

**In the United States District Court  
for the District of Colorado**

Case No. 15-CV-109-WJM-STV

MICHAEL VALDEZ,

Plaintiff,

v.

ROBERT MOTYKA, Jr., Denver Police Officer in his  
individual capacity and CITY AND COUNTY OF  
DENVER, a municipality,

Defendants.

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**PLAINTIFF'S MOTION FOR PREJUDGMENT INTEREST**

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Plaintiff, through undersigned counsel, respectfully submits this Motion for Prejudgment Interest pursuant this Court's Order (Dkt. 334) As grounds for his Motion, Plaintiff states as follows:

**INTRODUCTION**

Michael Valdez was shot in the back by Defendant Robert Motyka on January 16, 2013. He filed his complaint in the United States District Court on January 15, 2015 and, after six years of litigation before two Article III District Court Judges and three separate 10<sup>th</sup> Circuit appellate panels, a jury found in favor of Mr. Valdez on his claims against both Defendants. The jury, on September 23, 2021, awarded Mr. Valdez \$131,000 against Defendant Motyka and \$2,400,000 against Defendant City and County of Denver (Dkt. 329).

The damages evidence at trial included (a) Mr. Valdez's medical bills for life-saving surgery and care immediately after being shot and (b) his pain, suffering, emotional distress, anxiety, stress and disfigurement attendant to his injuries. The medical bills totaled \$130,844. See Plaintiff's trial exhibit 182.

Under the unique circumstances of this case the Court should exercise its discretion and award Mr. Valdez prejudgment interest on \$130,844 from January 16, 2013, the date of the shooting and surgery. For the remaining compensatory damages (\$2,400,156), Mr. Valdez notes that the Court has the discretion to award prejudgment interest on the entire amount beginning January 16, 2013. However, Mr. Valdez suggests that the Court award prejudgment interest on that portion of damages from August 1, 2016, approximately 18 months from the date Mr. Valdez filed this lawsuit. This request, as discussed below, is based on the significant amount of pretrial delay caused by successive defense appeals, overestimation by the defense of necessary trial days, and the defense requested continuance of the July 2020 trial. Without the unnecessary delay, Mr. Valdez would have prevailed at trial years ago. His damages would have been calculated and paid years ago and he would have had the use of the money. Instead, the Defendants, unfairly and unjustly, maintained the use and benefit of the money to Mr. Valdez's detriment. All prejudgment interest should be awarded against both Defendants jointly and severally.

**I. An Award of Prejudgment Interest Serves a Compensatory Function in this Case**

When it enacted 42 U.S.C. § 1983 Congress created "a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305–06,

(1986) (internal quotation marks omitted). “Accordingly, when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.” *Id.* at 306.

Colorado has recognized payment of interest as damages “for well over one hundred years.” *Allstate Ins. Co. v. Starke*, 797 P.2d 14, 18 (Colo. 1990). Prejudgment interest in tort actions for personal injuries is specifically provided for by Colorado statute, Colo. Rev. Stat. § 13-21-101 (2018). As numerous Colorado courts have correctly recognized, such prejudgment interest is an element of compensatory damages in actions for personal injuries, awarded to compensate the plaintiff for the time value of the award eventually obtained against the tortfeasor. *Allstate Ins. Co. v. Starke*, at 19; *Mladjan v. Public Serv. Co.*, 797 P.2d 1299 (Colo. App. 1990); *Heid v. Destefano*, 586 P.2d 246, 247 (Colo. App. 1978); *Houser v. Eckhardt*, 532 P.2d 54, 57 (Colo. App. 1974), *aff’d on other grounds sub nom. Security Ins. Co. v. Houser*, 552 P.2d 308 (1976).

Federal law similarly acknowledges the legitimacy of a plaintiff’s claim for interest. See *City of Milwaukee v. Cement Division, National Gypsum, Co.*, 515 U.S. 189, 197 (1995) (“Prejudgment interest is not awarded as a penalty; it is merely an element of just compensation.”). Importantly, it is intended to compensate a plaintiff for the time value of money. See *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331 (7th Cir. 1992) (“Money today is not a full substitute for the same sum that should have been paid years ago.”).

In the 10<sup>th</sup> Circuit, “prejudgment interest traditionally has been considered part of the compensation due plaintiff.” *F.D.I.C. v. UMIC, Inc.*, 136 F.3d 1375, 1387 (10<sup>th</sup> Cir.

1998) (quoting *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989)). And, although prejudgment interest is ordinarily awarded in a federal case, it is not recoverable as a matter of right. Rather, such an award is governed by a two-step analysis. First, the trial court must determine whether an award of prejudgment interest would serve to compensate the injured party. Second, when an award would serve a compensatory function, the court must still determine whether the equities would preclude the award of prejudgment interest. *Zuchel v. City & Cty. of Denver, Colo.*, 997 F.2d 730, 746 (10th Cir. 1993).

An award of prejudgment interest serves an important role in compensating a plaintiff for delays inherent in the judicial process that would otherwise wrongfully inure to the benefit of the rights-violating defendant. See *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1078 (10th Cir. 2002); see also *Carr v. Fort Morgan Sch. Dist.*, 4 F. Supp. 2d 989, 997 (D. Colo. 1998) (“[C]ourts, with very few exceptions, recognize that prejudgment interest helps make victims... whole and compensates them for the true cost of money damages incurred.”).

Prejudgment interest serves a second purpose: deterrence, providing an incentive against a defendant dragging out litigation for the purpose of delaying payment. *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 922 (9th Cir. 1995) (citations and quotations omitted), *cert. denied*, 116 S. Ct. 337 (1995) (“Prejudgment interest has become a familiar remedy widely recognized by federal courts as a means to make a plaintiff whole against a dilatory defendant... Money has a time value, and prejudgment interest is therefore necessary in the ordinary case to compensate a plaintiff fully for a loss suffered at time  $t$  and not compensated until  $t + 1$ .”).

## **II. The Role of Prejudgment Interest in Section 1983 Cases is to Compensate for Injuries and Also to Deter the Deprivation of Rights**

Ultimately, the purpose of awarding prejudgment interest is to compensate a plaintiff for being deprived of the monetary value of her or his loss from the time of the loss to the payment of judgment and to deter further dilatory payment.

The policies underlying Section 1983 mirror those of the interest generally and, particularly, an award of prejudgment interest. Section 1983 was enacted with two purposes: (1) compensation of persons for injuries caused by deprivations of their federal rights, and (2) deterrence of deprivation of rights. See *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978); *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978).

Moreover, in step with the second purpose of Section 1983, the imposition of interest, and particularly prejudgment interest, serves a deterrent effect. Certainly, the inclusion of prejudgment interest as part of an award of damages in a Section 1983 case would disincentivize civil rights violations. But also, uniformly awarding prejudgment interest in Section 1983 cases serves an interest in deterrence in a separate way: it incentivizes the avoidance of delay by defendants in Section 1983 litigation. Disincentivizing delay serves to decrease the time between the civil rights violation and compensation for that violation, which is itself an important aim of Section 1983.

Finally, 42 U.S.C. § 1988 (“Section 1988”), the companion statute to Section 1983 that provides reasonable attorneys’ fees to prevailing parties in civil rights cases, recognizes the necessity of compensation for delay. The Supreme Court has acknowledged that compensation for delay “whether by the application of current rather than historic hourly rates or otherwise - is within the contemplation of § 1988.” *Missouri*

*v. Jenkins*, 491 U.S. 274, 283-84 (1989). In approving compensation for delay, the Court held that “compensation received several years after the services were rendered - as it frequently is in complex civil rights litigation - is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings.” *Id.* at 283.

Awarding prejudgment interest, post-verdict, in Section 1983 cases fulfills the compensatory and deterrent purpose of Section 1983 (and Section 1988) and complies with the legislative intent behind its enactment

Non-economic damages, particularly those awarded in a Section 1983 case, are just as much an injury and loss to the plaintiff as economic damages. Importantly, as happened in this case, the violation of constitutional rights is often accompanied by a physical, emotional, or psychological injury, or some combination of those. If that injury had been incurred at the hands of a citizen, rather than at the hands of a state actor, an award of prejudgment interest for that injury would be awarded in accordance with state law tort principles. See Colo. Rev. Stat. § 13-21-101; Kan. Stat. Ann. § 16-201; N.M. Stat. Ann. § 56-8-4; Okla. Stat. tit. 12, § 727; Utah Code. Ann. § 15-1-1; Wyo. Stat. Ann. § 40-14-106. Every state in this Circuit has recognized that personal injuries, including the accompanying pain and suffering, are compensable and that an integral part of compensation is an award of prejudgment interest.

Colorado, the state where Mr. Valdez was shot in the back, requires courts to award prejudgment interest. *Todd v. Bear Valley Vill. Apartments*, 980 P.2d 973, 980 (Colo. 1999) (“[W]hen a plaintiff prevails on a personal injury. successful personal injury plaintiffs in Colorado are entitled to receive prejudgment interest on their damage

awards, calculated from the date of the injury."); *David v. Sirius Computer Sols., Inc.*, 779 F.3d 1209, 1211 (10th Cir. 2015) ("Compensatory damages, whether of the economic or noneconomic stripe, are designed to make the injured party whole. Prejudgment interest shares this same function, seeking to ensure tort victims are compensated for the loss associated with the delay in receiving payment occasioned by court proceedings.").

In addition, prejudgment interest is a form of restitution. See Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1794 (1992). Prejudgment interest is not awarded to compensate merely for lost investment opportunities. Rather, prejudgment interest reflects the defendant's use of the money - money that the defendant owes to the plaintiff due to the injury inflicted on the plaintiff some time ago. For this purpose, pecuniary damages (in the form of actual economic losses) cannot be distinguished from damages for pain and suffering, which the Defendants now owe to Plaintiff.

Any distinction between economic and non-economic damages applied in Section 1983 cases for purposes of awarding prejudgment interest is both artificial and would lead to an unjust result. The theory that injuries for civil rights violations, because they often involve jury awards of damages that are classified by some courts as "non-economic," should be compensated to a less extent than lost wages (or infringement on a trademark or violation of admiralty law), because these damages have been classified as "economic" damages, is offensive to our Constitution because it makes injuries stemming from civil rights violations less compensable than injuries stemming from other violations of the law. See U.S. Const. art. VI, cl. 2.

### III. Defendants Caused Substantial Delays in this Case

Mr. Valdez was shot on January 16, 2013. He remained in the hospital for approximately three weeks and was then transferred, in his paralyzed condition, to the Denver County Jail where he remained incarcerated until it became apparent that Mr. Valdez was the *victim* of a kidnapping perpetrated by the Montoya family and an attempted murder by the Defendants. Unceremoniously, Mr. Valdez was dumped out of jail, without a wheelchair, and without a place to live.

Mr. Valdez filed his lawsuit against the Defendants on January 15, 2015. It was patently obvious from the investigation by the Defendants surrounding the Montoyas' conduct that Michael Valdez did not shoot at any police officer nor did he attempt to possess or fire a gun. In his initial interview, Sgt. Motyka admitted that he never saw a gun prior to shooting 12 rounds at Michael Valdez who was on the ground. Instead of admitting liability, the Defendants engaged in scorched earth litigation tactics that unnecessarily prolonged the litigation.

Defendants filed their 12(b) Motion to Dismiss on June 24, 2015. (Dkt. 008) This filing resulted in an amended complaint, filed on July 20, 2015. (Dkt. 011) A second 12(b) motion was filed on August 3, 2015. (Dkt. 015) This motion was denied on February 10, 2016. (Dkt. 026) Defendants appealed the denial of the 12(b) motion on February 12, 2016. (Dkt. 027) The appeal lasted for 13 months, and the case ultimately was remanded to the trial court on March 13, 2017. The delay attributable to this appeal was approximately 13 months.

Conducting discovery was time consuming and difficult. Defense counsel directed the individual defendants to not answer questions at their depositions concerning the collusive meetings they all had with the defense experts, necessitating a



Motion to Compel (Dkt. 63), an in-person hearing (Dkt. 74 & 79), and then four re-opened depositions to answer those question. And, although Defendants knew that both Chuck and Jude Montoya would assert their 5<sup>th</sup> Amendment privilege against self-incrimination, they insisted on taking the depositions in two Colorado Correctional Facilities, one of which plaintiff's counsel attended.

Defendants filed their first Motion for Partial judgment on May 31, 2018 (Dkt. 82) and their second Motion for Partial Summary judgment on May 31, 2018 (Dkt. 83).<sup>1</sup> The first Motion for Partial Summary Judgment was denied on April 17, 2019 (Dkt. 124). The Defendants appealed this denial on May 14, 2019 (Dkt. 125). On September 26, 2019, this Court determined that the appeal was frivolous (Dkt. 147) and lifted the stay; the appeal was ultimately dismissed by the 10<sup>th</sup> Circuit (Dkt. 162). The delay attributable to the frivolous appeal was approximately five months.

Defendants filed their third motion for summary judgment on May 15, 2020. (Dkt. 181) This, too, was denied in the trial court.

Another cause for the delay in this case was Defendants' insistence that the trial would last for 10-14 days. Longer trial settings are more difficult for a court to accommodate and, consequently, must be scheduled later than shorter trials.

The Defendants endorsed multiple *faux* experts, Downs, Martin and McCarthy. One of the experts was withdrawn. Another was stricken under F.R.E. 702. The third,

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<sup>1</sup> Plaintiff, after conclusion of discovery, ultimately moved to dismiss all claims related to Defendants Motz, Roller and Derrick based on the lack of evidence that tied any of their bullets to Mr. Valdez's finger injury, the lack of supervisory role over Motyka, and the fact that their stated arrival on scene would seemed to have precluded their ability to intervene in Motyka's shooting. See Docs. 90 at 4, 93, 94 and 100. Judge Matsch granted the motion to dismiss and specifically refused to award any fees or costs to these defendants, finding that "counsel for the plaintiff could not have access to all of the information necessary to an understanding of the conduct of each of the defendants until discovery." See Dkt. 100 at 2.

Dr. Downs, had his testimony significantly restricted. All the litigation around the Defense experts was unnecessary, time consuming, and caused delay.

After the case looked like it was going to trial, Defendants filed their motion to continue which was granted, causing an additional delay of (9 months).

Shortly before the final trial setting, Defendants filed a motion to add four witnesses to the Final Pretrial Order (Dkt. 235), causing a flurry of last-minute litigation (Dkt. 244, 245, 247, 256, 278, 279, 285) including permission from this Court to add the four witnesses, only to drop three of the four witnesses prior to their final witness list (Dkt. 271, 279 at 6).

Mr. Valdez did not file any motions for summary judgment, did not file any frivolous appeals, and did not request any continuances of any trial date. Mr. Valdez has painfully and patiently worked to bring this case to a conclusion, all the while, impeded by his ongoing pain, disfigurement, and disabilities.

The recommended time for a case to be scheduled for trial after the filing of a complaint is 18 months. See [FAQs: Filing a Case | United States Courts \(uscourts.gov\)](https://www.uscourts.gov/faq-filing-a-case), last accessed October 4, 2021. As a result of the multiple appeals, motions, and other delays caused by the Defendants Mr. Valdez was unable to have a jury determine his claims for more than 81 months after the filing of the complaint, 4.5 times the suggested maximum period for U.S. District Court civil cases.

#### **IV. Equity Favors an Award of Prejudgment Interest as to the Entire Amount of the Damages Award**

“Equity” concerns the fair and just treatment of people. A review of the facts here leads to one conclusion: Michael Valdez was not treated fairly or justly by either of the Defendants. He was shot, jailed, and mistreated. Both Defendants, through counsel,

continued their mistreatment of Mr. Valdez throughout the trial, attempting to suggest that Mr. Valdez either had a gun, was attempting to get a gun, or shot at Defendant Motyka. The Defendants paid \$30,000 to a forensic pathologist from Georgia to improperly opine that Mr. Valdez was lying about how he was shot in the back by Defendant Motyka.

For the last eight years, and for the rest of his life, Mr. Valdez will live with the consequences of the Defendants' actions and inaction. Mr. Valdez carries the bullet fragments, physical, and emotional scars from the events of January 16, 2013.

For the Defendants, nothing has changed. Sgt. Motyka was given an award for shooting Mr. Valdez. Lt. MacDonald has retired from the Denver Police department and is now getting a second paycheck from the City of Sheridan. The City continues as usual, denying and obfuscating the bad conduct of its employees.

As it relates to prejudgment interest, the Defendants have had the use and benefit of their paychecks, tax revenue, and resources. Equity favors adding interest on the entire jury verdict in this case. The Court has the discretion to award prejudgment interest beginning on January 16, 2013. Mr. Valdez suggests that equity favors an award of prejudgment interest (a) beginning on January 16, 2013 as to the amount of \$130,831 and (b) beginning August 1, 2016, approximately 18 months after the filing of the complaint in this case, as to the balance of the award.

**V. The Defendants are Jointly and Severally Liable and Any Award of Prejudgment Interest Applies to Both**

Federal common law principles of tort and damages govern recovery under Section 1983. *Carey v. Piphus*, 435 U.S. 247 (1978). Where several independent actors concurrently or consecutively produce a single, indivisible injury, each actor will

be held jointly and severally liable for the entire injury. RESTATEMENT (SECOND) OF TORTS, §§ 875, 879; *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n. 8 (1979). Persons who concurrently violate others' civil rights are jointly and severally liable for injuries that cannot be apportioned. *Northington v. Marin*, 102 F.3d 1564, 1569 (10th Cir. 1996). Here, Mr. Valdez has a single injury caused by these two Defendants. Prejudgment interest is compensation for that injury and cannot be apportioned between these defendants. Accordingly, both are responsible.

### **CONCLUSION**

WHEREFORE, Plaintiff respectfully requests that this Court grant this Motion and award prejudgment interest on \$130,844 from January 16, 2013, to September 23, 2021 and on \$2,400,156 from August 1, 2016 to September 23, 2021. He likewise requests that the prejudgment interest award be made jointly and severally liable as between the two defendants.

Dated: October 5, 2021

Respectfully submitted,

*s/ Jeffrey S. Pagliuca*

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**Certificate of Service**

I hereby certify that on October 5, 2021, I electronically filed the foregoing *Plaintiff's Motion for Prejudgment Interest* with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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s/ Nicole Simmons

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