

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

KAREN ECHOLS,	§	
Individually and as Representative of	§	
the Estate of John T. Barnes, Sr.,	§	CIVIL ACTION NO.: 4:11-CV-00882
Deceased; JOHN A. BARNES; and	§	JURY TRIAL DEMANDED
APRIL GAY PHILLIPS, as Next	§	
Friend of CHELSIE DANIELA	§	
BARNES, a Minor Child, and JOHN	§	
TERRELL BARNES, Jr., a Minor	§	
Child,	§	
	§	
<i>Plaintiffs,</i>	§	PLAINTIFFS' FIRST AMENDED
	§	ORIGINAL COMPLAINT
v.	§	
	§	
RYAN GARDINER, Individually and	§	
in his official capacity, CITY OF	§	
HOUSTON, TEXAS; HAYDEN	§	
PROPERTIES, LLC; JS PROPERTY	§	
MANAGEMENT, INC.; and	§	
WOODLAND HILLS VILLAGE	§	
APARTMENT HOMES,	§	
	§	
<i>Defendants.</i>	§	

PLAINTIFFS' FIRST AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Plaintiffs Karen Echols, Individually and as Representative of the Estate of John T. Barnes, Sr., Deceased; John A. Barnes; and April Gay Phillips as Next Friend of Chelsie Daniela Barnes, a Minor Child, and John Terrell Barnes, Jr., a Minor Child; Plaintiffs in the above-titled cause, pursuant to FRCP 15(a)(1)(A), and file their First Amended¹ Complaint against Defendants, Ryan Gardiner, Individually and in his official capacity, the City of Houston, Texas; Hayden Properties LLC; JS Property Management, Inc.; and Woodland Hills Village Apartment Homes and respectfully bring their causes of action before this Court.

¹ Plaintiffs file this amended complaint as a matter of course pursuant to FRCP 15(a)(1)(A) as no responsive pleading has been filed.

I. INTRODUCTION

1. This is an action for Constitutional violations and state law personal injuries suffered by Plaintiffs as a result of the unreasonable search and seizure, personal injury, and wrongful death of Plaintiffs' decedent, John T. Barnes, Sr. Plaintiffs bring this action for compensatory damages under 42 U.S.C. § 1983 because Defendants jointly and severally deprived Decedent of his federally-protected right to be free from unreasonable seizure and unreasonable force. U.S. CONST. amends. IV, XIV.

2. Plaintiffs are the relatives and personal representative of the estate of John T. Barnes, Sr., and they bring this action on behalf of the estate pursuant to TEX. CIV. PRAC. & REM. CODE § 71.021 and as applied through 42 U.S.C. § 1983 and § 1988. At the time of his death, John T. Barnes, Sr. was 39 years old and in good health. He died intestate, and Karen Echols, his common law wife, has been appointed the administrator of the estate. Plaintiffs bring this action as the surviving family and sole heirs at law of their Decedent, and as the only persons entitled to recover damages because of Decedent's wrongful death. TEX. CIV. PRAC. & REM. CODE §§ 71.000 *et seq.* and as applied through 42 U.S.C. § 1983 and § 1988.

3. As a direct result of the policies, practices, customs and procedures of the City of Houston ("City"), Decedent John T. Barnes, Sr. was intentionally deprived of his constitutional right to be free from unreasonable searches and seizures guaranteed to him by the Fourth Amendment to the United States Constitution. Defendant Ryan Gardiner, a police officer acting in the course and scope of his employment with the City of Houston, and acting under color of state law, unjustifiably shot and killed John T. Barnes, Sr. under circumstances where no reasonable police officer would have done so. Under long established law on excessive deadly force, Officer Ryan Gardiner is not entitled to qualified or other immunity for these actions.

II. JURISDICTION AND VENUE

4. This action is brought pursuant to 42 U.S.C. § 1983 and § 1988 and the Fourth Amendment to the United States Constitution, made applicable to Defendants through the Fourteenth Amendment to the United States Constitution. This court has jurisdiction over Plaintiffs' claim under 28 U.S.C. § 1331 (federal question) and under 28 U.S.C. § 1343(3) (civil rights). This court further has jurisdiction over Plaintiffs' state law claims under 28 U.S.C. § 1367 (supplemental jurisdiction) as those claims form part of the same case or controversy under Article III of the United States Constitution.

5. Venue lies in the U.S. Southern District of Texas, the district in which the claim arose, pursuant to 28 U.S.C. § 1391(b).

III. PARTIES

6. Plaintiff Karen Echols is the common law wife of Decedent and is the Representative of the Estate of John T. Barnes, Sr. Plaintiff Karen Echols resides in Humble, Texas.

7. Plaintiff John A. Barnes is the father of John T. Barnes, Sr., deceased, and is the grandfather of Minor Children, Chelsie Daniela Barnes and John Terrell Barnes, Jr. Plaintiff John A. Barnes resides in New Caney, Texas.

8. Plaintiff April Gay Phillips is the mother of Decedent's two minor children, Chelsie Daniela Barnes and John Terrell Barnes, Jr. Plaintiff and her Minor Children reside in Clark Range, Tennessee.

9. Minor Child Chelsie Daniela Barnes is the daughter of Decedent. She was 14 years old at the time her father was shot and killed.

10. Minor Child John Terrell Barnes, Jr., is the son of Decedent. He was 13 years old

at the time his father was shot and killed.

11. Defendant City of Houston (the City) is a municipal corporation operating pursuant to the Constitution and the laws of the State of Texas within the U.S. Southern District of Texas. The City of Houston may be served with process through the City Secretary, 900 Bagby, Houston, Texas 77002.

12. Defendant Ryan Gardiner (Officer Gardiner) is an individual residing in Harris County, Texas. The acts and omissions complained of herein arise from the conduct of Defendant Ryan Gardiner while he was acting under color of state law, and each act and omission was committed pursuant to Officer Gardiner's employment and authority as a police officer with the City of Houston. Officer Gardiner may be served with process at his principal place of residence, located at 20743 Squaw Valley Trail, Crosby, Texas 77532-3206.

13. Defendant Hayden Properties, LLC, is a corporation organized under the laws of the State of Oregon, and with a principle place of business located at 5335 Meadows Road, # 350, Lake Oswego, OR 97035 and doing business in the State of Texas. Hayden Properties, LLC owned and managed the apartment complex where Plaintiffs' decedent was shot and killed on or about August 1, 2009. Said Defendant may be served with citation through its registered agent for service of process, Richard Hayden, at its registered office, 1825 Palisades Terrace, Lake Oswego, OR 97034.

14. Defendant JS Property Management, Inc., is a corporation organized under the laws of the State of Oregon, and with a principle place of business located at 4000 Kruse Way, #1-250, Lake Oswego, OR 97035 and doing business in the State of Texas. JS Property Management, Inc., managed the apartment complex where Plaintiffs' decedent was shot and killed on or about August 1, 2009. Said Defendant may be served with citation through its

registered agent for service of process, Jonathan Shen, at its registered office, 5335 Meadows Road, # 350, Lake Oswego, OR 97035.

15. Defendant Woodland Hills Village Apartment Homes is a corporation organized under the laws of the State of Texas or an assumed name, and with a principle place of business located at 2139 Lake Hills Drive, Kingwood, TX 77399 and doing business in the State of Texas. Woodland Hills Village Apartment Homes managed the apartment complex where Plaintiffs' decedent was shot and killed on or about August 1, 2009. Said Defendant may be served with citation through its registered agent for service of process, Richard Hayden, at its registered office, 1825 Palisades Terrace, Lake Oswego, OR 97034.

IV. FACTS

16. John T. Barnes, Sr. (John) was a 39-year old father when he was shot to death by Officer Ryan Gardiner, a uniformed City of Houston Police Officer. At the time he was shot and killed, John was the father of Chelsie Daniela, age 14, and John Terrell, Jr., age 13. John was the son of John A. Barnes and Barbara ("Bobbi") Barnes. John had worked as a sheriff's department jailer and a tow-truck driver before he was killed.

17. The shooting death occurred on or about August 1, 2009, at around 9:30 p.m. at the Woodland Hills Village Apartment Homes located in Kingwood, Texas, which was owned and managed by Hayden Properties LLC, JS Property Management, Inc. and/or Woodland Hills Village Apartment Homes.

18. On the evening of the incident, Officer Gardiner was working as a security guard/courtesy officer at the apartment complex. Officer Gardiner was wearing his official Houston Police Department uniform, and at all times material hereto was acting within the course and scope of his employment with the City. At all material times, Officer Gardiner was

an actor under color of state law.

19. Officer Gardiner had a checkered past as a Houston Police Officer. He had reportedly used his Taser electroshock weapon more than any other police officer in the Houston Police Department and upon information and belief several of the “Tasings” were unjustified uses of excessive force. Houston Police Department policy is to send a supervisor to the scene of each Taser use and, therefore, several HPD supervisors were aware of Officer Gardiner’s multiple examples of excessive force, yet did nothing. He had also been engaged in unjustified assaults on citizens amounting to excessive force, including at least one, and possibly two, other shootings of or at unarmed citizens.

20. As Officer Gardiner was patrolling the apartment complex that evening, he heard a verbal, not physical, exchange taking place between a man and woman near one of the apartments, and he went to investigate.

21. As Officer Gardiner approached the apartment where the conversation was taking place, John was just leaving the apartment. As John walked away from the apartment, Officer Gardiner ordered John to stop and lay down on the ground, although there was no reasonable suspicion or probable cause that John had committed a crime. When he refused, Officer Gardiner, without provocation or justification, physically attacked John. As allowed by law, John resisted this unlawful force and pushed Officer Gardiner away from him.

22. Officer Gardiner had not witnessed John engage in any illegal conduct before Officer Gardiner approached and attacked him. At no time did John make any sudden movements or gestures that could be interpreted by Officer Gardiner as aggressive or threatening. Nor did John say or do anything that would cause Officer Gardiner to fear imminent bodily harm. Clearly, John had no intent to harm Officer Gardiner or any other person, or

commit any violation of the law. Further, Officer Gardiner could see that John was unarmed. Under the circumstances, Officer Gardiner had no reason to believe that John posed a danger to himself or to any other person.

23. After being pushed back by John, Officer Gardiner stepped to a position approximately ten to fifteen feet away and drew his service pistol. John asked Officer Gardiner, "What are you going to do, shoot me?" Officer Gardiner then fired his weapon into John numerous times. As a result of the gunshots, John fell to the ground, bleeding.

24. Over the next several minutes Officer Gardiner prevented any person from coming near John, did not summon an ambulance, and did not allow any person to aid or assist the dying man. As a result of the gun shot wounds, John died. John might have been saved if Officer Gardiner had not prevented people from coming to John's aid. The City of Houston since then has prevented the release of John's autopsy report despite it being a public record subject to the Open Records Act. Preventing the release of autopsy reports of victims of Houston police officer shootings occurs frequently, such as in the shooting death of Joel Alfaro at the hands of HPD officers in 2009 and in many other improper shooting deaths. HPD Internal Affairs Department ("IAD") investigated the incident and, despite having clear information that the shooting was wholly unjustified and constituted excessive force, exonerated Officer Gardiner. The Chief of Police also did not recommend any discipline or retraining.

25. This was not Officer Gardiner's first questionable shooting. On March 15, 2006, Robert Cantrell was observed by Officer Gardiner allegedly driving a reported stolen vehicle. Mr. Cantrell stopped at a gas station. Officer Gardiner approached and shot Robert Cantrell four times while discharging his weapon seven times. No weapon was found on Mr. Cantrell. Despite Gardiner's admission that he left cover during a felony stop and did not use verbal

commands to gain compliance, the City of Houston did not discipline or retrain Officer Gardiner. Moreover, it did not discipline or retrain Officer Gardiner despite his explicit violation of the High Risk Vehicle Approach (HRVA) and Use of Force protocols thus indicating ratification and acceptance of these dangerous and unconstitutional patterns, practices, customs and procedures.

26. Houston Police Department has a long history of condoning and/or ratifying the excessive force of its police officers. On October 1, 1998, HPD Officers Anthony M. Ruggeroli and Brian T. Mitchel shot at suspects in a stopped car when they did nothing more than not respond immediately to verbal commands. Officer Ruggeroli merely shouted a few commands then left cover and went to the passenger window and shot at the unarmed driver. Officer Mitchel then ran up to the *passenger window and smashed it* and grabbed the passenger. The officers were not disciplined for using excessive force nor retrained in use of force or the proper high risk vehicle approach tactics, indicating ratification and acceptance of patterns, practices, customs and/or procedures of the excessive use of force.

27. In 1999, HPD Sgt. Glover's gun went off and struck a suspect when he used it to bash in passenger side window. Officer Shockley then discharged his weapon striking the other suspect in the vehicle. Despite using excessive force on both suspects and failure to use safe high risk vehicle approaches and full IAD investigation, there was no discipline or retraining as a result of this incident, indicating ratification and acceptance of HPD's excessive use of force and dangerous and unconstitutional high-risk vehicle approach (felony stop) patterns, practices, and customs.

28. In 1999, Jason Arboleda was shot and killed by HPD Officer R. A. Williams. Jason had left a bar with his friend Franky Aguirre, who was a passenger. On the way out from the area he struck, but did not seriously injure, Officer R. A. Williams. Officer Williams then

chased after Mr. Arboleda on foot and stopped him at a traffic light as Jason tried to flee in his vehicle. Officer Williams ordered Mr. Arboleda out of the car and on to the ground to which Mr. Arboleda complied. At that point, Officer Williams did *not* handcuff or otherwise secure Mr. Arboleda, who then jumped back in his car. The officer ran to the front of the car instead of obtaining cover. As Mr. Arboleda drove forward, Officer Williams shot and killed Jason. Officer Williams was not hit by the car and even felt safe enough to shoot rather to spend time getting out of the way. Despite IAD investigation, Officer Williams was not disciplined or retrained in the use of excessive force or high risk vehicle approach. The City determined it was a justified shooting and it never addressed Officer Williams' failure to follow either the written HRVA policy or any safe HRVA method. Further, the City did not order any training, indicating ratification and acceptance of HPD's dangerous and unconstitutional high-risk vehicle approach (felony stop) patterns, practices, customs and/or procedures and use of force

29. In 2000, HPD Officer R. C. Headley stopped a vehicle and determined it was stolen. Officer Headley then shot Mr. Langston (driver) and Mr. Plumber (passenger) when there was no reason to do so. Neither person was armed. Despite IAD investigation, there was no discipline nor training ordered.

30. In 2000, Officer Selvyn J. Ellis, who has 47 sustained complaints against him, received a suspension instead of firing, despite the fact he refused to answer questions during an IAD inquiry into improper conduct, including allegations of assault. He had previously been suspended for injuring a bar patron while working an extra job and not reporting the use of force.

31. In 2002, Officer Ted A. Adams, who has 41 sustained complaints against him, received a one day suspension instead of firing for not reporting the use of force after injuring a female after knocking her to the pavement with a leg sweep.

32. In 2003, Houston Police Lieutenant Hillman was involved in a faulty high-risk vehicle approach and used excessive force against unarmed Kevin Lunsford. When Hillman got near Lunsford he claimed that Lunsford moved and then Lt. Hillman shot and killed Lunsford. Despite IAD investigation, there was no discipline for excessive use of force or any training required.

33. On October 31, 2003, HPD Officer Butler was working at a large AMC movie theater in west Houston when 15 year old Jose Vargas was purportedly playing his radio too loud in his vehicle on his way to see a movie with his three teenage friends. Officer Butler went to investigate and the kids left. Officer Butler claimed the kids did not obey his commands to stop so Butler then gave pursuit. Vargas was scared and drove off. Officer Butler rushed up to the vehicle on foot when it was stopped in traffic with his gun drawn and not under any cover. This startled the 15 year old unarmed Vargas and the vehicle lurched forward with Officer Butler at the side of the driver's window. Officer Butler then shot and killed Vargas. Vargas had no criminal history. Despite the obvious excessive use of force and IAD investigation, Officer Butler was not disciplined nor retrained in the use of force.

34. In 2003, Mr. Juan Lozano was killed because HPD Officer R. L. Plotner used faulty high risk vehicle approach techniques by approaching a vehicle and failing to get under cover and give verbal commands to Lozano in a vehicle after a pursuit. Without being in fear of his life or serious bodily injury, Plotner shot and killed Juan. This officer was not disciplined or retrained in proper high risk vehicle approach tactics nor excessive use of force, indicating ratification and acceptance of HPD's dangerous and unconstitutional high-risk vehicle approach (felony stop) patterns, practices, customs and/or procedures similar to those that killed Roland.

35. In 2003, HPD Officer Rivera made a stop of a felony suspect in a van. Instead of

gaining cover and shouting verbal commands, Officer Rivera left cover and approached the van exposed. Officer Rivera shot the van driver when he was not frightened for his life. Officer River, however, should have maintained cover and a position of advantage. Officer Rivera was not disciplined or retrained for use of excessive force despite IAD investigation.

36. In 2004, HPD Officer C. Pena Jr. shot and seriously wounded an unarmed 16 year-old girl who was under a vehicle. Officer Pena gave verbal commands to LaDonna Banks and then shot her. Officer Pena received no discipline and no training in gaining cover when dealing with suspects and his use of excessive force.

37. In 2005 HPD Officer Thompson used faulty high-risk vehicle approach techniques and excessive force resulting in the shooting of an unarmed suspect, Timothy M. Thomas, who was driving when Officer Thompson pulled him over. Officer Thompson became suspicious because the driver was black and he had heard of a black felony burglary suspect. At first, Officer Thompson was behind cover and using his bullhorn. This only lasted a few minutes and then the officer left his cover and approached the vehicle with his gun drawn. Mr. Thomas started to get out of the car and when he did, he was shot by Officer Thompson who said he was in fear of his life due to Mr. Thomas' innocent movements. Thomas had no gun. Officer Thompson obviously used excessive force and faulty high risk vehicle approach. Officer Thompson was not disciplined and there was no training despite a full HPD IAD investigation.

38. August 14, 2007, a 17 year old unarmed girl was seriously wounded because of faulty high risk vehicle approach. Brittanee King, 17, was a *littering* suspect who had fled in a car for a short distance and was pursued by HPD Officer Carraway who believed Brittanee was dangerous² and approached her with gun drawn. When Brittanee stopped the vehicle to comply

² An acquaintance had jumped from the car but neither Brittanee or the police know why.

with the officer, Officer Carraway failed to use safe HRVA methods and left cover and exposed himself in full view of the young unarmed girl in the car. When the unarmed Brittane made an innocent movement, Officer Carraway claimed he feared for his life because he was not behind cover and in a position of advantage and shot Brittane, wounding her. Officer Carraway claimed he saw a shiny object--Brittane was wearing shiny bracelets. Despite the admitted unsafe HRVA approach methods and use of excessive force, no discipline or training was administered despite an IAD investigation

39. In 2008 Charles Chukwu was arrested and taken to the City of Houston jail at Mykawa Road where he was beaten by at least one City of Houston jailer without any reason. After the beating, Mr. Chukwu was purposefully released before he could get the names of the jail inmate witnesses. The jailers failed to file a timely use of force report and did not stop the beating of Mr. Chukwu, nor did the Houston jailers report another Houston jailer for the obvious excessive force. The jailers refused to take Mr. Chukwu to the jail clinic or hospital where the injuries could be documented, despite the excessive use of force and obvious injures.

40. The Chukwu incident was caught on videotape and investigated by the Houston IAD. It failed to find any violation when, in fact, excessive force had been used against Mr. Chukwu. Mr. Chukwu asked for the videotape from former City Mayor Bill White, Houston City Council and the HPD IAD, but was refused. At a Houston City Council meeting, Councilman Adrian Garcia stated that the videotape should be released. City Council member Sue Lovell asked the HPD IAD about the Chukwu jail beating video, however, she apparently never received a copy of the Chukwu video. More than two years after the alleged beating, Mr. Chukwu has not received the beating videotape.

41. On June 22, 2008, Henry Lee Madge was struck several times while in handcuffs

by a Houston police officer without justification and the officer was not disciplined.

42. Around February 6, 2009, Trenton Garrett was arrested and taken to the Houston jail at Mykawa Road where City of Houston jailers beat him without any reason. The jailers failed to file a timely use of force report and did not stop the beating of Mr. Garrett, nor did the Houston jailers report another Houston jailer for the obvious excessive force. The jailers refused to take Mr. Garrett to a hospital where the injuries could be documented despite the excessive use of force and obvious injuries. The incident was caught on videotape and investigated by the Houston IAD which failed to find any violation, when in fact, excessive force had been used against Mr. Garrett. Mr. Garrett asked for the videotape from the HPD IAD but was refused. More than two years after the alleged beating, Mr. Garrett has not received the beating videotape.

43. On August 5, 2009, Hatice Cullingford, Ph.D. ("Dr. Cullingford"), 65, was arrested by the Houston Police Department. Dr. Cullingford had never been convicted of any crime in her life and never previously been arrested for any crime. At the City of Houston Mykawa jail, Houston jail employees used excessive force on Dr. Cullingford.

44. In the late Spring of 2010, 15 year old Chad Holley was purposefully struck by a Houston police squad car and then violently beaten--by kicking, stomping and punching in the head, groin and other parts of his body--by least four Houston police officers while other Houston police officers looked on without intervention. Chad Holley was not resisting but had laid down on the ground with his hands behind his back. No officer attempted to stop the beating by the other officers and after the beating no officer reported any other officer for the incident. No use of force report was filled out by any officer in a timely manner. The Mayor of Houston, Annise Parker, thereafter, would not allow the release of a videotape showing the incident to the public.

45. In February, 2011, a videotape of the Chad Holley beating was released to local Houston television station KTRK, Channel 13, by a Houston citizen. Houston City Mayor Annise Parker then threatened the citizen and berated KTRK Channel 13: “Whoever provided the video to Channel 13 is in violation of a federal court order³ and should be prosecuted. It is unfortunate and irresponsible that Channel 13 has chosen to air the material at this time.”

46. On February 8, 2011, at a Houston City Council public meeting discussing the Chad Holley excessive force incident and past police excessive force incidents, Houston City Attorney David Feldman interrupted Houston City Councilpersons, such as Melissa Noriega, who were talking about the videotape of Holley and past instances of police brutality that could affect city liability. Mr. Feldman then instructed the City council to not to talk about the Chad Holley case. This was a sentiment Mayor Parker also verbalized. Council member Noriega agreed and stopped talking about excessive force events as did the Mayor and other City Councilpersons. For the past twenty years there have been excessive force cases against the City pending at all times, so under this policy the council members cannot speak about excessive force cases in public meeting.

47. In the present case, the City stopped the Harris County Medical Examiner from releasing the autopsy report of John. The City has a custom, practice, procedure and policy of preventing the release of autopsy reports involving improper officer involved shootings.

48. The Houston Police Chief is the policymaker in regards to training, policies, and discipline including firing officers. The Houston Police Chief approves all discipline of all its officers.

49. More pertinent facts appear in other sections as well.

³ The citizen was not a party to the lawsuit nor was any protective order directed at the citizen.

V. PLAINTIFFS' CIVIL RIGHTS CLAIM

50. The Civil Rights Act, codified as 42 U.S.C. § 1983, provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any laws, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983.

51. Plaintiffs allege that Defendants, jointly and/or severally, deprived Plaintiffs' Decedent of his Fourth Amendment rights, and those rights, privileges, and immunities secured by the Fifth and Eighth Amendments to the Constitution as incorporated and applied to the states through the Fourteenth Amendment. Defendants violated Decedent's rights in the following ways:

(A) By using excessive and deadly force in the course of Officer Gardiner's attempt to seize the Decedent, in violation of the Fourth Amendment and its reasonableness standard. Plaintiffs plead that Decedent was unlawfully shot and killed. This action resulted directly and only from a use of force that was clearly excessive to the need, and was objectively and subjectively unreasonable;

(B) By failing to provide medical attention, where it was clearly necessary and required by law; and

(C) By failing to provide supervision and/or proper training to prevent such incidents of excessive force.

52. Defendants' violations of John's constitutional rights resulted in John's suffering

and death and were a direct cause of Plaintiffs' injuries.

(1) PLAINTIFFS' FIRST CLAIM: 42 U.S.C. § 1983—PEACE OFFICER LIABILITY

53. Plaintiffs bring a claim against Officer Gardiner, individually as well as in his official capacity, pursuant to 42 U.S.C. § 1983 and for punitive damages.

54. At all material times, Officer Gardiner was acting under color of state law as an agent and employee of Defendant, the City of Houston ("City"). Defendant was wearing his official Houston Police Department uniform, and was acting in the course and scope of his duties as a Houston Police Officer at the time he shot and killed Mr. Barnes.

55. Force is excessive, and therefore violates the Fourth Amendment, if it is not reasonable in light of the circumstances facing the officer. *See Graham v. Connor*, 490 U.S. 386, 398 (1989). The facts and circumstances of this case show that Defendant Gardiner's act of shooting and killing Decedent was clearly unreasonable.

56. At the time of the incident, Officer Gardiner had no reason to believe that John was armed or dangerous. First, John made no violent movements towards Gardiner or any other person that could be interpreted as threatening. Second, John made no verbal threats to Officer Gardiner or any other person. Third, John did not touch Officer Gardiner other than to repel Gardiner's unlawful attack. Fourth, it was clear to Gardiner that Decedent was unarmed and did not have any weapon or dangerous device readily at hand.

57. Officer Gardiner did not have a reasonable fear of imminent bodily harm when he shot and killed John nor did Officer Gardiner have a reasonable belief that any other person was in danger of imminent bodily harm from John. Consequently, shooting and killing John was unwarranted under these circumstances, and was objectively unreasonable when comparing or

balancing the amount of force used against the need for the force.

58. Therefore, by using subjectively and objectively unreasonable deadly force while acting under color of state law, Officer Gardiner violated Decedent's rights under the Fourth and Fourteenth Amendments to the United States Constitution and caused his wrongful death.

(2) PLAINTIFFS' 2nd CLAIM: 42 U.S.C. § 1983—MUNICIPAL LIABILITY

59. Plaintiffs plead that John's constitutional rights were violated when he was shot and killed by Officer Gardiner. The Plaintiffs' injuries directly resulted from Officer Gardiner's excessive use of deadly force in shooting and killing John.

60. The City of Houston is also liable under 42 U.S.C. § 1983 for failing to supervise and train its police officers, and for overlooking and covering up officer misconduct. In addition, the City had a general policy, pattern and/or practice of not disciplining police officers for their conduct, thereby sanctioning the police officers' actions, which amounted to a departmental policy of overlooking constitutional violations. The City's failure to supervise and train its police officers, and the City's willful blindness towards the constitutional violations of its employees, constitute gross negligence and/or deliberate and conscious indifference to people's rights including the right to free from unreasonable search and seizure and the rights conveyed to Plaintiff's under the Texas Wrongful Death Statute as applied through 42 U.S.C. Sections 1983 and 1988. .

61. Additionally, municipalities may be held liable under 42 U.S.C. § 1983 for constitutional torts that are committed pursuant to a policy, procedure, practice, or custom of the municipality. Even if the City's practice of overlooking constitutional torts was not authorized by an officially adopted policy, the practice may be so common and well-settled that it fairly represents official policy. *See Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397,

404 (1997).

62. In the present case, the City's formal and informal actions in overlooking, hiding and/or tacitly encouraging police misconduct through other officers, the IAD Department, the Houston police chiefs, including Chiefs Hurtt, Nuchia, Brown, Bradford, McClelland and others, as well as Mayors White, Brown and Parker and the City Council reflect a policy, practice custom and procedure authorizing and allowing the use of excessive force that violated the civil rights of John. Consequently, the City is liable for harm caused to others, such as Plaintiffs, as a result of its policies, practices customs and procedures.

63. Defendant City is liable for the constitutional torts of Officer Gardiner because the City sanctioned the following customs, practices, and policies:

(A) Using excessive, and oftentimes deadly force, to carry out otherwise routine arrests or stops;

(B) Using deadly force when such force is not necessary or permitted by law;

(C) Ignoring the serious need for training and supervision of its officers in regards to the use of force;

(D) Failing to discipline those persons whom are found to have engaged in the use of excessive force upon those entrusted to their care and/or under their control;

(E) Failing to adequately supervise and/or observe its officers;

(F) Failing to adequately train officers regarding the availability of alternative means of detaining persons other than the use of force or deadly force.

(G) Failing to discharge officers who have shown a pattern or practice of using excessive force; and

(H) Adopting a practice whereby officers who are unfit for peace officer duties, as

shown by prior actions in the line of duty, are allowed to retain their positions.

64. At the time Officer Gardiner shot and killed John, Officer Gardiner was acting pursuant to an official city policy, practice, custom and procedure overlooking and/or authorizing police officer's excessive use of force. *See Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 659 (1978).

65. Thus, the City's policy of overlooking and cover up police brutality was a direct cause of Plaintiffs' injuries. In particular, the City's policy caused John to be deprived of his constitutional rights to be free from unlawful seizures and objectively unreasonable force under the Fourth and Fourteenth Amendments and his rights taken from the Texas Wrongful death Statute as applied through 42 U.S.C. Section 1983 and 1988..

A. *Failure to Train a Single Police Officer.*

66. A city may be held liable for its failure to train a single police officer when the officer's acts were so egregious that the city should have had clear warning that the particular officer posed a danger to citizens. *See Pineda v. City of Houston*, 124 F. Supp. 2d 1057, 1068 (S.D. Tex. 2000).

67. With respect to Officer Gardiner, the need for additional or different training was obvious. Defendant Gardiner had a history of unjustifiably and forcefully apprehending suspects and indiscriminately using his "Taser" electroshock weapon. The City knew that Officer Gardiner was likely to engage in other acts of excessive force, yet the City did nothing. By failing to discipline, supervise, or train Defendant Gardiner, the City authorized or ratified Officer Gardiner's wrongful acts both by acceptance of acts prior to and including those that caused John's death.

68. The City's acts and omissions, when viewed objectively, involved an extreme

degree of risk, considering the probability and magnitude of harm to others. The City had actual, subjective awareness of the risks involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others including John and the Plaintiffs.

69. Thus, in light of the particular risk posed by Officer Gardiner, the City's failure to train Defendant Gardiner constitutes gross negligence and/or deliberate and conscious indifference to the rights, safety, and welfare of others, including Decedent and Plaintiffs.

B. *Failing to Provide Medical Attention*

70. In addition, Defendants failed to provide medical care and attention to John after he was shot. Once he was shot, a special relationship was created whereby Defendants were required to intervene and provide emergency care.

71. Instead, Decedent's body remained on the pavement of the parking lot for almost the entire night after he was shot by Officer Gardiner.

72. The Defendants deliberately failed to render adequate care and attention to John, in violation of John's civil right for reasonable medical care.

(3) PLAINTIFFS' THIRD CLAIM: TEXAS TORT CLAIMS ACT

73. The allegations contained in the paragraphs 16 through 72 are incorporated herein by reference.

74. *Alternatively*, as a pendent state cause of action, Plaintiffs bring this action pursuant to the Texas Tort Claims Act, pursuant to TEX. CIV. PRAC. & REM. CODE §§ 101.021.

75. The shooting death of John was a direct and proximate result of the negligence of Officer Gardiner. *See* paragraphs 16 through 72, *supra*. Therefore, Plaintiffs elect to proceed with their State law claims solely against the City of Houston, as permitted by the Texas Tort

Claims Act.

76. At all material times, Officer Gardiner was the agent and employee of the City of Houston and was acting within the course and scope of his employment with the City of Houston.

77. Defendant City of Houston is liable for injuries suffered as a result of the death of John, proximately caused by a City employee's commission of a wrongful act in the course and scope of his employment through the use or misuse of tangible personal property; namely, Defendant Gardiner's service weapon required by his employer, the City of Houston.

78. Pursuant to the Texas Tort Claims Act, the City of Houston had actual notice of the events giving rise to this lawsuit within the six-month period following the unlawful shooting of John by police incident report, IAD Report signed off by the Chief of Police, TV News reports and public meetings where the death of John Barnes was brought to the attention of Mayor Annise Parker and the City Council.

(4) PLAINTIFFS' FOURTH CLAIM—ASSAULT

79. Under Texas law, the parallel cause of action for excessive force is a cause of action for assault and battery. TEX. PENAL CODE ANN. § 22.01. Consequently, Plaintiffs allege an alternative pendent State law claim for assault and battery, incorporating the allegations contained in Paragraphs 16 through 55 by reference.

80. Officer Gardiner committed an assault upon John when Officer Gardiner intentionally, knowingly, and/or recklessly caused John to be shot. Gardiner's assault conduct was committed intentionally, knowingly, and/or recklessly, and was the proximate cause of physical and emotional injuries to the Plaintiffs. Said injuries were the direct and immediate consequence of Officer Gardiner's wrongful acts and a natural and direct result of the assault.

81. At no time was said Officer Gardiner privileged to take the action, as lethal force was not necessary under the circumstances.

VI. PLAINTIFFS' NEGLIGENCE CLAIMS

82. In the alternative to the above claims, Plaintiffs bring the following claims of negligence against Defendants Hayden Properties LLC, and JS Property Management Inc.

(1) PLAINTIFFS' CLAIMS OF NEGLIGENT HIRING, TRAINING AND RETENTION AND GROSS NEGLIGENCE

83. Defendants Hayden Properties LLC, JS Property Management Inc., and Woodland Hills Village Apartment Homes owned, managed, occupied and had control of the apartment community where John was shot and killed. Defendants Hayden Properties LLC, JS Property Management Inc., and Woodland Hills Village Apartment Homes hired Ryan Gardiner to act as a security guard and courtesy offer. Hayden Properties LLC, JS Property Management Inc., and Woodland Hills Village Apartment Homes knew of the magnitude of the risk involved in hiring Defendant Ryan Gardiner as a security guard for the premises, but Defendants nonetheless proceeded to hire and retain Officer Gardiner, acting with conscious indifference to the rights, safety, and welfare of others, including John.

84. Defendants' negligence includes, but is not limited to, the following acts and omissions:

- a) Defendants negligently hired Officer Gardiner, despite Defendants' knowledge that Officer Gardiner could harm Defendants' tenants;
- b) Defendants failed to screen, or adequately screen, Gardiner;
- c) Defendants failed to train, or adequately train, Gardiner;
- d) Defendants failed to supervise, or adequately supervise, Gardiner; and
- e) Defendants negligently retained Gardiner even though Defendants knew, or

should have known, that Officer Gardiner posed a danger to their tenants.

85. Each of the above listed acts and/or omissions, taken singularly or in any combination, rise to the level of gross negligence. Defendants' acts and omissions, when viewed objectively from the standpoint of the actor at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of harm to others. Defendants Hayden Properties LLC, JS Property Management Inc., and Woodland Hills Village Apartment Homes had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. Therefore, Defendants Hayden Properties LLC, JS Property Management Inc., and Woodland Hills Village Apartment Homes were grossly negligent, for which Defendants are liable for exemplary damages.

86. As a proximate result of the negligence and/or gross negligence of Defendants, Hayden Properties LLC, JS Property Management Inc., and Woodland Hills Village Apartment Homes, Plaintiffs were caused to suffer damages, as set forth in more detail below.

(2) RESPONDEAT SUPERIOR

87. At the time of the incident, Defendant Ryan Gardiner was an employee, agent, and/or servant of Defendants, Hayden Properties LLC, JS Property Management Inc., and Woodland Hills Village Apartment Homes. Defendant Gardiner was acting within the course and scope of his employment with said Defendants at the time of the accident made the basis of this lawsuit. As such, said Defendants are responsible for the conduct of Defendant Gardiner under the doctrine of *respondeat superior* due to the master-servant relationship which existed at the time of the incident made the basis of this lawsuit.

VII. PLAINTIFFS' REQUEST FOR PERMANENT INJUNCTION

88. In addition to the aforementioned facts, Plaintiff states that the City of Houston

has a policy, procedure and/or practice that discourages citizen complaints. The City of Houston requires, *inter alia*, a complainant to submit a lengthy complaint form that must be sworn and notarized, potentially subjecting the complainant to a perjury charge if any fact stated in the complaint is not absolutely accurate. The City of Houston also has a policy, procedure and/or practice of condoning excessive force and then covering up police officer misconduct. According, Plaintiffs respectfully request permanent injunctive relief in the form of a Court Order directing the City of Houston that: (a) autopsy reports in police shooting deaths are not to be withheld from the public; (b) a public independent review board is to be created without its members being appointed by the City of Houston and it shall have subpoena power; (c) internal affairs reports in excessive force cases must be made public after one year from any incident; and (d) police complaint forms cannot require that citizens swear under oath to the facts in the complaint.

VIII. DAMAGES

89. In addition to the damages mentioned in the preceding paragraphs as a direct and proximate result of the intentional and unlawful conduct of Defendants, Plaintiffs have suffered, and in reasonable probability will continue to suffer damages, as described in the paragraphs below. TEX. CIV. PRAC. & REM. CODE § 71.001 *et seq.*

90. Plaintiff Karen Echols, as Representative of the Estate of John T. Barnes, Sr., Decedent, brings this survival action pursuant to TEX. CIV. PRAC. & REM. CODE § 71.021 and as applied through 42 U.S.C. § 1983 and § 1988. As a direct and proximate result of Defendants' tortious acts and omissions, John suffered pain and mental anguish from the time of the shooting, until his death. John likewise incurred funeral expenses. This claim survives to the Decedent's Estate and such claim is hereby made.

91. Plaintiff John A. Barnes, brings this action pursuant to TEX. CIV. PRAC. & REM. CODE §§ 71.001 – 71.011 and as applied through 42 U.S.C. § 1983 and § 1988. Plaintiff is a statutory beneficiary and may bring this action for the wrongful death of his beloved son. Under the Texas Wrongful Death Act, Plaintiff, as a surviving parent of the Decedent, is entitled to recover damages for the following:

a. Pecuniary Loss resulting from the Death of John T. Barnes, Sr., including, but not limited to, the care, maintenance, support, services, education advice, counsel, and reasonable contributions of a pecuniary value, excluding loss of inheritance, that the surviving parent would have received from John T. Barnes, Sr., had he lived.

b. Termination of the Parent-Child Relationship: The positive benefits flowing from the love, support, companionship, and society that Plaintiff would in reasonable probability, have received from John T. Barnes, Sr., had he lived.

c. Mental Anguish suffered by the surviving parent as a result of the death of John T. Barnes, Sr., including but not limited to the emotional pain, torment, and suffering that Plaintiff would, in reasonable probability, experience from the death of John T. Barnes, Sr.;

d. Loss of household services; and e. Loss of Inheritance: the earnings, if any, of the Decedent in excess of the amount he would have used for the support of himself and his family, and in which reasonable probability would have been added to his estate and left to the Parent at his natural death had he lived.

92. Plaintiff Karen Echols, Individually, brings this action pursuant to TEX. CIV. PRAC. & REM. CODE §§ 71.001 – 71.011 and as applied through 42 U.S.C. § 1983 and § 1988. Plaintiff is a statutory beneficiary and may bring this action for the wrongful death of her common-law husband. Under the Texas Wrongful Death Act and as applied through 42 U.S.C. §

1983 and § 1988, Plaintiff, as a surviving common-law wife of the Decedent, is entitled to recover damages for the following: pecuniary loss; mental anguish, loss of household services, and loss of inheritance, as noted herein.

93. Plaintiff April Gay Phillips as Next Friend of Chelsie Daniela Barnes and John Terrell Barnes, Jr., brings this action pursuant to TEX. CIV. PRAC. & REM. CODE §§ 71.001 – 71.011 and as applied through 42 U.S.C. § 1983 and § 1988. Minor Children Chelsie Daniela and John Terrell, Jr. are statutory beneficiaries, and may bring this action for the wrongful death of their beloved father. Under the Texas Wrongful Death Act, and as applied through 42 U.S.C. § 1983 and § 1988. Plaintiffs Chelsie Daniela and John Terrell Jr., as minor surviving children of the Decedent, are entitled to recover damages for the following: pecuniary loss; termination of the child-parent relationship; mental anguish, loss of household services, and loss of inheritance, as noted herein.

94. In addition, Defendants are liable for compensatory and exemplary damages arising from their negligence and gross negligence.

IX. ATTORNEY'S FEES

95. Plaintiffs are entitled to recover attorney's fees and costs as required by the Civil Rights Attorney's Fees Award Act of 1976. 49 U.S.C. § 1988. Plaintiffs thereby request that the Court and jury award their attorney's fees and expenses.

X. JURY DEMAND

96. Plaintiffs respectfully demand a jury trial pursuant to FED. R. CIV. P. 8(b).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that Defendants be cited to appear and answer herein, and that Plaintiffs have judgment against

Defendants, jointly and severally, for actual damages above the jurisdictional minimum of the Court; exemplary damages; pre-judgment interest; post-judgment interest, costs of court, attorney's fees and expenses and all other relief to which Plaintiffs are justly entitled, at law or in equity.

Respectfully submitted,

KENNEDY HODGES, L.L.P.

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