sort of confrontation with a emotionally disturbed individual has been ruled to be unlawful, and objectively unreasonable because the individual in crisis needs a calming approach, and such an individual benefits from gaining as much additional information, and prolonging the time of the incident as long as possible. When they behaved in this aggressive manner, **they escalated the situation**, causing him to turn defensive and pick up a Samurai sword with a 20-inch blade. They shot and killed him because they chose to handle him in an aggressive, threatening and confrontational way, knowing in advance that he was emotionally disturbed. The Court did not grant qualified immunity to these officers for escalating the situation. that they could have calmly controlled, and handled with a bit of simple thought and consideration for the totality of the circumstances. When Todd answered the door and talked to them, he was shirtless, unarmed, and tried to do his best to be responsive to their requests. See also, Asten v. City of Boulder, 652 F. Supp. 2d 1188 (D. Colo. 2009), officers cannot escalate a situation or engage in deliberate and/or reckless conduct during a seizure that unreasonably creates and gives themselves a false basis for using such unreasonable

force; Knapps v. City of Oakland, 647 F. Supp. 2d 1129 (N.D. Cal. 2009), Officer Cardoza had an extremely hostile and unprofessional attitude toward the Plaintiff the minute he stepped out of his police vehicle and uttered a profanity at him. (These cases speak to the false utterance from Defendant Gomez about Preston fighting security escalating the situation from the way it was reported by 911 and their own dispatcher as it truly existed); Probable Cause: Wheeler v Coss, 344 Fed. Appx. 420 (9th Cir. 2009), Circuit affirmed Summary Judgment **against** qualified immunity in the arrest of Wheeler for harassment by police officer Brent Coss. "Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested." In establishing probable cause, officers may not solely rely upon the claim of a citizen witness that he was a victim of a crime, but must independently investigate the basis of the witness' knowledge or interview other witnesses. Based on the totality of the circumstances that included Wheeler at the police substation on his own will asking the police for an escort home in order to keep the peace with his wife, & avoid violence. They never asked Wheeler if he had made any threatening statements earlier of an intent to harm or commit violence against his wife., see also, Williams v Sirmons, 563 F. Supp. 2d 1315 (**M.D. Fla. 2008**); (Leverich, Herberner, & Gomez were aware of her lie that escalated the matter by making it appear to be a violent matter).

CONCLUSION

The individually named defendants all took their lead from Defendant Gordon Hewatt. His incompetence and poor decision-making took this entirely manageable situation of a mentally incoherent unarmed defenseless man who had been compliant

with his police orders, and transformed it into a disaster. An average police officer with average intelligence, training, and reasonable sensibilities could never have lit this candle with the result being the house burning down in this extraordinary and unacceptable way. His actions, and all of their joint efforts to twist the facts, and tell lies, i.e. Herberner claimed that upon him touching Preston's arm, he responded by attacking them all. A self serving lie. If this case did not involve the very sad story of Preston's emotionally fragile 14 year old son, and Preston's devastated mother, it would be like watching a bad Jerry Lewis movie. Hewatt did not communicate any directions to his second in charge, Defendant Gomez, as to who should, and how their tasers should be deployed. He did not communicate a single direction to Defendant Herberner, Defendant Owens, to Defendant Kennedy, or any of them. No professional in America making over $25,000.00 per year or more expects to stay employed and/or be absolved of such gross incompetence in the performance of their jobs. How could Defendant Hewatt's incompetence, and Defendant's Gomez's lies from which she thereafter hid from by virtue of her own constitutional right allowing her the freedom from self incrimination (ASUMF, Section XVIII, #112) find any sanctuary in our Federal Courts? Subordinates officers and defendants like Williams and Kennedy admittedly arrived on the scene after the 6 taserings had occurred, but neither Hewatt or Gomez told them how long or how many times they had tasered Preston; relevant information especially in the context of directing and commanding that Kennedy and Williams assist in keeping Preston still, pinned to the ground, wait on his upper body, and face down on his stomach/chest causing him difficulty in breathing (**Exhibit 4c**, Deposition of Gomez pgs. 89-90). Defendant Hewatt admitted to not knowing if there was any sort of health risk or concern

after having delivered 15 seconds of electrical shock to Mr. Bussey's chest. This man was the leader of this inept police team in the wake of published Middle District of Florida prevailing and controlling law affirmed by the 11th Circuit Court of Appeals. The leader did not know if another 2-3 rounds to the chest wall might be tolerable or not, because he did not know the restrictions and limitations of his own police issued weapon. It is the equivalent of an electrician going to play golf in the middle of an electrical storm, without knowing whether doing such a thing might be objectively unreasonable. Such an admission on his part shows incompetence. All of his absurd actions, thoughts, and failures are more fully set forth in (ASUMF Section XII).

Next we have the complete inadequate training of all the named Defendants with regard to encountering mentally unstable, Baker Act subjects, and subjects with excited delirium and/or schizophrenia. Defendant Kennedy outwardly proclaimed that he was not properly trained for this incident by the City of Rockledge when it happened, as did Defendant Herberner (ASUMF Section XIII, Specifically #72, #74, & #77). Defendants have all of the documents and bulletins from Taser International and their employer (ASUMF, Section X), but it is abundantly clear that they do not actually understand nor grasp the content of the information (Section XI). Defendant Owens still, to this very day, has no idea what exited delirium is, how to spot it, or what to do to make sure that another tragic death does not occur if he should find himself in another like situation.

Next we get into the weak, unreasonable, and wholly dishonest statements made by these defendants to avoid the liability they earned. There is no evidence from the hospital or dispatcher suggesting that Mr. Bussey's two open wounds were going to cause him to bleed to death. He was wearing white pants. Despite trying to utilize that avenue

as the means for their unlawful violence against him, his white pants stayed white as per the hospital surveillance video. Dr. Mallory's own physician notes indicate that he was not bleeding, but rather presented with dried blood on his arm and hands. The Defendants are no better than Preston Bussey was while he lived. Except they are liars, users/buyers of cocaine, Lsd, have sold drugs, been arrested for stalking, child abuse, fighting women, and they killed him (ASUMF Section XVIII).

The Defendants were under Color of Florida State Law. The hospital surveillance shows them all in uniform. They were in the course and scope of their employment as police officers. This makes the Defendant, the City of Rockledge vicariously liable for the batteries committed by their employees that lead and/or significantly contributed to Mr. Bussey's death as per the doctrine of respondeat superior. A liability finding under Section 1983 of excessive police force against these officers, suffices for a finding of liability against the City of Rockledge, Florida.

WHEREFORE, Plaintiff asks that this Court grant a ruling of Summary Judgment as to liability in her favor against all defendants.

CERTIFICATE OF SERVICE

WE HEREBY certify that a true copy of the foregoing was furnished electronically through the CM/ECF system to: Joseph R. Flood, Jr. Esq., Dean Ringers Morgan & Lawton, P.A., P.O. Box 2928, Orlando, FL 32802; & Robert Bonner, Esq. MEIER, BONNER, 260 Wekiva Springs Road, Suite 2000, Longwood, FL 32779 this 3/28/2012.

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