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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KEVIN STEPHENS, individually and as personal representative of the ESTATE OF KELLY MICHAEL STEPHENS; VIRGINIA STEPHENS, an individual,

Plaintiffs,

vs.

ED MERCER, in his personal and official capacity as Chief of Police; JAMES ESBENSHADE, an individual; CITY AND BOROUGH OF JUNEAU, a municipality; and DOES 1 through 10, inclusive,

Defendants.

-) Case No.: 1:20-cv-00004-JWS
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}) **FIRST AMENDED COMPLAINT FOR:**
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}) (1) **DEPRIVATION OF CIVIL RIGHTS
UNDER 42 U.S.C. § 1983 (FOURTH
AMENDMENT);**
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}) (2) **DEPRIVATION OF CIVIL RIGHTS
UNDER 42 U.S.C. § 1983
(FOURTEENTH AMENDMENT);**
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}) (3) **DEPRIVATION OF CIVIL RIGHTS
UNDER 42 U.S.C. § 1983
(MONELL);**
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}) (4) **DEPRIVATION OF CIVIL RIGHTS
UNDER 42 U.S.C. § 1983
(SUPERVISORY LIABILITY);**
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}) (5) **ASSAULT AND BATTERY --
SURVIVAL ACTION (AS
09.55.570);**
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}) (6) **NEGLIGENCE -- SURVIVAL
ACTION (AS 09.55.570); AND**
})
}) (7) **WRONGFUL DEATH (AS. 09.55.58)**

DEMAND FOR JURY TRIAL

THE PARTIES

1. This action is brought by Plaintiff KEVIN STEPHENS, individually and as the Personal Representative of the ESTATE OF KELLY MICHAEL STEPHENS, and VIRGINIA STEPHENS, individually. KELLY STEPHENS is referred to as the “Decedent”. The parties are collectively referred to as “Plaintiffs.”

2. Plaintiffs KEVIN STEPHENS and VIRGINIA STEPHENS are the biological father and mother of the Decedent. KEVIN STEPHENS has been appointed to serve as the Personal Representative of the ESTATE OF KELLY MICHAEL STEPHENS by the Superior Court for the State of Alaska at Juneau, Case No. 1JU-20-00159.

3. Defendant ED MERCER (“MERCER”) is, and was at all times herein alleged, the Chief of Police for the Juneau Police Department. Defendant MERCER is sued in his individual and official capacities. Upon information and belief, Defendant MERCER resides in the City and Borough of Juneau.

4. Defendant JAMES ESBENSHADE (“ESBENSHADE”) is, and was at all times herein alleged, a Police Officer with the Juneau Police Department. Upon information and belief, Defendant ESBENSHADE resides in the City and Borough of Juneau.

5. Defendant CITY AND BOROUGH OF JUNEAU (“CITY”) is a municipality located in the City and Borough of Juneau. The Juneau Police Department is an agency of the CITY, a municipality, and is responsible for the actions of its officers.

6. The true names or capacities, whether individual, corporate, associate, or otherwise, of Defendants DOES 1 through 10, inclusive, are unknown to Plaintiffs who therefore sue said Defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that each of the Defendants is responsible in some manner for the occurrences alleged herein and each DOE Defendant was a substantial factor in causing injury and damages to Decedent and Plaintiffs, as herein alleged.

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JURISDICTION AND VENUE

7. This is a civil suit brought under the Civil Rights Act, 42 U.S.C. § 1983, for violations of Plaintiffs' rights under the United States Constitution. This Court has subject matter jurisdiction over the parties and this action pursuant to 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1331. It has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1337 and principles of pendent jurisdiction.

8. This suit seeks compensatory and punitive damages against all Defendants as permitted by law. In addition, this suit seeks all other relief as deemed appropriate at the time of trial, including, but not limited to, injunctive relief.

9. Venue is proper in this Court because the events or omissions that gave rise to the causes of action herein occurred in the City and Borough of Juneau, Alaska, within the District of Alaska.

FACTS

10. Decedent was 34-years-old at the time of his death. He was an intelligent, kind, thoughtful and creative person. Decedent was well known within the community as a prominent tattoo artist, and was affectionately known by his friends as "rabbit."

11. Decedent did have ongoing issues with drugs. Plaintiffs are informed and believe and thereon state that he had prior "run-ins" with officers with the Juneau Police Department ("JPD") and in fact had suffered a severe injury caused by JPD officers before the subject incident on or about July 5, 2018.

12. On December 28, 2019, Decedent was involved in an incident at the Super Bear Supermarket on Mendenhall Loop Road with another civilian. Plaintiffs are informed and believe that decedent may have been on some narcotic or had been suffering from some mental illness at the time.

13. Defendant ESBENSHADE was called out to investigate with other officers. Defendant ESBENSHADE interviewed the complaining witness and learned facts that a reasonable police officer would recognize as establishing that the suspect – who turned out to be Decedent –

was either under the influence of some drug, or was having mental issues, or both. Defendant ESBENSHADE discussed with the complainant the drug problem in Juneau in the context of discussing the suspect, the Decedent. During the course of his interview, Defendant ESBENSHADE learned that Decedent had been swinging a chain with what was described as a hook attached to the end of it.

14. Shortly after completing his witness interview, Defendant ESBENSHADE started driving around looking for the suspect who he learned was on foot and walking a dog. While driving around looking for the suspect in his car all alone, Defendant ESBENSHADE was talking to himself callously and without regard for the civil rights of the suspect (whom he knew was likely on drugs and/or suffering from a mental illness) formulating a plan to shoot and kill the suspect. Among other things, Defendant ESBENSHADE said to himself:

“[unintelligible] I’d shoot you. On video. I don’t [unintelligible]. If you came at me, I’d shoot you. Drop you dead. You can’t do that. You’re comin’ at me with a deadly weapon. Its like you pulled a gun on me. I’m gonna shoot. I don’t know what the hell you’re thinking.”

“ You only get one chance. You better make it good ‘cause when I get ahold of you, there’d be nothing left of you.”

15. Just prior to the second part of the incident that ended with Defendant ESBENSHADE carrying out his plan to find and shoot Decedent, Decedent had gone out for a walk with his puppy, heading down Cinema Drive and was carrying a dog leash.

16. Unbeknownst to Decedent, there was an unrelated 9-1-1 call that there had been a shot fired in the area around the Chinook Apartments on Cinema Drive.

17. Defendant ESBENSHADE was responding to that 9-1-1 call at the time the events occurred, giving rise to this action.

18. At all times relevant hereto, Decedent was unarmed. The only item he had with his person was the leash for his dog.

19. Defendant ESBENSHADE arrived at the scene and turned off his lights, seemingly approaching in stealth mode.

20. Defendant ESBENSHADE went to his truck and grabbed his assault rifle, despite already having his handgun at his side and presumably access to a taser, mace and/or pepper spray, and a baton.

21. Defendant ESBENSHADE walked toward the apartments with his assault rifle in the high ready position.

22. Defendant ESBENSHADE never announced that he was a police officer.

23. It was a dark night with little lighting.

24. After arriving at the scene, turning off his lights, approaching in stealth mode with his assault rifle in the high ready position and not announcing that he was a police officer, defendant ESBENSHADE came across Decedent whom he recognized as the suspect from the earlier Super Bear incident. Decedent approached Defendant ESBENSHADE and was yelling at Defendant ESBENSHADE. Rather than take actions that a reasonable police officer would do when confronted with someone like Decedent who was unarmed, within approximately a minute of arriving on the scene, Defendant ESBENSHADE shot and killed Decedent when Decedent was approximately 30 feet away from Defendant ESBENSHADE. Shortly thereafter, Decedent was pronounced dead.

25. Plaintiffs are informed and believe and thereon state that despite Defendant ESBENSHADE's actions, the Juneau Police Department did not discipline Defendant ESBENSHADE and in fact put Defendant ESBENSHADE back on the streets.

26. Plaintiffs are informed and believe and thereon state that Defendant ESBENSHADE acted with a reckless disregard of Decedent's life and in fact had planned and premediated killing Decedent. Plaintiffs are further informed and believe and thereon state that Defendant ESBENSHADE did so, knowing the custom and practice of the Juneau Police Department covering for its officers and that he would get away with the killing.

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FIRST CAUSE OF ACTION

Deprivation of Civil Rights Under 42 U.S.C. § 1983 (Fourth Amendment)

(By plaintiff Kevin Stephens as the and personal representatives of the Estate of Kelly Stephens and as decedent's successor in interest, against Esbenshade)

27. Plaintiffs reallege and incorporate by reference the preceding paragraphs as though fully set forth herein.

28. This cause of action is brought pursuant to 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments of the United States Constitution.

29. Plaintiff KEVIN STEPHENS as personal representative of the estate of Decedent and as the successor of Decedent, has standing to assert a claim for Decedent's pre-death damages.

30. Defendant ESBENSHADE shot and killed Decedent. Shooting a weapon is the use of deadly force. Plaintiffs allege that deadly force was not warranted: Decedent did not have a weapon, only the dog chain. At the time Defendant ESBENSHADE shot and killed Decedent, Decedent was acting aggressively but was not close enough to be considered as a person threatening imminent serious physical injury or death. As such any belief that Defendant ESBENSHADE claims to have that deadly force was necessary was not reasonable under the circumstances.

31. In the process, Defendant ESBENSHADE violated Decedent's right to be free from excessive force as secured by the Fourth and Fourteenth Amendments.

32. Defendant ESBENSHADE acted under color of law and within the course and scope of his employment with the CITY and the Juneau Police Department in deploying excessive force against Decedent.

33. Defendant ESBENSHADE's actions were substantial factors in causing injury to Decedent, as he was mortally wounded and endured pain and suffering in the time before he died.

34. As a result of Defendant ESBENSHADE's actions, Plaintiffs are entitled to damages in an amount to be proven at trial for Decedent's pain and suffering in the time before he died.

35. Defendant ESBENSHADE acted in knowing, callous and pre-mediated violation of Decedent's legal and constitutional rights all without good faith, so punitive damages are warranted.

SECOND CAUSE OF ACTION

Deprivation of Civil Rights Under 42 U.S.C. § 1983 (Fourteenth Amendment)

(By Plaintiffs Kevin Stephens and Virginia Stephens against Esbenshade)

36. Plaintiffs reallege and incorporate by reference the preceding paragraphs as though fully set forth herein.

37. This cause of action is brought pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment of the United States Constitution.

38. Defendant ESBENSHADE shot and killed Decedent. Shooting a weapon is the use of deadly force. Plaintiffs allege that deadly force was not warranted: Decedent did not have a weapon, only the dog chain. At the time Defendant ESBENSHADE shot and killed Decedent, Decedent was acting aggressively but was not close enough to be considered as a person threatening imminent serious physical injury or death. As such, any belief that Defendant ESBENSHADE claims to have that deadly force was necessary was not reasonable under the circumstances.

39. In the process, Defendant ESBENSHADE violated Plaintiffs' liberty interest in the companionship of their child and son, a right secured by the Fourteenth Amendment.

40. Defendant ESBENSHADE acted under color of law and within the course and scope of his employment with the CITY AND BOROUGH OF JUNEAU and the Juneau Police Department in deploying excessive force against Decedent.

41. Defendant ESBENSHADE's actions were substantial factors in causing injury to the Plaintiffs, as the shooting killed Decedent and deprived Plaintiffs of the companionship of their child and son.

42. As a result of Defendant ESBENSHADE's actions, Plaintiffs are entitled to damages in an amount to be proven at trial.

43. Defendant ESBENSHADE acted in knowing, callous and pre-mediated violation of the Plaintiffs' legal and constitutional rights all without good faith, so punitive damages are warranted.

THIRD CAUSE OF ACTION

Deprivation of Civil Rights Under 42 U.S.C. § 1983 (*Monell*)

(By Kevin Stephens and Virginia Stephens against Mercer and the City)

44. Plaintiffs reallege and incorporate by reference the preceding paragraphs as though fully set forth herein.

45. This custom, policy and practice of deficient use of force investigations is entrenched in the Juneau Police Department. It is part of the Code of Silence: police officers cover-up for each other, lie to the public and fail to investigate properly. This de facto policy, custom and practice has created an environment in which police officers can act with impunity and where using excessive force is commonplace and encouraged. Officers know the process is deficient and that they will not be held accountable. The Juneau Police Departments deficient investigation procedure is an unconstitutional policy, custom and practice under *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978).

46. The Juneau Police Department's deficient investigation procedure was a substantial factor in causing Decedent's death. Based on his experience with the Juneau Police Department (as well as the State of Alaska Office of Special Prosecutions), Defendant MERCER knew that any use of force investigation would be a whitewash. No matter how unreasonably he or his officers acted, Defendant MERCER could concoct a story and the investigators would rubber-stamp it. Based on reporting in the Anchorage Daily News, Plaintiffs are informed and believe and thereon state that Decedent was the 36th person to have been killed by the police since the beginning of 2015 and all of these deaths have been found to be justified homicides. In addition, of the more than 80 police and correctional officers who fired shots or participated in restraining someone who died none have faced criminal charges.

47. The Juneau Police Department's unconstitutional custom, policy, and practice, as alleged herein, were substantial factors in causing Decedent to be killed and the Plaintiffs to be deprived of the companionship and support of their son.

48. Therefore, Plaintiffs are entitled to damages in an amount to be proven at trial, as well as injunctive relief and a declaration that the Juneau Police Department's use of force investigation procedures are unconstitutional.

FOURTH CAUSE OF ACTION

Deprivation of Civil Rights Under 42 U.S.C. § 1983 (Supervisory Liability)

(By Kevin Stephens and Virginia Stephens against Mercer)

49. Plaintiffs reallege and incorporate by reference the preceding paragraphs as though fully set forth herein.

50. Chief MERCER has been responsible for supervising the Juneau Police Department's use of force investigations, including the investigation of Decedent's shooting.

51. Chief MERCER knew that the Juneau Police Department's force investigation procedure (as well as that of the Office of Special Prosecutions) was deficient, a whitewash designed to exonerate the officers. He also knew that it had become so entrenched that it created an environment that actually encourages officers to violate the law.

52. The force investigation process is still a sham, designed to attack the victim, exonerate the officers and cover-up the truth. The officers also know it, so they do not follow the law. That is what happened with Officer ESBENSHADE, as alleged herein.

53. Chief MERCER acted under color of law in supervising the Juneau Police Department's force investigation procedures, including the investigation of Decedent's shooting.

54. The acts of Chief MERCER's subordinates, who conducted the sham use of force "investigations," were substantial factors in depriving Plaintiffs of their constitutional rights, as alleged herein.

55. Chief MERCER knew, or reasonably should have known, that his subordinates were engaging in deficient and unconstitutional "investigations" and that the sham investigations actually encouraged officers to violate the law, leading to unjustified shootings like Decedent's. He condoned, ratified and encouraged his subordinates to continue approving and covering-up potential misconduct, and thus encouraged the rank-and-file to continue violating the law. He showed reckless

and callous disregard for the rights of others. As a result, more people have been injured and killed by unlawful police action, including Decedent.

56. Plaintiffs are informed and believe that defendants either knew or should have known of defendant ESBENSHADE's unfitness for duty yet failed to take actions prior to decedent's killing to protect citizens from defendant ESBENSHADE.

57. As a result of Chief MERCER's actions, as alleged herein, Plaintiffs are entitled to damages in an amount to be proven at trial.

FIFTH CAUSE OF ACTION

(Assault and Battery -- Survival Action -- AS 09.55.570)

(By plaintiff Kevin Stephens as the and personal representatives of the Estate of Kelly Stephens and as decedent's successor in interest, against Esbenshade and the City)

58. Plaintiffs reallege and incorporate by reference the preceding paragraphs as though fully set forth herein.

59. Defendant ESBENSHADE's wrongful acts, conducted without due care and in a callous and pre-mediated matter in the execution and enforcement of the law, were substantial factors in causing Decedent to be placed in great fear for his life and physical well-being.

60. Defendant ESBENSHADE's wrongful acts were substantial factors in causing , Decedent to suffer physical pain and suffering before he died, in an amount that will be proven at trial and in excess of the jurisdictional amount required by this Court. As Decedent's personal representatives and successors-in-interest representing the Estate, they are entitled to claim damages for all categories of loss allowed under AS 09.55.570.

61. Defendant ESBENSHADE's actions, as alleged above, including his callous pre-mediation were intended to cause injury to Decedent or, in the alternative, were despicable acts carried on with a willful and conscious disregard for the rights and safety of others, and subjected to Decedent to cruel and unjust hardship in a conscious disregard of Decedent's rights so as to justify an award of exemplary and punitive damages.

62. In conducting himself as alleged herein, Defendant ESBENSHADE was acting within

the course and scope of his employment with Defendant CITY, thus the CITY is responsible for ESBENSHADE's actions.

SIXTH CAUSE OF ACTION

(Negligence -- Survival Action - AS 09.55.570)

(By plaintiff Kevin Stephens as the and personal representatives of the Estate of Kelly Stephens and as decedent's successor in interest, against Esbenshade and the City)

63. Plaintiffs reallege and incorporate by reference the preceding paragraphs as though fully set forth herein.

64. At all times mentioned herein, Defendant ESBENSHADE owed Decedent a duty of care to avoid causing unnecessary physical harm and distress in the execution and enforcement of the law.

65. In conducting himself as alleged herein, Defendant ESBENSHADE breached this duty of care. Among other things, Defendant ESBENSHADE'S tactical conduct and decisions leading up to the use of deadly force show, as part of the totality of circumstances, that the use of deadly force was unreasonable.

66. Defendant ESBENSHADE's acts, as alleged herein, conducted without due care in the execution and enforcement of the law, were substantial factors in causing Decedent to suffer severe physical injury, extreme emotional and mental distress and other damages in an amount to be proven at trial and in excess of the jurisdictional amount required by this Court. As Decedent's successors in interest, the Estate is entitled to claim damages for all categories of loss allowed under AS 09.55.570.

67. In conducting himself as alleged herein, Defendant ESBENSHADE was acting within the course and scope of his employment with the Juneau Police Department and the CITY. Thus, the CITY is responsible for Defendant ESBENSHADE's actions.

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SEVENTH CAUSE OF ACTION

(Wrongful Death -- AS. 09.55.580)

(By plaintiff Kevin Stephens individually and as the and personal representatives of the Estate of Kelly Stephens and as decedent's successor in interest; and Virginia Stephens, against Esbenshade and the City)

68. Plaintiffs reallege and incorporate by reference the preceding paragraphs as though fully set forth herein.

69. At all times mentioned herein, Defendant ESBENSHADE owed Decedent -- and Plaintiffs -- a duty of care to avoid causing unnecessary physical harm and distress in the execution and enforcement of the law.

70. In conducting himself as alleged herein, Defendant ESBENSHADE breached this duty of care.

71. Defendant ESBENSHADE's acts, as alleged herein, conducted without due care in the execution and enforcement of the law, were substantial factors in causing Decedent to be killed and Plaintiffs were deprived of the companionship and support of their son.

72. Under AS. 09.55.580, Defendant ESBENSHADE's acts were substantial factors in causing Plaintiffs to suffer damages in all categories of loss allowed under AS 09.55.580 in an amount to be proven at trial.

73. In conducting himself as alleged herein, Defendant ESBENSHADE was acting within the course and scope of his employment with the Juneau Police Department. Thus, the CITY is responsible for Defendant ESBENSHADE's actions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

1. For damages in an amount to be proven at trial, including general damages, special damages and punitive damages;
2. For attorneys' fees, costs and interest, as allowed by law;
3. For injunctive relief regarding the Juneau Police Department's use of force

- investigation process, to wit, that it conform to proper practices as established by the evidence adduced at trial; and
4. For such other and further relief as the Court deems just and proper.

Dated this 1st day of September, 2020.

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand trial by jury in this case.

Dated this 1st day of September, 2020.

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