

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

THERESA MASON-FUNK,
individually and in her capacity as the
Special Administrator of the Estate of
Michael L. Funk,
212 Martin Street
Neenah, WI 54956

Plaintiff,

v.

CITY OF NEENAH,
a Wisconsin municipal corporation
211 Walnut Street
Neenah, WI 54956

Case No: 1:16-cv-978

CRAIG HOFFER
c/o Neenah Police Department
2111 Marathon Avenue
Neenah, WI 54956

ROBERT ROSS
c/o Neenah Police Department
2111 Marathon Avenue
Neenah, WI 54956

Defendants.

COMPLAINT

Plaintiff Theresa Mason-Funk (“Theresa”), individually and in her capacity as the special administrator of the Estate of Michael L. Funk, as and for her complaint against defendants City of Neenah (“City”), Craig Hoffer (“Officer Hoffer”) and Robert Ross (“Officer Ross”), alleges and states as follows:

NATURE OF THE CASE

1. This is a civil action based on the intentional and unlawful shooting of Michael L. Funk (“Michael”) by Neenah Police Department Officers Hoffer and Ross while carrying

out duties as officers and employees of the City, acting within the scope of their employment as City police officers and acting under color of law.

2. On the morning of December 5, 2015, while Michael was working at the Eagle Nation Cycles, Inc. shop at 206 Main Street in Neenah (“Shop”), he and others were taken hostage by Brian Flatoff (“Flatoff”).

3. The Neenah Police Department (“Neenah PD”) was notified that a hostage situation existed and sent officers to the scene of the events which are the subject of this lawsuit (“Incident”) including Officers Hoffer and Ross.

4. Soon after arriving at the scene of the Incident, Officers Hoffer, Ross and other Neenah PD officers formed a Hasty Response Team (“Team”) and made an assault on the Shop.

5. The Team made its assault through the Shop’s rear entrance located on an alley behind Main Street (“Alley”). After an exchange of gunfire with Flatoff, the Team withdrew from the Shop and abandoned the assault. Officers Hoffer and Ross then took up protected positions next to Vicky’s Beauty Shop (“Vicky’s”) at the corner of Doty Avenue and the Alley, northeast of the Shop’s rear entrance.

6. The Team members had been told by the Neenah PD that Flatoff was holding multiple hostages in the Shop and during the assault they had not been able to see persons in the Shop clearly, had not been able to identify who was shooting at them and had not been able to observe what other persons in the Shop were doing. Despite this, they concluded without any reasonable basis that there were no hostages and that all of the persons in the Shop were trying to ambush them.

7. Michael subsequently attempted to escape from Flatoff by going out the Shop's rear entrance into the Alley. Flatoff shot at Michael as he attempted to escape. It was apparent to a reasonable person in Officer Hoffer's and Officer Ross's location that Flatoff was firing at Michael and that Michael was a hostage and was not the hostage-taker.

8. Michael posed no threat to Officers Hoffer and Ross or to anyone else as he attempted to escape. Nevertheless, within seconds after Michael exited the Shop, Officers Hoffer and Ross emerged from their protected position and shot Michael multiple times without giving him any warning of their presence, any warning that he might be shot, or any other instruction or communication of any sort. Many of the shots fired by Officers Hoffer and Ross struck Michael in the back. Michael fell in the Alley.

9. After Michael fell, he was still alive. Officer Ross then shot Michael twice more.

10. Michael lay unattended in the alley next to the Shop's rear entrance for approximately 30 minutes after he was shot. Officers Hoffer and Ross made no attempt to ascertain Michael's condition or to procure medical assistance and help for him, even though they learned within four minutes after the shooting that Michael was not the hostage-taker. Michael died while lying in the Alley. Subsequently Michael was taken to a nearby hospital and pronounced dead.

11. This lawsuit is brought pursuant to 42 U.S.C. § 1983, pursuant to Wisconsin law concerning liability for battery and for wrongful death pursuant to Wis. Stat. § 895.01, § 895.03 and § 895.04. Theresa, individually, has been permanently deprived of the love, companionship, and financial support of her husband Michael due to Defendants' actions. Theresa brings this action individually and in her capacity as special administrator of Michael's

Estate for Michael's loss of life and pre-death pain, fright and suffering and pecuniary loss resulting from Defendants' wrongful causation of Michael's death and from their depriving Michael of his rights, privileges and immunities guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and their committing battery upon Michael, and for certain expenses arising from Michael's death.

JURISDICTION AND VENUE

12. The Court has jurisdiction of this action pursuant to 42 U.S.C. § 1331 and § 1367.

13. Venue is proper pursuant to 28 U.S.C. § 1391(b) as Defendants are located in this District and/or have a regular and established place of business within this District and the events and omissions giving rise to the claims which are the subject of this action occurred within this District.

PARTIES

14. Plaintiff Theresa Mason-Funk is an adult who resides in Neenah, Wisconsin. Prior to Michael's death she was married to Michael. Theresa was duly appointed as the special administrator of Michael's Estate by order of the Circuit Court for Winnebago County, Wisconsin on March 22, 2016 (Case No. 2016-PR-76).

15. Defendant Officer Hoffer is an adult. On information and belief, he resides in Menasha, Wisconsin. On December 5, 2015 and at all times material to this lawsuit, Officer Hoffer was employed by the Neenah PD as a police officer.

16. Defendant Officer Ross is an adult. On information and belief, he resides in Neenah, Wisconsin. On December 5, 2015 and at all times material to this lawsuit, Officer Ross was employed by the Neenah PD as a police officer.

17. Defendant City of Neenah is a Wisconsin municipal corporation with its principal place of business at 211 Walnut Street, Neenah, WI 54956. The City maintains and operates the Neenah PD.

18. The City is a defendant in this action because it is responsible and liable under Wis. Stat. § 895.46 to pay any judgment for damages and costs entered against Officer Hoffer and Officer Ross because their acts were done within the scope of their employment as City police officers while carrying out their duties as public officers and/or employees of the City.

19. At all times relevant to this Complaint, Officers Hoffer and Ross acted within the scope of their employment and under color of statutes, ordinances, rules and regulations, customs and usage of the State of Wisconsin, the City of Neenah and the Neenah PD. Theresa is suing Officers Hoffer and Ross in both their official and their individual capacities.

FACTUAL ALLEGATIONS

Background

20. At the time of the events giving rise to this Complaint, Michael Funk was 60 years old and was a husband, father and grandfather. He and Steven Erato (“Erato”) operated Eagle Nation Cycles, Inc. (“Eagle Nation”). Eagle Nation conducted a motorcycle sales, parts and repair business at the Shop.

21. On the morning of December 5, 2015, Flatoff took a machine pistol and several loaded magazines and went to the Shop. Flatoff intended to confront Vance Dalton, who had previously taken possession of Flatoff’s motorcycle in return for furnishing Flatoff with bail money and had left the motorcycle at the Shop.

22. Flatoff arrived at the Shop at approximately 8:30 AM on December 5. At that time Michael, Erato, Ryan Moderson and Moderson’s son were in the Shop. Flatoff held

Michael and the other persons present as hostages. Michael Petersen subsequently entered the Shop and was also held as a hostage. Flatoff demanded that his motorcycle be put back together and returned to him. Persons in the Shop then started putting the motorcycle back together.

23. The Neenah PD was alerted to the Incident and dispatched officers to the scene of the Incident. The officers included Lt. Shaun O'Bre ("Lt. O'Bre"), who was the officer in charge at the scene of the Incident, and Officers Hoffer and Ross. Other law enforcement agencies in the Neenah area also dispatched officers and equipment to the scene of the Incident.

24. Prior to the time Michael was shot, the Neenah PD was informed of the following facts and communicated those facts to Neenah PD officers including Officers Hoffer and Ross:

- a. That the only hostage-taker was Flatoff.
- b. That there were multiple hostages in the Shop.
- c. That the only hostage-taker was a white male who was wearing a plaid jacket.
- d. That Michael was a hostage and was wearing a black shirt with the name "Eagle Nation" written on it in yellow letters.
- e. That Michael had a concealed carry permit and might have a gun on his person.

The Team's Assault

25. Shortly after Lt. O'Bre and other Team members reached the Incident scene, Lt. O'Bre decided to make an assault on the Shop. He formed the Team to make the assault. The Team members included Officers Hoffer and Ross.

26. At approximately 9:42 AM, the Team launched its assault by charging into the Shop through the Shop's rear entrance which was located on the Alley.

27. At the time the Team entered the Shop it was bright outdoors and relatively dark in the Shop and Team members could not see the persons in the Shop clearly. Team members made no effort to identify Flatoff and the hostages in the Shop, to determine their location or to distinguish between them.

28. The first two Team members to enter the Shop fell down a staircase next to the door. The remaining Team members remained in the vicinity of the Shop's rear entrance.

29. At the time the Team entered the Shop, Michael was sitting at the desk he customarily used to conduct his business in the Shop. Flatoff was near Michael at that time. Flatoff began exchanging gunfire with Team members. Michael dropped to the floor and took cover.

30. Following the exchange of gunfire with Flatoff, the Team members abandoned the assault and retreated from the Shop. Officers Hoffer and Ross went to the northeast corner of Vicky's and remained in that vicinity, where they were protected from any shooter in the Alley by a wall. Neenah PD Officer Angela Eichmann and Lt. Angela Hanchek and Officer Raymond Berna of the Menasha Police Department were also at that location at that time.

31. Following the assault Officers Hoffer and Ross concluded that none of the persons in the Shop were hostages and that all of the persons in the Shop had set an ambush for the police and posed a threat to the police. They reached that conclusion despite the fact that they had received information from the Neenah PD dispatcher that Flatoff was holding hostages, they had not identified the person shooting at them during the assault, they had not determined what the other persons in the Shop were doing during the assault, and they had no other evidence to support their conclusion. Such conclusion was unreasonable and completely unfounded.

**Michael Funk Is Shot Multiple Times and Is Shot Twice
While Lying In the Alley After Being Severely Wounded**

32. No further activity occurred until approximately 9:45 AM, when Michael attempted to escape from Flatoff and was shot by Officers Hoffer and Ross.

33. At approximately 9:45 AM, Flatoff told Michael to shut the Shop's rear entrance door into the Alley. Michael moved toward the door and attempted to escape by going through the door into the Alley. When Flatoff saw that Michael was trying to escape, he fired several shots at Michael.

34. After exiting from the Shop, as Flatoff continued to fire at him, Michael dived to the ground outside the Shop's rear door. Michael had a pistol for which he had a concealed carry license. Michael then got to his feet, pivoted and pulled out his pistol with his right hand in order to defend himself against Flatoff.

35. Michael had no means of knowing where any police officers were located at that time, and he did not know where any officers were located.

36. Michael did not point his pistol in the direction of any police officers. He turned to face the Shop's rear door, the direction from which Flatoff had shot at him, and briefly pointed the pistol in Flatoff's direction. Michael did not fire his pistol at any time.

37. Michael then put his right arm down so that his pistol was pointing at the ground. As he did so, he turned away from the Shop's rear entrance and began to run away from the Shop and from Flatoff. At no time did Michael point his pistol in the direction of Officers Hoffer and Ross or threaten to harm police personnel or anyone else in any way.

38. After Michael went out the Shop's rear door, Officers Hoffer and Ross moved away from their protected position at Vicky's to a position at the end of the Alley next to Vicky's where they had a clear and unobstructed view of the Alley and of Michael.

39. As Michael continued his attempt to escape from Flatoff, neither Officer Hoffer, Officer Ross nor any other police personnel gave Michael any warning that they might shoot him or any other warning or instructions what to do. No police personnel said anything to Michael before Michael was shot. Michael did not see Officers Hoffer or Ross or any other police officers before he was shot.

40. Officer Hoffer had met Michael before December 5, 2015 and was familiar with Michael and with Michael's appearance.

41. At the time they shot Michael, Officers Hoffer and Ross both knew that the hostage-taker had a plaid shirt and that Michael was wearing a black shirt with the Eagle Nation logo in yellow letters. At the time of the shooting, Michael's shirt and its colors were visible and apparent to persons located in Officer Hoffer's and Officer Ross's positions.

42. Officers Hoffer and Ross made no effort before they shot Michael to identify him, to determine whether he was the hostage-taker or a hostage, to observe his features or to determine whether his clothing matched the description they had of his (Michael's) clothing or of the hostage-taker's clothing.

43. Immediately after Michael began running away from Flatoff, Officers Hoffer and Ross shot Michael. Officer Hoffer shot Michael at least twice and Officer Ross shot Michael at least seven times.

44. Many of the shots fired by Officers Hoffer and Ross were fired at and entered Michael's back and left side, at times when Michael was turned away or partly away from them.

45. After Officers Hoffer and Ross fired their initial shots, Michael fell to the ground. After he fell, it was apparent that he was severely wounded and posed no threat of harm to anyone. As Michael lay on the ground wounded, Officer Ross shot him twice more.

46. After the shooting ceased, Officer Eichmann asked Officer Hoffer if they should check Michael's condition. Officer Hoffer replied: "Fuck that. I could care less right now if he sits there and dies."

47. Michael lay unattended in the Alley for more than 30 minutes after being shot. During that period, the Neenah PD and its officers made no effort to reach Michael or to provide help or medical attention, even though a protective armored vehicle was available for use in reaching Michael and even though they learned within four minutes after the shooting that Michael was not the hostage-taker. Subsequently Michael was taken to a nearby hospital and pronounced dead.

COUNT 1

42 U.S.C. § 1983 – Michael's Loss of Life and Liberty and Death-Related Expenses

48. Theresa realleges paragraphs 1-47 above, which are incorporated by reference.

49. Officers Hoffer and Ross, while carrying out duties as officers and employees of the City, acting within the scope of their employment as City police officers and acting under color of law, violated Michael's rights and privileges granted to him by the Fourth and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. § 1983, by seizing Michael maliciously, intentionally and/or with reckless disregard of his rights, depriving him of his life and liberty, and shooting him and causing his death without reasonable basis or any legitimate governmental interest.

50. The force used by Officers Hoffer and Ross was unnecessary, unreasonable and excessive under the circumstances of the Incident for various reasons, including without limitation the following:

- a. Officers Hoffer and Ross and other Team members intentionally and recklessly created a situation conducive to the unnecessary use of deadly force against Michael by Officers Hoffer and Ross by concluding unreasonably and without foundation that none of the persons in the Shop were hostages and that all such persons, including Michael, were attempting to ambush them.
- b. Michael did not present an imminent threat of harm to Officers Hoffer and Ross or to any other person at any time during his attempted escape from Flatoff.

51. The conduct of Officers Hoffer and Ross violated clearly established constitutional rights of which reasonable officers knew or should have known.

52. As a direct and proximate result of the conduct of Officers Hoffer and Ross described above, committed maliciously, intentionally and/or in reckless disregard of Michael's and Theresa's rights, Michael and Theresa (individually and in her capacity as the special administrator of Michael's estate) have been damaged in various respects, including without limitation the following:

- a. Michael was deprived of his life and of the companionship and joy of his wife and suffered pre-death pain and suffering and pecuniary loss, all resulting from and attributable to the deprivation of his constitutional and statutory rights guaranteed by the Fourth and Fourteenth Amendments of the Constitution of the United States and protected under 42 U.S.C. § 1983. Theresa is entitled to recover such damages individually and in her capacity as special administrator of Michael's estate pursuant to Wis. Stat. § 895.01, § 895.03 and § 895.04.

- b. Michael's estate incurred funeral-related expenses. Theresa is entitled to recover such damages pursuant to Wis. Stat. § 895.01, § 895.03 and § 895.04.

COUNT 2

42 U.S.C. § 1983 – Theresa's Loss of Society and Companionship

53. Theresa realleges paragraphs 1-52 above, which are incorporated by reference.

54. As a direct and proximate result of the conduct of Officers Hoffer and Ross described above, committed maliciously, intentionally and/or in reckless disregard of Michael's and Theresa's rights, Theresa individually has been damaged in various respects, including without limitation deprivation of Michael's affection, society and companionship. Theresa is entitled to recover such damages individually pursuant to Wis. Stat. § 895.01, § 895.03 and § 895.04.

COUNT 3

Wrongful Death – Battery - Michael Funk

55. Theresa realleges paragraphs 1-54 above, which are incorporated by reference.

56. The conduct of Officers Hoffer and Ross described above was within the scope of their employment but constituted wrongful acts of battery that caused Michael's death.

57. As a direct and proximate result of the battery of Officers Hoffer and Ross described above, committed maliciously, intentionally and/or in reckless disregard of Michael's and Theresa's rights, Michael and Theresa (individually and in her capacity as the special administrator of Michael's estate) have been damaged in various respects, including without limitation the following:

- a. Michael was deprived of his life and of the companionship and joy of his wife and suffered pre-death pain and suffering and pecuniary loss, Theresa is entitled to

recover such damages individually and in her capacity as special administrator of Michael's estate pursuant to Wis. Stat. § 895.01, § 895.03 and § 895.04.

- b. Michael's estate incurred funeral-related expenses. Theresa is entitled to recover such damages pursuant to Wis. Stat. § 895.01, § 895.03 and § 895.04.

COUNT 4

Wrongful Death – Battery - Theresa's Loss of Society and Companionship

58. Theresa realleges paragraphs 1-57 above, which are incorporated by reference.

59. The conduct of Officers Hoffer and Ross described above was within the scope of their employment but constituted wrongful acts of battery that caused Michael's death.

60. As a direct and proximate result of the battery of Officers Hoffer and Ross described above, committed maliciously, intentionally and/or in reckless disregard of Michael's and Theresa's rights, Theresa individually has been damaged in various respects, including without limitation deprivation of Michael's affection, society and companionship. Theresa is entitled to recover such damages individually pursuant to Wis. Stat. § 895.01, § 895.03 and § 895.04.

WHEREFORE, Plaintiff Theresa Mason-Funk demands relief as follows:

- a. Compensatory damages as set forth above in an amount to be determined;
- b. Punitive and exemplary damages in an amount to be determined;
- c. Reasonable attorney fees and costs incurred in bringing this action pursuant to 42 U.S.C. § 1988; and
- d. Such other and further relief as the Court deems just and equitable.

PLAINTIFF DEMANDS TRIAL BY JURY OF ALL ISSUES SO TRIABLE.

Dated: July 25, 2016.

/s/ Howard B. Schoenfeld

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