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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14
15

16 JACQUELINE ALFORD,

17 Plaintiff,

18 vs.

19 HUMBOLDT COUNTY, GARY PHILP,
20 CITY OF EUREKA, CHIEF GARR
NIELSEN, and DOES 1 to 10, inclusive,

21 Defendants.

Case No. C 09-01306-CW

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
JUDGMENT AS A MATTER OF LAW**

Date: November 18, 2010

Time: 2:00 p.m.

Ctrm: 2, 4th Floor, Oakland

Honorable Claudia Wilken

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1 **I. INTRODUCTION**

2 This case involves the tragic death of Peter Stewart, a mentally-ill man who
3 burned to death as a result of Defendants' actions. Defendants' Motion for Judgment
4 as a Matter of Law should be denied because there are genuine issues of material fact
5 regarding whether the force used by the defendant-officers against the decedent, Peter
6 Stewart, was objectively unreasonable. Nearly all of the facts on which Defendants
7 rely are controverted by Plaintiff's evidence and inferences. Under these facts, as set
8 forth below, the officers' actions violated the Fourth and Fourteenth Amendments.
9 The officers are not entitled to qualified immunity because the relevant law was
10 clearly established. Accordingly, Defendants' Motion should be denied.

11 **II. MATERIAL FACTS**

12 On June 4, 2007, decedent Peter Stewart went to the residence of Debra Brown
13 and Matthew Moore to seek help while suffering from an acute psychiatric
14 emergency. When Ms. Brown phoned Jackie Alford, Mr. Stewart's mother, and
15 informed her that she was concerned about Mr. Stewart, Ms. Alford immediately
16 contacted Hoopa Tribal Dispatch and requested an ambulance to pick up her son since
17 she knew that Mr. Stewart's mental disability was the genesis of his behavioral
18 pattern. (Declaration of Jackie Alford ("Alford Decl.") at ¶ 2). Ms. Alford was
19 worried that perhaps her son had not taken his medication. (*Id.*).

20 Ms. Alford specifically informed dispatch that she did *not* want Police Officers
21 sent to the Moore home since she knew this would scare Mr. Stewart. (*Id.*). Dispatch
22 assured Ms. Alford that only an ambulance would be sent to the home. Ms. Alford
23 spoke directly to Deputy Berry of the HCSD and informed him that she only wanted
24 an ambulance sent to the Moore home and not the police since that would startle and
25 scare her son, and that if an officer was to be sent to the residence, it should be Mike
26 Roberts of the Hoopa Tribal Police Department since he was familiar with her son
27 and vice versa. (*Id.* at ¶¶ 2, 4). Deputy Berry assured Ms. Alford over the phone that
28 he would wait for an ambulance to arrive.

1 Instead, absent any reasonable suspicion to detain or probable cause to arrest Mr.
2 Stewart, Deputy Berry took it upon himself to escalate the situation by driving his
3 patrol car at a high rate of speed up the driveway to the Moore residence. (*Id.* at ¶4);
4 (Deposition of Matt Moore (“Ex. 1”) attached to Declaration of Brian E. Claypool
5 (“Claypool Decl.”) at 28:20-23). However, Mr. Moore indicated that prior to Deputy
6 Berry’s arrival, Mr. Moore had the situation under control with Mr. Stewart and that
7 Mr. Stewart had actually calmed down. (Ex. 1 to Claypool Decl. at 28:6-9). Mr.
8 Moore testified that, had Deputy Berry not alarmed Mr. Stewart, he could have
9 resolved the entire situation peacefully without anyone being injured. (*Id.* at 82:10-
10 16). Mr. Stewart may have pulled out a butter knife, but he never advanced upon
11 Deputy Berry nor did he ever verbally threaten him. Notwithstanding, Deputy Berry
12 threatened Mr. Stewart by stating that he was a second away from killing him, at
13 which time Mr. Stewart ran into the home and grabbed Mr. Moore’s 22 rifle.
14 However, the 22 rifle was *not* loaded with ammunition, which was obvious to both
15 Matt Moore and Deputy Berry. (*Id.* at 18:9-20; 19:2-4).

16 Sadly, Mr. Moore indicated that Stewart asked him to come back into the house
17 with him. Mr. Moore has stated that he would have been able to peacefully resolve
18 the situation but was reluctant to do so out of fear that Deputy Berry was going to
19 shoot him in the back and kill him and blame it on Mr. Stewart. Mr. Moore thus
20 refrained from entering the home to coax Mr. Stewart to peacefully leave the home.
21 The standoff began at this point.

22 Contrary to the officers’ testimony that Mr. Stewart immediately began firing
23 shots at them, there is a material factual dispute as to whether Mr. Stewart ever
24 discharged a loaded weapon at the officers. Mr. Moore never saw Mr. Stewart shoot
25 the 22 rifle at the officers, (Ex. 1 to Claypool Decl. at 14:2-4), and nobody associated
26 with the HCSD or the EPD presented any physical evidence linking any bullet
27 fragments or shell casings to Mr. Moore’s 22 rifle and his ammunition. (Deposition
28 of Lt. George Cavinta (“Ex. 5”) to Claypool Decl. at 35:10-25; 36:1-2). The officers

1 were quick to point out that a bullet hole in the side of a patrol car came from the rifle
2 that Mr. Stewart had in his possession, but no law enforcement official was able to
3 present a bullet fragment matching Matt Moore's ammunition. Similarly, no shell
4 casings were found linking Mr. Moore's ammunition to Mr. Stewart. This only
5 makes sense since Mr. Moore testified that the 22 rifle was *not* loaded. (Ex. 1 to
6 Claypool Decl. at 18:9-20; 19:2-4). This would have left a very short amount of time
7 for Mr. Stewart to search the entire Moore residence to locate ammunition for the 22
8 rifle and then load the rifle. Mr. Stewart was mentally challenged, making it virtually
9 impossible for him to search for, find, and install ammunition in the 22 rifle in such a
10 short amount of time and then begin firing upon the officers.

11 While the Defendants will portray Mr. Stewart as a nefarious individual
12 determined to inflict violence upon the officers, they fail to point out to the Court that,
13 during the evening hours of June 3, 2007, Mr. Stewart was seen eating a bologna
14 sandwich and watching television in the Moore home. At one point for a span of
15 several hours, Mr. Stewart turned off all of the lights and the Officers observed "no
16 movement" in the home which would have been consistent with Mr. Stewart sleeping.
17 (Deposition of Timothy Jones ("Ex. 4") to Claypool Decl. at 42:23-25; 43:1-15); (Ex.
18 1 to Claypool Decl. at 39:14-18). However, the police department did not use this
19 potential opportunity to enter the residence and apprehend and detain Mr. Stewart.

20 Even if the Court accepts the Defendants' spurious assertion that Mr. Stewart
21 initially shot a rifle at the Officers, the unanimous testimony of all law enforcement
22 was that, over the span of 18 hours leading up to the home burning down, Mr. Stewart
23 did not discharge any weapons. (Deposition of Sergeant William Nova ("Ex. 3") to
24 Claypool Decl. at 76:2-8, 17-21; 87:12-16); (Ex. 4 to Claypool Decl. at 42:1-10); (Ex.
25 5 to Claypool Decl. at 36:12-20). This fact alone establishes that Stewart was not
26 posing a risk of "immediate" grave bodily injury to any of the Officers at the time that
27 various chemical agents were deployed into the home. Further, the evidence will
28 show that the Moore residence was located in a "very rural" area in the mountains of

1 Hoopa, and that none of the Officers were concerned about the safety of the
2 community and there was no sense of urgency since time was on their side.

3 Nevertheless, both the HCSD and the EPD embarked on a vicious and barbaric
4 assault on Mr. Stewart without legal justification by deploying collectively over 60
5 rounds of 37 CS canisters of tear gas into the Moore residence. (Ex. 6 to Claypool
6 Decl. at 23: 9-13.) At no time prior to the deployment of tear gas into the home did
7 any law enforcement officials allow Jackie Alford to attempt to speak to her son to
8 convince him to leave the home, despite her requests to do so. (Alford Decl. at ¶¶ 6,
9 7); (Ex. 3 to Claypool Decl. at 98:5-9). All of the Officers knew that Mr. Stewart was
10 mentally challenged. (Ex. 5 to Claypool Decl. at 12: 23-25; 13:1-6). Additionally, at
11 no time prior to deploying chemical agents into the home did HCSD or EPD toss a
12 throw phone into the home or attempt to seriously negotiate with him. (Ex. 5 to
13 Claypool Decl. at 18:1-5). Indeed, they did nothing more than yell out on a speaker
14 phone for Stewart to get out of the home.

15 Both HCSD and EPD became frustrated that the deployment of tear gas canisters
16 into the residence was ineffective. At this point, HCSD and EPD collaborated and
17 decided to deploy hand-held pyrotechnic chemical agents into the home. The facts
18 will demonstrate that deploying pyrotechnic chemical agents into a residence is
19 against the policy of both the HCSD and the EPD.

20 Deputy Barney of the HCSD admits deploying two hand held Triple Chamber Gas
21 Grenade canisters into a broken window near area 4 of the home. (Ex. 2 to Claypool
22 Decl. at 24:4-7; 26:24-25; 27:1). Shortly after Deputy Barney's deployment of the
23 handheld Triple Chamber grenades, dark smoke and flames began emanating from
24 wall area 4 of the home (the same area in which Barney deployed the grenades). (Ex.
25 2 to Claypool Decl. at 26:1-15; 29: 5-11; 38:12-22). Louis Altic of the EPD
26 confirmed that the chemical agent deployed by Barney into wall area 4 of the
27 residence was a pyrotechnic chemical agent. Officer Altic of the EPD has also stated
28 that Tri Chamber grenades are flammable and generate heat and can start a fire. (Ex.

1 6 to Claypool Decl. at 31: 4-15). All of this factual information creates a profound
 2 factual dispute as to whether pyrotechnic chemical agents were deployed into the
 3 residence.

4 There was no evidence that Mr. Stewart started the fire. (Ex. 2 to Claypool Decl.
 5 at 35: 21-24); (Ex. 5 to Claypool Decl. at 28:3-5). Once the fire was reported to the
 6 command post, at which time all of the HCSD and EPD officials were so informed of
 7 the residence being on fire, the Hoopa Fire Department was *not* permitted to approach
 8 the residence and put out the fire. (Declaration of Raven Sherman (“Sherman Decl.”)
 9 at ¶ 3). Over 30 minutes elapsed from the initial report of the fire to the home being
 10 burned down and Mr. Stewart perishing in the fire. Mr. Stewart was found dead in
 11 the bathroom near a tub of water with moist sheets wrapped around his body.
 12 (Declaration of Richie Marshall (“Marshall Decl.”) at ¶2).

13 III. LEGAL STANDARD

14 The Court must view the evidence presented on the motion in the light most
 15 favorable to Plaintiff. Even where the basic facts are undisputed, summary judgment
 16 should be denied if reasonable minds could differ on the inferences to be drawn from
 17 those facts. *Adickes v. S.H. Kress & Co.* 398 U.S. 144, 158–59 (1970); *Lake*
 18 *Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 875 (9th Cir. 1987).
 19 Despite an officer’s first-hand testimony to the contrary, entirely circumstantial
 20 evidence may be sufficient to create a triable issue of fact. *Hopkins v. Andaya*, 958
 21 F.2d 881, 888 (9th Cir. 1992) (holding there was a triable issue of fact on whether the
 22 officer’s reported subjective fear of being killed was objectively reasonable, because a
 23 medical report showed the officer’s injuries were superficial).

24 IV. LEGAL DISCUSSION

25 A. Deputy Berry Violated Mr. Stewart’s Fourth Amendment Rights.

26 Defendants’ claim, that there is no basis for any action as to Defendant Berry, is
 27 without merit. The facts establish that Defendant Berry detained Mr. Stewart without
 28 any reasonable suspicion that he had committed a crime, and that he then escalated

1 the confrontation creating a volatile situation giving rise to a Fourth Amendment
2 violation.

3 At the time that Defendant Berry approached and attempted to detain Defendant
4 Berry by telling him he was moments away from shooting him, Mr. Stewart had not
5 committed any crime, but was merely exhibiting symptoms of his mental illness. To
6 detain a subject, officers must “have a reasonable suspicion, based on objective facts,
7 that the individual is involved in criminal activity.” *Brown v. Texas*, 443 U.S. 47, 51
8 (1979); *see also Terry v. Ohio*, 392 U.S. 1, 30 (1968) (reasonable suspicion exists
9 only where policeman reasonably concludes, *inter alia*, “that criminal activity may be
10 afoot”). Accordingly, Defendant Berry had no reasonable suspicion to detain Mr.
11 Stewart.

12 Rather than take steps to calm Mr. Stewart down or to maintain the situation until
13 medical personnel could arrive, Defendant Berry escalated the situation by telling Mr.
14 Stewart, whom he knew to be a mentally-ill man, that he was moments away from
15 shooting him. These actions created the volatile situation of what would ultimately
16 become a fatal stand-off, and gives rise to a claim under the Fourth Amendment. *See*
17 *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994)
18 (finding that, if true, facts showing that defendant officers “storm[ed] the house of a
19 man whom they knew to be a mentally ill, elderly, half-blind recluse who had
20 threatened to shoot anybody who entered,” thereby creating a volatile situation, state a
21 classic Fourth Amendment violation under *Graham*).

22 Accordingly, there are significant issues of material fact regarding Defendant
23 Berry’s actions on the date of the incident that preclude summary judgment on
24 Plaintiff’s Fourth Amendment claims against Defendant Berry.

25 B. Defendants’ Use of Force Violated the Fourth Amendment

26 Defendant’s claim, that their use of chemical agents to end the standoff did not
27 violate the Fourth Amendment, likewise fails. All claims of excessive force must be
28 evaluated under the standard of objective reasonableness. *Graham v. Connor*, 490

1 U.S. 386, 396-97 (1989). The reasonableness of a seizure, including the use of force
2 to arrest, is determined by “‘careful[ly] balancing . . . the nature and quality of the
3 intrusion on the individual’s Fourth Amendment interests against the countervailing
4 governmental interests at stake.’” *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S.
5 1, 8 (1985)).

6 The first step of the *Graham* analysis is to evaluate the type and amount of force
7 used. *Bryan v. McPherson*, 590 F.3d 767, 772 (9th Cir. 2009). The Court should then
8 “‘balance the amount of force applied against the need for that force.’” *Id.* (quoting
9 *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003). “Because such balancing
10 nearly always requires a jury to sift through disputed factual contentions, and to draw
11 inferences therefrom . . . summary judgment or judgment as a matter of law . . .
12 should be granted sparingly” in cases involving claims of excessive force.

13 *Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003). [A]ll force—
14 lethal and non-lethal—must be justified by the need for the specific level of force
15 employed.” *Bryan*, 590 F.3d at 773-74. Government interest factors to weigh include
16 “the severity of the crime at issue, whether the suspect poses an immediate threat to
17 the safety of the officers or others, and whether he is actively resisting arrest or
18 attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396. “The ‘most
19 important’ factor under *Graham* is whether the suspect posed an ‘immediate threat to
20 the safety of the officers or others.’” *Bryan*, 590 F.3d at 775 (quoting *Smith v. City of*
21 *Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (*en banc*)).

22 Further, “police are ‘required to consider what other tactics if any were available
23 to effect the arrest.’” *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d
24 1185, 1204 (9th Cir. 2000), *vacated on other grounds*, 534 U.S. 801(2001), (quoting
25 *Chew v. Gates*, 27 F.3d 1432, 1443 (9th Cir. 1994)). Thus, another factor to consider
26 is the availability of alternative methods to effectuate an arrest or overcome
27 resistance. *Smith*, 394 F.3d at 701. The fact that a warning does not precede the use
28 of force is another significant factor to consider. *Bryan*, 590 F.3d at 779-80 (“[T]hat

1 Officer McPherson did not provide a warning . . . and apparently did not consider less
2 intrusive means of effecting Bryan’s arrest factor significantly into our *Graham*
3 analysis.”); *Deorle v. Rutherford*, 272 F.3d 1272, 1284 (9th Cir. 2001) (“[W]arnings
4 should be given, when feasible, if the use of force may result in serious injury, and . . .
5 the giving of a warning or the failure to do so is a factor to be considered in applying
6 the *Graham* balancing test.”).

7 The Ninth Circuit recently reaffirmed that courts may not base their analyses “on
8 what officers actually felt or believed during an incident.” *Bryan*, 590 F.3d at 780.
9 “A simple statement by an officer that he fears for his safety or the safety of others is
10 not enough; there must be objective factors to justify such a concern.” *Id.* at 775
11 (quoting *Deorle*, 272 F.3d at 1281).

12 Further, the law is clear that, “where it is or should be apparent to the officers that
13 the individual involved is emotionally disturbed,” the officers must consider this
14 factor in determining the reasonableness of the force employed. *Deorle v.*
15 *Rutherford*, 272 F.3d 1272, 1282-83 (9th Cir. 2001) (finding that increasing the use of
16 force may exacerbate the situation, and the governmental interest in using such force
17 is diminished when dealing with a mentally ill individual).

18 There are triable issues of fact regarding whether the use of force against Mr.
19 Stewart under the circumstances of this case was excessive. As set forth below, there
20 is substantial evidence in the record that establishes that Defendants, without legal
21 justification, used excessive amounts of chemical agents, including pyrotechnic
22 agents, against Mr. Stewart, a mentally-ill man who had committed no crime and who
23 did not pose an immediate threat to the officers’ safety at the time the force was
24 deployed, which ultimately resulted in his death.

25 1. There is a Factual Dispute as to Whether Stewart Committed a
26 Crime and Whether He Discharged a Weapon.

27 There is no evidence that Mr. Stewart had committed any crime when Deputy
28 Berry stormed up the Moore driveway at a high rate of speed without any legal

1 probable cause. Defendants conveniently assert that, shortly after Stewart entered the
2 Moore residence, he fired a weapon at them. There is a factual dispute as to whether
3 this took place. Matt Moore never saw Stewart discharge a 22 rifle. Further, the rifle
4 in Stewart's possession was not loaded. Stewart never fired a weapon at any of the
5 EPD officers at any time during the time of arrival until the fire was ignited. Further,
6 there was no evidence of bullet fragments linking Matt Moore's ammunition to the
7 crime scene which supports the proposition that Stewart never fired a weapon at any
8 of the Officers. Accordingly, there is a clear factual dispute as to whether Mr.
9 Stewart committed a crime and whether he discharged a weapon at any point during
10 the course of the incident. However, as set forth below, even assuming that Mr.
11 Stewart did discharge a weapon at some point earlier in the incident, the evidence
12 establishes that Mr. Stewart did not pose an immediate threat to the officers or
13 members of the community at time force was used.

14 2. There is a Factual Dispute as to Whether Mr. Stewart Posed an
15 Immediate Threat to the Officers or Members of the Community at
16 the Moment the HCSD and EPD Deployed Chemical Agents Into
17 the Residence.

18 “The ‘most important’ factor under *Graham* is whether the suspect posed an
19 ‘immediate threat to the safety of the officers or others.’” *Bryan*, 590 F.3d at 775.
20 Here, there is a factual dispute as to whether Mr. Stewart posed an immediate threat to
21 the safety of the officers or others at the time the HCSD and EPD deployed chemical
22 agents into the residence. For a period of 18 hours leading up to Deputy Barney
23 deploying two pyrotechnic Triple Chamber gas grenades into the residence, it is
24 undisputed that Mr. Stewart did not discharge a weapon and neither the HCSD or the
25 EPD was worried about the safety of community members. In fact, during the early
26 morning hours of June 4, 2007, Stewart was observed watching television and, with
27 the aid of starlight scopes, Stewart was also observed sleeping. The HCSD knew
28 prior to deploying chemical agents that Stewart was mentally challenged and had

1 been recently released from Sempervirens Mental Health Facility. No attempt was
2 made by any law enforcement to deploy a throw phone into the residence. Jackie
3 Alford was never permitted to speak to her son at the scene.

4 Accordingly, there are significant material facts in this case that establish that Mr.
5 Steward did not pose an “immediate” threat to the officers at the time they decided to
6 deploy a barrage of tear gas, and ultimately pyrotechnic chemical agents, into the
7 residence. At least 18 hours of non activity by Stewart prior to the deployment of
8 chemical agents in no way presents an “immediate” threat to the officers. These facts,
9 thus, create a triable issue of fact as to whether the use of force was excessive under
10 the circumstances.

11 3. Mr. Stewart Was Not Actively Resisting at the Moment the
12 Defendants Deployed Chemical Agents Into the Residence Nor
13 Was He Attempting to Escape.

14 A factual dispute also exists as to whether Stewart was “actively” resisting or
15 attempting to flee at the moment that the Defendants deployed chemical agents into
16 the residence. *See Graham*, 490 U.S. at 396. A suspect who remains quietly inside a
17 residence for over 18 hours eating a sandwich, watching television and turning the
18 lights out as if to go to bed hardly resembles an individual “actively” resisting.

19 4. Alternative Less Intrusive Means of Apprehending Stewart Were
20 Available to the Defendants and Never Implemented

21 “[P]olice are ‘required to consider what other tactics if any were available to
22 effect the arrest.’” *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d
23 1185, 1204 (9th Cir. 2000). That simply did not happen here. Indeed, the most
24 astounding omission on the part of all of the Defendants was the profound failure to
25 allow Mr. Stewart’s mother to negotiate with her son to effectuate a safe and peaceful
26 resolution. Ms. Alford was present at the scene for nearly the entire time leading to
27 the fire, which she watched her son perish in. Ms. Alford asked the Defendants to
28 speak to her son since her voice calms him. She was not permitted to do so. Ms.

1 Alford implored the HCSD and EPD to allow her to toss her cell phone into the
2 residence and then call her son from another phone. She also requested to speak to
3 her son by intercom. The HCSD and EPD denied both requests. Ironically, the
4 Defendants will proclaim that it was too dangerous for any of the officers to approach
5 the home to toss a throw phone into the bedroom, yet it was not too dangerous for
6 Deputy Barney to approach the home and get within 2 feet of the broken-out bedroom
7 window to deploy handheld Triple Chamber pyrotechnic chemical agents. There are,
8 thus, triable issues of fact regarding the availability of less intrusive means for
9 apprehending Mr. Stewart.

10 5. There is a Profound Factual Dispute as to Whether Deputy Barney
11 Deployed Pyrotechnic Chemical Agents into the Residence.

12 At the heart of this case is Deputy Barney's intentional deployment of
13 pyrotechnic chemical agents into the home causing the fire and ultimate death of
14 Stewart. In *Boyd v. Benton County*, 374 F.3d 773, 777-79 (9th Cir. 2004), the court
15 reasoned that "flash-bang" devices have an "inherently dangerous nature," and cannot
16 be thrown blindly into a room "absent a strong governmental interest, careful
17 consideration of alternatives and appropriate measures to reduce the risk of injury."
18 *See also United States v. Morris*, 349 F.3d 1009, 1012 (7th Cir. 2003) (emphasizing
19 "the dangerous nature of flash-bang devices," and cautioning "that the use of such
20 devices *in close proximity to suspects may not be reasonable.*"); *Estate of Smith v.*
21 *Marasco*, 318 F.3d 497, 515-18 (3d Cir.2003) (where defendants used flash bang
22 grenades to enter an individual's home where the purpose was not to arrest him and
23 where the individual was non-threatening, mentally unstable and suicidal, a
24 reasonable jury could find that the defendant officers' conduct was unreasonable and
25 excessive under the Fourth Amendment).

26 Here, both the HCSD and EPD had access to pyrotechnics on the day of the
27 incident. Sergeant William Nova conceded that the EPD stored hand held
28 pyrotechnic chemical agents. (Ex. 3 to Claypool Decl. at 48:13-20). The CDC had in

1 its possession at the scene of the fire pyrotechnic chemical agents. (Deposition of
 2 Deputy Barney (“Ex. 2”) at 22:12-25; 23:1). Officer Louis Altic also had in his
 3 possession at the scene of the fire a *few* types of pyrotechnic chemical agents.
 4 (Deposition of Louis Altic (“Ex. 6”) at 18:9-12; 26: 9-22; 27:6-8.)

5 a. It was Against HCSD Policy to Deploy Pyrotechnic
 6 Chemical Agents into a Residence.

7 As of the date of the fire (June 4, 2007) the HCSD only permitted pyrotechnic
 8 chemical agents to be deployed outdoors for crowd control. At the deposition of
 9 Deputy Barney, the following exchange occurred:

10 Q: Do you recall back on June 4, 2007, what the HCSD’s policy spoke
 11 to as to when pyrotechnic chemical agents could be deployed?

12 A: “In summary, it could be deployed outdoors for crowd control.”

13 (Ex. 2 to Claypool Decl. at 17:2-5). As of the date of the fire on June 4, 2007, the
 14 EPD did not permit the deployment of pyrotechnic chemical agents inside a residence.
 15 When asked “why” at his deposition, Sergeant William Nova replied: “Because there
 16 was - - what is the word I am looking for here? The pyrotechnic-type chemical agents
 17 could cause fire. So generally they were not used indoors.”

18 b. A Factual Dispute Exists as to Whether the Handheld Triple
 19 Chamber Gas Grenade Deployed by Deputy Barney into the
 20 Residence was a Pyrotechnic Chemical Agent.

21 It is undisputed that Deputy Barney of the HCSD admits having deployed two
 22 handheld triple chamber CS gas grenades into the residence where Stewart was.
 23 Deputy Barney deployed the two triple chamber grenades because he felt that the CS
 24 37 tear gas canisters were ineffective. (Ex. 2 to Claypool Decl. at 25:11-14). The
 25 EPD had deployed a total of 26 rounds of CS 37 tear gas canisters into the residence.
 26 While Deputy Barney denies that the two handheld triple chamber CS grenades were
 27 pyrotechnic chemical agents, the testimony of Officer Louis Altic contradicts this.
 28

1 Officer Altic testified that the triple chamber grenades deployed by Deputy Barney
2 were pyrotechnics.

3 Q: Back in June of 2007, were you familiar with what is called a tri
4 chamber smoke grenade?

5 A: Yes.

6 Q: All right, and back in June, 2007, did you consider a tri chamber
7 smoke grenade to be a pyrotechnic chemical agent?

8 A: I believe that they are pyrotechnic.

9 Q: I'm sorry. You believe they are?

10 A: I believe they are. They generate heat.

11 Q: All right. And that belief is based on some training you had,
12 correct?

13 A: Correct.

14 (Ex. 6 to Claypool Decl. at 31: 4-15). Officer Altic went one step further when
15 interviewed by Detective Schlesinger a couple of days after the fire in early June
16 2007, by stating that he was under the impression that Deputy Barney had deployed
17 pyrotechnic chemical agents into the residence.

18 Q: Let's move to page 19 of exhibit 1. You see the first sentence on
19 page 19 of Exhibit 1, RS, which I assume refers to Detective Schlesinger,
20 he says, Okay. Um, did –when you were out there Louis, did you ever
21 hear anything about pyrotechnic being mentioned or anything like that?
22 And then LA appears, or below that says LA and then can you read that
23 answer before I read it?

24 A: The answer was “We – I did. Um, I thought that they said that the
25 handheld ammunition that they were going to throw was a pyro type, and
26 that was way late in the course of the—you know, they tried everything
27 else that they felt might be effective.

28 (Ex. 5 to Claypool Decl. at 28:4-19).

1 Officer Altic's testimony places into question for a jury to decide whether
2 Deputy Barney deployed (in violation of the HCSD Policy) two pyrotechnic chemical
3 agents into the residence. Since Officer Altic went on to state that the type of grenade
4 deployed by Barney generates heat, the Plaintiff should be permitted to argue by
5 inference at trial that the use of a heat generating pyrotechnic chemical agent in a
6 residence constituted excessive force due to the risk of fire and loss of life.

7 6. Deputy Barney's Objectively Unreasonable Deployment of a
8 Pyrotechnic Chemical Agent Into the Residence Caused the Fire
9 that Killed Stewart.

10 Undoubtedly, there is ample evidence, both direct and through inference, that
11 Deputy Barney's deployment of the two pyrotechnic triple chamber grenades ignited
12 the fire that killed Mr. Stewart. After a combined 60 rounds of tear gas being
13 deployed into the residence by HCSD and EPD, no fire had started and very little if
14 any smoke had emitted from the home. (Alford Decl. at ¶ 9). Suddenly, Deputy
15 Barney then deployed the two handheld triple chamber gas grenades in window area 4
16 of the residence and within a short time thereafter a heavy dark smoke emanated and a
17 fire started right near the window 4 area. Jackie Alford was at the scene and observed
18 and heard the deployment of countless tear gas canisters. She counted 39
19 deployments based on the noise that resounded from each launching of a tear gas
20 canister. (*Id.*). Not once did Ms. Alford observe any smoke flow from the home
21 during the first 39 deployments of tear gas canisters. (*Id.*).

22 She then observed an officer approach the residence and throw something into
23 the window. Ms. Alford heard a very loud boom. Within the next 10 minutes, she
24 saw very dark thick smoke flowing from the area where the officers threw an object
25 into the window. Ms. Alford then saw flames in the home. (*Id.*). She began to
26 scream and cry, begging and pleading with the EPD and HCSD to allow the Hoopa
27 Fire Department access to the residence to put out the fire. (*Id.*). There is ample
28 evidence to support a theory that Deputy Barney's deployment of pyrotechnic

1 chemical agents into the residence was objectively unreasonable and ignited the fire
 2 that killed Stewart. Further, there is no evidence to suggest that Mr. Stewart started
 3 the fire.

4 Accordingly, the facts here establish that there are triable issues of fact as to
 5 whether the use of force in this case is the Court should deny the Defendants' Motion
 6 for Judgment as a Matter of Law.

7 C. There is a Patent Factual Dispute as to Whether all Officers on the Scene
 8 from HCSD and EPD Violated Mr. Stewart's Fourth and/or Fourteenth
 9 Amendment Rights by Prohibiting the Hoopa Fire Department from
 10 Rescuing Him and Putting out the Fire Once the Home was Ignited in
 11 Flames.

12 The Fourth Amendment provides the applicable standard for Plaintiffs' denial of
 13 medical care claims, since the facts establish that Mr. Stewart was seized at the time
 14 of the fire.¹ However, whether Plaintiffs' claims are governed by the Fourth
 15 Amendment standard or the Fourteenth Amendment "deliberate indifference"
 16 standard, the facts as set forth below establish a constitutional violation.

17 In general, a seizure of a person is unreasonable under the Fourth Amendment if
 18 an officer unreasonably delays or denies medical treatment for an arrestee. Thus, in
 19 order to prove an unreasonable seizure, the Plaintiffs must prove by a preponderance
 20 of the evidence that the officers unreasonably delayed or denied medical treatment for
 21 Mr. Stewart when they delayed the Fire Department's attempts to rescue him.

22 Under the Fourth Amendment, police officers may not delay or deny medical care
 23 for a detainee unless it is "objectively reasonable" under all the circumstances. For
 24
 25

26 ¹ Fed. R. Civ. P. 8(a)(2) requires only that a plaintiff allege facts establishing that
 27 he is entitled to relief under some legal theory. *See Duncan v. Stuetzle*, 76 F.3d 1480,
 28 1486 n.9 (9th Cir. 1996). It is well-established that "specific legal theories need not
 (footnote continued)

1 example, officers are required to seek the necessary medical attention for a detainee
 2 or arrestee when he has been injured while being apprehended by either promptly
 3 summoning the necessary medical help or by taking the injured arrestee to a hospital.
 4 *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1415 (9th Cir. 1986) (holding that
 5 “due process requires that police officers seek the necessary medical attention for a
 6 detainee when he or she has been injured while being apprehended by either promptly
 7 summoning the necessary medical help or by taking the injured detainee to a
 8 hospital.”); *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1099 (9th Cir.
 9 2006); *Garvey v. Gibbons*, 2008 WL 4500011, at *11 (C.D. Cal. Oct. 5, 2008) (noting
 10 that “the Ninth Circuit has declared that, in light of the mandate of *Graham* that all
 11 excessive force claims arising out of an arrest should be analyzed under the Fourth
 12 Amendment, the officers’ duty to obtain medical treatment for an arrestee arises under
 13 the Fourth Amendment,” and *Maddox* sets the standard for objectively reasonable
 14 post-arrest care).² Here, Defendants actively interfered with the Fire Department’s
 15 rescue efforts, and that interference led to the death of Mr. Stewart.

16 Raven Sherman was a volunteer firefighter for the Hoopa Tribal Fire Department
 17 and she also served on the Board for the Hoopa Tribe. Ms. Sherman responded to the
 18 scene on June 4, 2007. (Sherman Decl. at ¶ 1). Ms. Sherman participated in the
 19 approval and purchase of a brand new state of the art fire truck in early 2007. She
 20 also tested the fire truck after it was purchased to assure that it functioned properly.

21 _____
 22 be pleaded so long as sufficient factual averments show that the claimant may be
 23 entitled to some relief.” *Fontana v. Haskin*, 262 F.3d 871 (9th Cir. 2001).

24 ² *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 596 (7th Cir. 1997)
 25 (holding that although the officers’ actions in denying medical care to an arrestee “are
 26 not readily thought of as ‘force,’ the Fourth Amendment requires that seizures be
 27 reasonable under all the circumstances; and we do think that it would be objectively
 28 unreasonable in certain circumstances to deny needed medical attention to an
 individual placed in custody who cannot help himself”).

1 (*Id.*). The fire truck that was at the scene on June 4, 2007, was equipped with a high
2 technology striker water canon. The striker canon allows the Hoopa Tribal
3 firefighters to deploy a high pressure water flow to a burning structure while
4 maintaining a safe distance from the dwelling that is on fire. (*Id.* at ¶ 2). The new fire
5 truck had an extensive water pressure system and a very large water tank which
6 improved the water pressure to allow the Hoopa firefighters to put out fires at a
7 distance. (*Id.* at ¶ 2).

8 Upon arrival at Bald Hills, the Hoopa Tribal Fire Department (HTFD) attempted to
9 gain closer access to the residence. The HCSD and EPD denied the HTFD closer
10 access to the residence. Ms. Sherman learned at this time that Peter Stewart was in
11 the residence. (*Id.* at ¶ 3). At approximately 3pm, Ms. Sherman noticed dark smoke
12 and flames coming from the residence. She then asked the HCSD and EPD
13 permission to stage the fire truck at a location of about 100 feet closer to the corner
14 which would have allowed the Hoopa Firefighters to immediately put out the fire
15 while maintaining a safe distance from the residence. Both the HCSD and EPD
16 denied the HTFD closer access to the residence. (*Id.* at ¶ 4). Ms. Sherman conveyed
17 again to the HCSD and EPD that all the HTFD needed was another 100 feet to the
18 corner and that would allow them to safely put out the fire and save Stewart's life.
19 She communicated to HCSD and EPD that the striker water canon would be able to
20 reach the residence while maintaining a safe distance. Both the HCSD and EPD again
21 denied Sherman's request. (*Id.*). The HTFD believes that had it been provided
22 another 100 feet access to the residence at the time the fire started, that the fire would
23 have been able to be put out (while maintaining a safe distance) and Stewart would
24 have survived. (*Id.* at ¶ 5).

25 Lt. Cavinta's account of his decision to not allow the Hoopa Fire Department to
26 gain closer access to put out the fire is chilling. Essentially, it was Cavinta's view
27 that either Mr. Stewart exited the residence after the fire started or he burned to death
28 and died inside the property. (Ex. 5 to Claypool Decl. at 28:9-25; 29:1-7; 30:1-13).

1 Cavinta knew that Mr. Stewart was mentally disabled and that he was terrified of the
2 police. There are several alternate explanations as to why Mr. Stewart may not have
3 exited the residence. For instance, it is possible that Mr. Stewart was unable to
4 extricate himself from the bathroom and needed help.

5 Stewart was found in the bathroom near a tub of water wrapped in moist sheets so
6 he certainly was trying to survive the fire and not perish. Additionally, no weapon
7 was found in the bathroom near Stewart's body. (Marshall Decl. at ¶ 2). Richie
8 Marshall also observed pictures being taken of the HCSD and EPD while Stewart's
9 body was still in the bathroom. The HCSD and EPD officers had their guns up in the
10 air and were smiling as if they had just tagged a trophy buck. (*Id.*).

11 These facts establish that the Defendants officers in this case were both
12 unreasonable under the circumstances under the Fourth Amendment and deliberately
13 indifferent to decedent's serious medical needs under the Fourteenth Amendment.

14 D. Defendant's Are Not Entitled to Qualified Immunity as Matter of Law

15 The Supreme Court in *Saucier v. Katz*, 533 U.S. 194 (2001), outlined a two-
16 step approach to qualified immunity. The first step requires the court to ask whether,
17 viewing the facts "in the light most favorable to the party asserting the injury, do the
18 facts alleged show the officer's conduct violated a constitutional right?" 533 U.S. at
19 201; *Millender v. County of Los Angeles*, 564 F.3d 1143, 1148 (2009). "If the answer
20 to the first inquiry is yes, the second inquiry is whether the right was clearly
21 established: in other words, 'whether it would be clear to a reasonable officer that his
22 conduct was unlawful in the situation he confronted.'" *Millender*, 564 F.3d at 1148
23 (quoting *Saucier*, 533 U.S. at 201). "[S]ince a reasonably competent public official
24 should know the law governing his conduct," qualified immunity does not apply when
25 the relevant law is clearly established. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19
26 (1982); see *Butz v. Economou*, 438 U.S. 478, 506 (1978). Qualified immunity does
27 not apply when "various courts have agreed that certain conduct is a constitutional
28 violation under facts not distinguishable in a fair way from the facts presented in the

1 case at hand.” *Saucier*, 533 U.S. at 202. Defendants bear the burden of establishing
2 there is no genuine issue of material fact and the affirmative defense of qualified
3 immunity is established as a matter of law. *Crawford-El v. Britton*, 523 U.S. 574, 587
4 (1998).

5 As set forth above, the facts of this case establish that Defendants’ actions
6 violated Mr. Stewart’s right to be free from excessive force and his right to medical
7 care. Moreover, the contours of these rights were clearly established as of June 3,
8 2007. Reasonable officers in Defendants’ position were on fair notice that such force,
9 in the particular context of this case, constituted excessive force in violation of
10 Plaintiff’s constitutional rights. Reasonable officers in Defendants’ position were also
11 on fair notice that preventing paramedics from entering the burning structure housing
12 Mr. Stewart violated his constitutional right to medical care. For these reasons,
13 Defendants are not entitled to qualified immunity.

14 1. The Rights Under These or Similar Circumstances Was Clearly
15 Established as of June 3, 2007

16 For courts to determine whether a right has been “clearly established,” the
17 Ninth Circuit has directed as follows: “[I]n the absence of binding precedent, a court
18 should look to whatever decisional law is available to ascertain whether the law is
19 clearly established’ for qualified immunity purposes, ‘including decisions of state
20 courts, other circuits, and district courts.’” *Drummond*, 343 F.3d at 1060
21 (citing *Malik v. Brown*, 71 F.3d 724 (9th Cir. 1995)) (internal citations and quotation
22 marks omitted). Importantly, courts may also look to standard police training
23 materials to determine whether an officer had sufficient notice that her conduct was
24 proscribed. *Drummond*, 343 F.3d at 1062 (“Anaheim’s training materials are relevant
25 not only to whether the force employed in this case was objectively unreasonable . . .
26 but also to whether reasonable officers would have been on *notice* that the force
27 employed was objectively unreasonable.”).

28

1 E. The Right to Be Free From Excessive Force

2 In *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), the court held that FBI
3 agents who exercised deadly force on an armed suspect during a standoff were not
4 entitled to qualified immunity. In so holding, the court reasoned:

5 Law enforcement officials may not kill suspects who do not pose an
6 immediate threat to their safety or to the safety of others simply because
7 they are armed. Whenever practicable, a warning must be given so that
8 the suspect may end his resistance or terminate his flight. A desire to
9 prevent an armed suspect from entering the place he is residing because
10 it may be difficult to persuade him to reemerge is insufficient cause to
11 kill him. Other means exist for bringing the offender to justice, even if
12 additional time and effort are required

13 *Id.* at 1204. Moreover, courts have consistently reasoned that the use of chemical
14 agents, such as tear gas, flash-bang grenades, or other pyrotechnics, on persons in
15 confined spaces may violate a person’s right to be free from excessive force. *See*,
16 *e.g.*, *Boyd*, 374 F.3d at 777-79 (finding that flash-bang devices are “inherently
17 dangerous,” and holding that the use of such a device amounted to unconstitutional
18 excessive force when officers threw it blindly into a room without “careful
19 consideration of alternatives and appropriate measures to reduce the risk of injury”);
20 *Stringer v. Rowe*, 616 F.2d 993, 999 (7th Cir.1980) (“the use of such agents should be
21 strictly limited to circumstances presenting the utmost degree of danger and loss of
22 control,” and the “use of potentially dangerous quantities of the substance is justified
23 only under narrowly defined circumstances” (citing *Spain v. Procunier*, 600 F.2d 189,
24 196 (9th Cir. 1979)).³ *See also Estate of Smith v. Marasco*, 318 F.3d 497, 501-02 (3d

25
26 ³ *See also Estate of Escobedo v. Bender*, 600 F.3d 770 (7th Cir. 2010), holding, based
27 on controlling precedent from the Seventh Circuit “and the clear trend in the law from
28 our sister circuits,” that:

(footnote continued)

1 Cir. 2003) (denying defendants' motion for summary judgment on an excessive force
2 claim where officers used tear gas and flash-bang grenades to enter the home of a
3 mentally disturbed man after he aimed a laser-sighted firearm at the officers).

4 Here, on June 3, 2007, it was clear to a reasonable officer that throwing more
5 than 60 rounds of 37 CS canisters of tear gas, as well as hand-held pyrotechnic
6 chemical agents, into a confined space containing a mentally impaired individual
7 constituted excessive force. This was an eighteen-hour standoff in a rural,
8 unpopulated area, during which Stewart never shot a weapon, never took a hostage,
9 and could be seen sedately eating a sandwich and watching television. This was not a
10 situation of “the utmost degree of danger and loss of control,” *Stringer*, 616 F.2d at
11 999 (citing *Procurier*, 600 F.2d at 196), and it would have been clear to a reasonable
12 officer under these circumstances that the use of *any* chemical agent was unjustified.
13 Further, Defendants refused to allow Stewart’s mother, Jackie Alford, to negotiate
14 with her son to effectuate a safe and peaceful resolution, and Defendants declined
15 even to throw a phone into the room with Stewart to discuss a negotiation. It would
16 have been clear to a reasonable officer that disregarding feasible and safe methods of
17 negotiation was a violation of Stewart’s rights. *See Boyd*, 374 F.3d at 777-79
18 (requiring “careful consideration of alternatives and appropriate measures to reduce
19 the risk of injury”). Moreover, by Defendants’ own admissions, deploying

20 _____
21 the clearly established law as of July 19, 2005, established that the use of
22 tear gas is unreasonable when: (1) attempting to subdue individuals as
23 opposed to mass crowds; (2) when the individual does not pose an actual
24 threat; (3) when the individual is not holding hostages; (4) when the
25 individual has not committed a crime and the officers are not in the
26 process of attempting to make an arrest; (5) when the individual is armed
27 but merely suicidal as opposed to homicidal; (6) when the individual is
28 not attempting to evade arrest or flee from the police; and (7) when the
individual is incapacitated in some form.

1 pyrotechnic chemical agents into a residence is against the policy of both the HCSD
2 and the EPD. *See Drummond*, 343 F.3d at 1062 (“Anaheim’s training materials are
3 relevant not only to whether the force employed in this case was objectively
4 unreasonable . . . but also to whether reasonable officers would have been
5 on *notice* that the force employed was objectively unreasonable.”).

6 In light of Defendants’ training, which explicitly prohibits the deployment of
7 pyrotechnics into a residence, as well as clear case law finding the use of chemical
8 agents justified “only under narrowly defined circumstances,” *Stringer*, 616 F.2d at
9 999 (citing *Procurier*, 600 F.2d at 196), Defendants were on fair notice that their
10 conduct was unlawful in the particular situation confronting him.

11 F. The Right to Medical Care

12 Likewise, after the house containing Stewart caught fire following the officers’
13 deployment of tear gas and pyrotechnic chemical agents, it would have been clear to a
14 reasonable officer that preventing paramedics from treating Stewart was a violation of
15 his right to medical care. In *Maddox*, 792 F.2d at 1415, the Ninth Circuit held that
16 “due process requires that police officers seek the necessary medical attention for a
17 detainee when he or she has been injured while being apprehended by either promptly
18 summoning the necessary medical help or by taking the injured detainee to a
19 hospital.” *Id.* In a subsequent case, *Tatum*, 441 F.3d at 1099, the court held that “a
20 police officer who promptly summons the necessary medical assistance has acted
21 reasonably for purposes of the Fourth Amendment” *Id.* (emphasis added). *See*
22 *also Estate of Phillips*, 123 F.3d at 596 (finding that, although the officers’ actions in
23 denying medical care to an arrestee “are not readily thought of as ‘force,’ the Fourth
24 Amendment requires that seizures be *reasonable* under all the circumstances; and we
25 do think that it would be objectively unreasonable in certain circumstances to deny
26 needed medical attention to an individual placed in custody who cannot help
27 himself”).

28

1 In this case, Stewart was trapped inside of a burning building, unquestionably
 2 unable to help himself. Defendants knew that Stewart was mentally impaired and had
 3 been recently released from Sempervirens Mental Health Facility, and Defendants
 4 observed dark smoke and flames emanating from home. It had been eighteen hours
 5 since the standoff began, and Stewart had never deployed a weapon at anyone. Yet
 6 Defendants denied Stewart the medical attention he required by preventing the Hoopa
 7 Fire Department from approaching the residence to put out the fire. The building
 8 burned for over thirty minutes before Stewart's body was recovered. In light of the
 9 unambiguous Ninth Circuit authority requiring, at the very least, the *prompt* summons
 10 of medical help, Defendants were on fair notice that their denying Stewart medical aid
 11 was unlawful.

12 G. Plaintiff Agrees to Dismiss Her Claims for Conspiracy to Commit Civil
 13 Rights Violations and the Municipal Liability Claim.

14 Upon receipt and review of Defendants' Motion for Judgment as a matter of law,
 15 in the spirit of good faith and in an effort to promote judicial efficiency, Plaintiff
 16 agrees so stipulate to dismiss the third and fourth causes of action for conspiracy to
 17 commit civil rights violations. Plaintiff will also stipulate to dismiss the *Monell* claim
 18 for municipal liability.

19 **V. CONCLUSION**

20 For all of the foregoing reasons, Defendants' Motion for Judgment as a Matter of
 21 Law should be denied.

22

23 DATED: October 28, 2010

LAW OFFICES OF DALE K. GALIPO
 THE CLAYPOOL LAW FIRM

24

25

By: /s/ Dale K. Galipo
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