Thomas Olson v City of Hooper Bay, et al, Case No. S-13455

Appellee's Brief

IN THE SUPREME COURT OF THE STATE OF ALASKA

THOMAS J. OLSON, Appellant, vs. CITY OF HOOPER BAY, OFFICER DIMITRI OAKS, OFFICER CHARLES SIMON, and OFFICER NATHAN JOSEPH, Appellees.	Supreme Court No. S-13455 Case No. 4BE-07-26-CI

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT BETHEL
THE HONORABLE LEONARD R. DEVANEY, PRESIDING

BRIEF OF APPELLEES CITY OF HOOPER BAY, OFFICERS OAKS, SIMONS AND JOSEPH

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AS 11.51.110 Endangering the welfare of a child in the second degree:

(a) A person commits the offense of endangering the welfare of a child in the second degree if the person, while caring for a child under 10 years of age,

(1) causes or allows the child to enter or remain in a dwelling or vehicle in which a controlled substance is stored in violation of AS 11.71; or

(2) is impaired by an intoxicant, whether or not prescribed for the person under AS 17.30, and there is no third person who is at least 12 years of age and not impaired by an intoxicant present to care for the child.

(b) In this section,

(1) "impaired" means that a person is unconscious or a person is physically or mentally affected so that the person does not have the ability to care for the basic safety or personal needs of a child with the caution characteristic of a sober person of ordinary prudence;

(2) "intoxicant" has the meaning given in AS 47.10.990.

(c) Endangering the welfare of a child in the second degree is a violation.

STATEMENT OF THE CASE

A. Introduction

In the midst of a struggle on a treacherous, slippery floor, where officers had already fallen perilously close to the top of stairs, an intoxicated, handcuffed arrestee kicked three officers, including kicks to the chest and knee. He twisted and turned his body, kicked, and attempted to bite to prevent officers from grabbing him and standing him up so he could be escorted down the stairs. He alternatively wrapped his legs around a pole, and any officer who sought to pry his legs away risked getting kicked in the face and the head or any other place the suspect could twist and reach. It was a challenge for three officers to subdue him in his intoxicated state. After a substantial struggle of about 10 minutes, the arrestee ultimately complied with officers' instructions and the police were able to walk him down the stairs and escort him to the police station. The arrestee's own lawyer admits that multiple Taser deployments were not unreasonable. Tr. 31-32. There is no actual evidence that the arrestee ever stopped his struggling and fighting during any of the Taser deployments, as demonstrated by the arrest tape and the officers' undisputed testimony. The arrestee's own "force" expert admits that it would have been appropriate to dose the appellant with pepper spray in an effort to control him,[1] even though pepper spray's burning sensation would have lasted far longer than all of the Taser deployments occurring during the struggle.

Disregarding the heat of the battle, and the tense, uncertain, and dangerous job police officers do day-to-day, appellant would have this Court apply 20/20 hindsight and

[1] Exc. 328 at 96:3-13; Exc. 354.

impose an arbitrary number of Taser deployments police can legally use on an actively resisting, physically violent suspect. Such arbitrary line-drawing would chill law enforcement and compromise officer safety.

Appellees ask this Court to affirm the Superior Court's judgment that the law gave the arresting officers no clear notice that their multiple Taser deployments on an actively resisting, non-compliant, and violent suspect were unconstitutional. Additionally, Appellees ask the Court to affirm the Superior Court's judgment that the arresting officers could have been reasonably mistaken as to what the law prohibited under the circumstances of this case. Appellees ask the Court to affirm the summary judgment in favor of the police officers and the City of Hooper Bay on the grounds of qualified immunity.

B. A Mother's Complaint Concerning Her Children's Safety

On December 26, 2006, at four in the morning, , the live-in girlfriend of 36-year-old Thomas "Boya" Olson, asked the police to check on the welfare of the 'Olson children. Exc. 303. See also Exc. 103 at ¶ 3. The concerned mother told the Hooper Bay Police that Boya was intoxicated and alone with their kids. Exc. 303. Sgt. Nathan Joseph and Ofc. Dimitri Oaks were dispatched to the Olson residence to check on the children's welfare. Exc. 35 at ¶ 2; Exc. 40 at ¶ 2.[2]

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[2] Alaska reached a crisis in the late 1990s when the state earned the tragic distinction of having the highest rate of child abuse and neglect among all 50 states. See Appellees' Exc. 360. The governor and the legislature tried to "break the cycle of abuse and neglect" by passing a comprehensive set of laws designed to address care providers' alcohol abuse and "to put children first." *Id.* While an adult with a drinking problem might feel he had the right to drink himself into oblivion in the presence of this minor

C. The Officers' Prior Knowledge of Boya Olson's Combativeness

The Superior Court found Boya had "an aggressive past history with police." Exc. 353. Sgt. Joseph knew Boya had been "assaultive, uncooperative and combative with police officers." Exc. 111 at ¶ 9:2-6; Exc. 112 at 13:23; Exc. 113 at 15:17. Ofc. Oaks had cited Boya as recently as December 11, 2006 for disorderly conduct involving drinking. Exc. 142 at 59:7-13; Exc. 45.

Sgt. Joseph and the backup officer, Ofc. Simon, carried Tasers and Oleoresin Capsicum ("OC"). It is undisputed that Joseph's partner, Ofc. Oaks, was not armed with a Taser on December 26, 2006. Tr. 35.[3] Under a police department order, "[t]he Taser or OC weapons are generally the first non-lethal weapons used in the force continuum. Neither will cause any injury or long lasting effect on the person." Exc. 58 at ¶ C.

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child as long as he did so in the privacy of his own home, HB 375 put an end to that misguided and dangerous expectation.

HB 375 enacted AS 11.51.110, "Endangering the welfare of a child in the second degree." That 1998 statute declared: "A person commits the crime of endangering the welfare of a child in the second degree if the person, while caring for a child under 10 years of age, ... is impaired by an intoxicant . . . and there is no third person who is at least 12 years of age and not impaired by an intoxicant present to care for the child." AS 11.51.110(a)(2). Under AS 11.51.110, "impaired means that a person is unconscious or a person is physically or mentally affected so that the person does not have the ability to care for the basic safety or personal needs of a child with the caution characteristic of a sober person of ordinary prudence." AS 11.51.110(b)(1).

[3] Appellant's complaint against Ofc. Oaks was premised on the assumption that Oaks deployed a Taser on December 26, 2006. Exc. 348. Finding that Ofc. Oaks was not even armed with a Taser on the day in question, the Superior Court granted summary judgment to Oaks on appellant's claim. *Id.* The City obtained partial summary judgment to the extent its liability was premised on the conduct of Ofc. Oaks. *Id.* Appellant did not appeal the judgment in favor of the City or Ofc. Oaks, premised on conduct of Ofc. Oaks.

D. Clarification as to How Tasers Work

The Taser has two distinct operation modes. Exc. 50. In the Electro-Muscular Disruption ("EMD") mode, the single-shot Taser cartridge discharges two propelled wires which hook into the skin of a person and conduct an electrical current which overrides the central nervous system for five-seconds causing involuntary muscle contractions and incapacity. Exc. 345 at 9:20 – Exc. 346 at 10:16; Exc. 51.

In the drive-stun mode, an electrical current of very low amperes, affects the sensory nervous system, momentarily causing pain. Exc. 52-53; Exc. 39 at ¶ 12. Contrary to Appellant's assumption, the drive-stun mode does not cause EMD. Exc. 345 at 9:20 – Exc. 346 at 10:16; Exc. 3317 at 50:15-51:15. *Cf.* Exc. 54 and 196. The drive-stun mode is used only in close quarters, where the two prongs have to have good physical contact with the suspect's body or clothing. See, Exc. 160 at 48:32-25.

When a Taser in the drive-stun mode has poor contact with the target, an audible electrical arcing occurs, evidencing that the current is having little or no effect. Exc. 346 at 10:17 – 11:25; Exc. 55. Thus, a rat-tat-tat sound on the arrest tape is a classic indicator that the Taser is making poor contact. In training, officers are told to listen to how the Taser is sounding and the rule of thumb in the field is that "silence is golden." Exc. 5; Exc. 345 at 6:18 7:4; Exc. 346 at 10:17 – 11:21.

E. Boya Olson Failed to Provide Three Youngsters and a Newborn Infant With Sober Supervision in Violation of AS 11.51.110(a)(2)

At approximately 4:05 a.m., on December 26, 2006, Sgt. Joseph and Ofc. Oaks arrived at the Olson residence in response to . concerns about the

Olson children. Exc. 35 at ¶¶ 2 and 3. The ages of the Olson children were 5, 3 ½, 1 ½ and 1-month old. Exc. 352. Although the outside temperature was 5 degrees Fahrenheit, the officers found the front door had been left wide open, as well as the door separating the arctic porch and the residence. Exc. 47; Exc. 35 at ¶ 3; Exc. 353; Tr. 25. The third door at the top of the stairs was also open. Exc. 105 at ¶16. Sgt. Joseph knocked on all three open doors and each time a voice said "Come in." Exc. 353.

The Olson residence is a single large room. Exc. 353. Although it was four in the morning, a light was on. *Id.* From the top of the stairs, the Officers could see , Boya's brother, unconscious on the couch. Exc. 35, ¶ 5. Nearby, Boya was unconscious on the bed. *Id.* There was a mattress on the floor on which the children and the newborn infant lay. *Id.* Some of the children were awake. Exc. 113 at 16:2-6; Exc. 131 at 16:10-13. Ofc. Joseph asked the oldest child, if was sober, and the child said he was not. Exc. 35 at ¶ 6. Ofc. Joseph asked the child if had been drinking and the child indicated he had been drinking. *Id.*

Sgt. Joseph could smell alcohol on the breath of both and Boya when he approached them. Exc. 113 at 17:15-23. Ofc. Joseph walked to the bed where Boya was still lying, unconscious. Exc. 36 at ¶ 8. Ofc. Oaks stood beside Boya and Joseph and could smell the odor of alcohol in the air. Exc. 132 at 21:16-20. Joseph woke Boya and asked him were everyone was. Boya stated he was "good." Exc. 36 at ¶ 8. Joseph told Boya the police were there to do a welfare check. *Id.* Joseph told Boya both doors had been left wide open, and Boya answered, "Really?" as if he had no idea the doors had

been left open or considered that the children could have wandered outside into the freezing cold. *Id.*; Exc. 42 at 37:34.[4]

Ofc. Joseph asked Boya to stand up so he could do a quick sobriety test. Exc. 36 at ¶ 9. Boya immediately started arguing, accusing the officers of trespassing. *Id.* Boya refused to stand up as instructed and he clenched his fists as if getting ready to attack, so Joseph immediately put handcuffs on Boya. *Id.*; Exc. 114 at 20:16-23; Exc. 132 at 21:16-20; Exc. 353. Meanwhile, when Joseph tried to determine the age of the newborn infant, Boya would not answer. Exc. 36 at ¶ 9; Exc. 42 at 36:04. The officers also could not wake , consistent with having been drinking. Exc. 35-36 at ¶¶ 5 and 10; Exc. 42 at 36:04.

Suddenly, and unexpectedly, Boya began yelling: "No more! No more! This is bullshit!" Exc. 42 at 35:45. The officers tried to calm Boya by telling him, "There's a baby in the house, Boya." *Id.*, Exc. 36 at ¶ 10. However, Boya continued to rant. Exc. 42 at 35:05. It is only after Boya's screaming tirade continued over a full minute, that stirred. *Id.* at 34:02; Exc. 36 at ¶ 10. After four attempts to get to sit up,

[4] The entirety of the officers' interaction with Olson is audio recorded. See Exc. 42. Listening to the arrest tape is crucial in this case as it gives the best evidence of the real uncertainty and escalating risks the officers faced. The arrest tape, when cued by Appellees starts at 39:39 min/sec and counts down. Thus, appellees' reference to Exc. 42 refers to minutes/seconds on the recording, with the recording starting at 39:39 and ending at 00:00.

was handcuffed, an officer telling the cuffs would come off when the police were done.[5]

F. Boya "Actively Resisting Arrest" in a Situation "Rapidly Escalating Out of Control"

1. Boya's Combativeness While Police Sought Urgent Back-Up

The Superior Court found "that the Plaintiff [Boya Olson] actively resisted arrest and that the situation before force was applied was rapidly escalating out of control." Exc. 353. For example, the arrest tape shows Boya yelling almost continuously. When the officers responded to Boya's aggressiveness by calling for backup, Boya went into a frenzy. Yelling at the top of his lungs, with egging him on, Boya screamed: "This is bullshit!" and bellowed "trespass!" and "motherfucker!" at the officers. Exc. 42 at 32:54. In response, Sgt. Joseph called for backup "ASAP" to "assist with the kids." Id. at 31:01-30:56; Exc. 36 at ¶ 11. In response, Boya just got louder than ever, yelling: "Bullshit! Bullshit! I'm sober. God damn it. He's sober too," even though Boya now admits he was drinking that night. Exc. 42 at 29:48; Exc. 104 at ¶ 9. Then, Boya yelled:

Boya:	You can get shot for trespassing! You can get shot for trespassing!
Officer:	Are you threatening me?
Boya:	No. I'm telling you!

Exc. 42 at 29:35; Exc. 36 at ¶ 11. As Boya continued screaming, the officers made their third call for backup. See Exc. 42 at 32:54 and 31:00 and 27:48; Exc. 36 at ¶ 12.

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[5] At this point, Sgt. Joseph did not simply call for to return home because in his experience with domestic violence, events can escalate quickly and get "a lot worse." Exc. 116 at 26:7-15.

After this third call for assistance, tried to get up and approach Boya. Exc. 42 at 27:03. Sgt. Joseph instructed to "Have a seat" and "Stay right there" in an effort to keep the brothers separated.

2. Boya's Kicking and Attempts to Bite

Less than three minutes after the last back-up call, Ofc. Charles Simon arrived. Boya appeared to be staggering and "very drunk" to Simon. Exc. 38 at ¶ 4; Exc. 154 at 24:8-9. Sgt. Joseph instructed Simon to "Get him [Boya] out of here." Exc. 42 at 24:40.

The distance from Boya's bed to the top of the stairs was approximately eight to 12 steps. Exc. 132 at 19:18-23. At the top of the stairs, was a floor-to-ceiling pillar. Near the pillar and the top of the stairs the floor was a "mess." Exc. 133 at 24:10-18 and 24:23-25. There was a black plastic trash bag on the floor, trash on the floor, and a slippery floor surface, especially near the top of the stairs. Exc. 153 at 20:1-5; Exc. 111-112 at 9:19 – 10:5; Exc. 133 at 24:10-18 and 24:23-25. It was a balancing act for the officers just to walk on the floor near the stairs, it was so slick. Exc. 111-112 at 9:19 – 10:5; Exc. 153 at 20:1-4.

As Simon, Boya, and Oaks approached the doorway at the top of the stairs, Boya starting kicking. Exc. 133 at 22:17-25. Ofc. Oaks also stepped on a trash bag and fell to the floor. Exc. 133 at 23:24 – 24:18. Simon, Oaks, and Boya all went down. Exc. 134 at 28:24 – 29:10. When Oaks tried to get Boya to stand, Boya kicked Oaks several times in the leg. Exc. 134 at 29:16-22. Ofc. Oaks observed Boya also attempting to bite at Simon, clamping down on Simon's jacket several times with his teeth. Exc. 134 at 29:22

– 30:1, 30:6-11 and 30:23-24. Ofc. Simon feared Boya was trying to bite him. Exc. 155 at 27:4- 7 and 27:12-16.

Sgt. Joseph saw Simon, Oaks, and Boya fall to the floor and witnessed Boya trying to kick at one, and then both, of the officers. Exc. 117 at 30:3-8; Exc. 117 at 31:6-14. Joseph observed Boya kick at one officer and then turn to kick at the other officer. Exc. 117 at 32:7-14. During the drawn-out struggle, Boya kicked Oaks in the knee and leg, hurting Oaks. Exc. 40 at ¶ 4. Boya kicked Simon in the chest, on the left thigh, and again on his leg, injuring Simon especially on his thigh. Exc. 38 at ¶ 6. The Superior Court specifically found that Boya "kicked at and attempted to bite the officers while on the floor, prior to the Taser deployment." Exc. 354.

While Boya kicked and attempted to bite in the struggle with Ofc. Simon and Oaks, Sgt. Joseph had his hands full with The Superior Court found that "Plaintiff's brother is heard throughout the [arrest] tape yelling encouragement to the Plaintiff [Boya]." Exc. at 354. Joseph struggled with on the couch and threatened to kick Joseph. Exc. 36 at ¶ 13; Exc. 354; Exc. 117 at 32:7-18.

From across the room, and while trying to control , Sgt. Joseph shot the Taser cartridge at Boya when he saw Boya threatening his fellow officers. Exc. 36 at ¶ 15. It is undisputed that this Taser deployment in the "EMD" mode was not effective. Exc. 354; Exc. 106 at ¶ 22.

As Boya continued to struggle with Simon and Oaks, Boya would sometimes wrap his legs around the pole near the stairway when the officers tried to stand him up. Exc.

143 at 64:4-20. Alternatively, Boya "was sitting up and he kept turning, turning his body . . . each time we tried to get around him to detain him." *Id.* at 64:8-17. After getting kicked by Boya in the chest and the leg, Ofc. Simon warned: "Boya, if you don't comply, I'm going to drive stun you. Let go of the pole." Exc. 38 at ¶¶ 6 and 7; Exc. 42 at 23:09-23:04. Boya defied Simon's warning, continued to resist, and after the tasing, yelled, as if the Taser had little effect: "Is that all you got? . . . Motherfucker! . . . Feels like a vibrator!" Exc. 42 at 23:04-22:47; Exc. 354. At this point in the arrest tape, the sounds of the physical struggle are intense.

While Boya belittled the effect of the Taser, tried to scheme with one of the children, saying: "You want to help your Dad? You know what to do! . . . Pliers . . . . Pliers," as if was trying to incite the child to find a weapon or some method to break the restraints. Exc. 42 at 23:38-29.

Boya kept fighting after the tasering, yelling "You son of a bitch!" over and over again. Exc. 42 at 21:59; 21:56, 21:49 and 21:45. During Boya's active resistance, Simon had to do two additional drive-stuns on Boya's neck and collar bone, telling Boya: "Stop trying to kick! Stop trying to bite and comply! *Id.* at 20:28; Exc. 39 at ¶ 8. Despite the additional tasings, Boya continued to fight, while officers repeatedly told him to "stop resisting." Exc. 39 at ¶ 8. Meanwhile, was still struggling with Sgt. Joseph. Exc. 42 at 21:17. Ofc. Oaks testified Boya was kicking too much for the officers to lift Olson up from the floor by grabbing his clothes. Exc. 130 at 11:20-12:3.

A few short minutes later, during sounds of an intense struggle on the arrest tape, Boya continued to argue and yell at the officers. Exc. 42 at 19:30. Then, at 19:18, the

sound of electrical arcing is audible on the arrest tape as if the Taser is not making a proper contact because of the struggle. *Id.* at 19:18; Exc. 55. Sgt. Joseph believed he deployed his Taser two times, but he could not feel the cycles working because of insufficient contact with the struggling Boya. Exc. 36 at ¶ 15. As Boya continued to fight, Boya kicked towards Ofc. Simon again. *Id.* at ¶ 16. Joseph again deployed his Taser, only to get kicked in the chest by Boya. *Id.* During the sound of arcing, the officers instructed Boya: "Stop. Boya, stop. Stop resisting. Stop resisting. Cooperate. Stop resisting. Are you going to comply? Are you going to comply, Boya? Are you going to comply? Stand up. Stand up, Boya." Exc. 42 at 18:37. At the moment Boya was momentarily on his stomach, the undisputed testimony is that Boya was "still struggling" with the officers. Exc. 118-119 at 37:22-38:4.[6]

While Boya continued to resist, the police dispatch interrupted, and one of the officers, obviously frustrated in the heat of the struggle at the speed and unexpectedness of the unfolding events, declared in frustration he was "too busy to answer the phone; I just deployed a Taser!" Exc. 42 at 17:31-23.[7] During this momentary interruption, Boya started yelling again. *Id.* at 17:03. One officer responded: "You going to comply?" but Boya continued to fight. *Id.* at 16:32. The officer still tried to reason with Boya, saying: "You can make everything a lot easier. Stand up. Stand up . . . just comply . . . Stop

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[6] Boya never actually stated that he was compliant during the tasings. In fact, he argued he "didn't respond" to the officer's commands and the "muscles in his legs" reacted to the tasing, consistent with Boya still resisting and appearing to kick. *See* Exc. 106-107 at ¶¶ 29 and 31.

[7] The officer's frustrated voice contrasts with the calm, reasonable tone the officers used with Boya.

fighting it. . . . Stand up. Are you going to stand up and comply? Are you going to stand up and comply? Stand up." *Id.* at 15:34. An officer then asked Boya another six times whether he was going to comply and stand up, but Boya took several minutes to do so before finally standing up so the police could escort him down the stairs. *Id.* at 13:47.

On the way to the police station, Boya twice said: "I want a drink from fighting with you guys." *Id.* at 12:34 and 12:25. At the police station, the officer asked if Boya was going to continue to resist, reminding Boya, "You were kicking at us." Boya admitted: "I was resisting." *Id.* at 10:13 – 9:47. Thus, Boya admitted to both "fighting" and "resisting." Boya was charged with four counts of reckless endangerment of a minor, resisting arrest, and three counts of assault on a police officer in the fourth degree. Exc. 37 at ¶ 17.

G. Even Using Tasers, it Still Took the Officers Over Five Minutes to Control Boya's Kicking and Active Resistance

With the first tasering happening at 23:37 on the arrest tape, and the last tasering occurring at 18:30, it took the officers roughly five minutes, seven seconds, to subdue Boya so that he stopped kicking and attempting to bite. See Exc. 42 at 23:37 – 18:30. Thus, the multiple Taser deployments were necessary because Boya continued to actively resist and fight the officers. Exc. 39 at ¶¶ 11 and 13.

Simon warned Boya before tasering him. Exc. 39 at ¶ 7. Simon deployed the Taser only after Boya became violent. Exc. 353. Ofc. Simon tased Boya a total of 7 times, but used only two-second drive-stuns, a shorter stun than the five-second deployments he was authorized to use. See Exc. 64 at ¶ 2.C.; Exc. 168; Exc. 39 at ¶¶ 7

and 8. Drive-stunning Boya's inner thigh was a logical and trained response to Boya wrapping his legs around the pole and refusing to let go. Exc. 333 at 116:3-15. There is no evidence that the tasers on Olson's thigh were "near his genitals" so that it indicated the officer was angry or intending abuse as asserted at p. 31 of appellant's brief. The officers are amazingly calm, composed, and professional with Olson even in the heat of the struggle with Boya as evidenced by the arrest tape. Exc. 42 at 24:40-13:47. Sgt. Joseph deployed his Taser a total of five or six times in defense of himself or his fellow officers. Exc. 166; Exc. 37 at ¶ 16.

There was no admissible evidence of "15 to 18" Taser deployments, as the Superior Court assumed. Cf. Exc. 354 n. 3 with Exc. 335 at 125:9-13. The lower court's deferring to Boya's expert to estimate the number of tasings was erroneous, since the expert was not an expert on Tasers. Exc. 310 at 23:8-12; Tr. 34. Boya's expert did not know what a Taser stun felt like, he never used a Taser, and he has never personally been present when anyone was shot with a Taser. Exc. 330 at 103:7-10; Exc. 314 at 41:13-17; Exc. 317 at 50:20-23.[8] Accordingly, the Superior Court had no basis for assuming up to 18 deployments, particularly in reference to appellant's expert's assumption.

H. Appellant's Expert Admitted the Officers' Use of Pepper Spray on Boya Would Have Been Appropriate

Even if this Court overlooks the actual record and assumes up to 18, two-second tasings, that would represent a total of 36 seconds of pain to counter the numerous kicks

[8] Even Boya himself asserts "22" burn marks supposedly caused by the two Taser prongs. Exc. 107 at ¶ 33. That is only consistent with 11 total tasings. The pictures offered by appellate are too unreadable to identify all of the supposed Taser marks.

Boya was inflicting on the officers and the other potential personal injury he could have inflicted. Since electricity does not linger in the body, Boya's kicks posed a greater risk of long-term injury to the officers than multiple tasings.

The burning sensation from one dose of pepper spray can last up to 45 minutes.[9] Appellant's expert candidly admitted it would have been an appropriate use of force to pepper spray Boya. Exc. 328 at 96:3-13; Exc. 354. If it was appropriate to pepper spray Boya, then the multiple two-second drive stuns, by analogy, were also reasonable.

The arrest tape belies any "punitive intent." Even appellant's expert has acknowledged the respectful, calm and non-threatening manner of Sgt. Joseph on the arrest tape. Exc. 337 at 130:19 – 131:4. In addition, even after the last Taser deployment at 18:30 on the arrest tape, Boya continued to refuse to stand up so he could be escorted from the house for another five minutes. See Exc. 42 at 18:30 through 13:40. During this second five minute period, the Taser was not employed, but officers still had to instruct Boya to stand up another 28 times before they got him to comply and walk down the stairs and out of the house. See *id.* The fact the officers refrained from tasing Boya for five minutes despite his non-compliance, evidenced by the officers' efforts to minimize the use of force. The fact the officers eventually defused the situation and got Boya to walk out of the house meant the officers avoided further injury which could have happened at the slippery top of the stairs or the stairs themselves, especially if Boya continued to kick, bite, or cause the officers to fall. See Exc. 37 at ¶ 20. When the circumstances are viewed as a whole, the multiple Taser deployments achieved Boya's

[9] See *LaLonde v. County of Riverside*, 204 F.3d 947, 952 (9th Cir. 2000).

eventual compliance and avoided worse injuries to the officers which could have happened on the stairs.

STANDARD OF REVIEW

"[T]he standard of review for summary judgment is to determine whether the moving party is entitled to judgment on the law applicable to established facts." *Reed v. Municipality of Anchorage*, 741 P.2d 1181, 1184 (Alaska 1987). The facts are those supported by admissible evidence and reasonable inference; not mere assertions of fact raised by counsel in memoranda. *Bennett v. Weimar*, 975 P.2d 691, 694 (Alaska 1999) (mere assertions of fact by counsel cannot be relied upon to deny summary judgment).

This Court uses its independent judgment to resolve legal issues, adopting the "rule of law that is most persuasive in light of precedent, reason, and policy." *Langdon v. Champion*, 745 P.2d 1371, 1372 n. 2 (Alaska 1987). Factual determinations will only be reversed if clearly erroneous, meaning this Court has a "definite and firm conviction that a mistake has been made." *Davila v. Davila*, 876 P.2d 1089, 1092 (Alaska 1994).

This Court is "not bound by the reasoning articulated by the trial court and can affirm summary judgment on alternative grounds," "considering any matter appearing on the record, even if not passed upon by the lower court, in defense of the judgment." *Wright v. State*, 824 P.2d 718, 720 (Alaska 1992).

ARGUMENT

A. "Excessive Force" and Qualified Immunity Are Distinct Legal Inquiries

Qualified immunity is not "a mere defense to liability;" it is an immunity from trial and "the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 2156 (2001). Immunity is a privilege "effectively lost if a case is erroneously permitted to go to trial." *Id.* at 201, 121 S.Ct. at 2156. Immunity is decided by the court, not a jury. *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 537 (1991).

Qualified immunity is analytically distinct from the issue of excessive force. Force is "excessive," and contrary to the Fourth Amendment, if it is objectively unreasonable. *Saucier*, 533 U.S. at 201-202, 121 S.Ct. at 2156. See also *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872 (1989). But the fact of excessive force does not resolve the qualified immunity issue. Regardless of whether the force was excessive, the contours of the right "must be sufficiently clear that a reasonable official would understand that what he is going violates that right." *Saucier*, 533 U.S. at 202, 121 S.Ct. at 2156; *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987). The "dispositive inquiry" under qualified immunity "is whether it could be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S.Ct. at 2156. Thus, it is improper to deny summary judgment on qualified immunity any time a material issue of fact remains on the excessive force issue since this undermines the protection qualified immunity intends which is to protect "all

but the plainly incompetent or those who knowingly violated the law." *Saucier*, at 202, 121 S.Ct. at 2157.[10]

B. Qualified Immunity May Apply Even if Questions of Fact Exist as to Whether the Force Was Objectively Reasonable

Even if material issues of fact exist as to whether force was "excessive" or "objectively reasonable," it is proper to apply qualified immunity when a reasonable officer would not consider his conduct unlawful under the circumstances. See, e.g., *Saucier*, 533 U.S. at 207-208, 121 S.Ct. at 2159 (Court observed it was "doubtful that the force used was excessive," but nevertheless "presumed" that excessive force had occurred, proceeded directly to address the question whether the degree of force was clearly established to be "unlawful," and reversed the lower court on qualified immunity grounds alone); *Sheldon v. City of Ambler*, 178 P.3d 459, 462, 467 (Alaska 2008) (notwithstanding issues of material fact as to the excessive force and "objective reasonableness," Court affirmed judgment on qualified immunity since officer could have reasonably believed his force was lawful); *Pearson v. Callahan*, 129 S.Ct. 808, 813 (2009) (receding from *Saucier* and allowing courts to resolve qualified immunity without first deciding if a constitutional violation occurred).

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[10] In considering the nature of the force employed, the Court should not be distracted by appellant's arguments about "alternatives" the officers should have employed. A "lesser alternative" is not the same thing as a "reasonable" response. See, e.g., *Forrester v. City of San Diego*, 25 F.3d 804, 807-808 (9th Cir. 1994) ("Whether officers hypothetically could have used less painful, less injurious, or more effective force in executing an arrest is simply not the issue."); *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994) (Fourth Amendment "does not require [police officers] to use the least intrusive means in the course of detention, only reasonable ones;" the test is reasonableness at the scene.)

C. The Superior Court Found that the Initial Tasings By Sgt. Joseph and Simon Were Objectively Reasonable and Not "Excessive," Consistent with Appellant's Admissions

The Superior Court found that "the initial deployments of the Taser by Sgt. Joseph and the initial deployments by Sgt. Simon objectively reasonable," meaning no excessive force occurred. Exc. 354 and 355. This is consistent with appellant's concessions during oral argument, when Mr. Olson's counsel admitted on the record that "maybe up to four tases" when Boya was kicking and attempting to bite "were appropriate." See Tr. at 31; 31-32, 32 and 34. The court reasoned: "The officers were faced with an immediate threat of bodily harm from the Plaintiff kicking and biting them in a rapidly deteriorating situation in the home." Exc. 354. As a matter of law, the court concluded: "The use of the Taser to subdue a suspect who repeatedly ignores police instructions and acts belligerently towards police is not excessive force." See, e.g., *Zivojinovich v. Barner*, 525 F.3d 1059, 1073 (11th Cir. 2008) (citing *Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir.), cert. denied, 543 U.S. 988 (2004)). See also, *Beaver v. City of Federal Way*, 301 Fed. Appx. 704, 705, 2008 WL 5065 620 at *1 (9th Cir. 2008) (no clearly established law that tasing a non-compliant suspect five times unconstitutional). Appellants' expert also conceded that force can be applied to gain compliance. Exc. 313 at 36:23 – 37:1.

D. The Two-Part Qualified Immunity Standard

Police officers have a crucial and difficult job. They are often forced to make split-second judgments in tense, rapidly escalating, and dangerous situations. Qualified immunity for police officers has evolved so that officers can do their job without the threat of being sued because of the "hazy border between excessive and acceptable

force." *Saucier*, 533 U.S. at 206, 121 S.Ct. at 2151. Qualified immunity shields conduct which "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986). "This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter*, 502 U.S. at 229, 112 S.Ct. 534 (quoting *Davis v. Scherer*, 468 U.S. 183, 196, 104 S.Ct. 3012, 3020 (1984)). See generally *Crawford v. Kemp*, 139 P.3d 1249, 1256 (Alaska 2006) ("[p]rotecting the exercise of judgment of local officials from undue influence caused by the threat of litigation is necessary to promote the public interest.")

Moreover, "[t]he reasonableness inquiry is an objective one." *Rowland v. Perry*, 41 F.3d 167, 172 (4th Cir. 1994). "Subjective factors involving an officer's motives, intent, or propensities are not relevant. The objective nature of the inquiry is specifically intended to limit examination into an officer's subjective state of mind, and thereby enhance the chances of a speedy disposition of the case." *Id.* at 173. See generally, *Hunter*, 502 U.S. at 229, 112 S.Ct. at 537 (immunity should be decided long before trial).

Alaska follows federal precedent in the area of qualified immunity. *Breck v. Ulmer*, 745 P.2d 66, 71-72 (Alaska 1987); *Sheldon*, 178 P.3d at 463 and 466 (modifying *Samaniego* to conform with *Saucier*.) This Court clarified the qualified immunity analysis in *Sheldon*, as follows:

> In *Saucier*, the United States Supreme Court emphasized that in deciding whether an officer is eligible for qualified immunity one must not merely look to whether an officer's actions were objectively reasonable, but also to whether the officer might have reasonably believed that his actions were reasonable.
>
> * * *
>
> This test recognizes that there may be behavior that is objectively unreasonable but that nonetheless an officer might have reasonably believed *was* reasonable. If this is the case, then the officer should be entitled to qualified immunity for his behavior. As the Supreme Court wrote, "[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. . . . If the officer's mistake as to what the law requires is reasonable . . . the officer is entitled to the immunity defense. In other words, a reasonable but mistaken belief can confer immunity on an officer *even after* it has been established that the officer violated a constitutional right by behaving unreasonably.

Sheldon, 178 P.3d at 463.

In short, the qualified immunity analysis has two parts. The first question is: Would a reasonable officer in the same position have been "on notice" that his particular use of force would be unlawful, that is to say, not "excessive"? *Id.* at 463 and 466; *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158. One way to determine "notice," is for the court to consider any cases, laws or regulations in or outside the jurisdiction which would suggest that the type of action taken by the officer is considered unlawful. *Sheldon*, 178 P.3d at 466. See also *Brosseau v. Haugen*, 543 U.S. 194, 199-200, 125 S.Ct. 596, 599 (2004) (standards for notice must be relevant to the particular circumstances in which the officer acts). When there is "no clear case or law or regulation from Alaska"—or anywhere else which a "hypothetical reasonable Alaska police officer should have been informed about—that says that the particular use of force are "excessive uses of force

when applied to an intoxicated and assaultive arrestee," this is persuasive evidence the officer was not "on notice" his conduct was unlawful. *Sheldon*, 178 P.3d at 466-467. In analyzing the notice issue, courts "must resist the urge to second guess those actions when things turn out badly," since courts must be "[c]ognizant of the reality that officers must often make quick judgments which might have unanticipated consequences." *Id.* at 467 (Village Safety Officer's use of force was not "shocking," excessive, or unlawful, even though the result of using force on a resisting suspect was the suspect's death). "If the law d[oes] not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier*, 533 U.S. at 202, 121 S.Ct. at 2156-2157. See also, *Sheldon*, 178 P.3d at 467 (officer entitled to summary judgment).

The second part of the qualified immunity analysis, consistent with *Saucier*, asks: Regardless of whether the use of force was objectively unreasonable, did the officer make a reasonable mistake of law or fact? *Sheldon*, 178 P.3d at 463. *Saucier*, 533 U.S. at 206, 121 S.Ct. at 2158. Qualified immunity shields an officer who makes reasonable mistakes as to the amount of force required under the circumstances. *Sheldon*, 178 P.3d at 463, 465, and 466; *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158 (qualified immunity's "further dimension" "acknowledge[s] that reasonable mistakes can be made as to the legal constraints on particular police conduct.")[11]

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[11] Appellant argues for the first time on appeal that if the nature of the act was "so egregious, so excessive," that the arresting officer "should have known that the use of force was unlawful, the Court should deny qualified immunity. In *Sheldon*, the Court remarked that "[o]ne should not let the lack of explicit law in an area be a substitute for

E. *Sheldon v. City of Ambler* Persuasively Illustrates the Qualified Immunity Analysis Which Should Be Applied in this Case

The predicament Hooper Bay police officers faced when Boya kicked, wrapped his legs around a pole, and bit at officers trying to get him to release the pole or stand up is analogous to the Village Safety Officer's use of force when arrestee Albert Sheldon grabbed the handlebars of a four wheeler and refused to let go in *Sheldon.* This Court affirmed summary judgment on qualified immunity in favor of the *Sheldon* officer and the City. The *Sheldon* officer was protected by qualified immunity when he used pepper spray, a police baton, and ultimately a "take down" to get Sheldon to release the handlebars, even when the force resulted in Sheldon's death. The Boya Olson case is an

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the reasonable officer's common sense." *Sheldon*, 178 P.3d at 467. But this "patently excessive" argument at pages 23-34 of appellants' brief is a new theory, which was not properly raised with the Superior Court. See Exc. 83 and 95 (appellant argued "[i]f the law d[oes] not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate"). Tr. 42 (referring to case law "notice") Moreover, the "patently excessive" argument is dependent on new factual findings, which the lower court never made, specifically: (a) that the officers tased a "compliant" suspect; and (b) the tasings were "torture." This Court has historically refused to consider new arguments not raised before the lower court because they are considered waived. See, e.g., *State Farm Auto Ins. Co. v. Raymer*, 977 P.2d 706, 711 (Alaska 1999); *Ellingstad v. State, Dept. of Natural Resources*, 979 P.2d 1000, 1007 n. 29 (Alaska 1999) (new arguments not raised below were waived); *Arnett v. Baskous*, 856 P.2d 790, 791 and n. 1 (Alaska 1993) (refused to consider new arguments). Even if the Court considers the "patently excessive" argument, it is meritless. Olson never denies that a reasonable officer would have understood he was being kicked and Olson was attempting to bite. Olson admits he was fighting and resisting. The undisputed evidence is that even when momentarily on his stomach, Olson continued to struggle. See Exc. 118-119 at 37:22-38:4. The argument that Olson had ceased his resistance while the tasing was occurring is nothing more than a bald assertion of appellant's counsel, which fails to create any material question of fact. *Bennett*, 975 P.2d at 694 (assertions in memoranda, unsupported by admissible evidence cannot be relied on in denying summary judgment); *Lord v. Wilcox*, 813 P.2d 656, 658 n. 4 (Alaska 1991) (mere assertions of fact fail to create genuine issues of fact).

even stronger case for qualified immunity since the arresting officers here only used a Taser (considered "non-lethal" force), and Boya was indisputably kicking and attempting to bite officers when they tried to stand him up or pry him from the pole he'd latched onto. The arresting officers in this case faced greater risk of personal injury than the VSO in *Sheldon*.

In *Sheldon*, Village Police Officer Bryan Jones found Sheldon on the street, intoxicated, "screaming" and "belligerent." *Sheldon*, 178 P.3d at 461. Dora, Sheldon's acquaintance, wanted to go home and did not want Sheldon to follow her. Meanwhile, the two residents who'd requested Jones to respond drove up on their four-wheeler, offering to give Dora a ride home. When Dora climbed onto the four-wheeler, Sheldon grabbed hold of the handlebars and wouldn't let go, despite VPO Jones' commands to do so. *Id.* After Sheldon tried to grab the driver's key and threatened the driver when she brushed his hand aside, VPO Jones used pepper spray on Sheldon, but Sheldon would not let go of the handlebars. *Id.* VPO Jones then struck Sheldon on his hands and the back of his knees with a police baton. Sheldon still would not release the handlebars. *Id.* at 461-462. Jones then struck Sheldon on the back of the head with the baton. *Id.* at 461. When Sheldon would still not release the handlebars, VPO Jones put Sheldon in a "bear hug," wrapping his arms around Sheldon's arms and shoving him. When Sheldon still resisted, Jones continued using the bear hug, shoved again, and performed a "take down" in which both Jones and Sheldon fell to the ground. *Id.* at 462. Sheldon died of injuries he sustained in the bear hug/take down.

In concluding that Jones' was entitled to qualified immunity, this Court affirmed the summary judgment because VPO Jones "could have reasonably believed that his use of force was lawful" since Jones had no clear notice "that a bear hug and a take down are excessive uses of force when applied to an intoxicated and assaultive arrestee." *Id.* at 467.

The facts in this case are even stronger than in *Sheldon*. While *Sheldon* involved the use of pepper spray, as well as impact blows from a police baton, and a fatal "bear hug," this case involves the use of a Taser, a non-lethal weapon, which inflicted pain only during the 2-seconds each drive stun was applied. See Exc. 168; Exc. 159 at 42:19-23. See also Exc. 58 at ¶ C.

Just like *Sheldon*, Boya was yelling, belligerent, and apparently intoxicated. Olson indisputably bit at Officer Simon and repeated kicked at the officers, succeeding in kicking all three officers who attempted to control him. See Exc. 153 at 20:10-12; Exc. 155 at 27:4-7; Exc. 162 at 54:18-21; Exc. 117 at 30:1-6 and 31:6-7 and 31:13-14; Exc. 133 at 23:3-6; Exc. 143 at 63:22-24 and 64:2-3.

Like *Sheldon*, Olson would not listen to officers' instructions and actively resisted arrest by wrapping his legs around a pole, twisting away from officers, and kicking at them. Exc. 143 at 64:8-20. Olson was only tased after he painfully kicked two officers, threatened further kicking which could have resulted in even more serious injury, bit at Ofc. Simon several times, twisted to kick at officers no matter what direction they approached, and refused to unwrap his legs so he could be lifted up and escorted outside. *Id.*; Exc. 153 at 20:4-19; Exc. 155 at 29:1-4 and 29:13-22; Exc. 117 at 32:5-15.

As in *Sheldon*, this Court does not need to be embroiled over a supposed dispute over whether the arresting officers' engaged in "excessive force." There is sufficient reason to affirm summary judgment in appellees' favor because the arresting officers in this case had no "clear notice" that their use of Tasers to protect themselves against bites and kicks and to get Olson to release his grip on the pole was "unlawful," as detailed further in subsection F. Exc. 163 at 58:9-12; Exc. 160 at 47:5-9; Exc. 118-119 at 37:22-38:4.[12]

F. A Reasonable Officer In the Same Position Would Have Had No "Notice" Multiple Tasings on a Restrained, But Actively Resisting, Intoxicated, and Combative Arrestee Were Unlawful

1. Hooper Bay Police Department Guidelines Were Not Violated

At pages 34 and 36, Boya argues that Hooper Bay Police Department General Order 2-6 was a "regulation," putting the officers on notice that "tasing Mr. Olson 15-18 times was unlawful." The Superior Court was not persuaded that a police department's internal guidelines was the sort of "regulation" the *Sheldon* Court would consider as "notice" an officer "could have had about the legality of his actions." Exc. 357-358. See also *Sheldon*, 178 P.3d at 466. Even if General Order 2-6 is relevant to the notice issue, the Order was not violated. Moreover, it was reasonable for the officers to rely on the order, even if the court finds they were mistaken as to what the law allowed.

General Order 2-6 reads, in relevant part:

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[12] A Taser can be used for compliance. See *Schumacher v. Halverson*, 467 F.Supp.2d 939, 952 (D. Minn. 2006) (grabbing onto pole of a basketball backboard to prevent officer from escorting suspect to a patrol car was "active resistance" justifying the use of a Taser and entitling officer to qualified immunity).

> The Advanced Taser shall not be used on a restrained or controlled subject unless the actions of the subject present an immediate threat of death or great bodily harm or substantial physical struggle that could result in injury to themselves or any person including the deploying officer.

Exc. 63 at ¶ 2 (emphasis added).

Boya's degree of resistance involved a "substantial physical struggle" and Boya's kicking and biting posed a risk that the officers could be injured. See Appellees' Brief, subsection E.2. Moreover, if the officers had continued to try to pry Boya's legs from around the pole, their faces could have been positioned directly in front of Boya's kicking legs, posing a danger for the officers. Even Boya's expert grudgingly admitted Boya kicking the officers in the face was a "reasonable fear." Exc. 325 at 85:14-22; Exc. 326 at 86:9-16 and 86:22 – 89:7.

Boya's expert also testified that a single individual can present "a challenge" to 2 or 3 officers. Exc. 311 at 28:1- 29:18. The ability of multiple officers to subdue a resisting suspect depends on the capacity of the arrestee to "deliver a strike with their fist or their feet." *Id.* Boya's expert admitted that even handcuffed suspects "could cause injury to a police officer "[p]rovided they are in a tactical position to do so." Exc. 312 at 30:10-21.

The arrest tape confirms that the officers were in a "substantial struggle" to restrain Boya, avoid his kicks and get him to stand up. See Exc. 42 at 24:40 through 15:04. Even when Joseph succeeded in subduing and eventually joined Simon and Oaks' effort to restrain Boya, it took all three officers several minutes to get Boya to stop fighting and comply. See *id.* at 19:30 to 15:04. There is no dispute that Boya admits he

was "fighting" and "resisting." *Id.* at 12:34 and 12:25 and 10:13 to 9:47. Accordingly, there was no reasonable dispute that the arresting officers complied with Hooper Bay department policy and tased in the midst of a "substantial physical struggle that could result in injury to themselves or any person including the deploying officer." See Exc. 63 at ¶ 2. See also Exc. 346 at 12: 12-17 and 13:4.

2. Recommendations of the "International Association of Chiefs of Police" Did Not Give Notice of Unlawful Conduct

At page 35 appellant argues that I.A.C.P. adopted a model policy prohibiting Electronic Control Weapons unless the suspect "demonstrates an overt intention to use violence or force against the officer or others or resists . . . arrest and other alternatives fore controlling them are not reasonable or available under the circumstances."[13] However, appellant "offered no evidence that this model policy has been adopted by any police agency within Alaska." Exc. 357.[14]

Even if the I.A.C.P. model policy is considered, it was satisfied, since Boya demonstrated "an overt intention to use violence or force against the officer." See also Exc. 357. Boya was kicking at the officers and ignored verbal warnings to stop before the first Taser was deployed. Exc. 353; Exc. 40 at ¶ 4; Exc. 38 at ¶ 6; Exc. 36 at ¶ 14.

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[13] See Exc. 177-178 at ¶ 43. The model policy clarifies that this with this "caution[] in mind, ECW's may be used consistent with a professionally recognized philosophy of use of force, that is, use only that level of force that reasonably appears necessary to control or subdue a violent or potentially violent person." *Id.* In effect, the model policy is not a helpful standard, but a restatement of a reasonableness rule.

[14] For this reason, Superior Court Judge Ben Esch also refused to adopt the I.A.C.P. model policy on Electronic Control Weapons in *Page v. City of Kotzebue*, Case No. 2KB-07-76 CI. See Exc. 73.

See also Exc. 42 at 20:28 ("Stop trying to kick; stop trying to bite and comply!"); Exc. 39 at ¶ 9.

Moreover, the model policy says that an electronic control device can be used when a person "resists" "and other alternatives for controlling them are not reasonable or available under the circumstances. First, Boya was clearly not cooperating with officers' verbal instructions. See, e.g., Exc. 42 at 23:09 – 23:04 ("Boya, if you don't comply I'm going to drive stun you. Let go of the pole"); *id.* at 20:28 ("Stop trying to kick; stop trying to bite and comply!"); *id.* at 18:37 ("Stop resisting. Stop resisting. Cooperate. Stop resisting. Are you going to comply? Are you going to comply? Are you going to comply? Stand up. Stand up, Boya.") See also *id.* at 16:32 and 15:34 (more instructions to "Stand up and comply" with no sign Boya was cooperating.) Second, pepper spray was not an available option. Exc. 39 at ¶ 10. Third, Officer Simon and Oaks both testified that they each tried to pin down Boya's legs to stop Boya from kicking, but this just caused Boya to kick at Simon some more. Exc. 142 at 61:3-11. The arresting officers also testified that it was hard to gain control of Boya because he was twisting and pivoting on the floor to avoid officers' efforts to restrain him from whatever direction they approached. See Exc. 143 at 64:8-15. When Simon tried to lift Boya up, Boya bit at Simon more than once. Exc. 155 at 27:4-16; Exc. 153 at 20:7-12; Exc. 134 at 29:16-23. Moreover, Boya's twisting and turning while alternatively grasping the pole and kicking at officers occurred in a particularly dangerous location near the top of the stairs and where the floor was so slippery Officers Simon and Oaks had already fallen. Under these facts, and in the heat of the struggle, a reasonable police officer would not have had

"clear notice" that the use of a Taser was unlawful, even under the supposed model policy. See also *Saucier*, 533 U.S. at 206, 121 S.Ct. at 2159 (objective reasonableness is "based upon the information the officers had when the conduct occurred.")

3. Case Law Did Not Give Fair Notice the Taser Use Was Unlawful

i. Published Case Law

Contrary to appellant's bald assertions, there was never a finding, nor was there admissible evidence, that Boya had "ceased struggling or resisting" during any of the Taser deployments. Instead, the Superior Court found:

> [T]he Plaintiff actively resisted arrest and that the situation before force was applied was rapidly escalating out of control. Plaintiff refused to comply with numerous verbal commands and remained belligerent . . . before any force was applied. This was conceded by the Plaintiff at oral argument. It is apparent from the audio recording of the struggle.

Exc. 353-354. The Superior Court continued:

> The officers were faced with an immediate threat of bodily harm from the Plaintiff kicking and biting them in a rapidly deteriorating situation in the home. . . . The use of the Taser to subdue a suspect who repeatedly ignores police instructions and acts belligerently towards police is not excessive force.

Exc. 354. The Superior Court further found that:

> [A]t the time of the arrest here, the contours of Fourth Amendment jurisprudence on claims of excessive force involving Tasers was not sufficiently clear such that a reasonable law enforcement officer in the officers' position under these circumstances would have known that the multiple tasings of the Plaintiff violated his Fourth Amendment right to be free of excessive use of force.

Exc. 358. See generally, *Graham*, 490 U.S. at 455, 109 S.Ct. at 1871-1872 (courts has "long recognized" the right to make an arrest "necessarily carries with it the right to use some degree of physical coercion. . . to effect it.")

While appellant cites case law supposedly giving notice that multiple tasings were unlawful, appellant's case authority does not actually support this argument. For example, while appellant argues *Hickey v. Reeder*, 12 F.3d 754 (8th Cir. 1993) is "remarkably similar," the case is readily distinguished. In *Hickey*, the use of the Taser was solely to compel the inmate to sweep his cell; not to protect an officer from a violent person who was actively resisting arrest, as in this case. *Id.* at 757 and 759. Indeed, *Hickey* was solely concerned with the "cruel and unusual punishment" standard under the 8th Amendment, and did not even involve the "excessive force" standard under the 4th Amendment. Cf. *Reed v. Hov*, 909 F.2d 324, 329 (9th Cir. 1989) (excessive force analyzed exclusively under the 4th Amendment's reasonableness standard). Thus, appellant's heavy reliance on *Hickey* at pages 43-44 is entirely misplaced.

Next, appellant relies on excessive force cases where the suspect in those cases did not pose a threat to the arresting officers and the officers did not employ a Taser. In stark contrast to Boya's kicking and biting, the suspect in *Smith v. City of Hemet*, 394 F.3d 689, 702 and 703 (9th Cir. 2005) was an unarmed man who did not attack or threaten the arresting officers. The *Smith* case did not even involve a Taser, but instead involved a much more aggressive use of force, including 4 applications of pepper spray, slamming the arrestee against a wall, throwing him on the ground, sliding him off a porch while face down, and siccing a police dog to bite the suspect three times. *Id.* at 694 and 702. In

Amnesty America v. Town of West Hartford, 361 F.3d 113, 118, 120 and 124 (2d Cir. 2004), the arrestees were all nonviolent suspects who, while passively resisting arrest, posed no physical threat to police officers. *Amnesty America* also did not involve Tasers, but instead involved claims of excessive force based on brutal "come-along holds." *Id.* at 119. In *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1127-1128, and 1130 (9th Cir. 2002), the arrestees were all peaceful protestors who were pepper sprayed in the eyes and denied first aid. There was no "active resistance" by the activists, the pepper spray was "unnecessary to subdue, remove, or arrest" the peaceful protestors, and the officers could have removed the protestors from the scene in minutes without causing pain or injury if they had simply used customary metal grinders to release the protestors' self-imposed restraints. *Id.* at 1130. In short, Appellant's non-Taser cases involving non-violent suspects are not instructive as to whether the officers in this case had fair notice that multiple Taser deployments on an actively resisting and violent suspect were unlawful.

The last two published cases appellant relies on, *Pastre* and *LaLonde*, are distinguishable because they pre-date *Saucier*, and mistakenly assume that the test for excessive force was the same test as for qualified immunity. Cf. subsections.A and B. Moreover, the cases are distinguishable. For example, in *LaLonde*, the arresting officer left burning pepper spray on the arrestee's face for 20 to 30 minutes after the suspect surrendered; even though the officer's training was to render first aid to flush out the person's eyes as soon as possible. *LaLonde*, 204 F.3d at 961. In *Pastre v. Weber*, 717 F.Supp. 992, 994-995 (S.D.N.Y. 1989), the facts are not even similar. An enraged

policeman, furious at having been led into a high speed car case, simply "clobbered" and brutalized an adolescent drunk with his fists.

In short, appellant offers no published case with similar facts giving Hooper Bay police officers fair notice that multiple Taser deployments on a restrained, but actively resisting and violent suspect posing a risk of injury to officers is unlawful. In *Sheldon*, when faced with the absence of instructive case law, this Court found the "silence speaks louder" and affirmed summary judgment on qualified immunity in the absence of fair notice that the particular application of force—even deadly force—when applied to an intoxicated and assaultive arrestee was clearly unlawful. *Sheldon*, 178 P.3d at 466-467. Likewise, the Superior Court in this case found the law was "not sufficiently clear" that multiple tasings of Boya Olson violated his right to be free from excessive force. Exc. at 358. On this basis, the judgment on qualified immunity should be affirmed.

ii. Unpublished Case Law

The Superior Court reasoned that unpublished case authority could not give fair notice to police officers on whether their use of force was unlawful. See Exc. 355. Mr. Olson's counsel conceded as much at oral argument, stating: "Well, let's set aside the unreported cases then . . . and just look at the reported cases." Tr. 36, lines 15-22. Nevertheless, at page 47-50, Boya tries again to rely on unreported case law.

However, the unreported cases do not support notice of unlawfulness. In Boya's cases, there was a significant dispute over whether <u>any</u> force could have legally have been used by the police officers. For example, in *Rios v. City of Fresno*, 2006 WL 3300452 at *9 and 10 (E.D. Cal. 2006) there was a dispute over "whether plaintiff

resisted arrest in any way," thus, summary judgment was denied on the excessive force claim. In *Harris v. County of King*, 2006 WL 2711769 at *3 (W.D.Wa. 2006) plaintiff denied that he had resisted at all and alleged he was complying with his hands held up in surrender at the time he was tased in the back. In *Hudson v. City of San Jose*, 2006 WL 1128038 at *1 and 3 (N.D.Cal. 2006) plaintiff denied that he had resisted at all; so the issue was whether the force applied by the officers was "unprovoked." In *Muro v. Simpson*, 2006 WL 2536609 at *4 and *5 (E.D.Cal. 2006), one of the defendant officers admitted Muro was standing with his arms to his sides in a non-threatening way and did not appear to be preventing another officer from entering the residence, consistent with Muro's denial that he "ever resisted." In *Vaughn v. City of Lebanon*, 2001 WL 966279 at *1, 2 and 5 (6th Cir. 2001) there was no clear physical threat to the officers' safety prior to the uses of pepper spray. Finally, *LeBlanc v. City of Los Angeles*, 2006 WL 4752614 (C.D.Cal. 2006), supports appellees' position rather than appellants. In *LeBlanc*, there was no clear notice that the use of a Taser on a narcotically intoxicated individual was excessive force. *Id.* at *16-18. Accordingly, the officers in *LeBlanc* were entitled to qualified immunity as to their use of a Taser. *Id.* at *18. Likewise, *Beaver v. City of Federal Way*, 2006 WL 3203729 (W.D. Wa. 2006) ultimately supports appellees' position. While a magistrate in the Western District of Washington initially assumed that

material questions of fact precluded summary judgment on qualified immunity, on appeal, the Court granted qualified immunity,[15] a judgment which was affirmed in the Ninth Circuit.[16]

Here, the Superior Court found that '[t]he officers were faced with an immediate threat of bodily harm from the Plaintiff kicking and biting them." Exc. 354. Boya's own expert admitted Boya was "certainly being uncooperative," "the use of force is appropriate to gain compliance," and the tasing only occurred after Boya kicked at officers. Exc. 323 at 76:8-9; Exc. 324 at 81:5-7; Exc. 313 at 36:23-37:4; Exc. 323 at 77:22-25. Even appellant's counsel in oral argument conceded that the initial use of the Tasers were "appropriate" and "subject to immunity." Tr. at 31, 31-32, 32, and 34. Thus, case law involving disputes as to whether <u>any</u> force could have been lawfully applied did not provide clear notice that the tasings in this case were unlawful when used to subdue a violent and resisting suspect. Finally, if the unpublished cases are considered, *Beaver* and *LeBlanc* are Taser cases in which qualified immunity was ultimately granted.

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[15] *Beaver v. City of Federal Way*, 507 F.Supp.2d 1137, 1148 and 1149 (W.D. Wa. 2007) (the law was not sufficiently clear that a reasonable officer would have understood that 5 tasings of a burglary suspect was unconstitutional).

[16] *Beaver v. City of Federal Way*, 301 Fed. Appx. 704, 2008 WL 5065620 at *1 (9th Cir. 2008) (there was no clearly established law in 2004 that tasing an arrestee five times who was non-compliant, but not posing a threat to officers, was unconstitutional). See also *Beaver*, 2006 WL 3203729 at *6 (suspect was not overtly threatening to the officers while the tasing was occurring).

G. A Reasonable Officer Would Have Believed His Actions Were Reasonable, Even if the Officer Was "Mistaken"

1. If an Officer's Mistake As to What the Law Requires Is Reasonable, Qualified Immunity Applies

"Twenty/twenty" hindsight does not apply to the qualified immunity analysis. *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158. The only relevant perspective is that of "reasonable officers on the scene." *Id.* Moreover, qualified immunity protects against reasonable mistakes. See also *Sheldon* , 178 P.3d at 463 ("'[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct . . . . If the officer's mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense.' In other words, a reasonable but mistaken belief can confer immunity on an officer even after it has been established that the officer . . . behave[ed] unreasonably.")

The U. S. Supreme Court explains:

> It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.
> * * * *
>
> Qualified immunity operates, then . . . to protect officers from the sometimes "hazy border between excessive and acceptable force."

Saucier, 533 U.S. at 206, 121 S.Ct. at 2158.

The standard is "reasonableness at the moment." *Id.* at 206, 121 S.Ct. at 2159. This recognizes the "reality that 'police officers, in pursuit of their dangerous and

important jobs, are often forced to make difficult decisions regarding the use of force.'" *Sheldon* at 178 P.3d 464. See also *Graham*, 490 U.S. at 396-397, 109 S.Ct. at 1872 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.")

2. Since it Was Unclear, Except in Hindsight, When Boya Would Stop Resisting, the Officers Could Have Made a Reasonable Mistake as to the Later Tasings

Appellant asserts at page 12: "Mr. Olson eventually let go of the pole, the officers turned him over onto his stomach, and continued to tase him on this back even though he was still handcuffed." It is this supposed "fact" which is the sole basis for appellant repeatedly asserting that Boya had "ceased struggling or resisting well before the officers ceased tasing him." See, e.g., Appellant's Brief at page 41. But the record does not support these assertions. In context, Sgt. Joseph stated Boya continued "struggling." See Exc. 118 at 37:22 – Exc. 119 at 38:4. Moreover, the arrest tape does not evidence tasering during any calm moments; Boya is actively fighting on the arrest tape when the Taser is being deployed. See Exc. 42 at 21:59 to 15:04. There is noting on the arrest tape to suggest that Boya is passively lying on his stomach or ever verbally "surrendering" when any of the final Taser deployments occur. In fact, Boya's expert admits that any of

the supposed Taser marks on Boya's back could be consistent with Boya getting tased as he was sitting up and kicking at the officers. See Exc. 333at 1115:1-5.[17]

This was a rapidly evolving, escalating, and violent struggle in which police officers were grappling with a heavy set man on a slippery floor. Two officers were not enough to control and restrain Boya, so eventually Sgt. Joseph had to join in. If a Taser deployment occurred while Boya was "on his stomach" it was a momentary position happening while Boya was "still struggling," according to the undisputed testimony of Sgt. Joseph. Exc. 118-119 at 37:22-38:4. The unsupported inference plaintiff wants the Court to make is that the officers continued to tase Boya even after he was compliant. But the arrest tape does not support this. In fact, the arrest tape supports only the opposite inference. On the arrest tape, Boya refuses to stand up for several minutes well after the last Taser deployment. Nevertheless, the tasing does not reoccur. Instead, the officers try to simply talk to Boya in an effort to "de-escalate" the situation. Over and over again, well after the last Taser deployment, the officers calmly ask Boya if he is going to standup and "comply." Exc. 42 at 15:04 to 13:47. When Boya eventually does stand, it is not because he is being tased on his stomach, it is because, *five minutes later*, he finally chose to comply with the officers' instructions.

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[17] There is no per se rule that a "handcuffed" suspect cannot be tased. See, e.g., *Devoe v. Rebant*, 2006 WL 334297 *7 (E.D.Mich. 2006) (drive-stun to lower right back of handcuffed suspect who refused to get into police car was objectively reasonable and did not constitute excessive force where arrestee was resisting officers' commands to enter the police car and was arguing with officers); *Willkomm v. Mayer*, 2006 WL 582044 *3 and *4 (W.D. Wis. 2006) (three drive stuns on handcuffed arrestee who failed to comply with officers' orders were objectively reasonable); *Carroll v. County of Trumbull*, 2006 WL 1134206 * 12 and *13 (N.D. Ohio 2006) (tasering a violent, thrashing, resisting handcuffed arrestee subject to immunity).

Since the undisputed testimony is that Boya was "struggling" even when he was on his stomach, and it was unclear when Boya would stop resisting, the officers acted reasonably even as to the later tasings. "[I]f an officer reasonably, but mistakenly believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158.

Only in hindsight can the number of tasings and the tasing while Boya was momentary struggling on this stomach be criticized. The reality is that the arresting officers were in the midst of a struggle filled with peril for the officers' safety. As detailed above:

- Boya acted intoxicated. The arrest tape demonstrates Boya could not be reasoned with, his angry outbursts were hard to predict, he was actively struggling with officers, and his escalation into violence was sudden and erratic.

- The physical struggle was a fast-evolving, dangerous situation, occurring on a slippery floor, close to stairs, and with officers who had already fallen to the ground alongside Boya.

- The officers were instructed that the Taser would not "harm the human body" or "cause injury." Even Boya yelled out: "Is that all you got? Feels like a vibrator!" consistent with the officers failing to get proper contact with the Taser because Boya was struggling.

- Boya was putting up a "substantial physical struggle" evidenced by the fact that two officers could not restrain or control Boya on a slippery floor. Boya admits he was "fighting" and "resisting."

- Boya kicked all three officers, either in the chest, knee or thigh, causing them pain. There was a risk, his continuing kicks could have injured officers in the head or face as they attempted to pry his legs from the pole. Also, if they had tried to carry him down the stairs before gaining his compliance, Boya could have continued to struggle and the officers could have fallen on the stairs.

- When Joseph joined the struggle with Simons and Oaks to subdue Boya, Joseph was kicked in the chest by Boya, consistent with Boya posing a challenge to all three officers.

- Despite multiple tases, it still took five minutes to subdue Boya so that he stopped kicking and struggling. That is a long and dangerous time frame for officers to be grappling with a suspect on a slippery surface which had already caused officers to loose their balance.

Since the officers were in danger and Boya was unpredictably violent, even the later tasings were lawful or, alternatively, officers made a reasonable mistake as to their lawfulness.

- The arrest tape shows this was a "heat of the battle" struggle, involving an erratic, volatile, and admittedly violent arrestee. The floor was slick, the struggle occurred near the top of the stairs, and the battling Boya was a physical challenge to even three officers. The record amply demonstrates that there was no patently excessive force.

The officers were defending themselves and facing a substantial struggle in very close quarters. In addition, no court, applying 20/20 hindsight, should second-guess officers under these specific circumstances and draw artificial lines as to the number of taser deployments which are "unlawful." The tasings in this case were not having a clear effect on Boya, as evidenced by Boya's own taunts ("Is that all you got?" "Feels like a vibrator!") The sound of the electrical arcing, apparent on the arrest tape, would have given any reasonable officer a basis for concluding that insufficient contact was occurring, consistent with Boya's aggression and on-going resistance. Under the facts of this case, where there was such close contact between the men and such a potentially dangerous struggle, the Court should hesitate to signal to Alaska law enforcement officers that the taser can be deployed only a certain number of times. To get distracted by the mere number of deployments, disregarding the context, would chill the difficult job police officers have responding to tense, rapidly evolving and potentially dangerous situations.[18]

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[18] Appellant relied on the analysis in *Beaver*, in which district court reasoned that with each application of the Taser, the reasonableness issue "becomes less clear." *Beaver*, 507 F.Supp.2d at 1144. See also Exc. 356. However, the context of this analysis is clearly distinguishable. In *Beaver*, the arrestee who was tased never verbally or physically threatened the police officers. *Beaver, 507 F.Supp2d* at 1144. In *Beaver*, the Taser was effectively shocking the suspect, and there was no dispute about proper contact. Also, the district court emphasized that the officers were a "safe distance" from the suspect because the Taser was being deployed from a distance in the EMD mode. See *id.* Even more importantly, there was credible evidence from an eyewitness in *Beaver* that the suspect was incapable of complying with the officer's instructions. *Id.* at 1145 and 1146. Thus, it was a closer question in *Beaver* whether the multiple tasings were reasonable. Ultimately, however, that did not prevent the Ninth Circuit from affirming the officers' entitlement to qualified immunity. In essence, the Ninth Circuit authorized the tasering of a non-compliant suspect 5 times even though the suspect was not a physical threat to

3. Appellant's Own Expert Admitted It Would Have Been Reasonable to Pepper Spray Boya

Appellant's "force" expert, Michael Lyman, was equipped with pepper spray as a police officer. Exc. 310 at 23:6. According to appellant's own case authority, a single dose of pepper spray to the face can cause a burning sensation that lasts up to 45 minutes. See *LaLonde*, 204 F.3d at 952. Significantly, Lyman admitted that the arresting officers in this case would have been justified in using pepper spray on Boya. Lyman testified:

> Q: [W]ould pepper spray in your opinion have been appropriate?
> A: Yes.
> Q: Why is that?
> A: Because that's a low level of a control weapon.
> Q: And that would be appropriate to gain compliance, to use to gain compliance, pepper spray?
> A: Yes.

Exc. 328 at 96:5-13. This is a very significant admission because the Taser and pepper spray were on the same level of force. Exc. 58 at ¶ C. Since appellant's own expert approved the use of pepper spray on Boya, this means that it was reasonable for the arresting officers to apply the same level of force—a Taser—to also gain Boya's compliance. Moreover, since the drive-stuns the arresting officers applied lasted only 2-seconds, use of a Taser, even multiple times, seems far less painful overall than a single application of a pepper spray, with its symptoms lasting up to 45 minutes if left untreated. The officers in this case applied force in two-second increments. In comparison,

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the officers when the tasering occurred. *Beaver*, 301 Fed.Appx. at *1. The physical threat to the officers which existed in the Boya Olson case, makes the multiple tasings independently reasonable.

appellant's own expert approved OC (the same level of force as a Taser) whose effects would have lasted many minutes.

Thus, even if appellant seeks to argue that multiple tasings were a "mistake" as to what the law allowed, the mistake was a reasonable one since appellant's own expert concluded pepper spray would have been appropriate.

RELIEF SOUGHT

Any liability that might have attached to the City of Hooper Bay was derivative of the claims against the individual officers. Exc. 358. Accordingly, affirming the judgment on qualified immunity, also entitles the City to judgment. See *id.* Appellees are entitled to Qualified Immunity on two grounds: (1) The law gave the arresting officers no clear notice that their multiple Taser deployments on an actively resisting, non-compliant, and violent suspect were unconstitutional; and (2) the arresting officers could have been reasonably mistaken as to what the law prohibited under the circumstances of this case.

Appellees seek the following relief:

a. For the Court to affirm the judgment in favor Sgt. Nathan Joseph on the grounds of qualified immunity;

b. For the Court to affirm the judgment in favor of Ofc. Charles Simon on the grounds of qualified immunity;

c. For the Court to affirm the judgment in favor of the City of Hooper Bay on the grounds of qualified immunity;

d. For the Court to affirm the judgment in favor of Ofc. Dimitri Oaks which has not been contested on appeal;[19] and

[19] See Exc. 348.

e. For appellants' costs and attorneys fees incurred in defense of this matter.

CONCLUSION

Appellant admits that he was resisting and fighting the arresting officers. Any reasonable officer under the circumstances would have understood that the deployment of a Taser, even multiple times, was not unlawful. The tasings occurred as self-defense, as protection of others, and as a means to gain compliance and control during a tense, rapidly escalating, and dangerous physical struggle. In addition, under the facts of this case, a reasonable officer could have been reasonably mistaken as to what the law allowed. Accordingly, under *Saucier*, as adopted by *Sheldon*, the Superior Court's summary judgment in favor of appellees based on qualified immunity should be affirmed.

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