LAW OFFICES OF DALE K. GALIPO
Dale K. Galipo (Bar No. 144074)
dalekgalipo@yahoo.com
21800 Burbank Boulevard, Suite 310
Woodland Hills, California 91367
Telephone: (818) 347-3333
Facsimile: (818) 347-4118

Brian Edward Claypool (State Bar No. 134674)
The CLAYPOOL LAW FIRM
Attorneys at Law
1055 E. Colorado Blvd. 5th Floor
Pasadena, CA 91106
Tel: (626) 240-4616
Fax: (626) 796-9951
E-Mail: becesq@aol.com

Attorneys for Plaintiff JACQUELINE ALFORD

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JACQUELINE ALFORD,

Plaintiff,

vs.

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

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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I. INTRODUCTION

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

II. MATERIAL FACTS

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

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

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

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

Contrary to the officers' testimony that Mr. Stewart immediately began firing shots at them, there is a material factual dispute as to whether Mr. Stewart ever discharged a loaded weapon at the officers. Mr. Moore never saw Mr. Stewart shoot the 22 rifle at the officers, (Ex. 1 to Claypool Decl. at14:2-4), and nobody associated with the HCSD or the EPD presented any physical evidence linking any bullet fragments or shell casings to Mr. Moore's 22 rifle and his ammunition. (Deposition of Lt. George Cavinta ("Ex. 5") to Claypool Decl. at 35:10-25; 36:1-2). The officers

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

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

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

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

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

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

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

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

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

III. LEGAL STANDARD

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

IV. LEGAL DISCUSSION

A. Deputy Berry Violated Mr. Stewart's Fourth Amendment Rights.

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

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

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

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

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

B. Defendants' Use of Force Violated the Fourth Amendment

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

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

The first step of the *Graham* analysis is to evaluate the type and amount of force used. *Bryan v. McPherson*, 590 F.3d 767, 772 (9th Cir. 2009). The Court should then "'balance the amount of force applied against the need for that force.'" *Id.* (quoting *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003). "Because such balancing nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom . . . summary judgment or judgment as a matter of law . . . should be granted sparingly" in cases involving claims of excessive force. *Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003). [A]ll force—lethal and non-lethal—must be justified by the need for the specific level of force employed." *Bryan*, 590 F.3d at 773-74. Government interest factors to weigh include "the severity of the crime at issue, 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." *Graham*, 490 U.S. at 396. "The 'most important' factor under *Graham* is whether the suspect posed an 'immediate threat to the safety of the officers or others.'" *Bryan*, 590 F.3d at 775 (quoting *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (*en banc*)).

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

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

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

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

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

1. <u>There is a Factual Dispute as to Whether Stewart Committed a Crime and Whether He Discharged a Weapon.</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A: "In summary, it could be deployed outdoors for crowd control."

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

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

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

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

> Q: Back in June of 2007, were you familiar with what is called a tri chamber smoke grenade?
>
> A: Yes.
>
> Q: All right, and back in June, 2007, did you consider a tri chamber smoke grenade to be a pyrotechnic chemical agent?
>
> A: I believe that they are pyrotechnic.
>
> Q: I'm sorry. You believe they are?
>
> A: I believe they are. They generate heat.
>
> Q: All right. And that belief is based on some training you had, correct?
>
> A: Correct.

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

> Q: Let's move to page 19 of exhibit 1. You see the first sentence on page 19 of Exhibit 1, RS, which I assume refers to Detective Schlesinger, he says, Okay. Um, did –when you were out there Louis, did you ever hear anything about pyrotechnic being mentioned or anything like that? And then LA appears, or below that says LA and then can you read that answer before I read it?
>
> A: The answer was "We – I did. Um, I thought that they said that the handheld ammunition that they were going to throw was a pyro type, and that was way late in the course of the—you know, they tried everything else that they felt might be effective.

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

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

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

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

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

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

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

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

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

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

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

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

(footnote continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. The Right to Be Free From Excessive Force

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

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

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

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

(footnote continued)

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

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

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

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

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

F. The Right to Medical Care

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

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

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

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

V. CONCLUSION

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

DATED: October 28, 2010

LAW OFFICES OF DALE K. GALIPO
THE CLAYPOOL LAW FIRM

By: /s/ *Dale K. Galipo*
DALE K. GALIPO
BRIAN E. CLAYPOOL
Attorneys for Plaintiff JACQUELINE ALFORD