

SECOND JUDICIAL DISTRICT COURT  
COUNTY OF BERNALILLO  
STATE OF NEW MEXICO

FILED  
JUN 11 2009  
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CHRISTINA VILLA  
*Juanita Miller*

RACHEL HIGGINS, as personal representative of the  
Estate of ANDREW LOPEZ, ELOISA LOPEZ,  
Individually, CARLOS RUIZ, Individually and  
ELOISA LOPEZ as guardian of ALYCIA RUIZ, a minor,  
Plaintiffs,

v.

No. CV 2009-09715

CITY OF ALBUQUERQUE, a Municipal Corporation,  
Defendant.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**THIS MATTER** having come before the Court for a Bench Trial on May 17, 18 & 19, 2011, the Court having heard the testimony, having reviewed the evidence and the record, having heard argument, and having reviewed the Plaintiff's and Defendant's Requested Findings of Fact, and Conclusions of Law, finds and concludes as follows:

**FINDINGS OF FACT**

1. At approximately 3:00 a.m. on February 8, 2009, Albuquerque Police Department (APD) Officer Brian Pitzer was on patrol when he noticed a vehicle traveling east with no headlights. He attempted to conduct a traffic stop but was unsuccessful and lost visual contact of the car. He advised dispatch to put an attempt to locate on the vehicle and provided the vehicle information.

2. On that same morning, Officers Justin Montgomery and Louis Henckel were riding "two man" patrol in Officer Montgomery's marked patrol unit. While on patrol, they noticed a two door tan vehicle appearing to have no headlights on. Officer Montgomery made a u-turn in an attempt to conduct a traffic stop. By the time he had made the turn, the vehicle was out of sight.

3. Officer Leighton Redhouse located the vehicle near the area of 51<sup>st</sup> Street and Glendale. Officer Redhouse engaged his emergency equipment attempting to pull over the vehicle.

4. Officers Montgomery and Henckel fell in directly behind Officer Redhouse who was following the suspect vehicle. They began to update dispatch with their location.

5. APD Sergeant Arturo Sanchez joined in the pursuit, also engaging his emergency equipment.

6. The suspect vehicle made no attempt to stop even though the emergency lights on the police vehicles had been engaged.

7. The suspect vehicle led the officers in and out of a residential neighborhood multiple times.

8. While the suspect vehicle was driving east on Rincon, the passenger in the vehicle bailed out of the car and fled on foot. These actions heightened the officers' concerns as to the situation facing them.

9. Sgt. Arturo Sanchez joined the pursuit of the vehicle, also engaging his emergency lights.

10. Shortly after the pursuit began, an APD officer or employee wrongly determined that the tan, two door, 1981 Buick Regal that was being pursued matched the description of a silver, four-door, late model Chevrolet Impala that was reported to have been involved in a shooting earlier in the morning.

11. It was communicated over the radio to officers pursuing Andrew Lopez' vehicle that such vehicle was involved in a shooting earlier that evening.

12. The vehicle pursuit continued, in part, because of this misidentification.

13. The misidentification of the 1981 Buick Regal as the late model Chevrolet Impala

heightened the intensity and fear associated with the low-speed pursuit and tainted the perceptions of the officers involved in the pursuit.

14. One of the officers involved in the vehicle pursuit, who had seen Andrew Lopez speaking on his cell phone during the pursuit, believed he saw Andrew Lopez driving with a gun or a weapon. At trial, the officer could not rule out that what he saw was actually a cell phone. At the end of the vehicle pursuit, when Andrew Lopez exited the Buick Regal, the officer announced "gun, gun, gun" over the radio.

15. Officer Montgomery was the first of approximately five officers to pursue Andrew Lopez on foot, East, down the driveway of 326 51st Street NW.

16. As Officer Montgomery followed Andrew Lopez, the two ran between the wall of the residence, which was to the North of Andrew Lopez, and a Ford F-150 that was to the South.

17. Officer Montgomery testified that he saw the largest handgun he had ever seen in Andrew Lopez' left hand as Andrew Lopez exited the Buick Regal and ran down the driveway.

18. In fact, Andrew Lopez was not in possession of a gun during the pursuit or thereafter.

19. From the time Andrew Lopez left the Buick Regal until his death, Officer Montgomery perceived Andrew Lopez' flight from police officers as an attempt to engage the officers in armed combat, and never considered that Andrew Lopez was merely trying to escape.

20. The driveway was enclosed to the East by a corrugated metal fence that was approximately six feet high.

21. When Andrew Lopez reached the fence at the East end of the driveway, Officer Montgomery believed that Andrew Lopez was turning around to shoot at him and never considered that Andrew Lopez was attempting to run through the space between the front of the Ford F-150 and the fence.

22. While Andrew Lopez was turning to his right, Officer Montgomery fired three shots at Andrew Lopez.

23. Two of the three shots missed Andrew Lopez, while one struck the Ford F-150 on its way to hitting Andrew Lopez in his right flank, causing a non-lethal bullet wound.

24. After being struck by the bullet, Andrew Lopez fell in front (East) of the Ford F-150.

25. There was a time gap between the last of the first three shots, which were fired when Andrew Lopez was standing, and the fourth and fatal shot, which was fired when Andrew Lopez was lying on the ground in front of the F-150. A defense expert offered an uncontroverted estimate of the time gap as lasting between five and ten seconds.

26. The positioning of Officer Montgomery and Andrew Lopez had changed significantly between the third and fourth shots.

27. During this gap between the third and fourth shots, Officer Montgomery had the opportunity to, and did, re-assess the situation.

28. Officer Montgomery knew that other officers were in the vicinity. There was time and opportunity to establish a more tactical, and safer, approach to the situation.

29. Before approaching Andrew Lopez and firing the fourth and fatal shot, Officer Montgomery was in a position of cover in the vicinity of the middle of the truck.

30. Officer Montgomery left the cover that was provided on the side of the truck, when it was unnecessary to do so, and forced himself into what he misperceived as a shooting situation.

31. Officer Montgomery walked around the front driver's side corner of the Ford F-150 with his gun pointed at Andrew Lopez, who lay motionless and unarmed on the ground, and, at a distance of approximately seven feet, shot him in the chest.

32. This fourth shot pierced Andrew Lopez' lung and heart and caused his death.

33. After the fatal shot was fired, one of the APD officers yelled a derogatory epithet at Andrew Lopez.

34. Officer Montgomery testified that, before firing the fourth and fatal shot, he had given Andrew Lopez multiple commands to drop the gun and that Andrew Lopez failed to comply with his commands.

35. According to Officer Montgomery, one factor which led him to fire the fourth and fatal shot was Andrew Lopez not following his multiple commands to drop the gun.

36. Based on the testimony of all other police officers at the scene, Officer Montgomery

failed to issue any audible commands to Andrew Lopez, including, but not limited to, any command to drop the gun.

37. Before firing the final and fatal shot, Officer Montgomery misperceived that Andrew Lopez had shot at him or other officers while Officer Montgomery was firing the first three shots.

38. Officer Montgomery testified that one of the reasons he fired the shot that killed Andrew Lopez was his perception that Andrew Lopez had previously shot at him or other officers.

39. Andrew Lopez did not have a gun and never fired any gunshots at Officer Montgomery or anyone else during the February 8, 2009 pursuit that resulted in his death.

40. When Officer Montgomery initially saw Andrew Lopez leave the vehicle and momentarily glance at the police vehicles that had pursued him, Officer Montgomery believed that Andrew Lopez wanted to engage him in armed combat.

41. Although Officer Montgomery fired three shots at Andrew Lopez at the end of the driveway, a distance of approximately seven feet, he perceived that Andrew Lopez had "disappeared" and was still trying to engage APD in armed combat.

42. Immediately before Officer Montgomery fired the fourth and fatal shot, Andrew Lopez did not utter any "fighting words" or any other words to Officer Montgomery or other police officers.

43. Immediately before Officer Montgomery fired the fourth and fatal shot, Andrew Lopez did not make any movements.

44. Immediately before Officer Montgomery fired the fourth and fatal shot, Andrew Lopez was not pointing anything at Officer Montgomery or any other police officer while he lay on his back already wounded.

45. At the time that Officer Montgomery fired the fourth and fatal shot, Andrew Lopez was wounded, immobile, unarmed, and lying on his back.

46. At all material times, Andrew Lopez was attempting to escape APD police officers.

47. Officer Montgomery testified that his decision to fire the fourth and fatal shot was based in part on his perception of the contents of Andrew Lopez' hands as he was laying in front of

the F-150 truck.

48. In his sixty-six page statement taken on the day after the incident, Officer Montgomery stated that immediately before he fired the fourth and fatal shot, he declined to give up his cover in order to see what was in Andrew Lopez' hands.

49. Nine months later, Officer Montgomery testified to the Grand Jury that he saw metal in Andrew Lopez' hands. This was the first time Officer Montgomery testified that he had seen metal in Andrew Lopez' hands.

50. The trajectory and entry point of the fourth and fatal shot are inconsistent with Officer Montgomery's testimony regarding the placement and content of Andrew Lopez' hands at the time.

51. The officer who first approached Andrew Lopez' body after the fourth and fatal shot, and who patted him down, handcuffed him, and then searched the immediate area for a weapon, did not notice an ashtray or any weapon at that time.

52. Officer Montgomery's testimony was not credible.

53. Officer Henckel's testimony was not credible.

54. Officer Montgomery's testimony regarding the placement and content of Andrew Lopez' hands immediately before the fourth and fatal shot was fired was not credible.

55. Andrew Lopez was not armed with a gun or an ashtray at the time he received the fourth and fatal shot.

56. It was reasonable for APD to give a warning before firing the final and fatal shot at Andrew Lopez.

57. APD failed to give Andrew Lopez a warning that deadly force was about to be utilized.

58. Officer Montgomery testified that in light of the fact that he was an APD officer, and in light of the fact that he had given commands to drop the gun, Andrew Lopez should have known "what was coming next", and that a warning of intent to use deadly force was unnecessary.

59. As noted above, if any command to drop the gun was given by Officer Montgomery, it was inaudible.

60. Andrew Lopez had no reason to know that the vehicle he was driving was misidentified by APD agents and employees as being involved in a shooting earlier in the morning; that Officer Montgomery misperceived him as wanting to engage in armed combat with them; that Officer Montgomery misperceived that he (Andrew Lopez) had been firing a weapon during the pursuit; or that APD would use deadly force against him.

61. The acts and omissions of APD on the night of February 8, 2009 proximately caused Andrew Lopez' death.

62. Taken in their totality, the acts and omissions of APD on the night of February 8, 2009 were unreasonable.

63. Immediately before firing the shot that killed Andrew Lopez, it was unreasonable for Officer Montgomery to believe that Andrew Lopez presented an immediate risk of death or great bodily harm.

64. When Officer Montgomery fired the fourth and fatal shot, he intended to injure Andrew Lopez.

65. Officer Montgomery's use of deadly force in firing the fourth and fatal shot was excessive and unreasonable.

66. Based on the testimony of the City of Albuquerque's own expert, the training provided, to the officers, on the use of deadly force, is not reasonable and is designed to result in the unreasonable use of deadly force.

67. The City's expert (a training officer for the City) testified that Officer Montgomery's actions were exemplary and that he (the expert) would use this incident to train officers on the proper use of deadly force.

68. Andrew Lopez' own conduct also proximately caused his death.

69. The City of Albuquerque violated the New Mexico Wrongful Death Statute and also violated Andrew Lopez' Civil Rights under the Constitution of the United States and the

Constitution of the State of New Mexico.

70. Pursuant to Plaintiff's Exhibit 36, that is, economist William Patterson's report, if Andrew Lopez worked until age sixty-two, his lost earning capacity is \$948,006.00.

71. Pursuant to Plaintiff's Exhibit 36, at pages 7 to 8, Andrew Lopez' loss of enjoyment of life, which is valued at \$100,000.00 per year, is \$4,730,538.00.

72. Pursuant to Exhibits 31 and 32, Andrew Lopez' funeral expenses were \$7,117.76.

73. Andrew Lopez experienced pain and suffering in his dying minutes after the fourth and fatal shot.

### **CONCLUSIONS OF LAW**

1. APD owed Andrew Lopez a duty of reasonable care.

2. APD breached that duty of reasonable care by undertaking the course of unreasonable acts and omissions described above.

3. Andrew Lopez' death was proximately and wrongfully caused by an intentional battery committed by a duly authorized APD Officer.

4. By breaching its duty to exercise reasonable care and/or its own Standard Operating Procedures, APD and its officers committed the tort of negligence.

5. APD's negligence caused the battery that resulted in Andrew Lopez' death.

6. The City of Albuquerque violated the New Mexico Wrongful Death Statute and also violated Andrew Lopez' Civil Rights under the Constitution of the United States and the Constitution of the State of New Mexico.

7. Andrew Lopez sustained damages which include, but are not limited to, wrongful death, pain and suffering, funeral expenses, loss of enjoyment of life, and lost earning capacity.

8. The Estate of Andrew Lopez is limited to damages not exceeding the sum of \$400,000.00 by statute.

9. Andrew Lopez was 25% responsible for his wrongful death; APD and the City of




Albuquerque were 75% responsible.

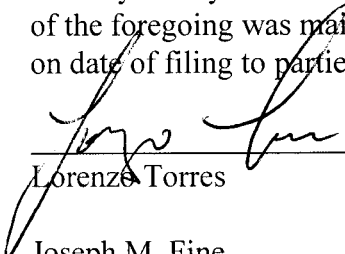
All requested Findings of Fact and Conclusions of Law inconsistent with those made by the Court are deemed refused.

Conclusions of Law contained in the "Findings" section are specifically incorporated as a part of the Court's Conclusions of Law. Similarly, all Findings of Fact contained in the "Conclusions" section are specifically incorporated as a part of the Court's Findings of Fact.

A form of Judgment and Final Order consistent with the above shall be prepared by Mr. Joseph M. Fine.

 6-7-2011  
The Honorable Theresa Baca  
District Court Judge

I hereby certify that a true and correct copy of the foregoing was mailed and e-mailed on date of filing to parties listed below.

  
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