UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH M. MCADAM,

Plaintiff,

Case No.: 1:11-cv-170

Hon. Janet T. Neff

v

OFFICER MATTHEW WARMUSKERKEN, DEPUTY DEREK WILSON, DEPUTY OSCAR DAVILA, CITY OF LUDINGTON, and COUNTY OF MASON,

Defendants.

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COUNTY DEFENDANTS' REPLY TO PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

*** * * * * ORAL ARGUMENT REQUESTED * * * * ***

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INTRODUCTION

The facts set forth in the Plaintiff's Counter Statement of Facts are generally undisputed. The Plaintiff's recitation of facts closely tracks the audio recording which was taken from Officer York's patrol car which cannot be properly disputed. In addition, the Plaintiff's own Counter Statement of Facts[1] primarily consists of elaborations rather than factual assertions that are in dispute. Under these circumstances, the Plaintiff cannot properly maintain that this is a case which "turns on which version of the facts is accepted." (Plf.'s Resp. Bri., p. 17). For purposes of the instant motion for summary judgment, some of the most significant undisputed facts include the following:

- Deputy Davila informed the Plaintiff that he was under arrest, although the Plaintiff does not recall being told that (Exh. 3, Davila Dep., p. 27; Exh. 1, McAdam Dep., p. 120);
- while attempting to apply the handcuffs the officers told the Plaintiff "don't tug" or "don't pull away" (Exh. 1, McAdam Dep., pp. 122- 24).

DISCUSSION

I. MUNICIPAL LIABILITY.

The Plaintiff asserts that deliberate indifference is evidenced in a number of ways, including the existing policies and procedures at the MCSD. Yet, he ultimately acknowledges that the "MCSD does have a SERT policy, separate from the less-lethal policy applicable to all deputies, which does require submission of a separate report to MMRMA." (Plf.'s Resp. Bri., p. 9; Exh. 19, Non-Lethal Force SERT Policy). Even if having a separate use of force report is a

[1] The Plaintiff claims in his Response Brief that County Defendants failed to comply with this Court's Guidelines related to the submission of separately numbered paragraphs of undisputed facts. However, the Statement of Facts that was attached to Co-Defendant Warmuskerken's Brief in Support of Motion for Summary Judgment is the product of all the Defendants' efforts to obtain a stipulated statement of facts from Plaintiff's attorney. At the time it was presented, the Plaintiff's attorney was specifically informed that counsel for the County Defendants had already approved of the proposed statement. (Exh. 27, E-mail Correspondence) The Plaintiff opted to submit his own Counter Statement of Facts. The County Defendants still rely upon the Statement of Facts, with separately numbered paragraphs, found attached to Defendant Warmuskerkern's Brief and attached here also as an Appendix.

constitutional requirement, (and it is not), such an alleged defect cannot be the "moving force" behind the alleged constitutional violation here. Sheriff Fiers clearly testified that Deputy Davila, as a member of the SERT, was required by the Mason County Sheriff's Department Non-Lethal Force SERT Policy (Exh. 17, Fiers Dep., pp. 16, 34-35, 55-56), to have filed such a report.

The Plaintiff also has not identified any prior incidents of misconduct indicating that there was a particular problem related to the inappropriate use of tasers. In the absence of such evidence informing the policymakers of a need to take action to prevent constitutional violations, it cannot be said that the instant case involves a deliberate indifference or a "systemic failure to train and/or supervise police officers adequately." (Plf.'s Resp. Bri., p. 8).

Undeterred, the Plaintiff asserts that the MCSD has a specific policy rendering it impossible to produce such information. In particular, he states that the "MCSD has a policy of report writing and record retention (or lack thereof) which precludes a review of historical use of force incidents involving the use of force for supervision, discipline and training." (Plf.'s Resp. Bri., p. 12). In this regard, the instant case is similar to the facts presented in *Steinway v Village of Pontoon Beach*, 2008 WL 2704897 (S.D.Ill. 2008), where the plaintiffs argued that the defendants' failure to record or report taser use constituted a widespread practice. In *Steinway*, the court was presented with a factual dispute involving the number of times one of the plaintiffs was tased at the time of his arrest. Although the plaintiffs argued that the defendants had the capability of downloading the data from each taser, the arresting officer testified that the data was never downloaded prior to or around the time of the arrest. In addition, there was testimony that the internal time clocks of the taser data tracking chips were never adjusted to local time. The plaintiffs asserted that this precluded "downloading data which would have been able to be used to ascertain if a particular taser had been used on a

particular date and time." *Id.* at *5. In other words, without the taser use data downloaded and the taser internal time clock set for local time, there was no means to verify which tasers were used, the number of times he was tased and the date and time of use. In this context, the plaintiffs argued that this failure of accountability allowed the municipal defendant's police officers to deploy tasers in an excessive manner in violation of an individual's constitutional rights. The court rejected the plaintiffs' argument, stating:

> This leaves the remaining assertion of municipal liability via the Village's alleged widespread practice of failing to require the downloading of taser use data before or around the time of the incident at issue. The Court finds that Plaintiffs have failed to put forth specific evidence showing multiple individuals who claim to have been tased by Village of Pontoon Beach police officers. Again, one instance will not suffice under *Monell*. Further, Plaintiffs failed to show any evidence that a widespread practice was the cause of the injuries suffered. In other words, that the Village was deliberately indifferent to the fact that the failure of the police department to download taser usage data for tracking purposes would plainly result in the officers' use of excessive force. Plaintiffs' widespread practice theory, accordingly, merely amounts to rank speculation without any evidence upon which a jury could base a reasonable inference. . . .

Id. at *6.

Plaintiff completely disregards the fact that there were other means of exploring the matters relevant to a municipal liability claim and that the County Defendants provided substantial information during the course of pretrial discovery. On this point, Plaintiff argues that his attorney did make inquiries about the individual Defendants' prior taser use. (Plf.'s Resp. Bri., p. 15, fn). However, such cursory questioning is hardly sufficient, particularly if the Plaintiff is not satisfied with the responses that were given.

For example, rather than interview arrestees or make a request for specific incident reports, the Plaintiff argues that with the absence of the historical taser data port information, he cannot verify the individual Defendants' testimony. (Plf.'s Resp. Bri., p. 15). However, Plaintiff was provided with five years of data showing all arrests by MCSD officers, including

present individual Defendants. The incident reports supporting these arrests detail the circumstances of each, including, as was true in the incident report for Plaintiff McAdam's arrest, whether a taser was deployed. If he really wanted information about prior use of tasers by department officers, he could have just asked for these incident reports. He chose not to. He cannot now complain that the department has a policy of obfuscation if he declined to look for the data in the form it is compiled.

Plaintiff impliedly suggest that the individual Defendants were not being truthful about their prior taser use. For purposes of a motion for summary judgment, however, such credibility determinations are inappropriate. See, e.g., *Singleton v Sinclair Broadcast Group, Inc.*, 660 F Supp 2d 136, 141, fn. 1 (D.Mass. 2009) ("Plaintiff cannot create a material issue of fact merely by suggesting that a jury might not believe a witness relating a fact subject to verification."); *Cox v Ky. Dep't of Transp.*, 53 F3d 146, 150 (6th Cir. 1995) ("[A] nonmoving party may not avoid a properly supported motion for summary judgment by simply arguing that it relies solely or in part upon credibility considerations. . . . [I]nstead, the nonmoving party must present affirmative evidence to defeat a properly supported motion for summary judgment."); *Hannon v Wedge*, 2012 WL 92736, *1 (W.D.Mich. 2012) ("The allegation that a jury may believe the non-moving party and disbelieve the movant is insufficient to create a genuine issue of material fact.").

Finally, with respect to the Plaintiff's spoliation argument, the record before this Court is not support a finding that Deputy Davila acted with a "culpable state of mind" when the three tasers were sent to Taser International in December of 2010. For example, he had no way of knowing that the tasers would ultimately be destroyed pursuant to the policies of Taser International. (Exh. 28, Davila Affid., ¶2). Deputy Davila was also unaware of the November 22, 2010 letter from the Plaintiff's attorney, or that there was a pending request for additional

taser data that was different from the information that was previously provided. (Exh. 28, Davila Affid., ¶3). Under these circumstances, the Plaintiff's arguments should be rejected. See, e.g., *Chavez v Hatterman*, 2009 WL 807440, *2 (D.Colo. 2009) (finding that there was no bad faith in failing to not preserve taser data where neither defendant had possession, custody or control of the taser at the time that its relevance became known); *More v City of Braidwood*, 2010 WL 3853227 (N.D.Ill. 2010) (denying without prejudice plaintiff's motion to compel because the plaintiff failed to show that the defendants willfully failed to provide the data download information).

II. *HECK V HUMPHREY.*

The Plaintiff's response to the arguments under *Heck v Humphrey*, 512 US 477, 114 S Ct 2364, 129 L Ed 2d 383 (1994), is primarily set forth in his Brief in Opposition to Defendant Warmuskerken's Motion for Summary Judgment. (Plf.'s Resp. Bri. to Co-Def. Mot for S.J., pp. 8-15). There, the Plaintiff spends a significant amount of time disputing the facts to support the existence of an assault. That, however, is clearly an attempt to undercut the effect of his criminal plea.

The Plaintiff also attempts to undercut the effect of his plea under the recent case of *People v Moreno*, 491 Mich 38, __ NW2d __, 2012 WL 1381039 (Apr. 20, 2012), where the Michigan Supreme Court held that MCL § 750.81d did not abrogate the common-law right to resist unlawful police conduct. Specifically, he argues that *Moreno* is irrelevant here because it involved a conviction for resisting and obstructing, rather than excessive force. However, since the *Heck* doctrine applies to the lawfulness of police conduct as both an element as well as an affirmative defense, *Schreiber v Moe*, 596 F3d 323, 334 (6th Cir. 2010), that is a distinction

without meaning.[2]

The Plaintiff further suggest that the assault and alleged excessive force are not "inextricably intertwined." Although the Plaintiff refers to the "temporal aspects" between the conduct related to the conviction and the force used by the police, the Sixth Circuit recently explained the "inextricably intertwined" principle in *Matheney v City of Cookeville*, 461 Fed Appx 427, 2012 WL 372974 (6th Cir. 2012), stating:

> For *Heck* to bar a § 1983 claim, success on the claim must necessarily imply the invalidity of the conviction. Thus, both the § 1983 claim and the conviction must arise out of the same events. See *Cummings v City of Akron*, 418 F3d 676, 682-83 (6th Cir. 2005). Conversely, an excessive force claim is not barred when the alleged use of force occurred after the suspect was handcuffed and brought under control. See *Coble v City of White House*, 2009 WL 2850764, at *8-9 (M.D.Tenn. Aug. 29, 2009), *rev'd on other grounds*, 634 F3d 865 (6th Cir. 2011). In such a case, the force would not be "inextricably intertwined" with the suspect's resistance to arrest.

Id. at *3. Because the plaintiff did not allege the application of force after he was handcuffed, the court in *Matheney* went on to conclude that the force used by the officers and the force he used in resisting arrest were inextricably intertwined.

In this case, with the exception of the incident at Memorial Hospital, there is nothing to suggest that the Plaintiff's excessive force claim is based upon an improper use of force after he was handcuffed and brought under control. As in *Matheney*, therefore, the Plaintiff cannot properly maintain that the alleged excessive force is not "inextricably intertwined" with his own assaultive conduct. *Heck* bars such a claim.

Finally, as it relates to Deputies Davila and Wilson, the Plaintiff cites *Ballard v Burton*, 444 F3d 391 (5th Cir. 2006), for the proposition that "*Heck* preclusion with regard to one officer does not necessarily require preclusion as to all officers." (Plf.'s Resp. Bri., p. 16). However,

[2] Alternatively, the Plaintiff states that "the law in Michigan on July 20, 2009, precluded a defense of excessive force (officer assault) to a charge of resisting and opposing." (Plf.'s Resp. Bri. to Co-Def. Mot for S.J., p. 12, fn. 5). Yet, there is nothing to suggest that the *Moreno* Court intended to give its holding prospective application only.

the Sixth Circuit rejected a similar argument in *Matheney*. Specifically, the plaintiff in *Matheney* argued that his conviction did not bar his subsequent § 1983 claim because the indictment only mentioned resistance against one of the officers and did not specifically mention two other officers that were later named as defendants in his civil suit. In rejecting that argument, the court explained:

> The resisting arrest charge arose out of one continuous struggle with all of the officers working together as a team. Thus, our analysis is not affected by the wording of the indictment. See *Cummings*, 418 F3d at 680, 682–83 (where the defendant pled no contest to assaulting only Officer Vaughn during an arrest, the court found that the plea barred the excessive force claim against Officer Vaughn, the city, and another officer).

Id. at *4.

CONCLUSION

For the reasons set forth in this Brief, the Defendants respectfully request that this Court grant their motion for summary judgment, pursuant to Fed.R.Civ.P. 56(c), and award it reasonable costs and attorney fees wrongfully incurred.

Respectfully submitted,

JOHNSON, ROSATI, SCHULTZ & JOPPICH, P.C.

BY: /s/ Jason D. Kolkema

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Dated: June 13, 2012

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
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OFFICER MATTHEW WARMUSKERKEN, DEPUTY DEREK WILSON, DEPUTY OSCAR DAVILA, CITY OF LUDINGTON, and COUNTY OF MASON,

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APPENDIX
STATEMENT OF FACTS

1. Shortly after midnight on July 20, 2009, Susan McAdam was driving her vehicle and was subsequently stopped by Ludington Police Officer Matthew York for having inoperable taillights. (Exhibit 1, York dep at 13).[1]

[1] The exhibit numbers identified in this Appendix referred to the Exhibits attached to Co-Defendant Warmuskerken's Brief in Support of Motion for Support Judgment dated May 3, 2012.

2. Plaintiff was a passenger in his mother's vehicle. (Exhibit 2, Ludington Police report; Dkt. No. 1, Complaint at ¶ 15).

3. Officer York activated his overhead lights and Ms. McAdam stopped her vehicle. (Exhibit 1, York dep at 13; Dkt. No. 1 at ¶ 18).

4. Officer York asked Ms. McAdam for her driver's license, registration and proof of insurance. (Exhibit 2, Ludington Police report; Exhibit 3, Video1; Dkt. No. 1 at ¶ 19).

5. Ms. McAdam stated she did not have a drivers license with her, but produced other documentation. Officer York asked Ms. McAdam to step out of her vehicle. He escorted her to the rear of the vehicle. Officer York asked Ms. McAdam if she had consumed any alcohol. She responded that she had two drinks at her mother's house. (Exhibit 2, Ludington Police report; Exhibit 3, Video; Dkt. No. 1 at ¶¶ 20-22).

6. Shortly after the stop, Mr. McAdam got out of the passenger side of the vehicle and walked towards Officer York and his mother. Mr. McAdam is 6'7", and weighed approximately 225 pounds at the time. (Exhibit 4, PI Dep at 57, 99-100).

7. Officer York asked Mr. McAdam what he wanted. Mr. McAdam stated he just wanted to check on his mom. Officer York indicated that she was okay and asked Mr. McAdam to get back in the vehicle, which he did. (Id. at 101; Exhibit 3, Video; Dkt. No. 1 at ¶¶ 23-24).

8. A short time later Mr. McAdam got out of the vehicle and approached Officer York and his mother. Officer York told Mr. McAdam to stay in the car. Mr. McAdam stated he did not have to stay in the car but could walk home. (Exhibit 4, PI dep at 101; Exhibit 3, Video; Dkt. No. 1 at ¶¶ 27-28).

9. Officer York told Mr. McAdam to walk away. Mr. McAdam responded that he would do so. During this discussion, Officer York contacted dispatch and requested another unit at his location. (Exhibit 3, Video; Dkt. No. 1 at ¶¶ 29-30).

10. Shortly thereafter, Officer Warmuskerken arrived at the scene in a marked Ludington patrol vehicle. When Officer Warmuskerken arrived, Officer York told dispatch, "we're calming down here." The video shows Mr. McAdam approaching Officer Warmuskerken. He was told to sit back in the car. Mr. McAdam stated he did not need to get back into the car. (Exhibit 4, PI dep at 101-105; Exhibit 3, Video; Dkt. No. 1 at ¶¶ 31- 34).

11. Mr. McAdam took his Apple iPhone and began recording his encounter with Officer Warmuskerken by putting the iPhone near Officer Warmuskerken's face. (Exhibit 5, Warmuskerken dep at 40-42; Dkt. No. 1 at ¶¶ 34, 36).

12. Officer Warmuskerken states that he moved Mr. McAdam's hand to get the iPhone from in front of his face, as it could be used as a weapon. (Exhibit 5, Warmuskerken dep at 40-42).

13. Officer York told Mr. McAdam that he was interrupting his investigation and needed to leave. At that point Mr. McAdam began walking away. He was followed by Officer Warmuskerken. (Exhibit 3, Video; Dkt. No. 1 at ¶¶ 37; Exhibit 5, Warmuskerken dep at 44).

14. Officer York told Officer Warmuskerken that he could let Mr. McAdam go, that he just did not want him around. (Exhibit 3, Video; Dkt. No. 1 at ¶ 38).

15. At about this time, Deputies Wilson and Davila arrived at the scene in a marked Mason County Sheriff's patrol car. They got out of their vehicle and approached Mr. McAdam. Officer York advised the deputies that Mr. McAdam needed to leave. The deputies responded "we'll take him." (Dkt. No. 1 at ¶¶ 39-40).

16. After walking a short distance away, Mr. McAdam stopped, turned around and asked if he could get his two dogs which were in the backseat of his mother's vehicle. (Exhibit 4, PI dep at 114).

17. One of the deputies told Mr. McAdam that it was his last opportunity to leave or he was going to jail. (Id. at 114-116; Dkt. No. 1 at ¶ 42).

18. Mr. McAdam turned around and began walking away from the scene, but then stopped and started recording again. Deputies Wilson and Davila and Officer Warmuskerken began to approach Mr. McAdam. Deputy Davila informed him he was under arrest. (Exhibit 5, Warmuskerken dep at 50-51).

19. The Deputies approached Mr. McAdam and tried to handcuff his hands. He resisted and was taken to the ground. (Id. at 52).

20. Officer Warmuskerken was acting as an assisting officer to the arrest made by Mason County. (Exhibit 5, Warmuskerken dep at 51).

21. After being taken to the ground, the officers were only able to get one of Mr. McAdam's wrists into a handcuff. (Dkt. No. 1 at ¶ 47).

22. Mr. McAdam was told several times by the officers to stop resisting, or he might be tased. (Exhibit 5, Warmuskerken dep at 54-56).

23. I don't recall Officer Warmuskerken saying anything before the first taser. (Ex. 4, Davila p. 37); I don't recall if Warmuskerken warned him before the taser – I don't recall hearing the word taser prior to Warmuserken's drive stun (Ex. 5, Wilson pp.36-37).

24. Officer Warmuskerken used his taser first and drive stunned Mr. McAdam in the left shoulder area. (Id. at 56-57, 107-108; Exhibit 6, Davila police report).

25. One of the deputies used his taser to drive stun Mr. McAdam when he continued his resistence to their commands. (Dkt. No. 1 at ¶¶ 50-51; Exhibit 2, Ludington police report).

26. Mr. McAdam still resisted being handcuffed so at that point Deputy Davila inserted a cartridge into his taser and deployed taser probes into Mr. McAdam's back. (Dkt. No. 1 at ¶ 53).

27. Mr. McAdam was then handcuffed and escorted back to the deputy's patrol car. (See, generally, Exhibit 5, Warmuskerken dep at 44-64; Dkt. No. 1 at ¶ 55).

28. Officer Warmuskerken received minor facial injuries as a result of this encounter. (Exhibit 7, Photo of Warmuskerken).

29. Mr. McAdam was taken by the Mason County deputies in their patrol vehicle to Memorial Medical Center to be checked per policy. Officer Warmuskerken followed in his patrol vehicle. (Dkt. No. 1 at ¶¶ 56-57).

30. While in the emergency room, one of Mr. McAdam's wrists was locked to the hospital bed. (Dkt. No. 1 at ¶ 60).

31. Though he was loud and yelling, Mr. McAdam was initially compliant at the hospital. (Exhibit 5, Warmuskerken dep at 75-76; Exhibit 8, Holmes dep at 10-15; Exhibit 9, Russell dep at 10-13).

32. Mr. McAdam was observed to be angry, uncooperative, and agitated by the nursing staff. (Exhibit 10, Luft dep at 21; Exhibit 8, Holmes dep at 10; Exhibit 11, Memorial Medical Center EDM Patient Record).

33. Mr. McAdam asked for his iPhone, and was told by a Mason County Sheriff Deputy he would not be getting it back because it was evidence. (Dkt. No. 1 at ¶ 63-64; Exhibit 5, Warmuskerken dep at 75-76).

34. Mr. McAdam became very agitated, started acting aggressive, and attempted to get up. (Exhibit 5, Warmuskerken dep at 77).

35. When told to lie down, Mr. McAdam began to sit up, and was told by at least one officer that he would be tased again if he did not comply. (Exhibit 4, McAdam dep at 137; Dkt. No. 1 at 66).

36. As Mr. McAdam attempted to get up, Deputy Wilson attempted to drive stun him. (Exhibit 12, Wilson dep at 53-54).

37. Mr. McAdam batted Deputy Wilson's arm away as he tried to drive stun Mr. McAdam. (Id.).

38. After seeing Mr. McAdam swat Deputy Davila's hand away, Officer Warmuskerken drive stunned Plaintiff in the thigh. Mr. McAdam complied and laid back down. (Exhibit 5, Warmuskerken dep at 77-79; Exhibit 12, Wilson dep at 53-54; Dkt. No. 1 at ¶ 70).

39. Mr. McAdam was discharged from Memorial Medical Center and transported to the Mason County Jail. (Dkt. No. 1 at ¶ 72).

40. Mr. McAdam was initially charged with "Assaulting/Resisting/Obstructing" Officer York in the performance of his duties, in violation of M.C.L. § 750.81d. (Exhibit 13, Felony information; Exhibit 14, Felony complaint).

41. On October 7, 2009, Mr. McAdam pled guilty to assault and battery against Officer Warmuskerken in violation of MCL 750.81. (Exhibit 15, Plea Transcript at 4-8; Exhibit 16, Judgment of Sentence; Exhibit 17, Plea Agreement).

MCADAM V COUNTY OF MASON

County Defendants' Reply to Plaintiff's Brief in Opposition to Motion for Summary Judgment

Exhibit 27

Jason Kolkema

From: Andrew J. Brege [abrege@cmda-law.com]
Sent: Wednesday, May 02, 2012 5:40 PM
To: Jason Kolkema
Subject: Re: McAdam v Warmuskerken, et al

Categories: Reviewed

Any thoughts on his proposed changes?

Seems he is going to file his own statement regardless what ours says.

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> Andrew: See attached. Thanks. Steve
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> -----Original Message-----
> From: Andrew J. Brege [mailto:abrege@cmda-law.com]
> Sent: Tuesday, May 01, 2012 4:49 PM
> To: 'Joshua Fahlsing'; Steve Vander Ark
> Cc: 'jkolkema@jrlaf.com'; Darlene Rosema; Allan Vander Laan; Pat
> Aseltyne
> Subject: McAdam v Warmuskerken, et al
>
> Mr. Vander Ark and Mr. Fahlsing:
>
> Pursuant to Judge Neff's request, attached please find our proposed
> statement of facts for your review. As you can see, most of the facts
> are taken from your complaint, with corresponding citations to
> depositions, video, and other records. These have already been

> reviewed and approved by co-defendants' counsel. If we cannot agree
> on the facts, my plan is to use this statement in support of our
> motion, and then pursuant to Judge Neff's civil guidelines, you can
> file a counter-statement in your response.
>
> Let me know if you have any trouble opening the document. By y
> calculation, our motion is due on May 3. If we do not hear back from
> you by noon that day, I will use this as our statement of facts and
> assume you will file a counter-statement.
>
> If you have any questions or concerns, do not hesitate to contact me.
>

--

MCADAM V COUNTY OF MASON

County Defendants' Reply to Plaintiff's Brief in Opposition to Motion for Summary Judgment

Exhibit 28

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH M. MCADAM,

Plaintiff,

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AFFIDAVIT OF DEPUTY OSCAR DAVILA
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, Oscar Davila, being duly sworn, depose and state as follows:

1. That I am, and was at all times relevant in this matter, a Deputy at the Mason County Sheriff Department with responsibilities that include the maintenance of all department tasers. I make this Affidavit with personal knowledge of the facts stated herein.

2. On December 30, 2010, I sent three tasers to Taser International, Inc., because they were not operating. In doing so, I did not know that the tasers would ultimately have to be destroyed pursuant to the policies of Taser International, did not know what was wrong with them, and did not know if they were in fact the same devices that were used in the early morning hours of July 20, 2009.

3. At the time the tasers were sent to Taser International, I was unaware of the correspondence from Joseph McAdam's attorney dated November 22, 2010, or that there was a pending requests for additional taser data that was different from the taser download reports that were previously provided in September of 2009.

4. As of December 30, 2009, I was unaware of the policies of Taser International involving the destruction of tasers, did not know that I could have requested that Taser International download the data from a particular taser prior to it being destroyed and was never informed by Taser International that any one of the three tasers would be destroyed.

5. That if sworn as a witness, I could testify completely and competently as to all facts set forth herein.

FURTHER AFFIANT SAYS NOT.

Deputy Oscar Davila

Subscribed and sworn to before
me by Oscar Davila on this
13 day of June, 2012

Notary Public in

TAMA LYN LEDGER
Notary Public - State of Michigan
County of Mason
My Commission Expires 12-22-2013

Mason County, Michigan
My commission expires: 12-22-2013