

COUNCIL OF THE COUNTY OF MAUI  
**POLICY AND INTERGOVERNMENTAL  
AFFAIRS COMMITTEE**

December 19, 2014

**Committee  
Report No.** \_\_\_\_\_

Honorable Chair and Members  
of the County Council  
County of Maui  
Wailuku, Maui, Hawaii

Chair and Members:

Your Policy and Intergovernmental Affairs Committee, having met on December 8, 2014, makes reference to County Communication 13-41, from Council Chair Gladys C. Baisa, regarding litigation matters.

By correspondence dated February 27, 2014, the Department of the Corporation Counsel requested consideration of the possible settlement of Joshua Nakagawa v. County of Maui, et al., Civil 11-00130 LEK BMK; and Anthony Lum-John v. County of Maui, et al., Civil 12-00569 JMS RLP (Consolidated). Attached to the request is a copy of the relevant complaints and a proposed resolution entitled "AUTHORIZING SETTLEMENT OF JOSHUA NAKAGAWA V. COUNTY OF MAUI, ET AL., CIV. NO. 11-00130 LEK BMK AND ANTHONY LUM-JOHN V. COUNTY OF MAUI, CIVIL NO. 12-00569 JMS RLP (CONSOLIDATED)". The purpose of the proposed resolution is to authorize the Department of the Corporation Counsel to settle the consolidated cases on behalf of the County and individual defendants Jun Hattori, Erik Losvar, Russell Kapahulehua, and Harry Matsuura.

Your Committee notes the complaints allege Mr. Nakagawa and Mr. Lum-John suffered injury and damages when police officers shot them during an incident that occurred on or about July 18, 2010, along Honoapiilani Highway near Punalau Beach, Maui.

By correspondence dated November 19, 2014, the Department of the Corporation Counsel provided an update on the consolidated cases. The Department advised that on March 21, 2014, the Court granted the County defendants' motion for summary judgment, dismissing all claims against all defendants. Plaintiffs appealed the Court's order to the Ninth Circuit Court of Appeals.

COUNCIL OF THE COUNTY OF MAUI  
**POLICY AND INTERGOVERNMENTAL  
AFFAIRS COMMITTEE**

Page 2

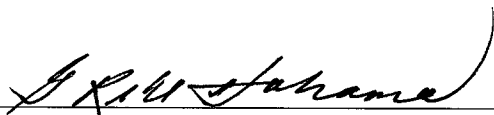
**Committee  
Report No.** \_\_\_\_\_

The Department anticipates the appeal may take approximately two or more years to resolve. The Department noted that in the meantime, there is no need for further action on the matter, and requested the proposed resolution be filed.

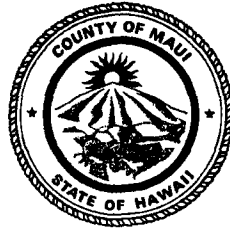
Based on the information received and the recommendation of the Department of the Corporation Counsel, your Committee voted 7-0 to recommend filing of the correspondence from the Department of the Corporation Counsel, transmitting the proposed resolution. Committee Chair Hokama, Vice-Chair Couch, and members Carroll, Cochran, Crivello, Victorino, and White voted "aye". Committee members Baisa and Guzman were excused.

Your Policy and Intergovernmental Affairs Committee RECOMMENDS that the correspondence dated February 27, 2014, from the Department of the Corporation Counsel, attached hereto, be FILED.

This report is submitted in accordance with Rule 8 of the Rules of the Council.

  
\_\_\_\_\_  
G. RIKI HOKAMA, Chair

ALAN M. ARAKAWA  
Mayor



PATRICK K. WONG  
Corporation Counsel

EDWARD S. KUSHI  
First Deputy

LYDIA A. TODA  
Risk Management Officer  
Tel. No. (808) 270-7535  
Fax No. (808) 270-1761

DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF MAUI  
200 SOUTH HIGH STREET, 3<sup>RD</sup> FLOOR  
WAILUKU, MAUI, HAWAII 96793  
EMAIL: CORPCOUN@MAUICOUNTY.GOV  
TELEPHONE: (808) 270-7740  
FACSIMILE: (808) 270-7152

RECEIVED  
2014 FEB 27 PM 1:39  
OFFICE OF THE  
COUNTY COUNCIL

February 27, 2014

MEMO TO: G. Riki Hokama, Chair  
Policy and Intergovernmental Affairs Committee

F R O M: Moana M. Lutey, Deputy Corporation Counsel *ML*

SUBJECT: Litigation Matters (PIA-1)  
Joshua Nakagawa v. County of Maui, et al., Civ. No.  
11.00130 BMK LEK; Anthony Lum-John v. County of Maui,  
et al., Civ. No. 12-00569 JMS RLP (Consolidated)

Our Department respectfully requests the opportunity to discuss the settlement of the above-captioned matter during the next Committee meeting. Our department would like to have this matter considered at the next committee meeting as we have a status conference with the Court on March 27, 2014. Copies of the Complaints and resolution are attached for your perusal.

It is anticipated that an executive session may be necessary to discuss questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of the County, the Council, and the Committee.

Our department would also like to request that a representative of the Department of Police be at the meeting to answer any questions that may arise.

Thank you for your anticipated assistance on this matter.

MML:ma  
Enclosures  
cc: Police Chief Gary Yabuta

S:\ALL\LITIGATION CASES\Nakagawa\Correspondence\2014-02-27 memo to PIA.settlement.wpd

# Resolution

No. \_\_\_\_\_

AUTHORIZING SETTLEMENT OF  
JOSHUA NAKAGAWA V. COUNTY OF MAUI, ET AL., CIV. NO.  
11-00130 LEK BMK AND ANTHONY LUM-JOHN V. COUNTY OF MAUI,  
CIVIL NO. 12-00569 JMS RLP (CONSOLIDATED)

WHEREAS, Plaintiff Joshua Nakagawa filed a lawsuit in the Circuit Court of the Second Circuit on January 13, 2011, Civil No. 11-1-0028(1) against the County of Maui, Maui Police Department, claiming general and special damages for injuries sustained during an incident with police officers on July 18, 2010; and

WHEREAS, the County of Maui removed the complaint filed by Joshua Nakagawa in the Circuit Court of the Second Circuit to the United States District Court for the District of Hawaii on March 2, 2011, where it was assigned Civil No. 11-00130 LEK BMK; said complaint was subsequently amended on October 28, 2011, to name individual police officers Jun Hattori, Erik Losvar, Russell Kapahulehua, and Harry Matsuura; and

WHEREAS, a Stipulation to dismiss the Maui Police Department as a defendant in the case was subsequently filed on April 23, 2012; and

WHEREAS, Plaintiff Anthony Lum-John filed a lawsuit in the Circuit Court of the Second Circuit on July 17, 2012, Civil No. 12-1-0703(3) against the County of Maui, Maui Police Department,

**Resolution No. \_\_\_\_\_**

Jun Hattori, Erik Losvar, Russell Kapahulehua, and Harry Matsuura, claiming general, special, and punitive damages, for injuries sustained during an incident with police on July 18, 2010; and

WHEREAS, the County of Maui removed the complaint filed by Anthony Lum-John to the United States District Court for the District of Hawaii on March 2, 2011, where it was assigned Civil No. 12-00569 JMS RLP; and

WHEREAS, the County of Maui subsequently moved to have the two complaints consolidated at the United States District Court for the District of Hawaii. The Order Consolidating Cases was filed on January 15, 2013; and

WHEREAS, the County of Maui, to avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, will attempt to reach a resolution of this case by way of a negotiated settlement or Offer of Judgment; and

WHEREAS, the Department of the Corporation Counsel has requested authority to settle this case under the terms set forth in an executive meeting before the Policy and Intergovernmental Affairs Committee; and

**Resolution No. \_\_\_\_\_**

WHEREAS, having reviewed the facts and circumstances regarding this case and being advised of attempts to reach resolution of this case by way of a negotiated settlement or Offer of Judgment by the Department of the Corporation Counsel, the Council wishes to authorize the settlement; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

1. That it hereby approves settlement of this case under the terms set forth in an executive meeting before the Policy and Intergovernmental Affairs Committee; and

2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County, Jun Hattori, Erik Losvar, Russell Kapahulehua, and Harry Matsuura in this case, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; and


3. That it hereby authorizes the Director of Finance of the County of Maui to satisfy said settlement of this case, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; and

4. That certified copies of this resolution be transmitted

**Resolution No. \_\_\_\_\_**

to the Mayor, the Director of Finance, the Chief of Police, and  
the Corporation Counsel.

APPROVED AS TO FORM AND LEGALITY:

  
\_\_\_\_\_  
MOANA M. IUTEY  
Deputy Corporation Counsel  
County of Maui

S:\ALL\LITIGATION CASES\Nakagawa\reso2.settlement.wpd

**ORIGINAL**

MICHAEL JAY GREEN 4451  
841 Bishop Street, Suite 2201  
Honolulu, Hawaii 96813  
Telephone: (808) 521-3336  
Facsimile: (808) 566-0347  
Email: michaeljgreen@hawaii.rr.com

FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

OCT 28 2011  
at 2 o'clock and 10 min. P.M.  
SUE BEITIA, CLERK

Attorneys for Plaintiff  
JOSHUA NAKAGAWA

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

JOSHUA NAKAGAWA,	)	CIVIL NO. 11-00130 LEK BMK
	)	(Other Non-Motor Vehicle Tort)
Plaintiff,	)	
	)	
vs.	)	FIRST AMENDED COMPLAINT;
	)	DEMAND FOR JURY TRIAL; FIRST
COUNTY OF MAUI; MAUI	)	AMENDED SUMMONS
POLICE DEPARTMENT; ERIC	)	
LOSVAR; HARRY MATSUURA;	)	
RUSSELL KAPAHULEHUA; and	)	
JUN HATTORI,	)	
	)	
Defendants.	)	
	)	
	)	

**FIRST AMENDED COMPLAINT**

PLAINTIFF JOSHUA NAKAGAWA ("Nakagawa"), asserting a claim for relief against Defendants COUNTY OF MAUI, MAUI POLICE DEPARTMENT, ERIC LOSVAR, HARRY MATSUURA, RUSSELL KAPAHULEHUA, and JUN HATTORI, alleges and avers as follows:



### **JURISDICTION AND VENUE**

This Court has subject matter jurisdiction over the claims set forth in this Complaint pursuant to Hawaii Revised Statutes § 603-21.5, and has personal jurisdiction over Defendants pursuant to Hawaii Revised Statutes § 634-35. The venue is appropriate in the Second Circuit of the State of Hawaii pursuant to Hawaii Revised Statutes § 603-36.

### **PARTIES**

1. At all times relevant, Plaintiff Nakagawa is and was a resident of the County of Maui, State of Hawaii.
2. Defendant County of Maui is a municipal corporation that is liable for the conduct of the Maui Police Department – an agency of the County.
3. The employees, agents, associates, and/or representatives of Defendant County of Maui and others who held themselves out as being employees, agents, associates, and/or representatives of Defendant County of Maui were acting within the scope of such relationships. Defendant City and County of Maui is therefore liable for all of the acts and/or omissions of its employees, agents and/or putative employees under the doctrine of respondeat superior, or are otherwise vicariously liable for their acts and omissions under the principal/agent or master/servant principles.

4. The employees, agents, associates, and/or representatives of Defendant County of Maui were acting under the actual and/or apparent authority and/or agency of Defendant County of Maui. Therefore, Defendant County of Maui is liable for all acts and/or omissions of the employees, agents, associates, and/or representatives of Defendant County of Maui under the theory of apparent authority/agency, or is otherwise vicariously liable for its acts and omissions under the theory of apparent authority/agency, or is otherwise vicariously liable for its acts and omissions under the theory of apparent authority/agency.
5. The Maui Police Department (“MPD”) is a legal entity or “persons” subject to damages liability for the purposes of 42 USC § 1983.
6. MPD is the primary law enforcement agency in the County of Maui.
7. Defendant MPD is also responsible for the training, hiring, control and supervision of all its officers, employees and/or agents as well as the implementation and maintenance of official and unofficial policies germane to the police function. At all times relevant to this Complaint, MPD employed and controlled all officers involved in the incident.
8. Defendant ERIC LOSVAR was an officer with Defendant MPD and the agent, servant and employee of each other Defendants herein, and was

acting with the permission and consent and within the course and scope of said agency and employment at all times relevant to this lawsuit.

9. Defendant HARRY MATSUURA was an officer with Defendant MPD and the agent, servant and employee of each other Defendants herein, and was acting with the permission and consent and within the course and scope of said agency and employment at all times relevant to this lawsuit.

10. Defendant RUSSELL KAPAHULEHUA was an officer with Defendant MPD and the agent, servant and employee of each other Defendants herein, and was acting with the permission and consent and within the course and scope of said agency and employment at all times relevant to this lawsuit.

11. Defendant JUN HATTORI was an officer with Defendant MPD and the agent, servant and employee of each other Defendants herein, and was acting with the permission and consent and within the course and scope of said agency and employment at all times relevant to this lawsuit.

#### **FACTUAL ALLEGATIONS**

12. On or about July 18, 2010, Plaintiff Nakagawa attended a party with friends at Punalau Beach, otherwise known as "Windmill Beach," in West Maui.

13. There were numerous attendees at the party, many of which were not known to Nakagawa.
14. While at the party, Plaintiff Nakagawa was attacked by multiple unknown individuals with pipes and bottles.
15. As a result of that attack, Nakagawa suffered multiple injuries, including but not limited to lacerations and abrasions to his head, left forearm, and left elbow.
16. It was later determined that the lacerations to his head required staples to close.
17. The injuries to his extremities were superficial, non-disabling, and did not cause permanent damage.
18. As a result of the attack, Nakagawa lost consciousness and was bleeding profusely.
19. Nakagawa regained consciousness as friends retrieved and assisted him to a truck in order to transport him to the Maui Memorial Medical Center for treatment.
20. Nakagawa was assisted into the open bed of the truck and was seated facing the front of the vehicle with his back against the tailgate.
21. There were approximately seven (7) individuals in the truck, three of which were in the bed of the truck with Nakagawa.

22. After Nakagawa and the other passengers were seated, Austin Pierman ("Pierman") began driving towards Maui Memorial Medical Center along Honoapiilani Highway.
23. Upon information and belief, Pierman was driving along Honoapiilani Highway when an individual, later determined to be an unnamed Maui Police Officer, unexpectedly entered the roadway in front of the moving truck.
24. Upon information and belief, Pierman attempted to swerve from the individual and allegedly grazed him or her with his vehicle.
25. As this happened, the truck driven by Pierman continued forward and passed multiple Maui Police Officers on the side of the road.
26. Soon thereafter, Nakagawa heard multiple gunshots coming from where he last observed the Maui Police Officers.
27. Upon information and belief, Nakagawa was struck three times by the gunshots of four Maui Police Officers.
28. Defendants ERIC LOSVAR, HARRY MATSUURA, RUSSELL KAPAHULEHUA, and JUN HATTORI (Defendant Officers were the four Maui Police Officers who fired and struck him with their firearms. The Defendant Officers fired approximately fifteen (15) rounds at the truck which contained Nakagawa.

29. Nakagawa was struck three times in his back: one near his left shoulder and two near his right shoulder.
30. Nakagawa was never charged with any crimes, and is considered an innocent bystander during the relevant periods of this complaint.
31. Upon information and belief, the police officer who entered the roadway to block the moving truck did so contrary to his training, and therefore put himself and the occupants of the moving vehicle in danger of injury or death.
32. Upon information and belief, even if Pierman were considered a “fleeing felon,” law and training prevents a police officer from using deadly force to seize that suspect.
33. Upon information and belief, the police officers that shot at the moving vehicle did so contrary to their training, which mandates an officer to assess his or her surroundings when utilizing deadly force to avoid unnecessary injury or death to innocent bystanders like Nakagawa.
34. Defendants ERIC LOSVAR, HARRY MATSUURA, RUSSELL KAPAHULEHUA, and JUN HATTORI’s actions were taken either willfully, recklessly or with such gross negligence as to indicate wanton disregard and deliberate indifference to Nakagawa’s civil rights.

35. As a result of the actions of Defendants, Plaintiff's injuries include, but are not limited to, nerve damage, respiratory failure, gunshot wounds, a severed artery, and other traumatic injuries.

36. Also as a result of the actions of Defendants, Plaintiff has lost income and incurred medical bills and in the future will lose income and incur medical bills and general and special damages in an amount to be shown.

37. The conduct of the Defendants converged to cause harm to Plaintiff such that the Defendants are jointly and severally liable for all injuries and damages sustained by Plaintiff as a consequence of the incident complained herein.

38. At all times relevant herein, Defendants employed Defendants ERIC LOSVAR, HARRY MATSUURA, RUSSELL KAPAHULEHUA, and JUN HATTORI as police officers, and continued to employ them, despite being on clear notice that said agents were not properly trained to act in capacity of Officer for MPD.

39. All relevant conduct by Defendants and/or its agents thereof, took place while Defendants and/or agents were performing duties within the scope of their employment relationship and therefore Defendants are responsible for any and all damages to Plaintiffs resulting from the acts of their agents under the doctrine of Respondeat Superior.

40. As a direct and proximate result of the aforesaid intentional, reckless, careless and negligent conduct of Defendants and/or its agents, Plaintiff suffered damages in an amount to be proven at trial.

41. Because the concurrent and/or successive tortious acts of these Defendants caused a single harm and it is impossible and/or impracticable to determine what portion each tortfeasor contributed to said harm as to the Plaintiff, Defendants should be held to be jointly and severally liable.

42. The conduct of the Defendants were willful, wanton and/or engaged in with conscious disregard for the rights and sensibilities of Plaintiff and Plaintiff is entitled to an award of punitive damages against Defendants to punish said Defendant and to deter others from engaging in similar conduct.

**COUNT I**  
*Assault*

43. Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

44. Plaintiff asserts a claim of assault against Defendants for the threat and/or use of force that placed Plaintiff in reasonable apprehension of imminent harmful or offensive contact.



45. Plaintiff asserts a claim of assault against Defendants for the fear and anticipation of harm that preceded the unwarranted use of force against Plaintiff.

46. As a direct and proximate result of Defendant's actions, Plaintiff has suffered substantial general and special damages in an amount to be proven at trial.

**COUNT II**  
*Battery*

47. Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

48. Plaintiff asserts a claim of battery against Defendants for the physical contact and unlawful seizure of Plaintiff.

49. Defendants engaged in multiple batteries of Plaintiff and as a direct and proximate result thereof, Plaintiff has sustained substantial general and special damages in an amount to be proven at trial.

**COUNT III**  
*Intentional Infliction of Emotional Distress*

50. Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

51. Defendants' actions in shooting Plaintiff were extreme and outrageous.

52. Plaintiff suffered severe emotional distress as a result of Defendants' actions.

53. Defendants intentionally inflicted severe emotional distress upon Plaintiff, and as a direct and proximate result thereof, Plaintiff has sustained substantial general and special damages in an amount to be proven at trial.

**COUNT IV**  
*Negligence*

54. Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

55. At all times relevant herein, Defendants were subject to a duty of care to avoid causing unnecessary physical harm and distress to citizens and to avoid placing themselves, innocent bystanders, and even suspects in unnecessary danger of injury or death in the exercise of their police function. The conduct of Defendants as set forth herein did not comply with the standard of care to be exercised by reasonable police officers; thus, the Defendants breached their duty of care.

56. At all times relevant, Defendants owed a duty to Plaintiff to exercise reasonable care in the conduct of its police work.

57. Defendants breached its duties and as a direct and proximate result, Plaintiff has sustained substantial general and special damages in an amount to be proven at trial.

**COUNT V**  
*Negligent Infliction of Emotional Distress*

58. Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

59. Defendants' negligent actions in shooting Plaintiff were extreme and outrageous.

60. Plaintiff suffered severe emotional distress as a result of Defendants' actions.

61. Defendants' negligent actions were the direct and proximate cause of Plaintiffs' damages suffered.

62. Defendants negligently inflicted severe emotional distress upon Plaintiff and as a direct and proximate result, Plaintiff has sustained substantial general and special damages in an amount to be proven at trial.

**COUNT VI:**  
*Violation of Civil Rights 42 U.S.C. § 1983*

63. Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

64. Defendants ERIC LOSVAR, HARRY MATSUURA, RUSSELL

KAPAHULEHUA, and JUN HATTORI, each acting under color of law in shooting the Plaintiff without lawful justification, deprived Plaintiff of certain constitutionally protected rights, including but not limited to:

- a. The right to be secure in their persons against unreasonable seizures guaranteed under the Fourth and Fourteenth Amendments of the United States Constitution;
- b. The right to be free from use of excessive force by law enforcement officers as guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution;
- c. The right to be free from a deliberate indifference to unnecessary and wanton infliction of pain prohibited by the Eighth Amendments of the United States Constitution;
- d. The right to freedom from illegal seizure of his person, and freedom from illegal detention proscribed by the provisions of the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution.

65. Defendants, who engaged in the aforesaid activities under color of law, violated the constitutional rights of Plaintiff, including but not limited to the rights of liberty, freedom from unreasonable seizures, and other civil

liberties protected by the *United States Constitution* in violation of 42 U.S.C. § 1983 and as a direct and proximate result, Plaintiff has sustained substantial general and special damages in an amount to be proved at trial.

**COUNT VII:**

*Violation of Civil Rights 42 U.S.C. § 1983: Municipal*

66. Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

67. Defendants issuance of vague, confusing, and contradictory policies of the Maui Police Department, including but not limited to it's policies in training and supervising its employees, are inconsistent with the requirements of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

68. Plaintiff further alleges that it is the policy, practice, and custom of the MPD; its supervisors, and police officers, to tolerate and ratify the use of unreasonable and cruel punishments and/or uses of force by its police officers, employees, and agents.

69. Plaintiff also alleges that it is the policy, practice, and custom of MPD to inadequately hire, train, and supervise its officers, agents, and employees in the use of firearms and other means of force.

70. That the wrongful and unlawful acts perpetrated by the Defendants, and each of them, intentionally disregarding the constitutional rights of the Plaintiff, were willful, oppressive, malicious, and with a wanton disregard for the established rights of the Plaintiff.

71. Defendants violated the constitutional rights of Plaintiff protected by the *United States Constitution* in violation of 42 U.S.C. § 1983 and as a direct and proximate result, Plaintiff has sustained substantial general and special damages in an amount to be proved at trial.

**COUNT VIII:**

*Negligent Supervision and Training*

72. Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

73. Defendant MPD has a mandatory duty to properly and adequately train and supervise officers and personnel under their control so as to avoid unreasonable risk of harm to citizens.

74. Defendant MPD breached its duty of care to citizens in that it failed to adequately train and supervise its officers by having inadequate training and supervisory procedures regarding use of deadly and non-deadly force.

75. As a direct and proximate result of Defendants' negligence, as herein alleged, Plaintiff has been damaged, the exact amount to be proven at trial.

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, in an amount to be shown, including general and special damages together with interest, attorney's fees, and such other relief as the Court deems just and proper.

DATED: Honolulu, Hawaii, October 28, 2011.



~~MICHAEL JAY GREEN~~  
Attorney for Plaintiff  
JOSHUA NAKAGAWA

HAYDEN ALULI 3388  
2180 Kaho'okele Street  
Wailuku, HI 96793  
Telephone: (808) 244-3434  
Facsimile: (808) 244-3388  
Attorney for Plaintiff  
ANTHONY LUM-JOHN

FILED

2012 JUL 17 PM 4:03

D. MORIOKA, CLERK  
SECOND CIRCUIT COURT  
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII

ANTHONY LUM-JOHN,

Plaintiff,

vs.

COUNTY OF MAUI; MAUI POLICE  
DEPARTMENT; JUN HATTORI;  
RUSSELL KAPAHULEHUA; ERIK  
LOSVAR; HARRY MATSUURA; DOE  
DEFENDANTS 1-10; and DOE  
ENTITIES 1-5,

Defendants.

) CIVIL NO. 12-1-0703 (3)  
) (Non-Motor Vehicle Tort)  
)  
) COMPLAINT FOR DAMAGES;  
) DEMAND FOR JURY TRIAL;  
) SUMMONS

COMPLAINT FOR DAMAGES

Plaintiff Anthony Lum-John (hereinafter "Plaintiff"), asserting a claim for relief against Defendants County of Maui, Maui Police Department, Jun Hattori, Russell Kapahulehua, Erik Losvar, Harry Matsuura, Doe Defendants 1-10, and Doe Entities 1-1, alleges and avers as follows:

JURISDICTION AND VENUE

This Court has subject matter jurisdiction over the claims set forth in this complaint pursuant to Haw. Rev. Stat. § 603-21.5, and has personal jurisdiction over Defendants pursuant to Haw. Rev. Stat. § 634-35. The venue is appropriate in the Second Circuit Court of the State of Hawaii pursuant to Haw. Rev. Stat. § 603-36.

PARTIES

(1) Plaintiff is and has been a resident and citizen of the County of Maui, State of Hawaii, at all times pertinent hereto.



(2) Defendant County of Maui is and has been a duly organized municipal corporation of the State of Hawai'i that is liable for the conduct of the Maui Police Department--an agency of the County--at all times pertinent hereto.

(3) The employees, agents, associates, and/or representatives of Defendant County of Maui and others who held themselves out as being employees, agents, associates, and/or representatives of Defendant County of Maui, were acting within the scope of such relationships. Defendant County of Maui is therefore liable for all of the acts and/or omissions of its employees, agents and/or putative employees under the doctrine of respondeat superior, or are otherwise vicariously liable for their acts and omissions under the principal/agent or master/servant principles.

(4) The employees, agents, associates, and/or representatives of Defendant County of Maui were acting under the actual and/or apparent authority and/or agency of Defendant County of Maui. Therefore Defendant County of Maui is liable for all acts and/or omissions of the employees, agents, associates, and/or representatives of Defendant County of Maui under the theory of apparent authority/agency, or is otherwise vicariously liable for its acts and omissions under the theory of apparent authority/agency.

(5) Defendant Maui Police Department (hereinafter "Defendant MPD") is a legal entity or "persons" subject to damages liability for the purposes of 42 U.S.C. § 1983.

(6) Defendant MPD is the primary law enforcement agency in the County of Maui.

(7) Defendant MPD is also responsible for the training, hiring, control and supervision of all its officers, employees, and/or agents as well as the implementation and maintenance of official and unofficial policies germane to the police function. At all times pertinent hereto, Defendant MPD employed and controlled all officers involved in this incident.

(8) Plaintiff is informed and believes, and thereupon alleges, that Defendant Jun Hattori (hereinafter "Defendant Hattori") is and has been a police officer employed by Defendant County of Maui and a resident and citizen of the County of Maui, State of Hawai'i, at all times pertinent hereto.

(9) Plaintiff is informed and believes, and thereupon alleges, that Defendant Russell Kapahulehua (hereinafter "Defendant Kapahulehua") is and has been a police officer employed by Defendant County of Maui and a resident and citizen of the County of Maui, State of Hawai'i, at all times pertinent hereto.

(10) Plaintiff is informed and believes, and thereupon alleges, that Defendant Erik Losvar (hereinafter "Defendant Losvar") is and has been a police officer employed by Defendant County of Maui and a resident and citizen of the County of Maui, State of Hawai'i, at all times pertinent hereto.

(11) Plaintiff is informed and believes, and thereupon alleges, that Defendant Harry Matsuura (hereinafter "Defendant Matsuura") is and has been a police officer employed by Defendant County of Maui and a resident and citizen of the County of Maui, State of Hawai'i, at all times pertinent hereto.

(12) Defendants Does 1-10 and Doe Entities 1-5 (hereinafter "Doe Defendants") are police officers employed by the County of Maui and/or other individuals and entities whose true identities and capacities are as yet unknown to Plaintiff and his counsel, despite diligent inquiry and investigation, and who acted herein as described more particularly below. Plaintiff will amend this Complaint to allege their true names and therein allege that each of the fictitiously named Doe Defendants are responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages, as herein alleged, were proximately caused by their conduct. Plaintiff has made good faith and diligent efforts to identify said Defendants. Plaintiff is informed and believes, and thereupon alleges, that at all times herein mentioned, Defendants, and each of them, were the agents, servants and employees of each other Defendants herein, and were acting with the permission and consent and within the course and scope of said agency and employment.

(13) All Doe Defendants, and including Defendants Hattori, Kapahulehua, Losvar and Matsuura, are sued herein both in their official and their individual capacities.

#### FACTUAL ALLEGATIONS

(14) Plaintiff is informed and believes, and thereupon alleges, that on or about July 18, 2010, Plaintiff attended a party with friends at Punalau Beach, otherwise known as "Windmill Beach", which is located in the northwest part of Maui.

(15) Numerous persons attended the party at "Windmill Beach", most of whom were unknown to Plaintiff.

(16) During the party, one of Plaintiff's friends, Joshua Nakagawa, was attacked by numerous, unknown individuals with pipes and bottles.

(17) As a result of that attack, Nakagawa suffered multiple injuries, including but not limited to, lacerations and abrasions to his head, left forearm, and left elbow, and was bleeding profusely.

(18) Plaintiff, along with some other friends, assisted Nakagawa from the beach back to the vehicle in which they all had arrived in order to transport him to the Maui Memorial Medical Center for treatment.

(19) Eight individuals left the area of "Windmill Beach" in said vehicle, which was a Toyota Tacoma pickup truck. Austin Pierman, who was driving, and three individuals were in the cab of the pickup truck; and four individuals were in the open bed of the pickup truck.

(20) Plaintiff and Nakagawa, along with two other individuals, were seated in the open bed of the pickup truck. Both Plaintiff and Nakagawa were facing the front of the pickup truck with their backs against the tailgate.

(21) Plaintiff is informed and believes, and thereupon alleges, that around the time that Plaintiff and his friends had left "Windmill Beach", Defendants Hattori, Kapahulehua, Lovsar and Matsuura were assigned to investigate a report of numerous gun shots being fired at an area called "Windmill Beach".

(22) About half-a-mile before reaching the area of "Windmill Beach", along a dark stretch of Honoapi'i'iani Highway, Defendants stopped a vehicle that was coming from the "Windmill Beach" area and conducted an investigation.

(23) Upon information and belief, as Pierman came upon Defendants' investigative encounter of the stopped vehicle on Honoapi'i'iani Highway, Defendant Lovsar unexpectedly entered onto the roadway in front of the moving pickup truck.

(24) Upon information and belief, Pierman attempted to swerve from Defendant Lovsar and allegedly grazed him.

(25) Upon information and belief, Pierman did not stop and continued forward on Honoapi'i'iani Highway.

(26) Immediately thereafter, Defendants Hattori, Kapahulehua, Lovsar and Matsuura discharged their firearms numerous times at the pickup truck with its eight passengers.

(27) One of the gunshots fired from Defendants Hattori's, Kapahulehua's, Lovsar's or Matsuura's firearms struck Plaintiff in his buttock.

(28) Plaintiff was never charged with any crimes arising out of this encounter and is considered an innocent bystander during the relevant periods of this Complaint.

(29) Upon information and belief, Defendant Lovsar, who entered the roadway to block the moving truck did so contrary to his training, and therefore put himself and the occupants of the moving pickup truck in danger of injury or death.

(30) Upon information and belief, even if Pierman were considered a "fleeing felon", law and training prevents a police officer from using deadly force to seize that suspect.

(31) Upon information and belief, Defendants Hattori's, Kapahulehua's, Lovsar's and Matsuura's multiple shooting at the moving pickup truck was contrary to their training, which mandates a police officer to assess his or her surroundings when utilizing deadly force to avoid unnecessary injury or death to innocent bystanders like Plaintiff.

(32) Defendants Hattori's, Kapahulehua's, Lovsar's and Matsuura's actions were taken either willfully, recklessly or with such gross negligence as to indicate wanton disregard and deliberate indifference to Plaintiff's civil rights.

(33) As a result of the actions of Defendants, Plaintiff's injuries include, but are not limited to, a traumatic gunshot wound to his buttock where the bullet cannot be dislodged or removed.

(34) Also as a result of the actions of Defendants, Plaintiff has lost income and incurred medical bills and in the future will lose income and incur medical bills and general and special damages in an amount to be proven at trial.

(35) The conduct of the Defendants converged to cause harm to Plaintiff such that the Defendants are jointly and severally liable for all injuries and damages sustained by Plaintiff as a consequence of the incident complained herein.

(36) At all times pertinent hereto, Defendants employed police officers, and continued to employ police officers, despite being on clear notice that said agents were not properly trained to act in capacity of Officer for Defendant MPD.

(37) All relevant conduct by Defendants and/or its agents thereof, took place while Defendants and/or agents were performing duties within the scope of their employment relationship and therefore Defendants are responsible for any and all damages to Plaintiff resulting from the acts of their agents under the doctrine of respondeat superior.

(38) As a direct and proximate result of the aforesaid intentional, reckless, careless and negligent conduct of Defendants and/or its agents, Plaintiff suffered damages in an amount to be proven at trial.

(39) Because the concurrent and/or successive tortious acts of these Defendants caused a single harm and it is impossible and/or impracticable to determine what portion each tortfeasor contributed to said harm as to Plaintiff, Defendants should be held to be jointly and severally liable.

(40) The conduct of the Defendants were willful, wanton, and/or engaged in with conscious disregard for the rights and sensibilities of Plaintiff and Plaintiff is entitled to an award of punitive damages against Defendants to punish said Defendants and to deter others from engaging in similar conduct.

**COUNT I**  
*Assault*

(41) Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

(42) Plaintiff asserts a claim of assault against Defendants for the threat and/or use of force that placed Plaintiff in reasonable apprehension of imminent harmful or offensive contact.

(43) Plaintiff asserts a claim of assault against Defendants for the fear and anticipation of harm that preceded the unwarranted use of force against Plaintiff.

(44) As a direct and proximate result of Defendants' actions, Plaintiff has suffered substantial general and special damages in an amount to be proven at trial.

**COUNT II**  
*Battery*

(45) Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

(46) Plaintiff asserts a claim of battery against Defendants for the physical contact and unlawful seizure of Plaintiff.

(47) Defendants engaged in multiple batteries of Plaintiff and as a direct and proximate result thereof, Plaintiff has sustained substantial general and special damages in an amount to be proven at trial.

**COUNT III**  
*Intentional Infliction of Emotional Distress*

(48) Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

(49) Defendants' actions in shooting Plaintiff were extreme and outrageous.

(50) Plaintiff suffered severe emotional distress as a result of Defendants' actions.

(51) Defendants intentionally inflicted severe emotional distress upon Plaintiff, and as a direct and proximate result thereof, Plaintiff has sustained substantial general and special damages in an amount to be proven at trial.

**COUNT IV**  
*Negligence*

(52) Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

(53) At all times pertinent hereto, Defendants were subject to a duty of care to avoid causing unnecessary physical harm and distress to citizens and to avoid placing themselves, innocent bystanders, and even suspects in unnecessary danger of injury or death in the exercise of their police function. The conduct of Defendants as set forth herein did not comply with the standard of care to be exercised by reasonable police officers; thus, Defendants breached their duty of care.

(54) At all times pertinent hereto, Defendants owed a duty to Plaintiff to exercise reasonable care in the conduct of its police work.

(55) Defendants breached their and its duties and as a direct and proximate result, Plaintiff has sustained substantial general and special damages in an amount to be proven at trial.

**COUNT V**

*Negligent Infliction of Emotional Distress*

(56) Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

(57) Defendants' negligent actions in shooting Plaintiff were extreme and outrageous.

(58) Plaintiff suffered severe emotional distress as a result of Defendants' actions.

(59) Defendants' negligent actions were the direct and proximate cause of the damages Plaintiff suffered.

(60) Defendants negligently inflicted severe emotional distress upon Plaintiff, and as a direct and proximate result thereof, Plaintiff has sustained substantial general and special damages in an amount to be proven at trial.

**COUNT VI**

*Violation of Civil Rights Under 42 U.S.C. § 1983*

(61) Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

(62) Defendants Hattori, Kapahulehua, Lovsar and Matsuura, each acting under color of law in shooting Plaintiff without lawful justification, deprived Plaintiff of certain constitutionally protected rights, including, but not limited to:

(a) The right to be secure in their persons against unreasonable seizures as guaranteed under the Fourth and Fourteenth Amendments to the United States Constitution;

(b) The right to be free from the use of excessive force by law enforcement officers as guaranteed under the Fourth and Fourteenth Amendments to the United States Constitution;

(c) The right to be free from a deliberate indifference to unnecessary and wanton infliction of pain prohibited by the Eighth Amendment to the United States Constitution; and

(d) The right to freedom from illegal seizure of one's person, and freedom from illegal detention proscribed by the provisions of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

(63) Defendants, who engaged in the aforesaid activities under color of law, violated the constitutional rights of Plaintiff, including but not limited to, the rights of liberty, freedom from unreasonable seizures, and other civil liberties protected by the United States Constitution, and Article I, §§ 2, 5, 6, 7, 8, and 12 of the Constitution of the State of Hawai'i, in violation of 42 U.S.C. § 1983; and as a direct and proximate result, Plaintiff has sustained substantial general and special damages in an amount to be proved at trial.

#### **COUNT VII**

##### *Violation of Civil Rights Under 42 U.S.C. § 1983: Municipal*

(64) Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

(65) Defendants issuance of vague, confusing, and contradictory policies of the Maui Police Department, including, but not limited to, its policies in training and supervising its employees, are inconsistent with the requirements of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 2, 5, 6, 7, 8, and 12 of the Constitution of the State of Hawai'i

(66) Plaintiff further alleges that it is the policy, practice, and custom of Defendant MPD, its supervisors, and police officers, to tolerate and ratify the use of unreasonable and cruel punishments and/or uses of force by its police officers, employees, and agents.

(67) Plaintiff further alleges that it is the policy, practice, and custom of Defendant MPD to inadequately hire, train, and supervise its officers, agents, and employees in the use of firearms and other means of force.

(68) Plaintiff further alleges that the wrongful and unlawful acts perpetrated by the Defendants, and each of them--by intentionally disregarding the constitutional rights of Plaintiff--were willful, oppressive and malicious, and performed with a wanton disregard for the established rights of Plaintiff.



(69) Defendants violated the constitutional rights of Plaintiff protected by the United States Constitution, as well as the Constitution of the State of Hawai'i, in violation of 42 U.S.C. § 1983; and as a direct and proximate result, Plaintiff has sustained substantial general and special damages in an amount to be proved at trial.

**COUNT VIII**

*Negligent Supervision and Training*

(70) Plaintiff realleges and incorporates by reference the above paragraphs as if said paragraphs were fully set forth herein.

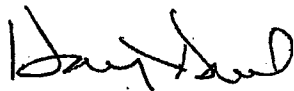
(71) Defendant MPD has a mandatory duty to properly and adequately train and supervise officers and personnel under their control so as to avoid unreasonable risk of harm to citizens.

(72) Defendant MPD has breached its duty of care to citizens in that it failed to adequately train and supervise its officers by having inadequate training and supervisory procedures regarding the use of deadly and non-deadly force.

(73) As a direct and proximate result of Defendant MPD's negligence as herein alleged, Plaintiff has been damaged in an amount to be proved at trial.

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, in an amount to be shown, including general, special and punitive damages, together with interest, attorney's fees, and such other relief as the Court deems just and proper.

DATED: Wailuku, Hawai'i, July 17, 2012.



---

HAYDEN ALULI  
Attorney for Plaintiff  
ANTHONY LUM-JOHN

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAI'I

ANTHONY LUM-JOHN,	)	CIVIL NO.
	)	(Non-Motor Vehicle Tort)
Plaintiff,	)	
	)	DEMAND FOR JURY TRIAL
vs.	)	
	)	
COUNTY OF MAUI; MAUI POLICE	)	
DEPARTMENT; JUN HATTORI;	)	
RUSSELL KAPAHULEHUA; ERIK	)	
LOSVAR; HARRY MATSUURA; JOHN	)	
DOES 1-10; and DOE ENTITIES 1-5,	)	
	)	
Defendants.	)	

DEMAND FOR JURY TRIAL

Plaintiff Anthony Lum-John hereby demands a trial by jury as to all issues so triable herein.

DATED: Wailuku, Hawai'i, July 17, 2012.



---

HAYDEN ALULI  
Attorney for Plaintiff  
ANTHONY LUM-JOHN

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII

ANTHONY LUM-JOHN,	)	CIVIL NO.
	)	(Non-Motor Vehicle Tort)
Plaintiff,	)	
	)	SUMMONS
vs.	)	
	)	
COUNTY OF MAUI; MAUI POLICE	)	
DEPARTMENT; JUN HATTORI;	)	
RUSSELL KAPAHULEHUA; ERIK	)	
LOSVAR; HARRY MATSUURA; DOE	)	
DEFENDANTS 1-10; and DOE	)	
ENTITIES 1-5,	)	
	)	
<u>Defendants.</u>	)	

SUMMONS

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon Plaintiff's Attorney, Hayden Aluli, Attorney At Law, 2180 Kaho'okele Street, Wailuku, HI 96793, an answer to Plaintiff's Complaint for Damages, which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in Plaintiff's Complaint for Damages.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing on this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Wailuku, Hawaii, JUL 17 2012

/sgd/ D. MORIOKA (seal)

CLERK OF THE ABOVE-ENTITLED COURT