

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

FILED

MAY 22 2003

SAMUEL L. KAY, CLERK
U. S. District & Bankruptcy Courts
Southern District of West Virginia

THOMAS WILLIAM BROWNING,

Plaintiff,

v.

Civil Action No. 2:00-0619
Honorable Charles H. Haden, II.

STEVE HARPER, MIDENT POLICE OFFICER,
M.K. CRUICKSHANK, SENIOR TROOPER,

Defendants.

**DEFENDANT STEVE HARPER'S RESPONSE TO PLAINTIFF'S CONSOLIDATED
MOTION AND MEMORANDUM TO MOTION TO EXCLUDE SAMUEL
FAULKNER'S TESTIMONY**

COMES NOW the defendant, Steve Harper, by and through undersigned counsel, and submits this Response to Plaintiff's Consolidated Motion and Memorandum To Motion To Exclude Samuel Faulkner's Testimony.

Samuel Faulkner's Expert Opinion will assist the trier of fact and complies with the requirements of Rule 702 of the Federal Rules of Civil Procedure.

Plaintiff asserts in his Motion that Samuel Faulkner's testimony should be excluded from trial because he allegedly only considered the police officer's version of the facts and ignores the Plaintiff's account of the incident in forming his opinion. Therefore, the Plaintiff contends, Mr. Faulkner ultimately reaches the conclusion that the police officers acted reasonably.

However, at his deposition, Mr. Faulkner specifically addressed the Plaintiff's version of the facts. At the deposition of Mr. Faulkner, the following exchange took place:

Q (Ms. Kirk): Now, in this case, you probably understand that the plaintiff is claiming that Steve Harper slammed his head into the ground ten or twelve times. Now, if that had occurred, as the plaintiff contended, what would your opinions be on that fact?

A (Mr. Faulkner): That would have not been reasonable force and it wouldn't have been following guidelines.

Q: (Ms. Kirk): And, likewise, if the State Police trooper had come over and stomped him in the head in the range of seven times, you're not here today contending that that would have been appropriate?

A: (Mr. Faulkner): No, ma'am, it would not be.

See Deposition of Samuel D. Faulkner, pg. 15-16. (The deposition of Mr. Faulkner is attached hereto. The deposition of Mr. Faulkner was noticed by this Defendant and taken for the use at trial). Mr. Faulkner was then asked to assume for purposes of his opinions if the events occurred as contended by the law enforcement officers, was the use of force employed reasonable. (deposition of Faulkner pp. 18-19).

Thus, the Plaintiff's contention that Mr. Faulkner has simply ignored the Plaintiff's version of the facts in forming his opinions is simply not correct. Mr. Faulkner was specifically asked at his deposition to render his opinion based upon the Plaintiff's version of the facts. He was then asked to render an opinion on whether the use of force was reasonable if he assumed that the scenario provided by the law enforcement officers was true.

Additionally, Mr. Faulkner's opinions will be helpful to the trier of fact. In this case, the trier of fact must evaluate the facts under a standard of "objective reasonableness." Although this standard may be comprehensible to even a lay person, any "objective" test implies the existence of conduct. Kopf v. Skyrn, 993 F.2d 374, 378 (1993). Thus, where the standard of conduct is not defined by the generic – a reasonable *person* – but rather the specific – a reasonable *officer* – it is more likely that Rule 702's line between common and specialized knowledge has been crossed. Id. Thus, given this more specific standard of conduct in cases involving the "objective reasonableness" of police officer, Mr. Faulkner should be permitted to

render his opinions regarding the conduct of the officers at the time of the subject incident as such testimony will attempt to "assist the trier of fact to understand the evidence or to determine a fact in issue."

Finally, an opinion is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. Fed.R.Evid. 704(a). However, such an opinion may be excluded if not helpful to the trier of fact. Kopf, 993 F.2d at 377-78 and Fed.R.Evid. 702. Even if the Court determines that such an opinion would not be helpful to the trier of fact, the inadmissibility of the expert's ultimate opinion does not altogether banish him from the stand, because his specialized knowledge may still assist the trier of fact in other ways. Id. at 378. Thus, if the Court finds that Mr. Faulkner's opinion as to the ultimate issue to be helpful, such evidence is admissible under Rules 702 and 704.

WHEREFORE, for the reasons outlined above, Defendant Steve Harper respectfully requests this Honorable Court to deny the Plaintiff's Motion to Exclude Samuel Faulkner's Testimony.

STEVE HARPER

By Counsel



THERESA M. KIRK, WVSB # 6619

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

THOMAS WILLIAM BROWNING,
Plaintiff,

v. Civil Action No. 2:00-0619

KANAWHA COUNTY SHERIFF'S DEPARTMENT,
STEVE HARPER, MDENT POLICE OFFICER,
M.K. CRUICKSHANK, SENIOR TROOPER,
D.G. PAINTER, RESOURCES OFFICER,
WEST VIRGINIA STATE POLICE,
Defendants.

The video evidentiary deposition of
SAMUEL D. FAULKNER was taken under the Federal
Rules of Civil Procedure in the above-entitled action
before David W. Sisson, a Certified Court Reporter
and Notary Public within and for the State of West
Virginia, on the 20th day of May 2003, commencing
at 1:00 p.m., at the law offices of Pullin, Fowler
& Flanagan, PLLC, Bank One Center, Suite 1000,
Charleston, West Virginia, pursuant to notice.

3

I N D E X

Defendant's Witness	Direct	Cross
Samuel D. Faulkner	5	22 (Foster)

E X H I B I T S

Faulkner Deposition Exhibits:	Marked
No. 1, Mr. Faulkner's resume, with attachments	21
No. 2, Mr. Faulkner's report	26

Reporter's Certificate 30/31

2

APPEARANCES: HEATHER D. FOSTER, Esquire
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Charleston, West Virginia 25314
Counsel for Plaintiff

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Defendant

MICHAEL D. MULLINS, Esquire
Septoe & Johnson
Seventh Floor, Bank One Center
Post Office Box 1588
Charleston, West Virginia 25326
Counsel for M.K. Cruickshank,
Defendant

ALSO PRESENT: MS. KAREN SMITH, Video Technician

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1 VIDEO TECHNICIAN: This is a video
2 deposition of Samuel Faulkner, held in the case of
3 Thomas Browning v. Kanawha County Sheriff's
4 Department, et al., Civil Action No. 2:00-0619, held
5 in the United States District Court for the Southern
6 District of West Virginia at Charleston. Today's
7 date is May 20th, 2003. The time is 1:06 p.m.
8 My name is Karen Smith, the
9 videographer, and the court reporter is David Sisson
10 with Mountain Reporting. Now, would counsel please
11 identify themselves?
12 MS. KIRK: Theresa Kirk, on behalf of
13 Steve Harper.
14 MR. MULLINS: Michael Mullins, on
15 behalf of Trooper Cruickshank.
16 MS. FOSTER: Heather Foster, on behalf
17 of Thomas William Browning.
18 (Witness sworn.)
19 WHEREUPON,
20 SAMUEL D. FAULKNER,
21 called as a witness in behalf of Defendant Harper
22 herein, having been first duly sworn to tell the
23 truth, testified as follows:

PAGE 5

Mr. Faulkner - Direct

5

1 DIRECT EXAMINATION
2 BY MS. KIRK:

3 Q Sir, if you will, start off by stating
4 your name for the record?

5 A Samuel D. Faulkner, F-a-u-l-k-n-e-r.

6 Q And before we get into your
7 background, Mr. Faulkner, was it your understanding
8 that originally the trial in this matter was
9 scheduled to -- or was set to start today?

10 A Yes, ma'am.

11 Q And, at that time, I contacted you and
12 asked you to appear at trial; is that correct?

13 A That's correct.

14 Q And then shortly thereafter the Court
15 moved the trial, and I then contacted you again and
16 let you know the news; is that correct?

17 A Yes, ma'am.

18 Q And, at that time, you informed me
19 that you were going to be out of town?

20 A That's correct.

21 Q And can you please tell us where
22 you're going to be for the rest of the week?

23 A I'll be in Massachusetts.

PAGE 7

Mr. Faulkner - Direct

7

1 Then I went to full-time uniform
2 patrol at the county hospital. I did that for about
3 four years. I then went to the City of Kent Police
4 Department, and was there only for about eight
5 months before I was hired down at the State Training
6 Academy. Since I've been at the State for the last
7 16 years, I've been commissioned through Portage --
8 through Madison County Sheriff's Office, and I do
9 now some police work, at least two days a month, out
10 at Port of Columbus Airport, where I'll put a

11 uniform on and do police work.

12 Q Now, you referred several times to
13 counties and cities. Were these counties and cities
14 in Ohio?

15 A Yes, ma'am, they were.

16 Q And can you explain, again, where you
17 are presently employed?

18 A I am presently employed at the Ohio
19 Peace Officer Training Academy. That's a section of
20 the Ohio Attorney General's Office.

21 Q What is your position there?

22 A I'm a law enforcement training
23 specialist.

PAGE 6

Mr. Faulkner - Direct

6

1 Q Now, can you please tell us -- tell us
2 where you're from?

3 A I'm from Ohio.

4 Q And what is your business address?

5 A 1650 State Route 56, London, Ohio.

6 Q And I'd like for you to tell us a

7 little bit about your educational background.

8 A Undergrad Degree was from Hiram
9 College in health, physical education and biology;
10 Master's Degree from Kent State University in

11 exercise physiology; and postgraduate work at Wright
12 State University in adult education.

13 Q And then, at some point, did you
14 become involved with law enforcement?

15 A Yes, ma'am, I did.

16 Q Can you tell us when that occurred?

17 A That would have been, I believe, in

18 about 1981, '82. I started in law enforcement in a
19 program -- a state program of supervising adult
20 felons, and while I was doing that I took my basic
21 peace officer training. I was then commissioned
22 through Portage County Sheriff's Office and did
23 undercover drug work for them and warrant services.

PAGE 8

Mr. Faulkner - Direct

8

1 Q And how long have you been in that
2 position?

3 A About 16 years now.

4 Q Have you ever had any special training
5 in use of force?

6 A Yes, ma'am, I have.

7 Q Can you tell us about that?

8 A I have conducted a series of actual
9 national research projects trying to help law
10 enforcement and the court system civilians

11 understand the force topic and develop some kind of
12 guidelines or standards that would be considered
13 appropriate for the use of force; and have done some
14 surveys through the law enforcement television

15 network, through the AFSCME Corrections United Union
16 out of Washington, and actually have done a research
17 project with the U.S. Justice Department, National
18 Institute of Justice.

19 Q All right. And you, yourself, have
20 received training as well on the use of force?

21 A Yes, ma'am.

22 Q Can you just briefly summarize that?

23 A That would have been just numerous

PAGE 9 SHEET 2

Mr. Faulkner - Direct

9

- 1 seminars attended on the force topic.
 2 Q Do you teach any classes on the use of
 3 force in West Virginia?
 4 A Yes, ma'am, I do.
 5 Q Can you explain?
 6 A I've actually been down to the West
 7 Virginia State Police Academy and trained their
 8 trainers in subject control and force issues. The
 9 trainers for the last -- well, I think ever since
 10 I've been at the Academy, for the last about 15
 11 years, have been coming up to the Ohio Peace Officer
 12 Training Academy to take training in force issues up
 13 there; anything from subject control, to use of
 14 force, to baton, aerosol agents, and I've been to
 15 West Virginia a number of times to do lawmen
 16 seminars on force topics.
 17 Q And have you ever written any articles
 18 on the use of force?
 19 A Yes, ma'am, I have.
 20 Q And are those articles -- we have your
 21 resume in front of us today. Are those articles
 22 included in your resume?
 23 A Yes, ma'am, they are.

PAGE 10

Mr. Faulkner - Direct

10

- 1 Q Can you give us some examples of some
 2 articles you have written?
 3 A It would have been articles on force
 4 in Law and Order, Street Survival, Tactical Edge,
 5 Police Magazine, FBI Journal.
 6 Q Have you written any books on the use
 7 of force?
 8 A Yes, ma'am, I have.
 9 Q And what is the title of the book?
 10 A Use of Force, Decision Making and
 11 Legal Precedence.
 12 Q Have you testified in other courts on
 13 the use of force?
 14 A Yes, ma'am, I have.
 15 Q And have you been qualified as an
 16 expert on the use of force in other courts?
 17 A Yes, ma'am, I have.
 18 Q Where have some of those courts been
 19 where you've been qualified?
 20 A All the way from California to New
 21 York and most points in between.
 22 MS. KIRK: All right. At this time, I
 23 would like to move to qualify Sam Faulkner as an

PAGE 11

Mr. Faulkner - Direct

11

- 1 expert on the use of force by law enforcement
 2 officers.
 3 MS. FOSTER: There's no objection.
 4 MR. MULLINS: No objection.
 5 BY MS. KIRK:
 6 Q Sir, in preparing for your testimony
 7 today and in preparing to formulate opinions in this
 8 case, what all have you reviewed?
 9 A I have reviewed the complaint and the
 10 attached affidavits, pictures taken of Mr. Browning
 11 after the incident, photographs of the arrest scene,
 12 transcripts from the preliminary hearing, the
 13 transcribed deposition of Mr. Browning, Sergeant
 14 Harper's motion for summary judgement, a July 16th,
 15 1998 State Police report signed by Trooper
 16 Cruickshank, a July 16th, 1998 statement by
 17 Conservation Officer Painter, the medical findings
 18 by Dr. Sopher, and a personal meeting and interview
 19 with Sergeant Harper.
 20 Q Based upon what you've reviewed in
 21 this case, what is your general understanding of
 22 what occurred on the day in question which led to
 23 the arrest of Mr. Browning?

PAGE 12

Mr. Faulkner - Direct

12

- 1 A Following a controlled buy situation
 2 with a confidential informant, the Kanawha County
 3 Sheriff's Office attempted to stop Mr. Browning; he
 4 did not stop. A high speed pursuit followed from
 5 that. It went on quite some time; for a
 6 considerable distance; speeds in excess of 100 miles
 7 per hour; at one point through a construction area
 8 where Mr. Browning was going off and on the stand-
 9 roadway.
 10 The passenger of the truck at one
 11 point was throwing tires and wheels out of the back
 12 of the truck. They went off of the roadway at one
 13 point, and I believe a Trooper O'Bryan said the
 14 truck almost rammed him. Trying to then terminate
 15 the pursuit, he got along side the passenger side of
 16 the vehicle, being cautious not to be rammed, and
 17 shot out the front passenger tire.
 18 Then was able to get ahead of the car
 19 and slow -- ahead of the truck and slow its
 20 progress, trying to bring it to a stop.
 21 Q Okay, if we could stop there then.
 22 Now, after the -- is it your understanding that Mr.
 23 Browning's vehicle eventually then did come to a

PAGE 13

Mr. Faulkner - Direct

13

1 stop?

2 A Yes, ma'am.

3 Q Okay. And after the vehicles came to
4 a stop, what is your understanding of what the law
5 enforcement officers are contending occurred from
6 the time that the stop occurred until Mr. Browning
7 was brought out?

8 A The statements of the officers; as
9 they were trying to slow Mr. Browning, he actually
10 struck the cruiser in front. Two other cruisers

11 tried to position themselves to block his exit. He
12 put the truck in reverse and rammed through the
13 cruisers in the rear. The engine was still running.
14 The officers felt Mr. Browning was going to attempt

15 to flee again, so they got out of the cruisers and
16 extracted him and the passenger from the truck.

17 Q Okay. And what is your understanding
18 of the events surrounding the actual extraction?

19 A I believe the State troopers went to
20 the passenger side, broke the window, opened the
21 door, and then removed the passenger from the

22 vehicle and placed him on the ground and stabilized
23 him to handcuff him.

PAGE 15

Mr. Faulkner - Direct

15

1 Q And why was it appropriate?

2 A High speed pursuit is always a

3 dangerous topic, both to the officers involved, the
4 people in the car fleeing, and anyone in the general
5 public that they may come in contact with. So this
6 is always a concern, pursuits, and you try to stop

7 them, really, as quickly and as safely as we can.

8 When they were able to stop the car,
9 the officer said the engine was still revving as if
10 Mr. Browning was, again, going to attempt to flee,

11 and this would have been a primary concern of the
12 officers and troopers at that time to make sure that
13 it did not go mobile again.

14 Q All right. So you believe it was

15 appropriate for them to bring Mr. Browning out of
16 that vehicle?

17 A Absolutely.

18 Q And are your opinions based upon your
19 training in law enforcement experience?

20 A Yes, ma'am.

21 Q Now, in this case, you probably

22 understand that the plaintiff is claiming that Steve
23 Harper slammed his head into the ground ten or

PAGE 14

Mr. Faulkner - Direct

14

1 An officer went to the -- a detective
2 went to the driver's side and was going to try to, I

3 believe, extract Mr. Browning from the window, and
4 Mr. Browning had put his hands between his legs.
5 The officer felt he may be going for a weapon, so he
6 backed out of the car, alerted other officers, who
7 then drew their firearms.

8 When they could again see Mr.
9 Browning's hands and see there was not -- that he
10 was not armed, the detective went around to --

11 Detective Henderson went around to the passenger
12 side and then grabbed Mr. Browning's arm and removed
13 him from the passenger side of the car.

14 Q Okay. Assuming that the events

15 occurred in regards to extracting Mr. Browning from
16 the vehicle as contended by the law enforcement
17 officers, do you have any opinion regarding whether

18 the officers acted appropriately in extracting Mr.
19 Browning from the vehicle?

20 A Yes, ma'am, I do.

21 Q And what is your opinion?

22 A It was appropriate and in line with
23 their training guidelines.

PAGE 16

Mr. Faulkner - Direct

16

1 twelve times.

2 Now, if that had occurred, as the

3 plaintiff contended, what would your opinions be on
4 that fact?

5 A That would have not been reasonable
6 force and it wouldn't have been following training
7 guidelines.

8 Q And, likewise, if the State Police
9 trooper had come over and stomped him in the head in
10 the range of seven times, you're not here today

11 contending that that would have been appropriate?

12 A No, ma'am, it would not be.

13 Q Now, what is your understanding of
14 what occurred after Mr. Browning was extracted from

15 the vehicle until the time that he was handcuffed?

16 A Any of the officers on the scene, and
17 we had city, state, federal, they all say that Mr.

18 Browning was combative and was struggling when he
19 was taken out of the vehicle.

20 He was placed face down in the prone
21 position, which is exactly how we train the officers

22 to place people.

23 Q Why do you place them in a prone

Mr. Faulkner - Direct

17

- 1 position?
 2 A This is done nationally in law
 3 enforcement, all the way up even in hospitals would
 4 do this. When we bring them out in a situation like
 5 that (a) they're not searched, so we don't know if
 6 the person is potentially armed or not. This was
 7 from a drug situation, and law enforcement is
 8 trained where there is drugs, there is very often
 9 weapons, and it broadcast to the officers by the FBI
 10 agent that Mr. Browning was known to be armed.
 11 So this would be a major concern. We
 12 would want to get them in a prone position. We
 13 would want to get the hands secured as quickly as we
 14 can, and the prone position allows the subject the
 15 least opportunity to attempt to assault an officer,
 16 and it is also one of the safest positions to put a
 17 person in, and that's why it is done.
 18 Q So you have no criticisms of the fact
 19 that he was put in the prone position.
 20 A No, ma'am. That's exactly what we
 21 train them to do.
 22 Q All right. And then what is your
 23 understanding of role that Steve Harper played in

Mr. Faulkner - Direct

19

- 1 opinion?
 2 A He was -- sergeant told me he took
 3 what he believes was the left arm of Mr. Browning --
 4 someone was struggling on the other side to control
 5 that hand, so he placed the handcuff on the hand
 6 that Sergeant had control of, and then reached over
 7 and handcuffed the other side.
 8 Q And is that consistent with how
 9 officers are trained?
 10 A Yes, ma'am.
 11 Q And is that a nationwide standard?
 12 A Yes, ma'am.
 13 Q Have you had the opportunity to review
 14 pictures of Mr. Browning's face that were taken
 15 shortly after his arrest?
 16 A Yes, ma'am, I have.
 17 Q And you agree that those pictures show
 18 that there was some sort of injury to his face?
 19 A Yes, ma'am, there was.
 20 Q I'm not asking you to render an
 21 opinion regarding the nature and extent of those
 22 injuries; do you understand?
 23 A Yes, ma'am.

Mr. Faulkner - Direct

18

- 1 apprehending this individual?
 2 A As I said, Detective Henderson was
 3 originally taking him out and he injured his ankle,
 4 so he had to back out to take care of his ankle,
 5 and, at that point, Sergeant Henderson saw --
 6 Sergeant Harper saw that there were a number of
 7 officers that had weapons drawn in covering Mr.
 8 Browning.
 9 He did not see any weapons at that
 10 time in Mr. Browning's hands -- so he had handcuffs
 11 with him. Another weapon brought to bear against
 12 Mr. Browning would not have helped anymore in that
 13 situation, so he moved in to be the control or the
 14 cuffing officer.
 15 Q All right. Now, assuming that the
 16 handcuffing occurred as stated by Steve Harper and
 17 the other law enforcement officers, do you have any
 18 opinion regarding whether the actions of Sergeant
 19 Harper were appropriate?
 20 A Yes, ma'am, I do.
 21 Q And can you tell us those opinions?
 22 A They were completely appropriate.
 23 Q And what is the basis for that

Mr. Faulkner - Direct

20

- 1 Q Okay. But based upon the fact that
 2 there was what we'll call an injury to the face, did
 3 that affect any of your opinions that you've
 4 expressed today?
 5 A No, ma'am, it doesn't.
 6 Q Okay. And why does it not?
 7 A A number of years ago I'd actually
 8 written an article for The FBI Journal, "No Magic
 9 Bullet." We are dealing with individuals on a
 10 playing field where we have grass or astroturf and
 11 we have helmets and pads on these people. We are
 12 out there in concrete and metal and cars going by us
 13 and environmental conditions, and it's just -- it's
 14 just common sense and well known if you're going to
 15 fight on the highway, you're going to get scratched
 16 up. I mean, that's going to be the officers, that's
 17 going to be the perpetrators.
 18 We try to have all of these tools or
 19 techniques that don't cause injuries, but in the
 20 arena we're dealing with, injuries are common.
 21 Q What is your understanding of the type
 22 of surface that Mr. Browning was on?
 23 A It was an asphalt roadway.

VIDEO EVIDENTIARY DEPOSITION OF SAMUEL D. FAULKNER - MAY 20TH, 2003

PAGE 21

Mr. Faulkner - Direct

21

1 Q Based upon your knowledge, background,
2 training and expertise on the use of force, the
3 opinions that you've expressed today, do you hold
4 those opinions to a reasonable degree of certainty?
5 A Yes, ma'am, I do.
6 MS. KIRK: I have nothing -- well,
7 actually, sir, I do want to back up. I want to hand
8 you what's been marked as Exhibit No. 1. If you
9 would, take a look at that.
10 THE WITNESS: Yes, ma'am. This would
11 be my resume and a list of the cases that I've
12 testified in, and a couple of pages of the continuum
13 that I authored.
14 BY MS. KIRK:
15 Q All right. So this is the resume and
16 the documents that you provided to us; is that
17 correct?
18 A Yes, ma'am.
19 MS. KIRK: At this time, I would like
20 to move into evidence Exhibit No. 1. Is there any
21 objection?
22 MS. FOSTER: No objection.
23 (WHEREUPON, Mr. Faulkner's

PAGE 23

Mr. Faulkner - Cross

23

1 or have you reviewed any other documents other than
2 those two that I've just mentioned?
3 A No, ma'am, I haven't.
4 Q Have you spoken with the plaintiff
5 regarding his version of events?
6 A No, ma'am, I haven't.
7 Q In your report and in your resume, it
8 references that you have testified in 190 -- or over
9 190 cases as an expert witness.
10 Have you ever testified against a
11 police officer on behalf of a civilian plaintiff?
12 A Not in a civil -- in a criminal; not
13 in a civil.
14 Q Have you ever been excluded by a Court
15 as an expert in excessive use of force?
16 A One time in Dayton by a magistrate.
17 Q How much are you being paid to testify
18 in this case?
19 A \$150 an hour.
20 Q How much time have you spent on this
21 case?
22 A I would say 20, 24 hours; just a very
23 rough guess.

PAGE 22

Mr. Faulkner - Cross

22

1 resume, with attachments, was
2 marked for identification as
3 Faulkner Deposition Exhibit No.
4 1 and is hereto attached.)
5 MS. KIRK: Sir, at this time, I have
6 nothing further for you.
7 MR. MULLINS: I have no questions of
8 Mr. Faulkner.
9 MS. FOSTER: Mr. Faulkner, I
10 previously identified myself. I am Heather Foster,
11 and I'm appointed to represent Thomas William
12 Browning, the plaintiff in this matter. I'm going
13 to ask you a few questions regarding the report that
14 you prepared.
15 CROSS-EXAMINATION
16 BY MS. FOSTER:
17 Q In your report, you reference several
18 documents that you have reviewed in preparing your
19 report. You stated that you've also, I guess
20 subsequent to the preparation of the report, spoken
21 with Detective Harper and also reviewed the medical
22 findings of Sopher.
23 Have you spoken to anyone additional

PAGE 24

Mr. Faulkner - Cross

24

1 Q What will your costs be through trial
2 of this case? Let me break that down; up to this
3 point and through trial.
4 A I can't really remember what the
5 original was review and the making of the opinion
6 paper in March. I really don't remember what was
7 billed in there. For this, I would say four hours
8 preparation time. I left at 6:30 this morning to
9 drive down, and whenever we're done here, another
10 three-and-a-half to four hours to get home.
11 Q How much do you get paid or make per
12 year for testifying in favor of police officers?
13 A Well, in terms of testifying, the
14 seminars I give, the classroom instruction and
15 whatnot, probably around \$50,000.
16 Q Have you ever found excessive use of
17 force in a case?
18 A Yes, ma'am.
19 Q Did you testify in that case?
20 A Yes, ma'am.
21 Q Has there been more than one time?
22 A Yes, ma'am.
23 Q Did you testify in all of the cases

Mr. Faulkner - Cross

25

- 1 you found excessive use of force in?
 2 A A number of cases they will call, they
 3 will give me a fact pattern; I will give them my
 4 opinion, and then they just say they wouldn't want
 5 to use me.
 6 Q Have you ever been presented with a
 7 fact pattern that you, yourself, refrained from
 8 testifying in; you were asked to give an opinion and
 9 then declined to testify?
 10 A Oh, yes, ma'am.
 11 Q Was that on behalf of police officers?
 12 A Yes, ma'am.
 13 Q In your report, you reference facts
 14 presented by the officers, and reference those facts
 15 as if they are facts and not mere claims by the
 16 police officers for the basis of your opinion.
 17 In Deposition Exhibit 1, pages 6 to
 18 10, is where you reference the officers' claims as
 19 fact. On page 10 --
 20 MS. KIRK: Let me just note that we
 21 went ahead and attached the resume as Exhibit 1, but
 22 we didn't attach the report.
 23 MS. FOSTER: Okay. Can we introduce

Mr. Faulkner - Cross

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- 1 Q And I believe you've already stated
 2 that. I would just like that reiterated. You offer
 3 an opinion comparing plaintiff's injuries in the
 4 medical reports to the officers' versions of the
 5 facts. Are you, indeed, a medical doctor?
 6 A No, ma'am.
 7 Q Are you certified to offer forensic or
 8 pathologic -- pathologic evaluations?
 9 A No, ma'am.
 10 Q Have you studied the Medical/Legal
 11 Investigation of Death by Spitz and Fisher?
 12 A No, ma'am.
 13 Q I previously referred you to
 14 Deposition Exhibit 2, Paragraphs 2 through 4. Would
 15 you agree that you reference the officers' testimony
 16 as fact as opposed to claims that the officers are
 17 making?
 18 A I viewed them in light of all the
 19 information that I was given.
 20 Q In your report, are you discounting
 21 Mr. Browning's version of events in lieu of the
 22 police officers' versions when you reference those
 23 statements of the officers as fact and Mr.

Mr. Faulkner - Cross

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- 1 the report as Exhibit 2?
 2 MS. KIRK: Yes, that's fine.
 3 MS. FOSTER: I'm sorry. I thought it
 4 was all together. We're now introducing the report
 5 as Exhibit 2 into the record.
 6 (WHEREUPON, Mr. Faulkner's
 7 report was marked for
 8 identification as Faulkner
 9 Deposition Exhibit 2 and is
 10 hereto attached.)
 11 BY MS. FOSTER:
 12 Q I will now reference Exhibit 2, pages
 13 6 to 10. As the basis -- this is beginning of the
 14 basis for your opinion. Paragraphs 2, 3, to the top
 15 of page 10, if you will refer to that, you state
 16 that -- and it's referencing the officers as mere
 17 fact, and it's a narrative as if it is fact. You
 18 then go on to state Mr. Browning claims that the
 19 officers made as if they are not fact.
 20 If the facts were as plaintiff
 21 presented them, would that be violation of the
 22 reasonable use of force?
 23 A Yes, ma'am.

Mr. Faulkner - Cross

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- 1 Browning's statement as a mere claim?
 2 A I wouldn't say I discounted them. I
 3 looked at them in terms of all the information that
 4 I was given, and I found Mr. Browning's event to be
 5 highly unbelievable.
 6 Q In your report you have referenced a
 7 continuum theory, and I believe you have attached it
 8 as an exhibit to your report.
 9 A Yes, ma'am.
 10 Q Did I correctly reference it as a
 11 continuum theory?
 12 A Yes, ma'am.
 13 Q Is this a theory that you developed
 14 from study that you conducted?
 15 A A series of studies, yes, ma'am.
 16 Q And these studies involved only
 17 officers as subjects; is that correct?
 18 A The pictorial representation, that
 19 would be from the officers' responses. I've also
 20 surveyed probably 4000 or 5000 civilians to find
 21 their belief system, and also 34 states worth of
 22 corrections officers.
 23 MS. FOSTER: I have no further

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1 questions.

2 MS. KIRK: I have nothing further.

3 MR. MULLINS: I have no questions.

4 VIDEO TECHNICIAN: This concludes the

5 video deposition. The time is 1:28 p.m.

6 (WHEREUPON, the deposition

7 was concluded at 1:28 p.m.)

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connected by blood or marriage with any of the parties to this action, am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel or financially interested in the action or interested directly or indirectly in the matter in controversy.

Given under my hand and official seal this 20th day of May 2003.

Certified Court Reporter
Notary Public

My Commission expires June 28, 2009.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

I, David W. Sisson, a Certified Court Reporter and Notary Public within and for the county and state aforesaid, duly Commissioned and qualified, do hereby certify that the foregoing video evidentiary deposition of SAMUEL D. FAULKNER was taken by and before me at the time and place and for the purpose specified in the caption hereof, the said witness having been first duly sworn by me to testify the whole truth and nothing but the truth concerning the matter in controversy.

I do further certify that the said deposition was transcribed under my direction and supervision; that the examination, reading and signing of said deposition were waived by the witness, and that this deposition is a true record of the testimony given by the witness.

I do further certify that I am not

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

THOMAS WILLIAM BROWNING,

Plaintiff,

v.

Civil Action No. 2:00-0619
HONORABLE CHARLES H. HADEN, II.

KANAWHA COUNTY SHERIFF'S DEPARTMENT,
STEVE HARPER, MDENT POLICE OFFICER,
M.K. CRUICKSHANK, SENIOR TROOPER,
D.G. PAINTER, RESOURCES OFFICER,
WEST VIRGINIA STATE POLICE,

Defendants.

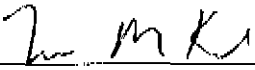
CERTIFICATE OF SERVICE

The undersigned Counsel for Defendant, Sergeant Steve Harper, does hereby certify that a true copy of the foregoing "**DEFENDANT STEVE HARPER'S RESPONSE TO PLAINTIFF'S CONSOLIDATED MOTION AND MEMORANDUM TO MOTION TO EXCLUDE SAMUEL FAULKNER'S TESTIMONY**" was served upon the Pro Se Plaintiff and Counsel

Thomas William Browning
South Central Regional Jail
1001 Centre Way
Charleston, WV 25309
PRO SE PLAINTIFF

Jeffrey K. Phillips
Michael D. Mullins
STEPTOE & JOHNSON
707 Virginia Street, East
P.O. Box 1588
Charleston, West Virginia 25326-1588
COUNSEL FOR DEFENDANTS,
M.K. CRUICKSHANK, SENIOR
TROOPER,
D.G. PAINTER, RESOURCES
OFFICER,
WEST VIRGINIA STATE POLICE

by placing the same in an envelope, properly addressed with postage fully paid and depositing the same in the U.S. Mail, on this 22 day of May, 2003.



THERESA M. KIRK, WVSB # 6619

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