

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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

CASE NO.: 6:11-CV-970-ORL-35-GJK

Plaintiff,

v.

PATRICK KENNEDY, et. al.,

Defendants.

**PLAINTIFF'S AMENDED STATEMENT OF UNDISPUTED MATERIAL FACTS
IN SUPPORT OF 2ND AMENDED MOTION FOR SUMMARY JUDGMENT**

Plaintiff, through counsel, files her Amended Statement of Undisputed Material Facts in Support of her 2nd Amended Motion for Summary Judgment.

I. The Decedent never attacked, nor had he ever tried to harm anyone at Wuestoff Hospital

1. Deposition of Matthew Leverich pgs. 40-41
2. Deposition of Gordon Hewatt (Tim Hewitt) pgs. 152; 189
3. Deposition of Patrick Kennedy pgs. 63, 66, 78-79
4. Deposition of Timothy Herberner pg. 42
5. Deposition of Robert Owens pg. 26
6. Deposition of Ivette Gomez, pg. 13 lines 14-20

II. The Decedent was not armed

7. Deposition of Matthew Leverich pg. 39
8. Deposition of Gordon Hewatt pgs. 151-152
9. Deposition of Patrick Kennedy pgs. 58, 66, 78-79
10. Deposition of Timothy Herberner pg. 5

11. Deposition of Robert Owens pgs. 20-21
12. Deposition of Ivette Gomez pg. 15

III. The Decedent was not committing any crime

13. Deposition of Matthew Leverich pgs. 42, 103
14. Deposition of Gordon Hewatt pgs. 335-338
15. Deposition of Patrick Kennedy pg. 63
16. Deposition of Timothy Herberner pgs. 41-42
17. Deposition of Ivette Gomez pg. 19

IV. Decedent had caused no property damage to hospital's lobby

18. Deposition of Matthew Leverich pg. 49
19. Deposition of Gordon Hewatt pg. 181
20. Deposition of Patrick Kennedy pgs. 67, 78-79
21. Deposition of Timothy Herberner pg. 42
22. Deposition of Robert Owens pg. 26
23. Deposition of Ivette Gomez, pg. 19, line 24 thru to pg. 20 line 4

V. Defendants recognized Preston's compromised mental state as per the police dispatch; & their personal observations of him prior to him being tasered.

24. Deposition of Matthew Leverich pg. 48
25. Deposition of Patrick Kennedy pgs. 58-59
26. Deposition of Timothy Herberner pgs. 28, 50-51
27. Deposition of Robert Owens pgs. 5, 46
28. Deposition of Gordon Hewitt pg. 217
29. Deposition of Ivette Gomez pg. 14; & 41

VI. The Defendants completely secured the hospital's lobby area with a several officers, male nurses, hospital security guards, and their police issued weapons; they admit there was no potential risk of harm to the public

- 30. Deposition of Matthew Leverich pgs. 60, 72-73, 109
- 31. Deposition of Gordon Hewatt pgs. 190-193; 200-201
- 32. Deposition of Robert Owens pg. 11
- 33. Deposition of Patrick Kennedy pgs. 70-71, 76

VII. No need to have hurried or rushed their interaction with the Decedent. He was on his knees with his hands behind his back as they had ordered. Time was no issue

- 34. Deposition of Matthew Leverich pg. 124
- 35. Deposition of Gordon Hewatt pgs. 200-201; 332-334
- 36. Deposition of Patrick Kennedy pgs. 17, 23, 84
- 37. Deposition of Timothy Herberner pgs. 47-48
- 38. Deposition of Robert Owens pgs. 120-121
- 39. Deposition of Ivette Gomez pgs. 25; & 80

VIII. Defendants made no attempt to find out from hospital's medical staff anything about the Decedent's mental/medical issues as diagnosed by them, even with the area 100% secured & facing no time issue or deadline

- 40. Deposition of Matthew Leverich pgs. 54-55 (agrees that it should have been done); 61, 63-66
- 41. Deposition of Gordon Hewatt pg. 150
- 42. Deposition of Patrick Kennedy pgs. 99-101
- 43. Deposition of Timothy Herberner pgs. 43, 52-53
- 44. Deposition of Robert Owens 11-12, 139
- 45. Deposition of Ivette Gomez pgs. 26-27

IX. Decedent was compliant with the Defendants' orders despite his nearly incoherent mental state by retreating, recoiling, getting on his knees, & putting hands behind his back

46. Deposition of Matthew Leverich pgs. 47, 50-51, 60, 78, 81, 105
47. Deposition of Gordon Hewatt pgs. 99 (**Confirms that Decedent asked him if he could call his mother while he was down on his knees**); 189-190, 215, 217
48. Deposition of Ivette Gomez pgs. 76-77 (Never told Preston they were going to take him into custody, arrest him, or would handcuff him while he was on his knees with his hands behind his back, prior to tasing him).
49. Deposition of Patrick Kennedy pgs. 68, 70-71, 78-79, 83
50. Deposition of Timothy Herberner pgs. 30, 32, 51-52
51. Deposition of Owens pgs. 7-8 (**Confirms Preston only backed away, and then begged them not to shoot him**).

X. Defendants' Responses to Request for Production of Documents addressing Taser Int'l Mfg. warnings, dangers, & risks of chest taserings, repeat, prolonged, & multiple taserings, and failure to quickly go "hands -on" after first tasing leading to death in excited delirium cases; impaired breathing/heart attack

52. Deposition of Leverich pgs. 28-29, 31, 34
53. Deposition of Hewatt pgs. 106-109
54. Deposition of Kennedy pgs. 26, 48-51
55. Deposition of Owens pgs. 79-82, 86-87
56. Deposition of Donald Williams pgs. 67-69

XI. Defendants lacked the understanding and were unfamiliar with dangers of improper use of their police issued Taser weapon despite the many written warnings/bulletins from the manufacturer provided to them by their employer, and lacked reasoning to see connection to excited delirium

57. Deposition of Hewatt pg. 325
58. Deposition of Leverich pg. 30
59. Deposition of Kennedy pg. 24-25, 29, 32

60. Deposition of Williams pg. 77
61. Deposition of Owens pg.126-127, 129 (Still does not understand or know what excited delirium is, or how to identify its signs/symptoms); pg. 72-73 (Agrees there is nothing in his file that would demonstrate that he was adequately trained regarding excited delirium!)
62. Deposition of Herberner pg. 15-17 (Agrees that since he was a rookie in training, he had **no knowledge and no documents, and no taser weapon** information nor the weapon itself as it had not been issued to him. Agrees he knew nothing of dangers of tasing a subject with excited delirium)
63. Deposition of Ivette Gomez pgs.45-47

XII. Incompetence & Poor Leadership under Defendant Hewatt's command

64. Deposition of Matthew Leverich pgs. 52-53, (not sure why Hewatt was yelling commands at Preston at same time as Defendants Gomez and Herberner; 3 officers giving one confused Baker Act patient simultaneous commands); pgs.56-57 (not sure why Hewatt allowed the security guards to come into the presence of their police scene with the decedent without acknowledging or authorizing their involvement); Pg. 108, Hewatt did not communicate any plan of handling the matter to any of them; they had no choice but to just react on his actions; Also Deposition of Ivette Gomez pgs. 23-25.
65. Deposition of Timothy Herberner pg. 20 (Hewatt never gave him any command during the encounter with the decedent, though he is the rookie with no training in Baker Acting or mental illness); pg. 48 (contrary to Hewatt's Florida Department of Law Enforcement in-custody death investigative statement that he told Defendant, Corporal Ivette Gomez, to keep her taser out and ready to use in case she got a better shot than

- he. Herberner confirms that no such conversation occurred which is what lead to two (2) officers triggering their taser weapons a total of six (6) times).
66. Deposition of Ivette Gomez pgs. 23-25 (no discussion b/w her & Hewatt re: taser use.)
 67. Deposition of Patrick Kennedy pg. 124 (Hewatt never gave him any instructions during the interaction with the Decedent, he let him join in and do as he pleased)
 68. Deposition of Gordon Hewatt pg. 325 (as the ranking leader of the police force at the hospital that night, and after tasing the Decedent three (3) times to his chest, an area prohibited by both the manufacturer and the Rockledge Police Dept., he was **not** aware that doing such a thing with a lethal weapon was a danger to the Decedent's health!!)
 69. Deposition of Gordon Hewatt pg. 295-296, 299-300, 320 (Retracts the lie he told to the Florida Department of Law Enforcement Investigator just two (2) days after in-custody death of Decedent at which time he represented that competent discussion and reasoning took place between himself and Defendant Gomez about utilizing two (2) tasers when no such discussion actually ever did happen, leading to the multiple and prolonged taserings of the Decedent).
 70. Deposition of Gordon Hewatt pgs. 118-120 (despite warnings of the taser manufacturer as attached to all of the defendants' request for production responses to avoid repeat, multiple, and prolonged taserings due to risk of heart attack, and breathing problems leading to death in excited delirium cases, therefore strongly recommending just 1 tasing then fast "hands-on" team to quickly restrain subject after first deployment, Defendant Hewatt did not move, command, or instruct his team to go in for "hands on" until after 6 rounds of taserings because he was concerned about the officers possibly

touching the taser wires, **THOUGH** the manufacturer encourages “hands on” **DURING** the application of the taser.

71. Deposition of Kennedy 126-127 acknowledges that in light of all of the Decedent’s compliant with their orders, if they had simply asked him to walk 100 ft with them to the Baker Act ward, it might have solved it all.

XIII. Defendants Admit their training/personnel files on handling subjects with excited delirium and/or mental illness issues is inadequate and/or thin

72. Deposition of Kennedy pgs. 35-37 (says he lacked adequate training in this sort of “hostile” situation); 39-41
73. Deposition of Leverich pg. 10, lines 15-8
74. Deposition of Herberner pg. 11, 15-17
75. Deposition of Hewatt pg. 66, 68, 71-73, 84-85
76. Deposition of Donald Williams pgs. 45, 49-50
77. Deposition of Ivette Gomez pgs. 42-44; and pg. 48

XIV. Taser risks and excited delirium were only briefly touched upon by Defendants’ employer during their taser certification class, followed by one field training example within 6 months of being hired, followed by 2-3 test questions on this issue of mental illness, Baker Act, and/or subjects with impaired/significantly diminished mental capacity as the full breadth of all the training they will ever do, or have ever done in this area of their jobs as public servants.

78. Deposition of Leverich pgs. 8, 13, 14, 18, 21
79. Deposition of Hewatt pgs. 6, 8-11, 17-18, 48-49, 57, 87, 89, 91, 99, pg. 210 (he had 1 field training exercise that he did poorly in because he failed to allow the mentally distraught homeless/drunken subject call his family, which is the same test he failed again in actuality).

80. Deposition of Kennedy pg. 12-16 (says that he was taught by the Rockledge Police Dept. to hurry, rush, and handle all excited delirium cases as fast and quick as possible by any means necessary).
81. Deposition of Herberner pgs. 4, 11, 12-17
82. Deposition of Owens pgs. 10 (had a similar field training experience with a mentally unbalanced subject at a hospital where he showed no compassion as stated by both of his training officers in their actual verbatim words, arrested the distraught subject without the hospital asking for that sort of police action, and otherwise handled it poorly); 21-23, 39-40, 43-44, 55, 57-67

XV. All named Defendants watched the 6 taserings, watched Defendant Kennedy put the pillow case over the Decedent's head (tight to his face by his own admission) further suffocating and inhibiting his respiration & breathing; watched Defendant Kennedy knee the Decedent's head down into the floor, and they all collectively wrestled with this thin Baker Act patient while he was on his stomach, hands cuffed behind his back, until he died. They all failed to intervene

83. Deposition of Leverich pgs. 91, 97, 103
84. Deposition of Hewatt pgs. 223-224; 227-228, 235-240**
85. Deposition of Kennedy pg. 57
86. Deposition of Herberner 24-25
87. Deposition of Owens pgs. 111-112 (surprised Sergeant Hewatt did not direct him to cease wrestling with Decedent in light of data).
88. Deposition of Ivette Gomez pgs. 88-89

XVI. Circumstances prove conclusively that Decedent would die or suffer likely severe injury from the various harms, tasering rounds, and prolonged struggle the Defendants needlessly afflicted upon him

89. Deposition of Kennedy pgs. **107-109** (his actions of suffocating admitting to trying to cause him intense pain, placing his knee on his skull, not even being spit on by Preston until his knee was on Preston's skull)pg. 124; 103-105, 115, 55-56
90. Deposition of Leverich pgs. 32-33, 35, 37-38, 91
91. Deposition of Hewatt pgs. 111-114, 121, 126, 132, 137, 148-149, 299-300, 236, 238
92. Deposition of Owens pgs. 30, 113-114
93. Deposition of Ivette Gomez pg. 46-47

XVII. Unreasonable & Irrational Thoughts & Decisions of the Defendants prove they do not believe their actions were over-reactions, but instead considered by them to be appropriate, valid, and plausible decisions for the present and future

94. Deposition of Kennedy pgs. 20-21: Will not take the time to calm down a non-violent Baker Act subject if that would be all that is required to avert a possible bad situation where time is no factor, and there is no weapon
95. Deposition of Kennedy pgs. 92-93: Will **not** approach or handle an encounter with a person suffering from mental illness, exited delirium, or a significantly compromised mental state differently than a normal person.
96. Deposition of Hewatt pg. 122: Despite all of the information he read from Taser International and his employer attached to his own discovery responses regarding impaired breathing and respiratory problems from multiple, repeat, and prolonged taserings, as well as it being prohibited to tase to the chest area due to the exertion and fatigue leading to death, he still did not think that a pillow case tight to the Decedent's face after these multiple, repeat, prolonged taserings from him and Defendant Gomez could have caused him to have further impaired breathing.

97. Deposition of Hewatt pg. 230-231: Even if Defendant Kennedy was stepping on the Decedent's skull and that is what prompted the Decedent to try spitting at Defendant Kennedy, Hewatt still finds nothing wrong with Kennedy placing his knee and over 300 pound body weight down on the patient's skull for no particular reason.
98. Deposition of Owens pg. 139: Even now hearing and understanding that the decedent's medical presentation at the hospital showed an aversion to his arm being touched, he would have still made no effort to find out his medical information if able to do it all over, even though it would have explained the reason the Decedent recoiled from being touched by Defendant Herberner.
99. Deposition of Ivette Gomez pg. 39 (6 rounds of tasing within span of 35 seconds sending 27 seconds, most of it to chest does **not** seem like a lot of tasing)
100. Deposition of Hewatt pg. 213-214, understood scope of his field training that directed him to let an unbalanced mental subject call home, he affirms that if he were given a second chance to handle the situation, and a phone call to the Decedent's mother would have calmed him down (as he asked of Defendant Hewatt when he complied by getting on his knees and putting his hands behind his back), he still would not have allowed it as of today, even if that meant calming him down & saving his life.
101. Deposition of Hewatt pg. 275-277: When he was once arrested for driving without headlights at night, swerving across the road in to oncoming traffic, then being arrested by an Indianatlantic police Sergeant for same and possession of a concealed weapon, he used profane language in talking to the Sergeant, claimed that he was himself an "asshole" and that he was intentionally "fucking" with the Sergeant. He refused to sit down after multiple orders from the Sergeant to do so. He thinks that in this situation,

he should NOT have been tased, because he has civil rights, and the Sergeant would have no right to do that. However he still thinks it is/was appropriate to taser an unarmed hospital mental patient 6 times who had not even uttered one bad word against him; just backed away 2-3 ft.

102. Deposition of Hewatt pg. 325-326: Thinks that after tasing the Decedent 3 times to his chest, that because he was on the floor squirming around in agony on his stomach, doing nothing violent to himself or anyone, just the “belly dance” as he called it, that it was appropriate to gang wrestle & pin him down on his stomach til he stopped moving.

XVIII. Defendants’ willingness to intentionally distort the facts & truth

103. Deposition of Herberner pgs. 7, 31-33: Defendant Herberner was with Defendant Gomez when they arrived at the hospital together, and though the hospital security guards did **NOT** tell her or him that the Decedent was fighting them, and she did not see it, she communicated this to the other officers via her radio. Herberner refutes her statement as does: Deposition of Leverich pgs. 48-49, 82, 121; Deposition of Hewatt pgs. 184-185, 263-266; Deposition of Kennedy pg 59, 61; Deposition Owens pg 90-94.
104. Defendants now claim their violent and aggressive behavior towards Preston was to save his own life due to bleeding to death concern: Deposition of Hewatt pgs. 104-105, 153, 158-161; Deposition of Ivette Gomez pgs. 81; 84-87
105. Profuse blood loss defense is refuted by Deposition of Hewatt pgs.330; Deposition of Herberner pg. 61; Deposition of Owens 24-28
106. In order to cling to claim that their lives were in jeopardy due to the Plaintiff having both a finger and elbow open wound, the Defendants have now claimed that he was trying to wipe blood on them as an intentional thing to do in a manner as though his

blood was a weapon, though none of the Defendants who gave statements to the Florida Department of Law Enforcement made this claim just two days after Mr. Bussey's death. Deposition of Kennedy pgs. 43-45; Deposition of Owens 13-19.

107. Another defense is that although the Matrix of Force escalation chart they use only allow the use of a taser when the subject tries to "physically defeat the officer", they have decided unto themselves that they can alter the words in this Matrix of Force chart to say "physically defeat custody" and say that not wanting to be touched is the same as trying to physically overpower fight the officer. Deposition of Owens pgs. 79-82; 86-87, 96-106, 108-109; Deposition of Kennedy pgs. 134-136;
108. Defendant Herberner lied and told the FDLE that when he tried touching the Decedent's arm, that Mr. Bussey sprang to his feet and attacked them. He told this lie two (2) days after his in custody death, but the video refutes as does his co-defendants who looked at video. Deposition of Leverich pgs. 111-113
109. Deposition of Owens pg. 95, admits that Defendant Gomez's false statement that Preston was fighting hospital staff, when he was not, escalated the situation making it more dangerous for the Decedent.
110. Defendant Hewatt's efforts to claim Preston's efforts to brush away outreached hands of Herberner and Officer Moore constituted a felony battery; (Hewatt depo 248-250); his lie that he communicated information about the use of two (2) tasers to Defendant Gomez when he did not do that at all, places his veracity at issue (fighting women, trespassing, selling drugs, frequent past use of cocaine, his own father having him sit for a polygraph at age 15, and his belief that he can be nasty and disrespectful to law

enforcement for which he should not face civil rights violations, but in turn inflict them on others without regret or shame) Deposition of Hewatt pgs. 275-286.

111. Defendant Herberner's veracity is also in question as he claimed that the Decedent attacked him when the hospital surveillance video shows him to be telling a lie in this regard (his own use of cocaine, purchase of cocaine several times Lsd, marijuana, various arrests: child abuse, domestic violence, & stalking).
112. Deposition of Ivette Gomez pgs. 27-28 (Refused statement to FDLE)
113. Deposition of Ivette Gomez pgs. 29 & 32 (Before being confronted with FDLE taser report, she claimed that she only recalled tasing Preston once. After being confronted with the actual report, she changed her testimony. Her intent was to tell a lie thinking no impeachment document existed, to falsely lessen her own conduct).

CERTIFICATE OF SERVICE

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

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