

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss

SUPERIOR COURT DEPARTMENT

CHRISTINA GRACIA, individually and
as Personal Representative of the Estate of Malcolm Gracia,

Plaintiff,

C.A. 1573CV00467

v.

CITY OF NEW BEDFORD, DAVID A. PROVENCHER,
individually and in his capacity as the Chief of the New Bedford
Police Department and TYSON BARNES, individually and in his
capacity as a police officer, BRIAN SAFIOLEAS, individually
and in his capacity as a police officer and; PAUL FONSECA,
individually and in his capacity as a police officer and; TREVOR
SYLVIA, individually and in his capacity as a police officer and;
DAVID BROWN, individually and in his capacity as a police
Officer.

Defendants.

 **COPY**

PLAINTIFF'S FIRST AMENDED COMPLAINT

INTRODUCTION

1. This is a negligence and civil rights wrongful death action arising out of the death of Malcolm Gracia, a 15 year old African American boy who, while committing no crime, was stopped and detained in a public park by the New Bedford Police Department, pursuant to its "high crime" neighborhood "Meet and Greet" policy, resulting in him being shot multiple times and killed by the police. The plaintiff brings the following claims: a) violations of the Massachusetts Civil Rights Act; 2) negligence; 3) negligent training and supervision; 4) loss of consortium and 5) punitive damages.

JURISDICTION

2. This Court has jurisdiction over this matter as the amount in controversy exceeds \$25,000. Venue is proper because the events, acts and omissions at issue occurred in Bristol County and the parties are all residents of New Bedford or work in the City of New Bedford.

THE PARTIES

3. Plaintiff, Christina Gracia is an individual who resides in Bristol County, Massachusetts. Ms. Gracia is the sister and appointed personal representative of Malcolm Gracia, a 15 year old minor who was shot and killed by officers of the New Bedford Police Department on May 17, 2012.

4. Defendant, City of New Bedford is a duly organized municipality under Massachusetts law whose executive duties and functions are in part carried out by the New Bedford Police Department.

5. David A. Provencher ("Chief Provencher") is an individual who resides in Massachusetts. At all relevant times herein, Chief Provencher was employed by the City of New Bedford in a supervisory capacity.

6. Defendants, Tyson Barnes, Brian Safioleas, Paul Fonseca, Trevor Sylvia, David Brown are police officers employed by the City of New Bedford who were involved in the shooting incident with Malcolm Gracia.

FACTUAL BACKGROUND

7. The City of New Bedford and its police department have established and implemented a citywide policing policy for low income, high crime neighborhoods called "Meet and Greet Policy." Under the City's Meet and Greet Policy, the police department's Gang Unit monitors certain public aspects of low income neighborhoods via a series of video surveillance cameras which it watches remotely on laptops.

8. If the officers view anything in the video feeds which they determine worthy of follow-up, they dispatch two units to the scene where a lead officer seeks to question citizens on the video, while the second unit keeps its distance as back up.

9. The Meet and Greet Policy targets low income, minority "high crime" neighborhoods and does not require any type of legally articulated suspicion before the Gang Unit officers are dispatched to confront and talk to a citizen portrayed on the video.

10. On the evening of May 17, 2012 fifteen-year-old Malcolm Gracia and a companion were illegally targeted, pursued, stopped, and seized by the New Bedford police. Gracia and his companion were targeted as part of the Meet and Greet Policy established by the City of New Bedford and/or the New Bedford Police Department and carried out by the New Bedford Police Department. The pursuit and seizure ultimately led to the fatal shooting of Gracia by officers of the New Bedford Police Department on or near Cedar Street in New Bedford, Massachusetts.

11. On the evening of May 17, 2012, five officers of the New Bedford Police Gang Unit were having dinner inside police headquarters on Rockdale Avenue. Sergeant Brian

Safioleas, the Gang Unit supervisor, was watching live video surveillance of Temple Landing, a neighborhood park with two basketball courts and a grassy area, on his laptop computer.

12. The officer saw Gracia and a companion exchange a handshake on the video. The officer suspected it was a "gang handshake", which was later proven to be a false suspicion based on the companion's statement after the incident. The officer did not recognize either of the two individuals on the video.

13. Based on the video, two unmarked units were dispatched to the basketball courts at Temple Landing. The officers did not have a reasonable suspicion, let alone probable cause, that either Gracia or his companion had engaged in criminal activity, were engaging in criminal activity or were about to engage in criminal activity.

14. As the two unmarked cruisers approached the basketball courts, the group of teens dispersed. The officers followed the two teens, Gracia and his friend, as they walked north on Cedar Street. The lead vehicle drove past the boys, stopping ahead of their path. The officer in the passenger seat got out of the car and walked south to face them.

15. According to the officer he yelled out, "Hey guys, what's going on tonight. I just want to talk to you." Gracia's friend, however, stated that the officer never attempted to engage them in conversation before telling them to "put their hands behind their backs." Similarly, a bystander witness standing on Cedar Street stated that the officer said nothing to the boys before ordering them to "stop and put their hands up."

16. The officers still did not have a reasonable suspicion, let alone probable cause, that either Gracia or his companion had engaged in criminal activity, were engaging in criminal activity, or were about to engage in criminal activity.

17. As the officer approached, the boys did not call out to him, but simply continued walking in the same direction. According to accounts by the officer, "they grew noticeably tenser and their previously normal walking gait" quickened. The officer claimed that on account of the boys' alleged nervousness, he "immediately perceived a threat" and told the teens to take their hands out of their pockets.

18. When the teens did not remove their hands, the officer decided he wanted to pat frisk both of them and proceeded to walk toward them. Reaching them, the officer put a hand on each of their shoulders and waited for Officer Barnes to get out of the car and assist him.

19. The officers still did not have a reasonable suspicion, let alone probable cause, that either Malcolm or his companion had engaged in criminal activity, were engaging in criminal activity, or were about to engage in criminal activity.

20. Meanwhile, a second pair of unnamed officers had parked their cruiser farther to the south of the boys along the sidewalk, and they were together, walking north towards the encounter. The officer with the teens told Gracia and his friend to put their hands on a nearby car. When they did not comply, the officer tried to guide Gracia and his friend towards a car parked along the sidewalk. As the officer "guided" them, Gracia suddenly turned and ran south and easterly towards the row of Cedar Street residences.

21. The officers still did not have a reasonable suspicion, let alone probable cause, that either Malcolm or his companion had engaged in criminal activity, were engaging in criminal activity, or were about to engage in criminal activity.

22. Gracia was then faced with the two detectives approaching together from the south. Gracia abruptly stopped and backed up towards his initial direction. According to law

enforcement accounts, he appeared, at some point, to be grasping at his waist pocket with both of his hands. Officer Barnes grabbed Gracia's shoulders "in an attempt to control his movement."

23. Accordingly to law enforcement accounts, Gracia then stabbed Barnes twice, and fled south along Cedar Street.

24. As he ran, he was confronted by the two officers who had been approaching from the south; they directed him to stop but claim that he advanced towards one of the officers. At some point, the other detective, standing to Gracia's right, fired a Taser at him but missed.

25. According to accounts, at that point, both detectives in Gracia's general vicinity had their guns drawn and pointed at Gracia; both allegedly continued yelling at him to stop advancing. It is alleged that Gracia's refusal to stop and drop the knife led both officers to fire at Gracia.

26. Three shots were allegedly fired. One or more of these shots struck Gracia, causing him to fall to the ground. Accounts of the incident indicate that the detectives told Gracia to stay down, but, still holding the knife, he got on one knee with his other foot on the ground.

27. Three more shots were supposedly fired with one of them going through his head. The autopsy report indicates that four bullets struck Gracia, but none of these shots were fired at him head-on. Three entered his back and were apparently fired from behind him. The trajectories of two of these bullets suggest that they were fired from directly behind him and that one may have been fired while he was on the ground and bent forward. The fourth was a shot to the head which appears to have been fired from Gracia's right. It entered just below his right ear and passed directly through his head, exiting at the level of the left ear.

28. The medical examiner determined that none of the wounds indicated any damage to skin from gunpowder or gases associated with the escape of a projectile. This finding lead the examiner to conclude that the shots were not near gunshot wounds but were fired at some distance.

29. The plaintiff timely and adequately made presentment on the defendants in writing on or about May 6, 2014, receipt of which was acknowledged by the defendants in writing, in compliance with the Massachusetts Torts Claims Act.

COUNT I

(Wrongful Death -- Violations of the Massachusetts Civil Rights Act, M.G.L. ch. 12 §§ 11H, 11I)

30. Plaintiff repeats and re-alleges the allegations set forth in each of the preceding paragraphs as if fully set forth herein.

31. Plaintiff had the right to freedom of speech and to lawfully congregate in a public park. He also had the right to be free from unreasonable searches and seizures under the Massachusetts Constitution and the Federal Constitution.

32. The Defendants' targeting of the Plaintiff based on the City's and police department's "Meet and Greet" Policy and his seizure and subsequent shooting without legal reason, cause or justification violated his rights.

33. The Defendants' acts and omissions were intentional, wanton, reckless, and/or malicious in nature entitling the plaintiff to an award of punitive damages. The Defendants targeted the plaintiff by racial and socioeconomic profiling despite the video showing that he had committed no crime, was not a threat to commit a crime and otherwise was peacefully congregating in a public park with his friend.

34. Prior to confronting the plaintiff, the Defendants knew that there was no legal justification for detaining him or demanding that he submit to a search. Eyewitnesses have indicated that the police did not "Meet and Greet" the plaintiff and his friend but rather immediately demanded that they stop and submit to be searched.

35. Moreover, the Defendants knew that the plaintiff had the legal right not to respond to the police and walk away if he chose to do that.

36. The Defendants intentionally, wantonly, recklessly and/or maliciously ignored their legal obligations to the plaintiff as a citizen. Instead of complying with their Constitutional obligations, the Defendants wrongfully ordered that the plaintiff stop and be searched and, when he exercised his legal right not to talk to the police, they physically seized the plaintiff causing him to attempt to flee resulting in a physical confrontation with the police where he was shot and killed.

37. The Defendant's profiling of the plaintiff, stopping of the plaintiff, ordering that he not move and submit to be searched and the seizing of the plaintiff constituted threats, intimidation and/or coercion which deprived him of his rights under the Massachusetts and Federal Constitutions. The plaintiff had a right to be left alone while lawfully congregating in or walking through a public park.

38. As a direct and proximate cause of the Defendants' violations of plaintiff's rights, the Defendants' actions resulted in hospital, medical, funeral and burial costs and deprived the statutory wrongful death beneficiaries of Gracia's of his services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice.

Wherefore, the Plaintiff requests damages pursuant to Chapter 229 § 2, including punitive

damages, pre- and post judgment interest, attorney's fees and costs as provided by law and such other additional relief as the Court deems just and proper.

COUNT II

(Wrongful Death – Supervisory Capacity, Violations of the Massachusetts Civil Rights Act, M.G.L. ch. 12 §§ 11H, 11I as to City of New Bedford and Chief Provencher)

39. Plaintiff repeats and re-alleges the allegations set forth in each of the preceding paragraphs as if fully set forth herein.

40. Plaintiff had the right to freedom of speech and to lawfully congregate in a public park. He also had the right to be free from unreasonable searches and seizures under the Massachusetts Constitution and the Federal Constitution.

41. The Defendants' targeting of the Plaintiff based on the City's and police department's "Meet and Greet" Policy and his seizure and subsequent shooting without legal reason, cause or justification violated his rights. The violations of the plaintiff's rights arose from the City's and the police department's Meet and Greet policy which was supervised and implemented by Chief Provencher.

42. The Meet and Greet policy targeted the plaintiff through racial and socioeconomic profiling despite the video showing that he had committed no crime, was not a threat to commit a crime and otherwise was peacefully congregating in a public park with his friend.

43. The Defendants' Meet and Greet policy, which, in essence, was implemented as "stop and frisk" policy, evidenced a deliberate indifference for the rights of Gracia and for the rights of other citizens lawfully using public land.

44. Moreover, through prior complaints and/or the custom and manner in which the program was implemented, the Defendants were aware, or should have been aware, that the Meet and Greet Policy causes the violation of the civil rights of citizens including the rights to be free from interference from the police, to freely engage in use of public land, to freely congregate, to freedom of expression and not to be stopped, frisked and detained when there was no legal reason or justification to do so.

45. Prior to confronting the plaintiff, the Defendants knew that there was no legal justification for detaining him or demanding that he submit to a search.

46. As evidence that the Defendant's policy was stop and frisk policy, eyewitnesses have indicated that the police did not "Meet and Greet" the plaintiff and his friend but rather immediately demanded that they stop and submit to be searched.

47. Moreover, the Defendants knew that the plaintiff had the legal right not to respond to the police and walk away if he chose to do that.

48. The Defendants intentionally, wantonly, recklessly and/or maliciously ignored their legal obligations to the plaintiff as a citizen. Instead of complying with their Constitutional obligations, the Defendants, under the guise of their Meet and Greet Policy, wrongfully ordered that the plaintiff stop and be searched and, when he exercised his legal right not to talk to the police, they physically seized the plaintiff causing him to attempt to flee resulting in a physical confrontation with the police where he was shot and killed.

49. The Defendant's Meet and Greet Policy was the direct and proximate cause for the profiling of the plaintiff, stopping of the plaintiff, ordering that he not move and submit to be searched and the seizing of the plaintiff. These acts, all done as part of the Defendants' Meet and

Greet Policy, constituted threats, intimidation and/or coercion which deprived him of his rights under the Massachusetts and Federal Constitutions. The plaintiff had a right to be left alone while lawfully congregating in or walking through a public park.

50. As a direct and proximate cause of the Defendants' violations of plaintiff's rights, the Defendants' actions resulted in hospital, medical, funeral and burial costs and deprived the statutory wrongful death beneficiaries of Gracia's his services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice.

Wherefore, the Plaintiff requests damages pursuant to Chapter 229 § 2, including punitive damages, pre- and post judgment interest, attorney's fees and costs as provided by law and such other additional relief as the Court deems just and proper.

Plaintiff further requests a permanent injunction prohibiting the continued use and implementation of the Meet and Greet Policy/Program.

COUNT III
(Wrongful Death - Negligence As to All Defendants Pursuant to the MTCA)

51. Plaintiff repeats and re-alleges the allegations set forth in each of the preceding paragraphs as if fully set forth herein.

52. Plaintiff had the right to freedom of speech and to lawfully congregate in a public park. He also had the right to be free from unreasonable searches and seizures under the Federal and Massachusetts Constitutions.

53. The Defendants had a duty of reasonable care to the citizens of New Bedford when carrying out its police functions.

54. The Defendants, directly and/or vicariously through their agents and/or employees, negligently targeted the Plaintiff based on the City's and police department's Meet

and Greet Policy and seized and subsequently shot the plaintiff without legal cause or justification.

55. The Defendants, directly and/or through their agents, failed to use reasonable care when: a) targeting the plaintiff based on video evidence which showed he had committed no crime, was not in the process of committing a crime and was not a threat to the public; b) profiling the plaintiff for questioning, search and seizure because he was a minority and in a public park in a low income neighborhood; c) demanding that the plaintiff stop and submit to a search despite no legal justification; d) failing to abide by the plaintiff's Constitutional right not to talk to the police and walk away when the plaintiff exercised his right to not interact with the police; e) seizing the plaintiff when the defendants had no legal right to do so; f) escalating the situation with the plaintiff into a confrontation with the police after the plaintiff had attempted to exercise his right not to interact with the police and simply walk away; g) using unreasonable force to subdue the plaintiff, particularly firing a second round of shots into the plaintiff, one of which was through his skull, when he was down and there was no longer any reasonable threat to the police.

56. The Defendants' acts and omissions were intentional, wanton, reckless, and/or malicious in nature entitling the plaintiff to an award of punitive damages.

57. As a direct and proximate cause of the Defendants' violations of plaintiff's rights, the Defendants' actions resulted in hospital, medical, funeral and burial costs and deprived the statutory wrongful death beneficiaries of Gracia's of his services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice.

Wherefore, the Plaintiff requests damages pursuant to Chapter 229 § 2, including punitive

damages, pre- and post judgment interest, attorney's fees and costs as provided by law and such other additional relief as the Court deems just and proper.

COUNT IV

(Wrongful Death -- Negligent Training and Supervision as to City of New Bedford and Chief Provencher Pursuant to the MTCA)

58. Plaintiff incorporates by reference all other paragraphs of this Complaint as if fully set forth herein and further alleges as follows.

59. The Defendant City of New Bedford and/or Chief Provencher had a duty of care to the citizens of New Bedford to properly train its officers in interactions with citizens, the legal parameters for questioning, stopping, searching, seizing and detaining citizens, the use of firearms and in the use of deadly force.

60. The Defendant City of New Bedford and/or Chief Provencher failed to use reasonable care in the training and supervision of its officers in the areas of a) a citizen's right not to engage police and walk away; b) when it is justified for police to stop and frisk a citizen; c) when it is justified for police to detain or seize a citizen; d) how to prevent an informal meeting or conversation with a citizen from escalating into a stop, search and/or physical confrontation; e) the use of firearms and f) the use of deadly force.

61. As a direct and proximate cause of the Defendants' violations of plaintiff's rights, the Defendants' actions resulted in hospital, medical, funeral and burial costs and deprived the statutory wrongful death beneficiaries of Gracia's of his services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice.

Wherefore, the Plaintiff requests damages pursuant to Chapter 229 § 2, including punitive damages, pre- and post judgment interest, attorney's fees and costs as provided by law and such

other additional relief as the Court deems just and proper.

Count V

Wrongful Death -- Conscious Pain and Suffering

(All Defendants)

62. Plaintiff incorporates by reference all other paragraphs of this Complaint as if fully set forth herein and further alleges as follows.

63. The defendants' actions as described above in paragraphs caused Gracia conscious pain and suffering prior to his death for which the Estate is entitled to be compensated.

Wherefore, the Plaintiff requests damages pursuant to Chapter 229 § 2, including punitive damages, pre- and post judgment interest, attorney's fees and costs as provided by law and such other additional relief as the Court deems just and proper.

Count VI

Gross Negligence, Recklessness and Willful and Wanton Conduct

(All Defendants)

64. Plaintiff incorporates by reference all other paragraphs of this Complaint as if fully set forth herein and further alleges as follows.

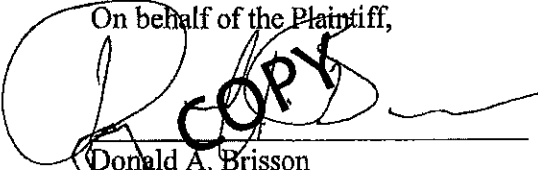
65. The defendants, as described above in paragraphs, independently, vicariously or in association with one another, engaged in acts and/or omissions that constituted gross negligence and/or recklessness and/or willful and wanton misconduct in violation of their respective duties and obligations.

Wherefore, the Plaintiff requests damages pursuant to the Chapter 229 § 2 against each defendant in an amount that will adequately punish and deter each defendant for its gross

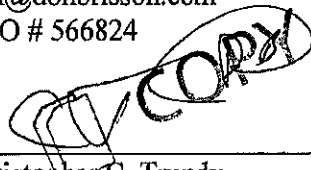
negligence and/or recklessness and/or willful and wanton misconduct together with pre- and post judgment interest, attorney's fees and costs as provided by law and such other additional relief as the Court deems just and proper.

PLAINTIFF REQUESTS A TRIAL BY JURY ON ALL COUNTS CONTAINED HEREIN

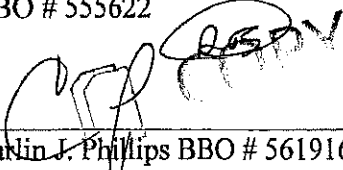
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