The Honorable Karen Donohue
July 20, 2018, 11:00 a.m.
Department 22

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SARA L. LACY in her Personal Capacity and as Personal Representative of the Estate of CECIL D. LACY, JR., deceased, Plaintiff, v. SNOHOMISH COUNTY, Defendant.	NO. 16-2-21526-2 **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Defendant's Motion for Summary Judgment has no basis in fact or law. Because numerous issues of material fact exist to preclude summary judgment, and because Defendant's legal arguments are at best erroneous, Defendant's motion must be denied.

II. FACTS

A. THE INCIDENT THAT RESULTED IN MR. LACY'S DEATH

On September 18, 2015, Cecil D. Lacy, Jr., a relatively healthy 46 year-old Native American man, left his residence for his nightly exercise.[1] Approximately twenty minutes into his walk, a Snohomish County dispatch operator advised officers of "a traffic hazard," describing

[1] Declaration of Ryan D. Dreveskracht in Support of Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment ("Dreveskracht Decl."), Ex. A at 1; *id.*, Ex. D at 11.
[2] *Id.*, Ex. A at 1.
[3] *Id.*, Ex. B at 28.
[4] *Id.* at 30.
[5] *Id.*, Ex. C.
[6] *Id.*, Ex. B at 32-33.
[7] *Id.*, Ex. D at 7.
[8] *Id.*, Ex. B at 31-33.
[9] *Id.* at 33.
[10]

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

as a man "walking in the roadway waiving his arms and hands in the air."[2] Snohomish County Sheriff's Deputy Charles Tyler Pendergrass responded to the call.[3] While en route, Pendergrass did not attempt to gather any additional information known by dispatch or make any effort to formulate a tactical plan with the Tulalip Tribes Police ("Tribal Police"),[4] who Pendergrass knew were also en route.[5]

When Pendergrass arrived on scene he immediately noticed that Mr. Lacy's body was tense; he was "super sweaty," was swinging his arms wildly, and was "talking at a very high rate,"[6] and "couldn't stand still."[7] Pendergrass commanded Mr. Lacy to stop walking, detained him on the side of the roadway near his patrol vehicle, had dispatch run a records management system check, and asked him for his address and reason for walking about at night.[8] Though "still talking at a very high rate," Mr. Lacy was able to communicate the information requested.[9] Critically, he also informed Pendergrass that "he had two mental health issues"—information that Pendergrass ignored because he thought that the symptoms Mr. Lacy was exhibiting were "more of a substance issue to where he was maybe on meth."[10] Thus, Pendergrass chose not to procure medical aid.[11] Throughout the interaction Mr. Lacy repeatedly expressed to Pendergrass that he

---

[2] *Id.*, Ex. A at 1.
[3] *Id.*, Ex. B at 28.
[4] *Id.* at 30.
[5] *Id.*, Ex. C.
[6] *Id.*, Ex. B at 32-33.
[7] *Id.*, Ex. D at 7.
[8] *Id.*, Ex. B at 31-33.
[9] *Id.* at 33.
[10] *Id.*, Ex. B at 33, 37-38, 86; *but see id.*, Ex. R at 21 ("[M]y belief that he was possibly under the influence of Meth, however his body type didn't coincide with that."). Other that what he received at the Police Academy in 2010, Pendergrass had no training on how to distinguish the effects of drug use from symptoms of mental illness or excited delirium. *Id.*, Ex. B at 12, 18, 34, 90, 102, 114, 116; *id.*, Ex. R at 23. Indeed, the County did not even have an excited delirium policy or, for that matter, train on the policies that it did have. *Id.*, Ex. B at 21-22; *id.*, Ex. H at 24-25. For example, although the County does have a policy directing deputies to "request on-site mental health evaluations of mentally ill persons," Pendergrass was not aware of "what would dictate whether a deputy makes an on-site mental health evaluation." *Id.*, Ex. B at 87. Instead, the County's policies instruct officers to treat mental health crises and medical conditions as one and the same. *Id.*, Ex. H at 31-32; *see also id.*, at 65-66 (Defendant admitting that at the time of the incident it had no policy on how to assess a mentally ill individual or determine when to call medical aid); *id.*, at 180 (same).
[11] *Id.*, Ex. B at 39.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

just "wanted to walk home," but Pendergrass nonetheless continued to detain him.[12]

Tribal Police arrived shortly after this interaction.[13] Mr. Lacy remained "animated . . . just almost like dancing," sweating profusely,[14] "talking fast," "pacing around," unable to hold still, and "agitated."[15] Pivotally, there were no discussions between Pendergrass and Tribal Police about who was going to take the lead at this point[16]—the roles of the officers remained "dynamic."[17] There also was no discussion between the officers about the odd symptoms that Pendergrass had observed during his interactions with Mr. Lacy, his mental illnesses, or the fact that Mr. Lacy had expressed to the officers that he "just got out of . . . a mental health facility"; nor was there any effort to devise a tactical plan.[18]

Tribal Police conducted a "pat down" and attempted to put Mr. Lacy in handcuffs, but he "pulled away, ripped his arms out, and kind of freaked out [and] got aggressive," exclaiming that "he just wanted to go home, just wanted his wife to give him a ride."[19] In response, Pendergrass "drew [his] taser and advised [Mr. Lacy] that if he can't calm down, that he's going to get tased."[20] Pendergrass also expressed to Mr. Lacy that "[e]ither way you're going to go" in a police vehicle.[21]

This had the desired effect. Mr. Lacy was cuffed "in the front" and the three officers escorted Mr. Lacy to a Tribal Police vehicle.[22] Mr. Lacy began to get into the vehicle, but then changed his mind, "stood up, said he didn't feel comfortable; he just wanted to get home, wanted

---

[12] *Id.*, Ex. D at 7; *see also* Ex. R at 6 ("[H]e wanted to walk home, but we . . . weren't going to let him . . . .").
[13] *Id.*, Ex. B at 35.
[14] *Id.*, Ex. E at 20.
[15] *Id.*, Ex. F at 8; *see also id.*, Ex. M at 6, 8.
[16] *Id.*, Ex. B at 35.
[17] *Id.* at 53; *id.*, Ex. M at 8.
[18] *Id.*, Ex. B at 36; *id.*, Ex. M at 8.
[19] *Id.*, Ex. B at 42-43.
[20] *Id.* at 43; *see also id.*, Ex. R at 10.
[21] *Id.*, Ex. G at 84; *see also id.* at 89-90 ("A. . . . [H]e was given two options, and either way he was going to get transported by law enforcement . . . . Q. So the transport was not voluntary? A. No. . . . I don't think that was a voluntary option.").
[22] *Id.*, Ex. B at 43-44.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

to call his wife."[23] Pendergrass and the Tribal Officers commanded Mr. Lacy to get back into the car, and he initially complied.[24] The officers were "just about to shut the door again and [Mr. Lacy] pushed the door open and came out swinging" his handcuffed arms.[25] Pendergrass then tased Mr. Lacy in the right shoulder and again in the abdomen[26] and "went hands on with him again"[27] by using control holds "to prevent him from getting away."[28] One of the Tulalip Officers then "did a leg sweep to get him onto the ground."[29]

Once on the ground, one of the Tribal Officers secured Mr. Lacy's arms—which "were outstretched in front of him as he was on his stomach"[30]—while the other Tribal Officer crossed Mr. Lacy's legs and pressed them towards his buttocks.[31] Meanwhile, Pendergrass was controlling Mr. Lacy's torso and head, "using his body weight on [Mr.Lacy's] back" and "us[ing] his arm on the back of [Mr. Lacy's] head to maintain control."[32] The entire time that Mr. Lacy was pinned in this control hold by Pendergrass—"[a]bout a minute, maybe a little bit longer"[33]—Mr. Lacy "was face down" "in a fairly straight line"[34] in a "prone" position.[35] After some time in this control hold, Mr. Lacy "stated that he couldn't breathe,"[36] which Pendergrass heard but chose to ignore.[37] Pendergrass had not been trained on the risks associated with prone positioning since

---

[23] *Id.* at 44; *id.*, Ex. R at 7.
[24] *Id.*, Ex. B at 45.
[25] *Id.*; *see also id.*, Ex. R at 7 ("[H]e freaked out. Swinging his arms, . . . he didn't hit me with em.").
[26] *Id.*, Ex. D at 8.
[27] *Id.*, Ex. R at 8.
[28] *Id.*, Ex. B at 55-56.
[29] *Id.*, Ex. E at 14.
[30] *Id.*, Ex. E at 15-16.
[31] *Id.*, Ex. F at 13; *see also id.* Ex. M at 7 (Tribal Officer recalling, "I crossed his legs and pushed his feet, um, to his hind end and sat on his feet").
[32] *Id.*, Ex. D at 9; *id.*, Ex. R at 8.
[33] *Id.*, Ex. B at 67.
[34] *Id.*, Ex. E at 16, 25; *see also id.*, Ex. D at 14 (eyewitness recollecting that "Cecil was flat on his stomach").
[35] *Id.*, Ex. F at 13; *see also id.*, Ex. I at 8 ("Lacy was proned out on the ground and had his hands stretched out above his head.").
[36] *Id.*, Ex. E at 16.
[37] *Id.,* Ex. B at 112. In initial interviews with investigating officers Pendergrass lied about hearing this. *See* Ex. R at 21 ("Q . . . At any point did he say that he was distressed . . . ? A. No. Q. You never heard him say he couldn't breathe? A. No.").

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

attending the Police Academy in 2010.[38] At no time during this interaction did it appear that Mr. Lacy was trying to harm the officers.[39]

Once Pendergrass realized that Mr. Lacy was not breathing, he rolled Mr. Lacy from "a face down position to a face up position."[40] Instead of rendering lifesaving aid, Pendergrass rubbed Mr. Lacy's sternum for five to ten seconds, then directed one of the Tribal Police to look for a pulse while he "went back to [his] patrol car to look for a CPR mask and some medical gloves."[41] According to one eyewitness, the officers "got up and slowly waked around, not attending to the lifeless male."[42] Not surprisingly—since it is common knowledge that "every moment of delay in chest compressions has considerable impact on the chance of survival"[43]—Pendergrass' CPR certification was long expired at the time.[44]

B. EXPERT EVIDENCE

Plaintiff's police practices expert, Susan M. Peters—a 29-year law enforcement veteran—has offered expert testimony concluding that Defendant fell below the applicable standard of care by: (1) failing to call for emergency medical services when it became clear that Mr. Lacy was exhibiting signs and symptoms of being in crisis; (2) failing to train and provide contemporaneous policies to Pendergrass in the foreseeable law enforcement tasks of handling of mentally disturbed persons; (3) failing to recognize that Mr. Lacy was suffering from a medical and mental health

---

[38] *Id.*, Ex. B at 100; *see also id.*, Ex. G at 137-39 ("Q. [W]hen would it be okay to use a face down or hogtie type of restraint? A. It wouldn't. . . . Q. Okay. So just generally, prior to September 18th of 2015 officers were trained not to use that type of restraint? A. Yeah. . . . Q. Okay. And I assume that since it shouldn't be used at all, it shouldn't be used particularly with folks suffering from mental health crisises; is that right? A. On any person. Q. On any person. Okay. Across the board? A. Yes."); *cf. id.*, Ex. B at 106 (Pendergrass testifying that it would "be okay to use a face down restraint on an individual who is agitated and hyper-fearful").

[39] *See id.*, Ex. M at 13 ("I don't believe he was trying to harm us at all. . . . He was trying to push himself up back to his feet. . . . [B]ut it didn't seem that he was trying to harm us at all . . . ."); *see also id.*, Ex. F at 12; Ex. G at 171-72.

[40] *Id.*, Ex. E at 17; *see also id.*, Ex. F at 14 ("Q. So after he became unresponsive, you rolled him from his stomach . . . ? A. Correct.").

[41] *Id.*, Ex. B at 65, 68-69.

[42] *Id.*, Ex. D at 13.

[43] *Id.*, Ex. N at 6.

[44] *Id.*, Ex. B at 81; *id.*, Ex. G at 75.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

emergency and to facilitate medical care;[45] (4) physically restraining Mr. Lacy in a prone position; and (5) failing to ensure that Pendergrass was current on his CPR certification.[46]

Plaintiff's emergency medicine expert, Dr. Jared Strote—a practicing emergency physician and professor at the University of Washington with a research focus on police use of force, in custody deaths, and excited delirium—has offered expert testimony concluding that: (1) a notably high number of features of excited delirium were present in Mr. Lacy's presentation, including his early encounter with Pendergrass; (2) the concentration of methamphetamine in Mr. Lacy's blood was much lower than fatal; (3) the physiologic and psychiatric abnormality present in Mr. Lacy during the encounter decompensated into a medical emergency due to the acts and omissions of Pendergrass; (5) Pendergrass' failure to call for EMS assistance soon after encountering Mr. Lacy significantly contributed to his death; (6) Pendergrass' use of a prone position restraint decreased Mr. Lacy's ability to ventilate and compensate for increased acidosis from the struggle;[47] and (7) delays and pauses in CPR further decreased Mr. Lacy's chance of survival once he went into cardiac arrest.[48]

Plaintiff's forensic pathology expert, Dr. Bennett Omalu—the Chief Medical Examiner of San Joaquin County and a practicing forensic pathologist and neuropathologist—has offered expert testimony concluding that Mr. Lacy died as a result of mechanical positional asphyxiation,

---

[45] Pendergrass has admitted that "excited delirium is an emergency medical situation" and that when law enforcement encounters a person exhibiting the symptoms of excited delirium the standard of care requires them to "[h]ave EMT staged and ready to move in as soon as an individual is restrained." *See id.*, Ex. B at 117, 124-25.

[46] *Id.*, O at 8-22. The County has admitted that Pendergrass' failure to keep up to date with his CPR certification fell below the applicable standard of care. *Id.*, Ex. G at 76.

[47] While Defendant has offered expert testimony that positional asphyxia does not pose an increased risk of death, other experts disagree with this position when the symptoms of excited delirium are present. *Cf.* Declaration of Theodore Chan in Support of Defendant's Motion for Summary Judgment; *with* Dreveskracht Decl., Ex. Q (peer reviewed article concluding that "law enforcement authorities and others should bear in mind the potential for the unexpected death of people in states of excited delirium who are restrained in the prone position or with a neck hold").

[48] *Id.*, Ex. N at 4-7.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

and that acute amphetamine toxicity, hypertensive cardiovascular disease, and obesity were contributory factors to his death.[49]

II. LAW AND ARGUMENT

A. APPLICABLE STANDARD

Summary judgment can be granted only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Malnar v. Carlson*, 128 Wn.2d 521, 534-35, 910 P.2d 455 (1996). "The court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Marincovich v. Tarabochia,* 114 Wn.2d 271, 274, 787 P.2d 562 (1990); CR 56. The burden of showing there is no issue of material fact falls upon the party moving for summary judgment. *Hash v. Children's Orthopedic Hosp.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

Here, Defendant cannot meet its burden. Numerous genuine issues of material facts exist. Defendant is not entitled to summary judgment.

B. DEFENDANT IS LIABLE FOR ITS OWN NEGLIGENT CONDUCT.

Relying wholly on *Sheimo v. Bengston*, 64 Wn. App. 545, 825 P.2d 343 (1992), Defendant argues that any negligence that occurred after the Tulalip Police arrived on the scene "would fall on" the Tulalip Tribes.[50] Defendant is mistaken.

Sheimo does not stand for the proposition that the acts of a municipality can be attributed to another jurisdiction when that jurisdiction's employee allegedly "takes charge" of an incident.[51] In *Sheimo*, an estate brought an action the City of Colville, alleging that City was negligent in

[49] *Id.*, Ex. P.
[50] Def. Mot. Sum. J., at 18.
[51] *Id.*

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

failing to warn and divert passing motorists, and that this resulted in the shooting death of the decedent, an incident bystander. 64 Wn. App. at 547. The City moved for summary judgment, asserting the public duty doctrine as a defense, and the trial court denied the motion. *Id.* Thereafter, the City and the estate settled. *Id.* The City then filed a third party complaint against Stevens County, claiming a right to contribution. *Id.* The County moved for summary judgment, arguing County officers assisting in the operation were under the direction and control of the City and therefore not liable pursuant to RCW 10.93. *Id.* The court granted the County's motion for summary judgment and dismissed the third party complaint. *Id.*

Here, RCW 10.93 does not apply—the statute explicitly applies only to "local, state, and federal agencies," not tribal agencies. RCW 10.93.001. But even were the statute to apply, Defendant cannot seriously argue that Pendergrass was "under the direction and control" of the Tulalip Tribes when he (1) failed to recognize symptoms of excited delirium and de-escalate, and (2) failed to call emergency medical services. RCW 10.93.040. Each of these events unquestionably took place prior to the Tulalip Tribes' arrival on the scene. Nor can Defendant maintain that Pendergrass was "under the direction and control" of the Tulalip Tribes when he (3) used a prone position control hold on Mr. Lacy, and (4) failed to promptly initiate CPR.[52] *Id*.

At any rate, the "direction and control" question is somewhat academic since, most importantly, "**there is a written agreement between the two agencies which allocates liability**." *Sheimo*, 64 Wn. App. at 550 (emphasis added). In what can only be described as an effort to mislead the Court, glaringly absent from Defendant's motion is any mention of the Cooperative Law Enforcement Agreement between Snohomish County and the Tulalip Tribes, which explicitly states: "**The County shall be responsible for all civil liability of whatever**

[52] At a minimum, whether Pendergrass was "under the direction and control" of the Tulalip Tribes would present a question of fact to be determined by the jury. *See* 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 4:4 (4th ed. 2017) ("The question of whether an employee has become a 'borrowed' or 'loaned' servant is ordinarily a question of fact.") (citing RCW 10.93.040).

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

nature arising from the acts of its own law enforcement officers and employees regardless of whether they were acting pursuant to a Tribal commission to the extent provided by law."[53] This clause of the agreement controls the inquiry. *See, e.g., Thomas v. Cannon*, No. 15-5346, 2017 WL 2402791, Slip op. at 5 (W.D. Wash. June 1, 2017).

C. NUMEROUS ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT AS TO CAUSATION.

1. Positional Asphyxiation

Defendant represents that "[t]here is **no evidence in the record**" to demonstrate that Pendergrass placed his body weight on Mr. Lacy for **more than thirty seconds**.[54] Defendant again misleads this Court. Each of the involved officers has testified to the contrary. According to Pendergrass, Mr. Lacy was pinned down for "[a]bout a minute, maybe a little bit longer."[55] The Tribal Officers, too, have testified that Mr. Lacy was in a facedown, prone position hold for "between 30 and 60 seconds"[56] and that roughly "30 seconds [passed] between when Lacy said 'I can't breathe' and when he went limp."[57]

Defendant also misrepresents Dr. Omalu's causation testimony. According to Defendant, Dr. Omalu testified that a "time frame of three to five minutes" is required to cause positional asphyxiation.[58] But this is not Dr. Omalu's testimony:

> So for somebody to suffer asphyxia injury, it has to be sustained. They have to hold the person down. Not for 30 seconds. Usually sustained. But remember, there is a variation. **Some people will only need one minute. Like people like Cecil who has other comorbidities, okay?** . . . I said in the practice of medicine you cannot use thresholds because the risk of asphyxia injury is not dependent on the level of oxygen alone. . . . I've answered that the standard we use is three to five minuets. However, it could be shorter; it could be longer. . . . Remember, Cecil was saying, "I can't breathe; I can't breathe." If they had stopped, they had to let go of him at that moment he said, "I can't breathe," let him get back

[53] Dreveskracht Decl., Ex. J at 13-14 (emphasis added).
[54] Def. Mot. Sum. J., at 22 (emphasis in original).
[55] Dreveskracht Decl., Ex. B at 67.
[56] *Id.*, Ex. E at 27.
[57] *Id.*, Ex. I at 9.
[58] Def. Mot. Sum. J., at 22.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

> himself, put him up, sit him up, lie him just flat, take off all the pressure, do not agitate him, there's a good likelihood that he would have survived.[59]

Assuming, as this Court must at this juncture, that Mr. Lacy was pinned down for "[a]bout a minute, maybe a little bit longer,"[60] and that "people like [Mr. Lacy] who has other comorbidities" can succumb to asphyxiation in "one minute,"[61] issues of material fact preclude summary judgment on the causation element of Plaintiff's negligence claim.

2. Other Causation Evidence

Dr. Strote, Plaintiff's emergency medicine expert, has opined as follows, in relevant part:

> 1. Mr. Lacy demonstrated behaviors that clearly put him at high risk of sudden in-custody death. . . .
> 2. The law enforcement team encountering Mr. Lacy should have identified this risk of in-custody death. . . .
> 3. The law enforcement team's choice to restrain Mr. Lacy more likely than not escalated his agitation and led to his death. . . .
> 4. The law enforcement team's choice not to call EMS immediately more likely than not led to Mr. Lacy's death. . . .
> 5. The law enforcement team's decision to continue fighting with Mr. Lacy rather than step back and call for EMS more likely than not led to his death. . . .
> 6. The law enforcement team's decision to restrain Mr. Lacy in a prone position, placing Deputy Pendergrass' body weight on his back likely further increased the chance of death. . . .
> 7. Delays and pauses in CPR further decreased Mr. Lacy's chance of survival once he went into cardiac arrest. . . .
> Based on the above, to a reasonable degree of medical certainty, the multitude of errors in judgment and action made by the officers during this encounter more likely than not led to a medical emergency that ultimately resulted in Mr. Lacy's death.[62]

Dr. Strote's expert report was disclosed to Defendant on December 6, 2017.[63] Yet again, however, Defendant misleads the Court by representing that no causation evidence exists beyond

---

[59] Dreveskracht Decl., Ex. K at 33, 29, 56, 35-36.
[60] *Id.*, Ex. B at 67.
[61] *Id.*, Ex. K at 33.
[62] *Id.*, Ex. N at 4-7. Dr. Omalu also has opined that it was the multitude of errors in judgment and action made by the officers during this encounter more likely than not resulted in Mr. Lacy's death. *See id.*, Ex. K at 43, 102 ("[W]ithout him being compelled to be on the ground that day, more likely than not he wouldn't have died. . . . They swept his feet. He fell. And there was no EMS present [until] after he became unresponsive. They checked; he had no pulse. 9-1-1 was called. It was too late by then.").
[63] *Id.*, Ex. L.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

the opinions of Dr. Omalu.[64] If Dr. Strote's opinion is believed, as it must be at this juncture, additional issues of material fact preclude summary judgment on the causation element of Plaintiff's negligence claim.

D. PLAINTIFF'S NEGLIGENCE CLAIMS ARE NOT BARRED BY THE PUBLIC DUTY DOCTRINE.

Defendant argues that Plaintiff's negligence claims based on a "general duty to act as a reasonable officer fail" under the "public duty doctrine."[65] Defendant misunderstands the public duty doctrine, and Plaintiff's claims.

1. The Public Duty Doctrine Does Not Apply Because Plaintiff Is Not Asserting A Legal Obligation Imposed By Statute, Ordinance, Or Regulation.

Municipal corporations are liable for damages arising out of their tortious conduct, or the tortious conduct of their employees, to the same extent as if they were a private person or corporation. RCW 4.96.010(1); *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012); *Mancini v. City of Tacoma*, 188 Wn. App. 1006 (2015). "The distinction between mandated duties and common law duties is important because duties imposed by common law are owed to all those foreseeably harmed by the breach of the duty." *Munich*, 175 Wn.2d at 891; *Mancini*, 188 Wn. App. 1006, at *8. The only duties the Washington Supreme Court has limited under the public duty doctrine are those "mandated duties" imposed by a statute, ordinance, or regulation:

> Since its inception, the "public duty" analysis has remained largely confined to cases in which the plaintiff claims that a particular statute has created an actionable duty to the "nebulous public." Although we could have been clearer in our analyses, the only governmental duties we have limited by application of the public duty doctrine are duties imposed by a statute, ordinance, or regulation. This court has never held that a government did not have a common law duty solely because of the public duty doctrine. . . . [T]he public duty doctrine is properly applied to duties mandated by statute or ordinance as opposed to common law duties.

[64] *See generally* Def. Mot. Sum. J., at 21-23.
[65] Def. Mot. Sum. J., at 11-15.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Munich, 175 Wn.2d at 886-88; *see also Mancini*, 188 Wn. App. 1006, at *8 ("[T]he public duty doctrine has never been applied by the Supreme Court to bar a claim alleging the breach of a common law duty by a governmental actor."); *Westfarm Assocs. Ltd. P'ship v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669, 685 (4th Cir. 1995) ("[T]he public duty doctrine does not preclude the existence of a common law duty."); *Cox v. Washington*, No. 14-5923, 2015 WL 5825736, at *13 (W.D. Wash. Oct. 6, 2015) (same).[66]

Here, because Plaintiff is asserting a common law duty—the duty to act with reasonable care—the public duty doctrine does not apply.[67]

2. Pendergrass Owed Mr. Lacy A Duty To Act With Reasonable Care.

Without analysis, Defendant asserts that "Plaintiff cannot meet [her] burden . . . to show that a duty was owed individually to the decedent."[68] To the contrary, Plaintiff easily meets her burden.

> Under common law, a defendant owes a plaintiff the duty to exercise reasonable care if (1) the defendant, by act or misfeasance, poses a risk of harm to the plaintiff, as where the defendant actively creates or increases peril and exposes the plaintiff to it; or (2) the defendant, by omission or nonfeasance, fails to prevent harm to the plaintiff despite an obligation to do so, as where the defendant passively tolerates peril after voluntarily assuming responsibility to protect the plaintiff from it.

Mita v. Guardsmark, LLC, 182 Wn. App. 76, 84, 328 P.3d 962 (2014); *see also Robb v. City of Seattle*, 176 Wn.2d 427, 436–37, 295 P.3d 212 (2013); 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 4:4 (4th ed. 2017). Put another way, public officials do not have to act, but when they "do act, they have a duty to act with reasonable care." *Washburn v. City of Federal Way*, 178 Wn.2d 732, 758, 310 P.3d 1275 (2013);

[66] Appendix 1 (unpublished); GR 14.1.

[67] Were there a close call as to the application of the public duty doctrine—there is not—it should be resolved in favor of Plaintiff, given that "the Washington Supreme Court has indicated its disfavor of the public duty doctrine." *Marin v. United States*, 814 F. Supp. 1468, 1487 (E.D. Wash. 1992) (citing *Bailey v. Town of Forks*, 108 Wash.2d 262, 267, 737 P.2d 1257 (1987)).

[68] Def. Mot. Sum. J., at 12.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

see also Coffel v. Clallam Cty., 47 Wn. App. 397, 403-04, 735 P.2d 686 (1987); *Parrilla v. King Cty.*, 138 Wn. App. 427, 157 P.3d 879 (2007).

Here, Pendergrass assumed a duty specific to Mr. Lacy when he approached and detained Mr. Lacy, gave Mr. Lacy instructions, transmitted the interaction between himself and Mr. Lacy to his dispatcher and requested backup and a Records Management System search, assessed and determined that Mr. Lacy was likely under the influence of methamphetamine, was informed that Mr. Lacy was suffering from at least two mental illnesses, assisted taking Mr. Lacy into custody, shot Mr. Lacy with a Taser, held Mr. Lacy facedown in a prone position and with his weight on Mr. Lacy's back until he asphyxiated, and then, once Mr. Lacy was found to be unresponsive, took to the task of rendering inadequate CPR. *See Jenkins v. Spokane Cty.*, No. 10-0228, 2012 WL 13018818, at *4 (E.D. Wash. Mar. 8, 2012)[69] (holding that a deputy "assumed a duty specific to [the plaintiff] when he ran the vehicle's license plate, transmitted the results to his dispatcher, initiated a traffic stop of the vehicle, and began giving [plaintiff] instructions"); *Garnett v. City of Bellevue*, 59 Wn. App. 281, 286-87, 796 P.2d 782 (1990) (officer liable for negligence that was "the result of direct contact with the plaintiff"); *Mitchell v. City of Tukwila*, No. 12-238, 2012 WL 4369187, at *4 (W.D. Wash. Sept. 24, 2012)[70] (holding that the public duty doctrine "does not protect officers being sued for negligence on account of an affirmative act"). During each step when Pendergrass took affirmative actions by instructing, detaining, and then ultimately using force on Mr. Lacy, he owed Mr. Lacy a duty to avoid misfeasance. But he didn't. Instead, Pendergrass approached and detained a mentally disturbed individual with foreknowledge and precipitated/created a situation—via inappropriate tactical conduct and decisions—that put Mr. Lacy's life in jeopardy.[71]

[69] Appendix 2 (unpublished).
[70] Appendix 3 (unpublished).
[71] *See generally* Dreveskracht Decl., Ex. O; *id.*, Ex. N.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Notably, this identical issue was recently adjudicated by King County Superior Court Judge Spector in *Watness v. City of Seattle*, No. 17-2-23731-1 SEA (Wash. Super., King Cty. Feb. 27, 2018).[72] There, the defendant argued that "[t]here is no duty on the part of a police officer" to take reasonable care in their approach and interaction with a mentally ill suspect, prior to killing her. Defendants' Motion to Dismiss Under CR 12(b)(6) at 7, *Watness v. City of Seattle*, No. 17-2-23731-1 SEA (Wash. Super., King Cty. Jan. 26, 2018).[73] The Court disagreed, for the same reasons articulated above, and allowed the plaintiff's pre-shooting negligence claim to proceed to trial. *Watness*, No. 17-2-23731-1 SEA, at 2. Here, similar facts and claims warrant a similar result. The reasonableness of Deputy Pendergrass' pre-intentional conduct is a question properly determined by a jury.

3. Even Were The Public Duty Doctrine Applicable—It Is Not—An Exception Applies.

There are four exceptions to the public duty doctrine: (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship. *Cummins v. Lewis Cty.*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006). If any one of the exceptions applies, the government is held to owe a duty to the plaintiff. *Id.* Here, the legislative intent exception applies.

The Washington legislature intended to protect individuals from use of unnecessary deadly force by peace officers. By statute, the use of deadly force is justifiable when necessarily used by a peace officer to arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony. RCW 9A.16.040(c). The necessity of use of deadly force turns on whether the peace officer has probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others. RCW 9A.16.040(2).

[72] Appendix 4.
[73] Appendix 5.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Under this rubric, the legislature clearly intended individuals to have a cause of action based upon an inappropriate use of deadly force. The public duty doctrine should not be used to defeat the Plaintiff's claim here, where, if the facts are construed in favor of Plaintiff, Pendergrass used inappropriate deadly force.[74]

E. PLAINTIFF'S NEGLIGENT USE OF EXCESSIVE FORCE CLAIM IS PROPER.

1. Negligent Use Of Excessive Force Is Cognizable.

Defendant cites to *Boyles v. City of Kennewick*, 62 Wn. App. 174, 813 P.2d 178 (1991), and *McKinney v. City of Tukwila*, 103 Wn. App. 391, 13 P.3d 631 (2000), to argue that "[a] claim of 'negligent use of excessive force' is not recognized in the State of Washington."[75] Defendant is again mistaken.

Fundamentally, it appears that Defendant misunderstands the claim. Plaintiff's "negligent use of excessive force claim is not a separate claim, but is an issue within the general negligence claim." *Conely v. City of Lakewood*, No. 11-6064, 2012 WL 6148866, at *12 (W.D. Wash. Dec. 11, 2012).[76] Although cases where officers use an inappropriate prone position restraint are often brought as Fourth Amendment excessive force claims, *see, e.g., Drummond*, 343 F.3d at 1061, the same facts of an excessive force claim may also "form the factual basis for [a] negligence claim." *Hamilton v. City of Olympia*, 687 F. Supp. 2d 1231, 1247 (W.D. Wash. 2009); *see also, e.g., Kirby v. City of E. Wenatchee*, No. 12-0190, 2013 WL 1497343, at *14 (E.D. Wash. Apr. 10,

---

[74] Placing body pressure on a prone positioned suspect constitutes the use of deadly force. *Greer v. City of Hayward*, 229 F. Supp. 3d 1091, 1103 (N.D. Cal. 2017) (citing *Drummond v. City of Anaheim*, 343 F.3d 1052, 1056–67 (9th Cir. 2003)); *Tucker v. Las Vegas Metro. Police Dep't*, 470 Fed. Appx. 627, 629 (9th Cir. 2012), Appendix 19 (unpublished); *Garlick v. Cty. of Kern*, 167 F. Supp. 3d 1117, 1155 (E.D. Cal. 2016); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004); *see also* Dreveskracht Decl., Ex. B at 101 ("Q. . . . Would you agree with me that an overweight individual who is in an agitated state, who is under the weight of a restraining officer, that could constitute deadly force? . . . A. Yes."); *cf. id.* at 99 ("Q. . . . [Y]ou would agree with me that deadly force wasn't necessary in this case; is that correct? A. Yes."); *id.*, Ex. G at 108, 110-111 (Defendant admitting that none of the reasons articulated in RCW 9A.16.040 justified the use of deadly force here).

[75] Def. Mot. Sum. J., at 16.

[76] Appendix 6 (unpublished).

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

2013)[77]; *Hardan v. Nye Cty.*, No. 15-0470, 2017 WL 4349228, Slip op. at 12 (D. Nev. Sept. 28, 2017); *Folsom v. Pima Cty.*, No. 08-0524, 2012 WL 12957382, at *5 (D. Ariz. Sept. 13, 2012).[78]

Neither of the cases that Defendant relies upon hold otherwise. In *Boyles*, the plaintiff alleged that a police officer "used excessive force" by "shoving and wrenching plaintiff's arm behind her back, and handcuffing her in spite of complaints that she was in pain and discomfort." 62 Wn. App. at 177. Having missed the two-year statute of limitations for intentional torts, RCW 4.16.100(1), the plaintiff moved to amend the compliant to add a negligence claim. *Id.* The trial court denied the motion, and the Court of Appeals upheld the ruling, reasoning that because there was no non-intentional acts alleged in the original complaint, the new negligence claim would not relate back to the original filing date and amendment would therefore be futile. *Id.* Notably, ***dicta* in *Boyles* counsels in favor of allowing Plaintiff's claim to proceed**: "[T]here are no Washington cases mandating a claim of assault and battery for all injuries inflicted during or after an arrest. While a claim for negligence against a police officer is possible, it is not raised by the factual allegations of the complaint in this case . . . ."[79] *Id.* at 178 (emphasis added).

Defendant fares no better under *McKinney*, a case that dismissed a 42 U.S.C. § 1983 claim and went on to hold that because "the officers' use of force was reasonable, the assault and battery claims against the Respondents fail because the touching was lawful." 103 Wn. App. at 409. Defendant's citation to these cases is baffling, if not, yet again, misleading.

2. Plaintiff's Negligent Use Of Excessive Force Claim Does Not Involve An Intentional Act.

As is quite common generally, Plaintiff has plead alternative theories of intentional and

[77] Appendix 7 (unpublished).
[78] Appendix 8 (unpublished).
[79] The converse, of course, is true here. Plaintiff has clearly stated a claim for negligence for Pendergrass' pre-intentional conduct (*i.e.*, tactical conduct and decisions that fell below the applicable standard of care) and post-intentional conduct (*i.e.*, delays and pauses in rendering lifesaving aid).

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

negligent tort.[80] CR 8(e)(2). Officers in excessive force cases often seek dismissal by arguing that their "behavior was at most 'negligent' and not 'intentional.'" *Medlin v. City of New York*, No. 89-1442, 1990 WL 186232, at *2 (E.D.N.Y. Nov. 20, 1990).[81] Plaintiff's negligent use of excessive force claim guards against such a ploy. Plaintiff agrees that if a jury finds that *the entirety* of Pendergrass' acts related to his use of force were intentional, relief would sound in her intentional tort claims. But if, on the other hand, the jury finds that *the entirety* of Pendergrass' acts were not intentional, Plaintiff's negligence claims will remain viable. *Glowczenski v. Taser Int'l Inc.*, No. 04-4052, 2010 WL 1936200, at *8 (E.D.N.Y. May 13, 2010).[82] And if, as discussed immediately below, a jury finds that some of Pendergrass' conduct related to his use of force was negligent, and some was intentional, Plaintiff is entitled to have a jury determine where the negligent conduct ended and the intentional conduct began.

3. Nothing Prevents A Claim For Negligent Use Of Excessive Force Under A Totality Of The Circumstances Standard.

Again, during each step when Pendergrass took affirmative actions by instructing, detaining, and then ultimately using force on Mr. Lacy, he owed Mr. Lacy a duty to avoid misfeasance. By approaching, directing, and detaining Mr. Lacy with foreknowledge of his agitated mental state and precipitating/creating a situation—via inappropriate tactical conduct and decisions—that put Mr. Lacy's life in jeopardy, Pendergrass fell below the applicable standard of care.[83] This misfeasance set into effect a chain of events that "more likely than not led to a

---

[80] Plaintiff's Second Amended Complaint, at 8-13.
[81] Appendix 9 (unpublished).
[82] Appendix 10 (unpublished).
[83] Dreveskracht Decl., Ex. O. Defendant has essentially admitted that Pendergrass' acts and omissions here fell below the applicable standard of care. *See id.*, Ex. H at 23 ("Q. [Deputies] should follow the County's written policies? A. Correct. Q. And they should follow the County's written standards, if any? A. Correct. Q. And, again, that's what a reasonable and prudent officer would do; is that correct? A. Correct."); *cf. id.* at 152 ("Q. So you have no opinion whether or not Deputy Pendergrass followed County policy and procedures in September of 2015; is that correct? . . . A. Correct."). The Defendant's CR 30(b)(6) designee's failure to have an opinion on this topic is binding, in that it will not be allowed effectively to change its answer by introducing evidence that Pendergrass complied with its policies at trial. *Casper v. Esteb Enter., Inc.*, 119 Wn. App. 759, 768, 82 P.3d 1223, 1228 (2004).

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

medical emergency that ultimately resulted in Mr. Lacy's death."[84]

While, as described above, Pendergrass' negligent conduct can be evaluated as a claim that is separate and distinct from any intentionally tortious conduct, some courts have chosen to evaluate both the negligent and intentional conduct as a single "duty that extends to the totality of circumstances" surrounding an officer's use of force, allowing the jury to determine for itself where the negligent conduct ends and the intentional conduct begins. *Hayes v. Cty. of San Diego*, 57 Cal. 4th 622, 638, 305 P.3d 252 (2013); *see also*, *e.g.*, *Reed v. D.C.*, 474 F. Supp. 2d 163, 173-74 (D.D.C. 2007); *LaBauve v. State*, 618 So.2d 1187, 1190 (La. App. 1993); *Picou v. Rozands*, 343 So. 2d 306, 308 (La. Ct. App. 1977).

Although Washington courts do not appear to have specifically articulated a "totality of the circumstances" approach for intentional and negligent torts that cause the same harm, the California Supreme Court's reasoning in *Grudt v. City of Los Angeles* is persuasive—especially insofar as Defendant invites this Court to look to California common law for guidance.[85] 2 Cal. 3d 575, 468 P.2d 825 (Cal. 1970). The trial court in *Grudt*—a police shooting case—had dismissed the plaintiff's negligence claim as the Defendant urges here, "upon the theory that plaintiff could not go to the jury on both negligence and intentional tort principles," since the officers had admitted that their decision to shoot the decedent was intentional. 468 P.2d at 830. On review, the California Supreme Court found that the "trial court's ruling lack[ed] support in law [and] reason":

> There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence. There exists an inconsistency between a cause of action for willful injuries and a cause of action for injuries arising from negligence. But it is not

[84] Dreveskracht Decl., N at 6.
[85] Def. Mot. Sum. J., at 16 n.3.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

> such an inconsistency as would either have prevented the uniting of the two causes of action in the same complaint originally or the reliance upon both by the plaintiff at the trial. The law is well settled in this state that a plaintiff may plead and proceed to trial upon inconsistent causes of action. Thus, in the case at bar, plaintiff was free to present evidence predicated upon both theories to the jury and she was entitled to instructions on both negligence and intentional tort . . . .

Id. (citation and quotation omitted). In *Hayes,* the California Supreme Court elaborated on this holding by explaining that, even if no intentional tort was committed, a jury could find that the officer's pre-intentional conduct was unreasonable:

> [T]he shooting in *Grudt* appeared justified if examined in isolation, because the driver was accelerating his car toward one of the officers just before the shooting. Nevertheless, we concluded that the totality of the circumstances, including the preshooting conduct of the officers, might persuade a jury to find the shooting negligent. In other words, preshooting circumstances might show that an otherwise reasonable use of deadly force was in fact unreasonable.

Hayes, 305 P.3d at 256.

In Washington State, too, a plaintiff is allowed to plead both negligence and intentional tortious conduct in the same case, and to allege that both negligent and intentional conduct caused the same damage. CR 8(e)(2). For instance, a hospital could be liable under principles of corporate negligence for improper training, while the physician is liable for common law battery. *Pedroza v. Bryant*, 101 Wn.2d 226, 232-33, 677 P.2d 166 (1984); *Bundrick v. Stewart*, 128 Wn. App. 11, 17, 114 P.3d 1204 (2005). The State may also be liable for its negligence in investigating child abuse that resulted in an abuser's intentional harm to child. *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991). *Tegman v. Accident & Medical Inv., Inc.* also is on point. 150 Wn.2d 102, 75 P.3d 497 (2003). There, the Washington State Supreme Court dealt specifically with circumstances where both intentional and negligent conduct caused harm to the plaintiff and held that the fact that some of the harm was caused by intentional conduct did not bar the negligence claim. *Id.*; *see also Rollins v. King Cty. Metro Transit*, 148 Wn. App. 370, 199 P.3d 499, *rev. denied*, 166 Wn.2d 1025 (2009).

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Here, Plaintiff's negligence claim extends to Mr. Lacy's entire encounter with Pendergrass, and is not confined to Pendergrass' ultimate volitional decision to use force. It is entirely consistent with Washington law to submit both negligent and intentional tort claims to the jury under a totality of circumstance theory, allowing the jury to determine for itself where Pendergrass' negligent conduct ended and his intentional conduct began.

Defendant argues that allowing a totality of circumstance theory to proceed here would be inappropriate because the California Supreme Court's opinion in *Hayes* is "plainly inapplicable" since "[n]o such duty-generating statute or case law exists in Washington."[86] This argument is both misleading and inapposite.[87] First, *Hayes* did not involve a "duty-generating statute." The only relevant statute cited in *Hayes* was California's waiver of immunity statute, Cal. Gov't Code § 820, which (1) does not create any duties, and (2) largely mirrors Washington's waiver of immunity statute, RCW 4.96.010. What is more, although Plaintiff admits there are no binding cases that direct this Court to employ a totality of the circumstance theory, there are also no cases prohibiting it. To the contrary, as explained by *Grudt*, *Hayes*, and the numerous state and federal cases applying the totality of the circumstance theory,[88] sound persuasive reasoning—including reasoning expressed in binding Washington precedent, discussed above—counsels for allowing this claim to move forward under a totality of the circumstance theory.[89]

F. PLAINTIFF'S OUTRAGE CLAIM IS PROPER.

Defendant argues that Plaintiff's outrage claim should be dismissed because Ms. Lacy was

---

[86] Def. Mot. Sum. J., at 16 n.3.

[87] As discussed above, under clearly established, binding precedent, Plaintiff is allowed to present her pre-intentional conduct negligence claims to a jury regardless of how the claim is styled. CR 8(e)(2). The only question is whether it will be up to a jury or the Court to determine where Pendergrass' tortious conduct became intentional. With no disrespect to the Court, Plaintiff would prefer that a jury make the call.

[88] *See, e.g., Reed*, 474 F. Supp. 2d at 173-74 (D.D.C. 2007); *LaBauve*, 618 So.2d at 1190; *Picou*, 343 So. 2d at 308; *Young Han v. Cty. of Folsom*, 695 F. Appx. 197, 199 (9th Cir. 2017), Appendix 11 (unpublished); *Howard v. Cty. of Riverside*, No. 12-0700, 2014 WL 12589650, at *7 (C.D. Cal. May 7, 2014), Appendix 12 (unpublished).

[89] Because there is no binding appellate authority in Washington State on this issue, the Washington State Supreme Court recently granted direct review in a case where similar defenses are asserted. Order Granting Review, *Beltran-Serrano v. City of Tacoma*, No. 95062-8 (Wash. Dec. 15, 2017), Appendix 13.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

not "present for the acts alleged to constitute outrage."[90] Defendant is correct that *if it was Ms. Lacy bringing the outrage claim in her personal capacity*, the claim would not survive. But this says nothing about Ms. Lacy's claim on behalf of her late husband's estate. Washington State's survival statute explicitly allows a personal representative to bring claims for "emotional distress . . . suffered by a dece[dent]." RCW 4.20.046.

Defendant also contends "Washington law does not permit a Plaintiff to recover for both outrage and battery when the claims are based in the same facts."[91] But this assumes that Plaintiff will be successful on both her battery and outrage claims. While Plaintiff surely hopes this will be the outcome, juries are finicky; Plaintiff may only recover for outrage. Defendant's argument here too, in other words, has less to do with the impropriety of Plaintiff's claim, and more to do with the hypothetical situation where Plaintiff recovers on multiple claims, including her outrage claim. Were the Defendant's hypothetical to come to fruition, the Court is surely clever enough to apportion damages in accordance with whatever limitations are placed upon it by law. *See, e.g., Kiteley v. Lee*, No. 06-2-34414-6, 2009 WL 10417809 (Wash. Super., King Cty. May 27, 2009).[92] But this is certainly not something that can be determined at the summary judgment stage.

Finally, Defendant contends in a footnote that Plaintiff cannot meet the "extreme and outrageous conduct" element of her outrage claim. Defendant is mistaken. Assuming, as the Court must, that Pendergrass used excessive deadly force against Mr. Lacy—by putting him in a face-down prone position restraint[93] and continuing to apply force even after being told that "he couldn't breathe"[94]—the only question is whether this constitutes "extreme and outrageous

[90] Def. Mot. Sum. J., at 10.
[91] *Id.* at 11.
[92] Appendix 17.
[93] Dreveskracht Decl., Ex. E at 16, 25; Ex. D at 14; Ex. F at 13; Ex. I at 8.
[94] *Id.*, Ex. E at 16.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

conduct"; which is a question fully within the province of a jury. *See Campos v. City of Merced*, 709 F. Supp. 2d 944, 966 (E.D. Cal. 2010) (where there is a plausible case of excessive force being used "a trier of fact needs to determine" whether that force "constituted extreme and outrageous conduct"); *Perez v. Nevada*, No. 15-1572, 2017 WL 4172268, Slip op. at 7 (D. Nev. Sept. 20, 2017) (same); *Kiteley*, 2009 WL 10417809, at *3 (finding that the same facts that make up an assault claim "extreme and outrageous"); *Kirby v. City of Tacoma*, 124 Wash. App. 454, 473, 98 P.3d 827 (2004) ("Whether conduct is sufficiently outrageous is ordinarily a jury question.").

G. QUESTIONS OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT ON PLAINTIFF'S BATTERY AND FALSE IMPRISONMENT CLAIMS.

Defendant makes two frivolous assertions here. First, Defendant contends "Plaintiff has not alleged vicarious liability."[95] This is wrong. In the **first paragraph** of her Second Amended Complaint Plaintiff alleges:

> Snohomish County is, and was at all times mentioned herein, responsible for the actions or inactions . . . of the Snohomish County Sheriffs Office and its employees, including . . . Deputy Charles Pendergrass. At all times material to this lawsuit, . . . Deputy Charles Pendergrass w[as] acting within the course and scope of [his] employment during the incident that gave rise to Plaintiff's complaint.[96]

Defendant also argues that Plaintiff's battery and false imprisonment claims should be dismissed because she identifies only "the non-party individual officers involved in this matter" in this portion of her Second Amended Complaint.[97] Wrong again. Plaintiff clearly alleges in these sections that "Pendergrass intentionally confined Mr. Lacy without lawful justification" and that "Pendergrass intentionally, and without Mr. Lacy's consent, physically seized, grabbed, pushed,

[95] Def. Mot. Sum. J., at 19.
[96] Declaration of Bridget E. Casey in Support of Defendant's Motion for Summary Judgment ("Casey Decl."), Ex. A, ¶ 1.
[97] Def. Mot. Sum. J., at 19.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

tackle[d], and inflicted other acts of physical violence on Mr. Lacy."[98]

Defendant addresses the merits of Plaintiff's battery claim in a footnote, arguing that none of Pendergrass' "minimal uses of force can be deemed unreasonable."[99] Defendant is incorrect. "Washington recognizes the state tort of battery by a law enforcement officer in an excessive force case." *Orn v. City of Tacoma*, No. 13-5974, 2018 WL 1709497, Slip op. at 9 (W.D. Wash. Apr. 9, 2018) (citing *Staats v. Brown*, 139 Wn.2d 757, 991 P.2d 615 (2000)). Here, Plaintiff has adduced evidence that Pendergrass held Mr. Lacy—an overweight man exhibiting signs of excited delirium, with a known mental illness—facedown in a prone position and asserted pressure on his back, causing his death.[100] Case law,[101] Plaintiff's experts,[102] Pendergrass,[103] and Defendant[104] are all in consensus: if Plaintiff's version of the facts is to be believed, Pendergrass' use of force was excessive.

Defendant further argues, also in a footnote, that Plaintiff's false imprisonment claim must fail because "Pendergrass did not become involved in any restraint of Mr. Lacy until after he was already fighting with the Tribal Officers, and he had probable cause for numerous crimes."[105] The gist a false imprisonment claim is the unlawful violation of a person's right of personal liberty:

> A person is restrained or imprisoned when he is deprived of either liberty of movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used.

---

[98] Casey Decl., Ex. A ¶¶ 62, 71.
[99] Def. Mot. Sum. J., at 20 n.6.
[100] Dreveskracht Decl., Exs. O, P, Q.
[101] *Campbell v. City of Spokane*, No. 08-0134, 2010 WL 457438, at *7 (E.D. Wash. Feb. 3, 2010), Appendix 15 (unpublished); *Arce v. Blackwell*, 294 F. Appx. 259, 261 (9th Cir. 2008), Appendix 16 (unpublished); *Greer*, 229 F. Supp. 3d at 1103; *Drummond*, 343 F.3d at 1056–67; *Tucker*, 470 Fed. Appx. at 629; *Garlick*, 167 F. Supp. 3d at 1155; *Champion*, 380 F.3d at 903.
[102] Dreveskracht Decl., Exs. O, P, Q.
[103] *Id.*, Ex. B at 99-101.
[104] *See id.*, Ex. G. at 137-38 ("Q. . . . [W]hen would it be okay to use a face down or a hogtie type of restraint? A. It wouldn't. . . . Q. Okay. And so that restraint should not have been used in regard to Mr. Lacy . . . ? A. Yeah. No.").
[105] Def. Mot. Sum. J., at 20 n.7.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Bender v. City of Seattle, 99 Wn. 2d 582, 591, 664 P.2d 492 (1983) (quotation omitted). Here, Pendergrass stopped and detained Mr. Lacy; commanded him to go to the side of the road; "drew [his] taser and advised [Mr. Lacy] that if he can't calm down, that he's going to get tased"; and assisted two other officers as Mr. Lacy was placed in the back of a police car.[106] These facts surely would implore a reasonable person to believe that he or she was restrained. *Moore v. Pay'N Save Corp.*, 20 Wn. App. 482, 487, 581 P.2d 159 (1978). And at this point, Mr. Lacy was not suspected of committing any crime and Pendergrass did not consider him a threat to himself or others.[107] Plaintiff's battery and false imprisonment claims must proceed to trial.

H. PLAINTIFF WILL VOLUNTARILY DISMISS HER NEGLIGENT TRAINING AND SUPERVISION CLAIM.

Although "there is no doctrinal reason that employers cannot be liable for negligent supervision where its employees act negligently in the scope of their employment," Plaintiff acknowledges that "these claims are probably pointless." *Traverso v. City of Enumclaw*, No. 11-1313, 2012 WL 2892021, at *6 (W.D. Wash. July 16, 2012).[108] Thus, because Plaintiff's negligent training and supervision claim is based on the same facts alleged in her negligence claim, and because Defendant has now conceded that it is vicariously liable for the tortious conduct of Pendergrass, Plaintiff voluntarily dismisses her negligent training and supervision claim.[109]

---

[106] Dreveskracht Decl., Ex. B at 32, 43, 44. Throughout its summary judgment filing, Defendant attempts to point blame on the Tulalip Police officers, arguing that Pendergrass, as a back up, essentially had nothing to do with any decision-making or conduct that took place when the Tulalip Police arrived on scene. Again, this portrayal of the incident is contradicted by Pendergrass' testimony describing the lead/backup roles between himself and the other two officers as "dynamic." *Id.* at 53.

[107] *Id.* at 47, 79. Any question of probable cause is a jury question at any rate. *See Moore*, 20 Wn. App. at 488 ("[W]hether probable cause exists to justify an arrest or detention is a factual issue to be resolved by the jury.").

[108] Appendix 17 (unpublished).

[109] However, Plaintiff must still be able to present evidence that Pendergrass was not trained to properly deal with Mr. Lacy on that fateful night—for example, proof that he lacked current CPR training, as well as training on how to identify symptoms of mental illness or excited delirium aside from what he learned at the Police Academy in 2010. *Mitchell v. City of Tukwila*, No. 12-0238, 2013 WL 6631898, at *1 (W.D. Wash. Dec. 17, 2013), Appendix 18 (unpublished).

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

III. CONCLUSION

Because numerous issues of material fact exists to preclude summary judgment, and because Defendant's legal arguments are at best mistaken, Plaintiff respectfully requests that Defendant's Motion for Summary Judgment be DENIED.[110]

Dated this 9th day of July 2018.

GALANDA BROADMAN, PLLC.

s/ Ryan Dreveskracht
Ryan Dreveskracht, WSBA No. 42593
Gabriel S. Galanda, WSBA No. 30331
Attorneys for Plaintiff
P.O. Box 15146
Seattle, WA 98115
Tel: (206) 557-7509
Email: ryan@galandabroadman.com
gabe@galandabroadman.com

I certify that this memorandum contains 6,835 words, in compliance with the Local Civil Rules.

[110] Plaintiff also urges the Court to address the troubling half-truths, exaggerations, and prevarications in the Defendant's summary judgment filing, including: (1) concealing the existence of a an interlocal agreement between itself and the Tulalip Tribes; (2) purposefully ignoring contradictory testimony of the involved officers (including its own employee); (3) distorting the testimony of one of Plaintiff's experts; (4) completely disregarding the opinions of another of expert; and (5) misrepresenting the law and the pleadings in this action. CR 11, RCW 4.84.185.

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

CERTIFICATE OF SERVICE

I, Bree R. Black Horse, declare as follows:

I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Ave. NE, Suite L1, Seattle, WA 98115.

On July 9, 2018, I emailed the foregoing documents to the following:

Mikolaj T. Tempski
SNOHOMISH COUNTY PROSECUTING ATTORNEY
3000 ROCKEFELLER AVE M/S 504
EVERETT, WA 98201-4046
425-388-6330
Email: MTempski@snoco.org

Bridget E Casey
SNOHOMISH COUNTY PROSECUTING ATTORNEY (CIVIL)
3000 ROCKEFELLER AVENUE
M/S 504
EVERETT, WA 98201
425-388-6341
Email: bcasey@snoco.org

The foregoing statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 9th day of July 2018.

Bree R. Black Horse

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

APPENDIX 1

2015 WL 5825736
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Tacoma.

Judith COX and Charles Cox individually and as Personal Representatives of the Estates of C.J.P. and B.T.P., Plaintiffs,
v.
State of WASHINGTON, Department of Social and Health Services, Forest Jacobson, Rocky Stephenson, Jane Wilson, and Billie Reedlyyski, Defendants.

No. 14–05923RBL.
|
Signed Oct. 6, 2015.

Attorneys and Law Firms

Anne Melani Bremner, Evan D. Bariault, Frey Buck PS, Cheryl L. Snow, Elizabeth Jean Donaldson, James Steven Rogers, Law Offices of James S. Rogers, Seattle, WA, for Plaintiffs.

Joseph Michael Diaz, Attorney General's Office, Olympia, WA, Peter J. Helmberger, Attorney General's Office, Tacoma, WA, for Defendants.

ORDER

RONALD B. LEIGHTON, District Judge.

***1** THIS MATTER comes before the Court on the parties' cross-motions for summary judgment [Dkt. # 19; Dkt. # 24]. This case involves the infamous disappearance of Susan Cox Powell. Her husband, Joshua, is suspected of murdering her. Two years after Susan's disappearance, Joshua murdered their two young sons (ages 7 and 5 years) and took his own life. He killed the boys during court-ordered visitation facilitated by Department of Social and Health Services (DSHS) social workers. [1] Susan's father, Charles Cox, [2] has sued DSHS and the social workers assigned to the boys' care. He alleges that the social workers violated his grandsons' Fourteenth Amendment rights by failing to ensure their safety and that DSHS acted negligently in failing to keep the juvenile court abreast of material facts surrounding the boys' dependency.

1 The individual defendants are: Forest Jacobson (DSHS social worker), Rocky Stephenson (DSHS Child Protective Services investigator), Jane Wilson (DSHS supervisor), and Billie Reed–Lyyski (DSHS CPS supervisor). Unless context requires otherwise, they are referenced collectively as the "social workers."

2 For ease and with respect, this Order will refer to Plaintiffs Charles and Judith Cox together as "Cox," and will use masculine pronouns.

Susan disappeared from her home in Utah in December 2009. Within weeks of the report that she was missing, Joshua relocated with their sons to Washington. He and the children moved in with his father, Steven. In September 2011, police arrested Steven for possession of child pornography and voyeurism. The Pierce County Sheriff's Department (PCSD) removed the children from Steven's home and placed them with DSHS. Pierce County Superior Court Judge Kathryn Nelson affirmed their placement and subsequent transfer to their maternal grandparents, temporarily stripping Joshua of custody. Once Joshua had a rental home separate from his father's, she also made the informed decision—relying on psychological, investigatory, and testimonial evidence—to allow his children to visit him there. During one such supervised visit, Joshua bludgeoned his sons and set his house on fire, killing his children and himself.

This Court cannot undo the merciless murder of the Powell children or the devastating effect their loss had on their extended family. The Court knows that a very troubled father killed his two sons before taking his own life, the reasons for which belie compassion and understanding. The Court also knows that family members worried about this horrific potentiality; the fact that it was realized compounding the sadness and outrage felt by all.

But the Court cannot exercise the luxury of hindsight when judging those who attempted to keep the children safe for failing to do so at the hands of a murderer. DSHS and the social workers were tasked, as they often are, with walking a razor's edge between helping Joshua to develop the techniques to better parent his children and protecting the best interests of his children under the confines of a judicial order.

To ensure the judiciary and those who further its efforts can engage in the pursuit of justice without fear of vexatious retribution, federal law provides them absolute immunity. The social workers are not liable to Cox for their recommendations to the court or their facilitation of the Powell family's court-ordered visitation.

DSHS did reasonably update Judge Nelson about the state of the dependency, so its decisions were not a proximate cause of the children's deaths. Instead, her informed order permitting visitation was a superseding cause that severed DSHS's liability as a matter of law.

I. BACKGROUND

A. Factual History.

***2** The facts are undeniably tragic and largely undisputed. During the Utah investigation into Susan's disappearance, Joshua moved to Washington with his two sons and lived with his father, Steven. Two of Joshua's adult siblings, Alina and John, also lived in the home. John often ran throughout the house naked and in a diaper. He had a hangman's noose, gallows, and an image of a woman with a sword in her vagina displayed in his room. Approximately eighteen months after their move Utah police searched Steven's house in connection with Susan's disappearance and removed fifteen computers. These computers contained child and incestuous pornography, as well as evidence of Steven's obsession with his daughter-in-law, Susan.

On September 22, 2011, the PCSD arrested Steven for possession of child pornography and voyeurism. Because they were unable to rule out Joshua as a suspect associated with his father's arrest, and because they believed that the Utah police would imminently arrest him for Susan's murder, the PCSD also removed the children from Steven's home. The PCSD placed them into protective custody and transferred custody to DSHS.

Joshua did not want his in-laws to obtain custody of the boys, so he entered into agreed dependency. On September 28, 2011, Judge Nelson, who had concurrent jurisdiction over Cox's nonparental child custody action, affirmatively ordered the children into DSHS's temporary custody and supervision. DSHS elected to place the children with Cox. She also ordered DSHS to facilitate supervised visits between Joshua and his sons every Sunday for three hours while Cox attended church. Judge Nelson permitted Joshua, DSHS, and the boys' guardian ad litem, Julio Serrano, to consider expanded visitation.

DSHS developed its initial visitation plan with a goal of reunification. The plan allowed for one three hour supervised visit between Joshua and his children each week at the Division of Child and Family Services (DCFS) offices or other DCFS-pre-approved locations, including the Foster Care Resources Network (FCRN) building.

On October 26, 2011, Judge Nelson held an initial dependency review. She again concluded that the children should remain in the custody, control, and care of DSHS, and not Joshua. She ordered a minimum of three hours per week for visitation and again permitted expanded visitation. She also ordered Joshua not to disparage his in-laws in front of his children and to undergo a series of psychological examinations.

Accordingly, Dr. James Manley began evaluating Joshua at the end of October and continued to do so through January 2012. During this time, Joshua rented a home. He, Serrano, and the social workers agreed to increase the amount of supervised visitation at the house. Dr. Manley observed Joshua interacting with his sons in this setting. Dr. Manley also communicated with Forest Jacobson, one of the social workers responsible for the boys' care; questioned Joshua about his familial and sexual history; and tested Joshua's personality, parental stress levels, and potential for child abuse. In a report to the court, Dr. Manley referred Joshua to a psychologist familiar with personality disorders and forensics. He also noted that Joshua had the skill, intellect, and ability to safely and adequately parent his children during visitation. Dr. Manley recommended that Joshua have ongoing and regular supervised visits with the boys two to three times per week, "predicated on the children's wishes to see their father, the concurrence of their therapist, and [Joshua's] ability to keep his focus on his children."

***3** Dr. Manley reviewed many of the pornographic images seized from Steven's home. In a second report to the court, he referred Joshua for further psychosexual evaluation and a polygraph, because Dr. Manley had concerns that the incestuous pornography found by the police might be Joshua's and not Steven's. Dr. Manley recommended that Joshua not have custody of his children until more was known about Joshua's sexuality,

parenting history, attitudes, and ability to maintain healthy boundaries.

On February 1, 2012, Judge Nelson held a second dependency review. She examined Dr. Manley's reports and a report by Serrano. She questioned Serrano and the parties' attorneys. Joshua's attorney informed Judge Nelson that Elizabeth Griffin–Hall—the assigned FCRN visitation supervisor—and Jacobson were in the courtroom, should Judge Nelson have any lingering questions. A PCSD detective was also available in the courtroom. Judge Nelson affirmed Dr. Manley's recommendations. She also emphasized the permanent plan of reunification of Joshua and his sons and ordered visitation to continue as the parties had established: twice a week for a minimum of three hours at Joshua's rental home. At that time, Joshua had not been arrested for association with Steven's illegal activities or for Susan's disappearance.

On February 5, 2012, Griffin–Hall and the boys arrived at Joshua's rental home for a regularly scheduled visit. The boys eagerly ran ahead of Griffin–Hall. Joshua locked them in and her out of the house. Joshua bludgeoned his children and set the house on fire, killing his sons and himself.

B. Procedural History.

Cox, individually and on behalf of his deceased grandchildren, sued DSHS in Pierce County Superior Court for negligent investigation and for breach of their duty to protect the boys from harm. DSHS moved for summary judgment on these negligence claims, which the state court denied. Cox amended his complaint to add constitutional claims against the social workers, and the defendants removed the case to this Court.

The parties bring cross-motions for summary judgment. Cox argues that the social workers violated the boys' constitutional rights to reasonable safety and adequate care by failing to inform Judge Nelson of Joshua's disparaging remarks about his in-laws and by moving visitation from FCRN to Joshua's rental home. The social workers argue that they are entitled to absolute, or at least qualified, immunity from these § 1983 claims. Cox also argues that DSHS was negligent in its care for his grandchildren. He argues that DSHS negligently investigated Joshua's behavior before moving visitation to his house and that DSHS breached a duty to keep the boys safe. DSHS claims state law immunity. It also argues that it did not owe a duty to the boys. But if it did, it did not breach that duty and was not the proximate cause of the boys' murder.

The Court considers whether the social workers violated the boys' constitutional rights by failing to protect them from Joshua during court-ordered visitation. The Court also considers whether DSHS reasonably provided Judge Nelson with material information and reasonably executed her February order continuing visitation.

II. DISCUSSION

A. Standard of Review.

***4** Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248–50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also Bagdadi v. Nazar,* 84 F.3d 1194, 1197 (9th Cir.1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. *See Anderson,* 477 U.S. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury[,] or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52. The moving party bears the initial burden of showing no evidence exists that supports an element essential to the nonmovant's claim. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant has met this burden, the nonmoving party then must show the existence of a genuine issue for trial. *See Anderson,* 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine issue of material fact, "the moving party is entitled to judgment as a matter of law." *Celotex,* 477 U.S. at 323–24.

B. § 1983 Claims Against the Social Workers.

Cox argues that the social workers violated the boys' Fourteenth Amendment substantive due process rights

assess the reasonableness of the action, courts consider whether the state actor did in fact affirmatively place the victim in danger. In undergoing this examination, courts neither look solely to the agency of the individual nor to what options may or may not have been available to the individual. Instead, they "examine whether the [state actor] left the person in a situation that was more dangerous than the one in which they found him." *Munger v. City of Glasgow Police Dep't,* 227 F.3d 1082, 1086 (9th Cir.2000).

Courts have concluded that state child protective agencies expose children in their care to a danger they otherwise would not have faced when the agency makes poor placement decisions. For example, the Ninth Circuit determined that by approving a foster child's adoption, the state "created a danger of molestation that [the child] would not have faced had the state adequately protected her." *Tamas v. Department of Social & Health Services,* 630 F.3d 833, 843–44 (9th Cir.2010). Similarly, the Seventh Circuit held the state liable for placing a child in an abusive foster home after the state agency had removed the child from her parents' custody. *See K.H. ex rel. Murphy v. Morgan,* 914 F.2d 846, 852 (7th Cir.1990). Another court found the state-created danger theory applicable to a child protective agency that had returned a child to her father when he subsequently beat her to death, even though the father's custody was established per court order, because the agency's investigation and recommendation predicated the court's decision. *See Ford v. Johnson,* 899 F.Supp. 227, 233 (W.D.Pa.1995) (denying the state's motion to dismiss to the extent that the Third Circuit would recognize the state-created danger theory as a viable theory of constitutional recovery).

Here, the social workers did not create or expose the children to a situation more harmful than where the social workers encountered them-Steven's home-nor did they provide Judge Nelson with false or incomplete information, as in *Ford v. Johnson.* The boys lived with their grandfather, a voyeur and pornography addict, and their father, a narcissist suspected of murdering his wife. With the assistance of the PCSD, the social workers removed the children from that environment and commenced dependency proceedings, stripping Joshua of custody. They facilitated visitation safely at FCRN beginning in October 2011 and at Joshua's house as early as November 2011. Taking the boys to court-ordered supervised visitation did not expose them to a danger greater than what they would have faced had the social workers not intervened in the boys' care but had instead left them in Steven's home and Joshua's custody.

***8** Unlike in *Ford v. Johnson,* the social workers did not mislead Judge Nelson nor cause the children to be returned to Joshua's custody. Instead, they fought to keep the boys from his custody by sharing their concerns with Dr. Manley and Judge Nelson. Jacobson shared facts about Joshua's rants against his in-laws and the boys' therapist's professional concerns with Dr. Manley. Dr. Manley detailed this information in a report provided to Judge Nelson. [4] For these reasons, the state-created danger exception does not apply to the factual circumstances at hand.

4 Moreover, to hold social workers liable for the dangers associated with transitioning visitations to a biological parent's home when a permanent plan of reunification exists would instill in them the same timidity judges and prosecutors would feel doing their jobs without the benefit of immunity. The onslaught of potential litigation and blame could make social workers reluctant to remove children from unsafe homes or to help parents develop better skills, so as to avoid the reunification process and subsequent potential for suit.

Second, under the special relationship exception, the Constitution imposes upon the State a duty to assume some responsibility for the safety and general well-being of a person taken into its custody and held there against his will:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

See DeShaney, 489 U.S. at 200 (1989) (citing *Estelle v. Gamble,* 429 U.S. 97, 103–04, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) and *Youngberg v. Romeo,* 457 U.S. 307, 315–17, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982)). This affirmative duty to protect arises from the State's restraint of the individual's

freedom to act on his own behalf, not from its failure to act to protect his liberty interests against harms inflicted by other means. *See id.* This special relationship terminates when the individual is no longer in the State's custody. *See id.*

In *Deshaney,* social workers who had learned that a hospitalized child might be a victim of physical abuse obtained a court order placing the child in the hospital's custody. *Id.* at 192. After an investigation, a pediatrician, a psychologist, a police detective, the county's lawyer, several social workers, and various hospital staff determined there was insufficient evidence of abuse to retain the child in the custody of the court. *Id.* After the child was returned to his father's custody, the father severely beat his son, rendering him mentally disabled. *Id.* at 193. The Supreme Court held that the special relationship exception did not apply, because the child was no longer in the State's custody. *Id.* at 201 ("[T]he State does not become the permanent guarantor of an individual's safety by having once offered him shelter."). Therefore, the State did not have an obligation to protect the child from his father.

Here, the boys were in the State's custody at the time of their death. After finding them dependent, Judge Nelson ordered them into the custody, control, and care of DSHS. The boys had not yet been returned to Joshua. Therefore, the special relationship exception to the general rule that the State does not have a responsibility to protect the liberty of its citizens against invasion by private actors applies; the social workers owed the boys reasonable safety and minimally adequate care appropriate to their ages and circumstances while the boys were in the State's custody. *See Lipscomb ex rel. DeFehr v. Simmons,* 962 F.2d 1374, 1379 (9th Cir.1992).

b. The Social Workers Did Not Violate the Boys' Constitutional Rights.

***9** The social workers argue that even if the boys had constitutional rights to protection and care while in the State's custody, the social workers did not violate these rights. Cox argues that they violated the boys' rights by moving visitation without conducting a safety assessment of the house and by not informing the court of family members' and law enforcements' concerns or of Joshua's disparagement of his in-laws.

To violate a due process right, state officials must act with such deliberate indifference that their actions "shock the conscience." *Brittain v. Hansen,* 451 F.3d 982, 991 (9th Cir.2006). " '[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his actions." *Bryan Cnty. v. Brown,* 520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

When applied to foster children, and for these limited purposes also to dependent children, the deliberate indifference standard requires the following proof:

> [A] showing of an objectively substantial risk of harm and a showing that the officials were subjectively aware of facts from which an inference could be drawn that a substantial risk of serious harm existed and that either the official actually drew that inference or that a reasonable official would have been compelled to draw that inference.

Tamas, 630 F.3d at 845 (9th Cir.2010). The subjective component may be inferred if the risk of harm is obvious. *Id.*

Cox has not made both of these showings. Arguably, the social workers *may* have drawn an inference from gut feelings and speculations that a substantial risk of serious harm to the children existed during visitation generally-given the common supposition that Joshua murdered Susan.

But, no proof that Powell posed an objectively substantial risk of harm to his sons during supervised visitation, whether at FCRN or his rental home, existed from which the social workers could have drawn these subjective conclusions. PCSD removed the children from Joshua's custody because Steven's home was unsafe and because they believed Joshua's arrest was imminent, not because evidence showed he was a threat to his sons. By the February 2012 hearing, Joshua still had not been charged with any crime. Psychological evidence suggested he possessed the intellect, skill, and practice to parent his children safely and adequately during visitation. Indeed, Judge Nelson, relying on the multitudinous information before her, continually authorized visitation. [5] Therefore,

the social workers did not disregard facts that Joshua presented a serious harm to his sons; they did not act with deliberate indifference for the boys' liberty interest.

5 Cox argues that had the social workers been more forthright with the court that Joshua was in violation of her order for disparaging his in-laws or that family members and law enforcement had concern for the children, Judge Nelson may not have reached the conclusion she did. Given the weight of the evidence before her—that Joshua likely murdered his wife and may have enjoyed incestuous pornography—and the state of federal law governing the termination of parental rights, it is unreasonable to say a detailed account of his remarks about his in-laws would have prompted her to then conclude he was an objective threat to his children.

Cox also argues that the social workers were deliberately indifferent because they did not conduct a safety assessment of Joshua's rental home. This is incorrect, because Dr. Manley, Serrano, and Jacobson each evaluated Joshua's rental home.

c. It was Not Clearly Established that DSHS's Conduct was a Violation of the Boys' Constitutional Rights.

Even if the social workers had violated the boys' constitutional rights, the defendants are entitled to qualified immunity unless the right was clearly established. The social workers argue that during the boys' dependency there was no clearly established federal law that could have alerted a social worker to the possibility that coordinating court-ordered visitation with a biological father could violate a child's rights. Cox argues that it was clearly established that a social worker could be liable for the harm experienced by a child under the social worker's care.

***10** Clearly established constitutional rights are those that a reasonable official could compare his actions to and understand whether or not his behavior violates that right:

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful ... but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

See Hope v. Pelzer, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (citing *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523, (1987)) (internal citations omitted). The specific conduct alleged need not have been previously and explicitly deemed unconstitutional, but existing case law must have made it clear that the conduct violated constitutional norms. *See Kennedy v. City of Ridgefield,* 439 F.3d 1055, 1065–66 (9th Cir.2006). The Court's inquiry is "wholly objective and [ ] undertaken in light of the specific factual circumstances of the case." *Brittain,* 451 F.3d at

While it is clearly established that the rights and safety of a child supersede a parent's right to visitation generally, it was not clearly established at the boys' death that by facilitating court-ordered visitation, the social workers could be violating the boys' constitutional rights. Indeed, such unlawfulness is still not clearly established. Federal and case law do not clearly set forth liberty interests of protection and care for dependent children visiting a biological parent such that a reasonable social worker could anticipate she was violating the law by coordinating court-ordered and supervised visitation. Therefore, even if Judge Nelson's February 1, 2012 order did not ratify the social workers' decision to hold visitation at Joshua's house, making them absolute immune, they still have qualified immunity because they did not violate the children's clearly established constitutional rights.

C. State Law Negligence Claims Against DSHS.

Cox claims that DSHS was negligent in its handling of his grandchildren's dependency in at least two ways. He argues that DSHS failed to conduct a reasonable investigation of Joshua's abusive behavior and failed to inform Judge Nelson of Joshua's non-compliant behavior that it knew about, leading her to sanction DSHS's harmful visitation placement decision. *See* RCW 26.44.050 (establishing the tort of negligent investigation). Cox also argues more generally that DSHS negligently failed to protect the children by placing them in harm's way. [6]

6 Cox's negligence claim is based largely on the fact that DSHS allowed—and did not do more to stop

> the court from allowing—Joshua to see his sons, even though Cox, the police, Judge Nelson, and everyone else believed he killed their mother. But the State is properly reticent to terminate parental rights on the basis of suspicion.
>
> Exactly one year after the murders, a Senate Bill bearing the boys' names was introduced. It would have prohibited a parent "under investigation for homicide" from having custody of, or even visitation rights with, his children. Because this is not good public policy generally—even though it certainly would have benefitted the boys, Cox, the social workers, DSHS, and society if it were the law in this case—the Bill did not pass. It is not the law in Washington that a suspected murderer has no visitation rights.

Anticipating DSHS to make a public duty doctrine defense to his second claim (common law negligence), Cox argues that DSHS owed the boys protection for two reasons. Cox first argues that the Legislature intended to impose a duty upon DSHS to care for dependent children when crafting RCW chapter 13.34, which requires DSHS to develop and implement policies regarding dependent children's visitation. Cox next argues that because DSHS was entrusted with the boys' care, DSHS and the boys had a special relationship. He asserts that DSHS further established this relationship when it assured Cox and the boys of the boys' safety. Under this special relationship, DSHS allegedly owed the boys a duty to protect them from harm.

***11** DSHS makes at least three counter-arguments, none of which include a public duty doctrine defense. First, it asserts statutory immunity from suit under a Washington law enacted in June 2012 that declares DSHS is not liable for acts performed in compliance with court orders or for its advocacy to the court. *See* RCW 4.24.595. Second, DSHS argues that it owes no statutory or common law duty to guarantee the safety of dependent children during visitation. It asserts that the claim of negligent investigation cannot apply because DSHS arranged visitation, not placement of the children in Joshua's custody; the legislature did not intend to create a private right of action against DSHS; and a special relationship did not exist between DSHS and the boys. Third, DSHS argues that if it is not immune and breached a duty it owed to the boys, its actions were not the proximate cause of their death, because Judge Nelson's February 2012 order ratified its decisions and severed its liability.

1. Statutory Immunity from Negligence Claims.

DSHS's first line of defense against Cox's negligence claim invokes a Washington statute that was enacted four months after Joshua killed his sons. That statute provides broad immunity for DSHS (and its employees) when the act complained of was done in compliance with a court order:

> The department of social and health services and its employees shall comply with the orders of the court, including shelter care and other dependency orders, and ***are not liable for acts*** performed to comply with such court orders. In providing reports and recommendations to the court, employees of the department of social and health services are entitled to the same witness immunity as would be provided to any other witness.

RCW 4.24.595(2) (effective June 7, 2012) (emphasis added). The effect of the court's order on DSHS's potential liability is discussed in more detail below. But DSHS's argument that this statute provides the easy answer to Cox's negligence claim is misguided.

DSHS argues that despite (1) the well-settled rule that a statute does not have retroactive effect unless the legislature says it does, and (2) the fact that this statute was enacted *after* the events upon which the lawsuit is based, the statute can and should be applied *prospectively* to grant DSHS immunity because Cox filed suit *after* the statute was enacted. It argues that "the triggering event is not the events underlying the case" but instead the "attempt to hold DSHS liable." Indeed, it repeats this argument, *verbatim,* in its Motion and its Reply [Dkt. # 24 at 10; Dkt. # 29 at 7].

This claim is based solely on a Washington Supreme Court case that DSHS describes as "squarely on point": *In Re Haviland,* 177 Wash.2d 68, 301 P.3d 31 (2013). But *Haviland* does not remotely address the immunity statute upon which DSHS's immunity defense is based, and it does not hold that *that* statute's "triggering event" is the lawsuit seeking to hold DSHS liable, rather than the underlying events giving rise to the cause of action. It

certainly does not broadly hold (nor could it, without a seismic shift in the law) that *every* statute enacted after the events forming the basis for a lawsuit applies to the case, so long as it was enacted prior to the date the lawsuit was commenced, or even that this is the general rule.

***12** *Haviland* involved an entirely different statute in an entirely different context. Haviland, 85, suffered from advanced dementia, and his first wife was deceased. His second wife (Mary, 35), exercised "undue influence" over him, leading him to change his will to benefit her, rather than his children. After he changed it, and after he died-but before Haviland's estate was settled-Washington's "slayer" statues were amended "to prevent financial abusers of vulnerable adults from acquiring property or any benefit from their victim's estates." Haviland, 301 P.2d at 33; see 2009 amendments to chapter 11.84 RCW.

In probate, Mary sought to enforce the new will, and Haviland's children sought to disinherit her based on the amendments. Mary argued that the new provision did not apply, because she had "vested rights" that could not be terminated retroactively. The children argued, and the Washington Supreme Court held, that the "triggering event" for the amendments' application was their effort to preclude Mary from taking under the tainted will, not the abuse that led Haviland to sign it. It explained that the amendments' purpose is to "regulate the receipt of benefits," *not* the abuser's conduct while the vulnerable adult is alive. The deterrence for financially abusing vulnerable adults "exists elsewhere"-including in the criminal code. *Haviland,* 301 P.2d at 35. The Washington Supreme Court held that the amendments applied prospectively, and their application to Haviland's probate was "triggered" by the children's "filing of the petition to declare Mary an abuser." *Id.* at 38. It also noted that its decision was "limited to the triggering event of *these* statutes." *Id* . at 34, note 2 (emphasis added).

Haviland is not authority for the proposition that DSHS immunity statute can or should be prospectively applied to immunize DSHS from negligence and consequences that pre-date the statute's effective date. Instead, the immunity statute is far more analogous to the one at issue in In re Estate of Burns, 131 Wash.2d 104, 928 P.2d 1094 (1997) (discussed in Haviland, 301 P.2d at 35). Burns unremarkably held that the precipitating event for application of a new statute expanding the state's ability to recover medical benefits from an estate was the decedent's receipt of those benefits, not the creation of his estate. Thus, the state's effort to apply the statute to "recover earlier benefits" (pre-dating the statute) from a later-created estate was "an improper retroactive application" of the new law. *Id.*

DSHS is not immune from Cox's negligence claim under RCW 4.24.595(2).

2. The Scope of DSHS's Duty.

DSHS's second line of defense is its equally bold assertion that Cox's negligence claims fail as a matter of law because it had "no duty" to investigate the circumstances of the boys' dependency, or to inform the court of material information.

It argues that its duty to investigate applies only in the custody or "placement" context, under RCW 26.44.050. That statute imposes on the DSHS a duty to investigate and to avoid harmful placement decisions, such as a child remaining in an abusive home, or wrongly removing a child from a non-abusive home. DSHS argues that the dependency statute at issue in this case (Chapter 13.34) imposes no similar duty.

***13** But the cases upon which DSHS relies do not stand for that proposition. *Aba Sheikh v. Choe,* 156 Wash.2d 441, 128 P.3d 574 (2006), for example, involved a claim by a third party assaulted by a foster child-an entirely inapposite situation. The Washington Supreme Court unsurprisingly held that DSHS was not liable for failing to predict and prevent the assault: "We hold that the State owes no duty to persons harmed by the tortious acts of dependent children." *Id.* at 449, 128 P.3d 574. This is a garden variety application of the public duty doctrine. It is not support for the claim that the state owes no duty to investigate the circumstances of a dependency that poses the same risks encountered in the placement context, where it *does* have a duty: failing to remove a child from a known dangerous situation, or wrongfully removing him from a situation that was not dangerous.

DSHS also relies heavily on *M.W. v. Department of Social and Health Services,* 149 Wash.2d 589, 70 P.3d 954 (2003). *M.W.* similarly involved "the scope of DSHS's duty while investigating child abuse allegations." *Id.* at 955. But the harm suffered there was not by a third party, and it was not inflicted upon the dependent child by an abusive parent. Instead, DSHS investigators themselves

negligently harmed the child while investigating whether she had been abused. The Court again reiterated that the duty to investigate did not reach this conduct; it was and is limited to "harmful placement decisions." *Id.* at 959. It also noted that DSHS *does* have a "common law duty of care" not to harm children, and specifically did not address the applicability of its holding on that potential claim. *Id.* at 959, 960.

Finally, DSHS claims that the Washington Supreme Court has "already rejected" the claim that the dependency statutes were intended to create tort liability. *See* Dkt. # 29 at 9; *Braam v. State,* 150 Wash.2d 689, 711–712, 81 P.3d 851 (2003). But *Braam* involved a class action by foster children on a variety of claims. The Supreme Court "rejected" the plaintiffs' statutory claims-under Chapters 74.14A and 74.13 RCW-because those statutes did not "explicitly create a cause of action" and because implying one would be "inconsistent" with DSHS's "broad power" to administer them. *Id.* The court did not address the statute or the claims in this case. Furthermore, it rejected these statutory claims because the plaintiffs had "other remedies," including the right to seek redress under the statute that *is* at issue here:

> We note that parties believing themselves aggrieved by DSHS's failure to abide by these statutes, including a foster child through an attorney or guardian ad litem, will have an opportunity to raise the issue in the context of dependency actions. *See, e.g.,* RCW 13.34.120.

Braam, 150 Wash.2d 689, 711–712, 81 P.3d 851.

These cases do not hold, or even suggest, that DSHS has "no duty" to the children to investigate a visitation placement in connection with a dependency proceeding under Chapter 13.34 RCW. And that claim simply does not make sense. If DSHS's position were accurate, this case would not be about the steps it took, the information it provided, or the fact that a judge reviewed that information and approved the plan it had made based on it. If DSHS flatly had no duty, it would not need to even address whether it was immune or otherwise not culpable based on the Judge's orders.

***14** Instead, it seems clear that in the context of "placement decisions," DSHS has some duty to investigate the circumstances of the dependency in order to reasonably ensure that they do not place a child in an abusive situation or wrongly remove him from one that is not. Such a rule is consistent with the cases cited and with the duty to investigate to avoid "bad placements."

DSHS's motion for judgment as a matter of law on the basis that it owed "no duty" is DENIED.

3. DSHS Reasonably Informed Judge Nelson, so DSHS's Ratified Actions are Not the Proximate Cause of the Boys' Deaths.

DSHS argues that even if it owed a duty to the boys, it did not breach that duty. And even if it breached a duty, that negligence did not proximately cause the boys' death because Judge Nelson's February 2012 order was a superseding cause that severed their liability.

Cox argues that DSHS was negligent, and its negligence proximately caused the boys' death. He asserts that DSHS provided Judge Nelson with insufficient information on which to base her decisions and placed his grandchildren in harm's way. He identifies the following as material facts DSHS allegedly failed to share with Judge Nelson: PCSD Detective Gary Sander's, Cox's, Joshua's sister Jennifer Grave's, and the boys' therapist's concerns for the children's safety; Joshua's disparagement of Cox; Joshua's familial and sexual history; and the visitation location change. He argues that because DSHS negligently informed Judge Nelson of the state of the dependency, her decision authorizing visitation to continue at Joshua's house cannot act as a superseding cause.

Proximate cause includes two elements: legal causation and cause in fact. *See Baughn v. Honda Motor Co.,* 107 Wash.2d 127, 142, 727 P.2d 655 (1986). Legal causation involves the question of whether liability should attach as a matter of law. *See Hartley v. WA,* 103 Wash.2d 768, 779, 698 P.2d 77 (1985). It is a determination left to the courts. *See Kim v. Budget Rent A Car Sys., Inc.,* 143 Wash.2d 190, 204, 15 P.3d 1283 (2001). Cause in fact refers to the "but for" consequences of an act. *See id.* It is usually a question for the jury; however, it may become a question of law for the court "when the facts are undisputed and inferences there from are plain and incapable of reasonable doubt or differences of opinion." *Baughn,* 107 Wash.2d at 142, 727 P.2d 655.

Judicial action can break the causal connection between an alleged negligent act and subsequent harm. *See Bishop v. Miche,* 137 Wash.2d 518, 532, 973 P.2d 465 (1999) (citing *Schooley v. Pinch's Deli Market, Inc.,* 134 Wash.2d 468, 482, 951 P.2d 749 (1998)). "[W]hether a court action precludes the existence of proximate cause may be decided as a matter of law when the court is aware of all material information and reasonable minds could not differ on the issue." *Petcu v. WA,* 121 Wash.App. 36, 58, 86 P.3d 1234 (2004) (quoting *Tyner v. Dep't of Soc. & Health Servs.,* 141 Wash.2d 68, 86, 1 P.3d 1148 (2000)). In order to assess if DSHS's alleged breach of duty was a cause in fact of the boys' deaths, the Court considers the information before Judge Nelson to determine whether, but for DSHS's alleged failure to keep her abreast of the state of the dependency, she would not have ordered visitation continued at Joshua's house.

***15** Cox has failed to identify material information not before Judge Nelson. Through Jacobson, DSHS communicated with Dr. Manley, whose reports to the court detailed the boys' therapist's concerns; Joshua's controlling and self-focused behavior; Joshua's rants about Cox and the media; Joshua's familial, psychological, and sexual history; and that the visitation location had moved from FCRN to Joshua's rental home. Judge Nelson understood that Washington and Utah law enforcement suspected Joshua of murdering his wife and that both law enforcement and Dr. Manley thought Joshua might be sexually deviant. Weighing the information she had gleaned from Cox's nonparental custody action and the dependency action against the law regarding Joshua's parental rights,[7] Judge Nelson nevertheless authorized the continuance of visitation and ordered Joshua to undergo further psychological testing.

7 "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *see also* RCW 13.34.020 ("The legislature declares that the family unit is a fundamental resource of American life which should be nurtured.").

The family members' and Detective Sanders' opinions were based on the same factual information as Judge Nelson had. Reasonable minds could not differ as to whether sharing these biased and commonly-held concerns with Judge Nelson would have prompted her to reach a conclusion different than she reached on the weight of objective evidence on February 1, 2012.[8] The social workers thus did not negligently fail to provide Judge Nelson with any material information. Therefore, her order operated as a superseding intervening cause, cutting off DSHS's liability for any preceding negligence as a matter of law. *See Bishop,* 137 Wash.2d at 532, 973 P.2d 465; *see also Schooley,* 134 Wash.2d at 482, 951 P.2d 749; *Tyner,* 141 Wash.2d at 88, 1 P.3d 1148; *Petcu,* 121 Wash.App. at 58, 86 P.3d 1234.

8 Judge Nelson could not have lawfully stripped Joshua of custody at that hearing. The court placed the children in DSHS's custody because Steven's home was an unhealthy environment and law enforcement believed Joshua would be imminently arrested for Susan's murder, not because they believed Joshua sexually or physically abused his boys. *See* RCW 13.34.180 (addressing the allegations needed to file a petition for termination of a parent child relationship).

Judge Nelson also could not have taken away Joshua's right to visitation. His noncompliance —disparaging Cox—did not adversely affect his children's health, safety, or welfare. *See* RCW 13.34 .136(2)(b)(ii).

Furthermore, even if Judge Nelson's order ratifying DSHS's decision to move visitation were not a superseding cause severing DSHS's liability for DSHS's subsequent execution of her order, reasonable minds could not conclude that DSHS negligently facilitated the Powell family's February 5, 2011 visitation. DSHS may change a visitation plan in light of "increased or decreased safety concerns, changes in permanency plans, and/or the well-being of the child." Given the relative success of earlier family visits, Dr. Manley's determination that Joshua could safely parent during supervised visitation, Serrano's consensus, Judge Nelson's authorization, Griffin–Hall's supervisory presence, and the continuing goal of reunification, DSHS reasonably increased the duration of visitation and reasonably moved the location to Powell's rental home—DSHS's preferred visitation location.

III. CONCLUSION

The Court feels immense sorrow for the Cox family's losses and the heartbreak they have been forced to weather. The Court also feels sorrow for the social workers subjected to Joshua's sickness, yet grateful for their willingness to enter their profession. The Court is equally grateful to Judge Nelson, who considered the evidence before her with sound reasoning and solemnity.

An integral component of the judicial system, social workers require absolute immunity under federal law when performing quasi-prosecutorial and quasi-judicial functions, as occurred here. The social workers are absolutely immune from Cox's § 1983 claims and entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(a).

***16** DSHS did not negligently inform Judge Nelson about the state of the dependency. Therefore, it was not the proximate cause of the children's deaths, because Judge Nelson's February order was a superseding cause that severed DSHS's liability as a matter of law. DSHS is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(a).

Cox's Partial Motion for Summary Judgment [Dkt. # 19] is DENIED, and Defendants' Motion for Summary Judgment and Qualified Immunity [Dkt. # 24] is GRANTED. The case is DISMISSED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 5825736

End of Document

APPENDIX 2

2012 WL 13018818
Only the Westlaw citation is currently available.
United States District Court,
E.D. Washington.

John W. JENKINS; and
Joann G. Kausshen, Plaintiffs,
v.
SPOKANE COUNTY; the Spokane County Sheriff's Office; Mark Cole Speer; and Dale Moyer, Defendants.

NO. CV-10-228-EFS
|
Signed 03/08/2012

Attorneys and Law Firms

David R. Partovi, Partovi Law, Spokane, WA, for Plaintiffs.

Dan L. Catt, Spokane County Prosecuting Attorney's Office, Spokane, WA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EDWARD F. SHEA, United States District Judge

***1** Before the Court, without oral argument, are Defendants Spokane County, the Spokane County Sheriff's Office, Mark Cole Speer, and Dale Moyer's (collectively, "Defendants") Motion for Overlength Brief, ECF No. 15, related Motion to Expedite, ECF No. 16, and Motion for Summary Judgment, ECF No. 19. After reviewing the record in this matter, the submissions of the parties, and applicable authority, the Court is fully informed. For the reasons discussed below, the Court grants Defendants' motion for leave to file an overlength brief and related motion to expedite, and grants in part and denies in part Defendants' motion for summary judgment.

I. Defendants' Motion for Overlength Brief

Defendants ask the Court for leave to file an overlength memorandum in support of their motion for summary judgment. On December 2, 2011, Defendants filed a twenty-five page memorandum, five pages over the twenty-page limit set in Local Rule 7.1(f). Plaintiffs have not responded to Defendants' motion.

After reviewing the materials submitted by Defendants, the Court finds that defense counsel has shown good cause to permit an overlength brief in light of the number of claims raised in Plaintiffs' complaint and the fact that Plaintiffs did not abandon some of these claims until after Defendants had filed their motion. Accordingly, the Court grants Defendants' motion for leave to file an overlength brief and accepts Defendants' memorandum as filed.

II. Defendants' Motion for Summary Judgment

A. Background [1]

1 The parties failed to submit a Joint Statement of Uncontroverted Facts in relation to Defendants' motion as required by the Court's November 18, 2010 Scheduling Order. ECF No. 6 at 4. When considering this motion and drafting this background section, the Court 1) took as true all undisputed facts; 2) viewed all evidence and drew all justifiable inferences therefrom in Plaintiffs' favor; 3) did not weigh the evidence or assess credibility; and 4) did not accept assertions made by Defendants that were flatly contradicted by the record. *See Scott v. Harris*, 550 U.S. 372, 380 (2007); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Disputed facts are supported by citation to the record, while undisputed facts are set forth without reference to an ECF number.

Shortly after midnight on June 27, 2007, Joann Kausshen was driving east on Government Way in Spokane County, Washington, with Plaintiff John Jenkins riding in the passenger seat. Deputy Dale Moyer of the Spokane County Sheriff's Office (SCSO) was on patrol and was driving west on Government Way. Deputy Moyer turned his patrol vehicle around and began following Ms. Kausshen's vehicle, noting that it was traveling at approximately 40 miles per hour in a 30 mile per hour zone as it entered Spokane city limits.

Deputy Moyer entered the car's license plate number, 548RKA, into the dashboard computer of his patrol car, verified that he had entered the correct license plate number, and then sent the information to the Washington Crime Information Center (WACIC) to check the status of the plate. The WACIC responses displayed a reported-

stolen license plate with a similar plate number, 548RPA. Though Deputy Moyer knew that the WACIC frequently returns information about license plate numbers that are similar to the plate an officer enters, he failed to notice the difference between the two plate numbers. Apparently unaware that the vehicle he was following had not been reported stolen, Deputy Moyer used the computer in his patrol car to forward the information returned from the WACIC to his dispatcher. Upon receiving notice that Deputy Moyer was following what appeared to be a stolen vehicle, the dispatcher immediately called for another unit to assist Deputy Moyer. Deputy Moyer attempts to explain his failure to notice the difference between the two plates on the grounds that he was "negotiating curves trying to stay up with the vehicle" and that "when I copied and sent the WACIC response to dispatch for verification of the stolen status, my transmission must not have included WACIC's entire response." Moyer Aff., ECF No. 22 ¶¶ 12, 66.

***2** Ms. Kausshen and Mr. Jenkins' car stopped at the traffic light at the intersection of Government Way and Sunset Boulevard in Spokane. When the light turned green, Ms. Kausshen initiated a left-hand turn onto Sunset Boulevard. [2] Kausshen Aff., ECF No. 31 ¶¶ 3-4. Deputy Moyer activated his lights, and after traveling roughly one block, Ms. Kausshen pulled over at the first safe stopping location, a parking lot. *Id.* ¶ 5; Moyer Aff., ECF No. 22 ¶ 17. SCSO Deputy Mark Cole Speer was already in the area, and arrived at the scene immediately, parking just to the right of Deputy Moyer's patrol car. Deputy Speer exited his patrol car and drew his weapon. Officer Braun of the Spokane City Police Department was also in the area, and arrived shortly thereafter.

2 Deputy Moyer states that the vehicle "suddenly took off" when the light turned green. Moyer Aff., ECF No. 22 ¶ 15. Ms. Kausshen contests this. ECF No. 31 ¶ 4.

From his patrol car, Deputy Moyer observed the male passenger in the vehicle making "what would be termed furtive movements," which caused him to be concerned that the passenger was concealing something or accessing a weapon. Moyer Aff., ECF No. 22 ¶¶ 20, 21. Using the loudspeaker mounted on his patrol car, Deputy Moyer informed the vehicle's occupants of the reason for the stop, told them that force could be used against them if they did not comply, and instructed them to show their hands outside of the window. Deputy Moyer's voice was "highly agitated and he was barking orders at [the vehicle's occupants] aggressively." Jenkins Decl., ECF No. 30 ¶ 3. [3]

3 Deputy Moyer contests this, stating that he was speaking in a "calm and clear voice." Moyer Aff., ECF No. 22 ¶ 23.

Deputy Moyer instructed Ms. Kausshen to exit the vehicle, to turn so that her back was facing the deputies, and keeping her hands raised, to walk backwards until she was in between the two patrol vehicles. Ms. Kausshen did this, and Deputy Speer handcuffed her and placed her in Deputy Moyer's patrol vehicle without incident. Deputy Moyer then instructed Mr. Jenkins, who was sitting in the passenger seat, to exit the driver's side of the vehicle and walk towards the deputies in the same manner as Ms. Kausshen. The parties' accounts of what happened next differ significantly.

According to Mr. Jenkins and Ms. Kausshen, Mr. Jenkins complied with all of Deputy Moyer's orders and neither made furtive movements nor adopted a "defiant stance." Jenkins Decl., ECF No. 30 ¶¶ 4, 6; Kausshen Decl., ECF No. 31 ¶ 10. Mr. Jenkins walked backwards towards the officers, kept his hands raised high, and did not lower his hands except to lift his shirt as instructed by Deputy Moyer. Jenkins Decl., ECF No. 30 ¶¶ 5, 7; Kausshen Decl., ECF No. 31 ¶¶ 10, 11. Mr. Jenkins had recently had back surgery, which caused him some difficulty in following the officers' commands. Jenkins Decl., ECF No. 30 ¶ 4. As he neared the deputies' vehicles, Mr. Jenkins told Deputy Moyer "to do it right." *Id.* ¶ 8. While Mr. Jenkins was lifting his shirt pursuant to Deputy Moyer's instructions, Deputy Moyer moved rapidly from behind his patrol vehicle and violently tackled him. *Id.* ¶ 5; Kausshen Decl., ECF No. 31 ¶¶ 10, 12.

According to Deputy Moyer and Deputy Speer, Mr. Jenkins dropped his hands, clenched his fists, and lowered his head and shoulders in a "defiant type stance" immediately after exiting the vehicle. Moyer Aff., ECF No. 22 ¶ 32. Mr. Jenkins was instructed to lift his shirt and perform a full turn while still next to the vehicle, *before* walking backwards towards the officers. *Id.* ¶¶ 34-35. Once he had covered roughly half the distance between the car and the deputies' patrol vehicles, Mr. Jenkins began turning his head as if to determine the deputies locations, repeatedly lowered his hands, and backed toward Deputy Moyer's driver's-side door instead of following instructions to step to his right toward the

gap between the patrol cars. *Id.* ¶¶ 40-46; Speer Aff., ECF No. 23 ¶¶ 15-18. When Mr. Jenkins was near the front bumper of Deputy Moyer's patrol vehicle, he "stopped and suddenly dropped both hands with his right hand going towards his front right pocket while he yelled out 'lets just do it right' and continued backing towards [Deputy Moyer's] location."[4] Moyer Aff., ECF No. 22 ¶ 48. Believing that Mr. Jenkins was reaching for a weapon, Deputy Moyer closed the distance between himself and Mr. Jenkins and used an "arm bar" and "leg sweep" to bring Mr. Jenkins to the ground. *Id.* ¶¶ 50-53.

4 There are minor discrepancies in Defendants' accounts of the exact phrasing of Mr. Jenkins' statement: Deputy Moyer relates the statement as "let's just do it right," Moyer Aff., ECF No. 22 ¶ 48; Deputy Speer relates the statement as "something like 'let's do this right,' " Speer Aff., ECF No. 23 ¶ 22; and Officer Braun testified at Mr. Jenkins' trial that Mr. Jenkins had said "let's do this shit right." ECF No. 29-1 at 10.

***3** Once Mr. Jenkins was on the ground, Deputy Moyer restrained him by placing his knee on Mr. Jenkins' shoulderblades. With Deputy Speer's help, Deputy Moyer handcuffed Mr. Jenkins, who was screaming in pain. Mr. Jenkins notified the deputies that he was recovering from surgery on his back, and the deputies used their radios to call for medical assistance. At this point, Deputy Moyer re-checked the vehicle's license plate and V.I.N. and learned that the vehicle was indeed *not* stolen. An ambulance arrived and Mr. Jenkins was taken to Sacred Heart Medical Center (SHMC). Once Mr. Jenkins had been treated and released by a physician at SHMC, Deputy Moyer placed him under arrest for an outstanding misdemeanor warrant and for obstructing a public servant in violation of RCW 9A.76.020. On September 20, 2007, Mr. Jenkins was tried and acquitted in Spokane County District Court on the obstruction of a public servant charge.

On June 14, 2010, Mr. Jenkins and Ms. Kausshen filed suit against Spokane County, the SCSO, Deputy Speer, and Deputy Moyer in Spokane County Superior Court, asserting claims for negligence, excessive force, negligent hiring, retention, training, and supervision, and violation of their First, Fourth, and Fourteenth Amendment rights. On July 22, 2010, Defendants removed the matter to this Court. ECF No. 1.

Defendants moved for summary judgment on December 2, 2012. ECF No. 19. In support of their motion, Defendants submitted the affidavits of Deputies Moyer and Speer, Spokane County Deputy Sheriff Richard Gere, and defense counsel Dan Catt. ECF Nos. 22-25.[5] In their response, Plaintiffs abandon the following claims: all claims brought on behalf of Ms. Kausshen; all claims brought against Deputy Speer; Mr. Jenkins' fifth cause of action alleging violations of his First and Fourteenth Amendment rights; and Mr. Jenkins' eighth cause of action alleging negligent hiring, retention, training, and supervision. ECF No. 27 at 3-4. Though the SCSO was initially named as a defendant in this lawsuit, *see* ECF No. 1 at 10, defense counsel asserts that the SCSO was never a party, and the Court treat Plaintiffs' claim against the SCSO as abandoned as well. Accordingly, Mr. Jenkins retains the following claims: a negligence claim against Deputy Moyer, and § 1983 claims for excessive force and First Amendment retaliation against both Spokane County and Deputy Moyer. The Court addresses Defendants' motion with regard to these claims only.

5 Plaintiffs and Defendants have both also submitted select excerpts from the deposition of Van Blaricom, Plaintiffs' proposed expert witness on police conduct. *See* ECF Nos. 25-2 & 29-1. However, Plaintiffs have not submitted any information relating to Mr. Blaricom's education, credentials, or experience, nor have they emailed Mr. Blaricom's Rule 26(a)(2) report to the Court as required by the Court's November 18, 2010 Scheduling Order. ECF No. 6 at 2. Accordingly, the Court is unable to judge whether Mr. Blaricom is qualified to offer expert opinion on the record before it, and disregards the opinions expressed in his deposition excerpts.

B. Discussion

i. Summary Judgment Standard

Summary judgment is appropriate if the record establishes "no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party opposing summary judgment must point to specific facts establishing a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). If the nonmoving party fails

Mendocino Env. Ctr. v. Mendocino Cnty., 14 F.3d 457, 464 (9th Cir. 1994)).

Here, the Court need not address whether Deputy Moyer is entitled to qualified immunity, nor whether Mr. Jenkins has properly supported a *Monell* claim against Spokane County, because even viewing the facts in the light most favorable to Mr. Jenkins, no First Amendment violation occurred. Mr. Jenkins has submitted no evidence showing that he was engaging in political or otherwise protected speech, that Deputy Moyer's conduct deterred or chilled him from further protected speech, or that such deterrence motivated Deputy Moyer's conduct. And any factual dispute about Mr. Jenkins' subjective intent in making his utterance is irrelevant to these issues. Accordingly, because there are no genuine issues of material fact surrounding Mr. Jenkins' First Amendment claim, and because Defendants are entitled to judgment as a matter of law, the Court grants Defendants' motion in this regard.

v. Conclusion

For the reasons discussed above, the Court grants Defendants' motion with regard to Mr. Jenkins' First Amendment retaliation claim and Fourth Amendment claim as it relates to Spokane County. The Court denies Defendants' motion with regard to Mr. Jenkins' negligence claim and Fourth Amendment claim as they relate to Deputer Moyer. Accordingly, only Mr. Jenkins' negligence and Fourth Amendment excessive force claims against Deputy Moyer remain.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendants' Motion for Overlength Brief, **ECF No. 15**, and related Motion to Expedite, **ECF No. 16**, are **GRANTED**.

2. Defendants' Motion for Summary Judgment, **ECF No. 19**, is **GRANTED in part and DENIED in part** as set forth above. Only Mr. Jenkins' negligence and Fourth Amendment excessive force claims against Deputy Moyer remain.

3. Because this Order dismisses several of Plaintiffs' claims, the parties are each **DIRECTED** to file a notice with the Court discussing how the Court's ruling affects the parties motions in limine, exhibit and witness lists, and objections thereto **no later than 12:00 p.m. on Monday, March 12, 2012.**

4. The caption for this matter is hereby **AMENDED**. All future filings in this matter shall bear the following caption:

JOHN W. JENKINS, Plaintiff,

v.

DALE MOYER, Defendant.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide copies to counsel.

All Citations

Slip Copy, 2012 WL 13018818

APPENDIX 3

2012 WL 4369187
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Myesha MITCHELL, Plaintiff,
v.
The CITY OF TUKWILA, et al., Defendants.

No. C12–238RSL.
|
Sept. 24, 2012.

Attorneys and Law Firms

Edward C. Chung, Chung, Malhas, Mantel & Robinson, PLLC, Seattle, WA, for Plaintiff.

Jeremy W. Culumber, Keating Bucklin & McCormack, Seattle, WA, Shelley M. Kerslake, Kenyon Disend, Issaquah, WA, for Defendants.

ORDER GRANTING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

ROBERT S. LASNIK, District Judge.

***1** This matter comes before the Court on Defendants' "Motion for Summary Judgment on False Arrest, NIED and 8th Amendment" (Dkt.# 20). For the reasons set forth below, the Court GRANTS Defendants' motion IN PART. [1]

1 The Court also GRANTS Plaintiff's motion (Dkt.# 25) to accept the late filing of her opposition. The Court notes, however, that it is entirely unsympathetic to her counsel's assertion that he is somehow not to blame for his own failure to update his own e-mail address. It also cannot fathom how counsel's stated unavailability from June 28, 2012, to July 13, 2012, see Dkt. # 18, has any bearing on his ability to timely respond to Defendants' motion, which was filed July 19, 2012.

I. BACKGROUND

This case concerns Ms. Myesha Mitchell's claims against Defendant City of Tukwila and Defendant Steve Gurr, a Tukwila police officer, for damages related to Mr. Gurr's alleged use of unreasonable force against Ms. Mitchell on February 5, 2010. Dkt. # 1; *accord* Dkt. # 26. Specifically, Ms. Mitchell alleges that Officer Gurr stopped her without justification after she left her vehicle parked in front of a stranger's house, Dkt. # 26 at 2, and tased her without justification "again and again," *id.* at 3, before placing her under arrest, Dkt. # 1 at ¶ 4.8. She asserts claims for false arrest and imprisonment under state and federal law, negligent and intentional infliction of emotional distress, excessive force in violation of the Fourth Amendment, cruel and unusual punishment in violation of the Eighth Amendment, a due process violation in violation of the Fifth Amendment, assault and battery, and negligence. Dkt. # 1 at 6–9.

II. DISCUSSION

The Court can enter judgment as a matter of law only if it is satisfied that there is no genuine issue of material fact. Fed.R.Civ.P. 56(c). The moving party as to each issue bears the initial burden of informing the Court of the basis for summary judgment. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). It must prove each and every element of its claims or defenses such that "no reasonable jury could find otherwise." *Eli Lilly & Co. v. Barr Labs., Inc.,* 251 F.3d 955, 962 (Fed.Cir.2001). In doing so, it is entitled to rely on nothing more than the pleading themselves. *Celotex,* 477 U.S. at 322–24. Only once the moving party makes that initial showing does the burden shifts to the nonmoving party to show by affidavits, depositions, answers to interrogatories, admissions, or other evidence that summary judgment is not warranted because a genuine issue of material fact exists. *Id.* at 324.

Notably, to be material, the fact must be one that bears on the outcome of the case. A genuine issue exists only if the evidence is such that a reasonable trier of fact could resolve the dispute in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "If the evidence is merely colorable ... or is not significantly probative ... summary judgment may be granted." *Id.* at 249–50. In reviewing the evidence "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods. Inc.,* 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

With these standards in mind, the Court turns to each of the disputed claims.

A. False Arrest and Imprisonment

The Court starts with Defendants' contention that it is entitled to judgment as a matter of law on Ms. Mitchell's federal and state false arrest and imprisonment claims.

***2** Defendants' position is straightforward. *See* Dkt. # 20 at 6. They correctly note that "[t]he existence of probable cause is a complete defense to an action for false arrest, false imprisonment, or malicious prosecution," *McBride v. Walla Walla Cnty.,* 95 Wash.App. 33, 38, 975 P.2d 1029 (1999)); *see Pierson v. Ray,* 386 U.S. 547, 555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) ("[A] peace officer who arrests someone with probable cause is not liable for false arrest...."); *Bender v. City of Seattle,* 99 Wash.2d 582, 603, 664 P.2d 492 (1983) (Dimmick, J., concurring) ("As indicated by the majority, it is well established that the causes of action for malicious prosecution and false arrest require that plaintiff prove want of probable cause and malice."), and they point out that, through her attorney, Ms. Mitchell stipulated to the existence of probable cause in state court, *see* Dkt. # 29 at 9–10; Dkt. # 30 (Exhibit 6).

In response, Ms. Mitchell argues three points. First, she asks the Court to allow her additional time pursuant to Federal Rule of Civil Procedure 56(d) to obtain more discovery concerning the circumstances under which she was arrested.[2] Dkt. # 24 at 11–12. Second, her counsel suggests that she may not have stipulated at all. *Id.* at 13, 664 P.2d 492. And, third, she argues that the Court must scrutinize the validity of her stipulation as it would a "release-dismissal agreement." *Id.* at 13–14, 664 P.2d 492. The Court disagrees.

2 Ms. Mitchell's counsel actually makes his request pursuant to Rule 56(f). The Court notes for his benefit that the Rule was amended nearly two years ago.

First, Ms. Mitchell has failed to demonstrate entitlement to a Rule 56(d) continuance. Though the Ninth Circuit has made clear that "[a] party requesting a continuance pursuant to Rule 56([d]) must identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment," *Tatum v. City & Cnty. of San Francisco,* 441 F.3d 1090, 1100 (9th Cir.2006),[3] Ms. Mitchell has not submitted any affidavit in support of her request. *See* Dkt. # 24; Dkt. # 26 (no reference of request to continue); Dkt. # 27 (same). That failure alone justifies the Court's denial of her request. *Kitsap,* 314 F.3d at 1000 ("Failure to comply with these requirements is a proper ground for denying relief."); *Campbell,* 138 F.3d at 779 (same).

3 *Accord United States v. Kitsap Physicians Serv.,* 314 F.3d 995, 1000 (9th Cir.2002) ("The facts supporting a Rule 56([d]) motion must be set forth in an accompanying affidavit."). "References in memoranda and declarations to a need for discovery do not qualify as motions" for discovery under the summary judgment rule. *State of Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Campbell,* 138 F.3d 772, 779 (9th Cir.1998).

Furthermore, the Court notes that even were it to rely on the "[r]eferences in [Ms. Mitchell's] memoranda," it would still find that Ms. Mitchell has failed to demonstrate cause for continuance. *See Tatum,* 441 F.3d at 1100. Rather than identifying the "specific facts that further discovery would reveal," *id.,* she proposes only a broad fishing expedition, noting her desire to discover "[a]ny and all video surveillance ..., [a]ny and all records ..., [a]ny and all audio recordings ...," etc. Dkt. # 24 at 12. This request is both non-specific and entirely speculative-each an independent basis for denying her request. *See Campbell,* 138 F.3d at 779–80 (" '[D]enial of a Rule 56([d]) application is proper where it is clear that the evidence sought is almost certainly ... pure speculation.' " (quoting *Terrell v. Brewer,* 935 F.2d 1015, 1018 (9th Cir.1991)). Each broad topic is also completely unrelated to the singular fact at issue: Ms. Mitchell's alleged factual stipulation. *See id.* (affirming the denial of a Rule 56(d) motion because "the facts that the defendants hope to elicit during discovery are not essential to resisting California's summary adjudication motion").

***3** Next, the Court finds no merit in Ms. Mitchell's equivocation about whether she did in fact stipulate to the existence of probable cause. The Court thinks it worthwhile to note that, in her affidavit, Ms. Mitchell does not dispute any of Defendants' contentions regarding the state court's multiple findings of probable cause or her own stipulation. Dkt. # 26. And there appears to be good reason. Defendants have provided the Court with multiple state court documents reflecting findings of probable cause, as well as audio recordings of an additional finding and Ms. Mitchell's stipulation. See Dkt.

30. Accordingly, because counsel's argument is not evidence, the Court finds that Ms. Mitchell has failed to raise any genuine issue as to either the state court findings or her stipulation. *Celotex,* 477 U.S. at 324.

Finally, the Court sees no reason not to hold Ms. Mitchell to her stipulation. *See* Dkt. # 30 (audio recording). The Ninth Circuit has "repeatedly held that criminal defendants are bound by the admissions of fact made by their counsel in their presence and with their authority." *United States v. Hernandez–Hernandez,* 431 F.3d 1212, 1219 (9th Cir.2005); *Del Monte v. Cnty. of San Diego,* Civil No. 06cv872–L(WMc), 2008 WL 3540245, at *3 (S.D.Cal.2008) ("Because of the stipulation as to probable cause in the state court criminal case, plaintiffs' claim based upon wrongful arrest must be dismissed with prejudice."). The same is true of Washington courts. *Torrey v. City of Tukwila,* 76 Wash.App. 32, 40, 882 P.2d 799 (1994) (holding that plaintiffs' "stipulations as to probable cause for arrest would defeat any independent state claim for false arrest").

Moreover, Ms. Mitchell's reliance on *Lynch v. City of Alhambra,* 880 F.2d 1122, 1126–29 (9th Cir.1989), is misplaced. As its name should suggest, application of the "release-dismissal agreement" doctrine is dependent on the existence of some sort of release-dismissal agreement. *See id.* at 1124 ("The only issue in this appeal is whether the release signed by Lynch is enforceable ."); *see also Town of Newton v. Rumery,* 480 U.S. 386, 392, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987) (applying contract law principles to determine whether a waiver of a federal right to sue was unenforceable). And in this case, Ms. Mitchell has not presented any evidence that would allow the Court even to infer that her stipulation was the result of some sort of dismissal agreement. To the contrary, as discussed, Ms. Mitchell filed only a single affidavit in support of her opposition to Defendants' motion. *See* Dkt. # 26. And that affidavit makes no mention whatsoever of any stipulation, let alone any underlying agreement. *See id.* Accordingly, Ms. Mitchell has failed to raise a genuine factual issue as to the applicability of the doctrine, and therefore, Defendants are entitled to summary judgment on her false arrest and false imprisonment claims.

B. Negligent Infliction of Emotional Distress

***4** The Court next considers Defendants' assertion that Washington's public duty doctrine precludes Ms. Mitchell's claim against Officer Gurr for negligent infliction of emotional distress. It finds that it does not.

"Under the public duty doctrine, a plaintiff alleging negligence against a government entity must show that a duty was owed specifically to the plaintiff, not to the public in general." *Munich v. Skagit Emergency Commc'ns Ctr.,* 161 Wash.App. 116, 121, 250 P.3d 491 (2011). The doctrine is subject to an important limit, however. It "provides only that an individual has no cause of action against law enforcement officials for failure to act." *Robb v. City of Seattle,* 159 Wash.App. 133, 146–47, 245 P.3d 242 (2010). It does not protect officers being sued for negligence on account of an affirmative act. *Id.; Coffel v. Clallam Cnty.,* 47 Wash.App. 397, 403, 735 P.2d 686 (1987) ("The doctrine provides only that an individual has no cause of action against law enforcement officials for failure to act. Certainly if the officers do act, they have a duty to act with reasonable care.").

In this case, Ms. Mitchel's claim is premised on her tasering by Officer Gurr. Dkt. # 1 at ¶ 7.2. This is an affirmative act to which the public duty doctrine does not apply. *Robb,* 159 Wn.App. 146–47 (rejecting the contention that "the duty of a governmental actor is determined solely by resort to the public duty doctrine and the four recognized exceptions"). Accordingly, the Court DENIES Defendants' public-duty based argument for the dismissal of this claim. *See Garnett v. City of Bellevue,* 59 Wash.App. 281, 286–87, 796 P.2d 782 (1990) (recognizing a cause of action against police officers for negligent infliction of emotional distress).

C. Eighth Amendment

Ms. Mitchell concedes that her claim under the Eighth Amendment is invalid and should be dismissed. Dkt. # 24 at 2 n.3. Accordingly, the Court GRANTS Defendants' motion as to that claim.

III. CONCLUSION

For all of the foregoing reasons, the Court GRANTS Defendants' motion IN PART. It DISMISSES Ms. Mitchell's state and federal claims for false arrest and imprisonment and for any alleged violation of the Eighth Amendment. It DENIES, however, Defendants' motion as to her negligent infliction of emotional distress claim.

Finally, the Court also thinks it is important to note that it is troubled by the inconsistencies between Ms. Mitchell's declaration, Dkt. # 26, and her responses to Defendants' request for admission. *See* Dkt. # 29 at 3–6 (detailing the inconsistencies). It notes for her and her counsel's benefit that both are subject to sanction under Federal Rule of Civil Procedure 26(g)(3) for disclosures that are not "complete and correct at the time made." It encourages them to consider whether a correction is warranted, see Fed.R.Civ.P. 26(e), assuming of course that she has not already admitted each by virtue of her tardy response. *See* Dkt. # 29 at 5 n. 5 (noting Fed.R.Civ.P. 36(a)(3)).

All Citations

Not Reported in F.Supp.2d, 2012 WL 4369187

APPENDIX 4

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

Commissioner Eric Watness, as Personal Representative of the Estate of Charleena Lyles; Karen Clark, as Guardian Ad Litem on behalf of the four minor children of decedent,

Plaintiff,

v.

The City of Seattle, a Municipality; Jason M. Anderson and Steven A. McNew, individually; Solid Ground, A Washington non-profit corporation,

Defendants.

NO. 17-2-23731-1 SEA

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' JASON M. ANDERSON AND STEVEN A. MCNEW'S MOTION TO DISMISS UNDER CR 12 (b)(6)

THIS MATTER having come before the undersigned Judge of the above-entitled Court pursuant to Defendants Jason M. Anderson and Steven A. McNew's Motion to dismiss the three causes of action against them pursuant to CR 12(b)(6). The court has reviewed the pleadings and attachments filed by the moving parties and the responsive pleadings as follows:

1. Defendants Jason M. Anderson and Steven A. McNew's Motion to Dismiss Under CR 12 (b)(6);

2. Plaintiffs' Opposition to Defendants Anderson and McNew's Motion to Dismiss;

JUDGE JULIE SPECTOR
516 THIRD AVENUE C-203
SEATTLE, WA 98104
206-477-1342

3. Declaration of Edward H. Moore in Support of Plaintiffs' Opposition to Defendant McNew and Anderson's Motion to Dismiss;

4. Defendant City of Seattle's Joinder to Defendants Janson M. Anderson and Steven A. McNew's Motion to Dismiss Under CR 12 (b)(6);

5. Defendants Jason M. Anderson and Steven A. McNew's Reply in Support of Motion to Dismiss Under CR 12 (b)(6);

The court is bound by the second amended complaint filed on December 27, 2017. There are three separate causes of actions: 1) Negligence, 2) Violation of the Washington Law Against Discrimination (WLAD), and 3) a violation of the State Constitution.

Plaintiffs failed to respond in its brief to the claim of a violation of the WLAD. Therefore, that claim is dismissed.

Second, there is no separate cause of action for a claim an alleged violation of the State Constitution, Article I, Sections 3. Therefore, that claim is dismissed.

However, as a 12(b)(6) motion regarding the negligence claim, that motion is denied.

IT IS SO ORDERED.

DATED this 27th day of February, 2018.

HONORABLE JULIE SPECTOR

JUDGE JULIE SPECTOR
516 THIRD AVENUE C-203
SEATTLE, WA 98104
206-477-1342

APPENDIX 5

HONORABLE JULIE SPECTOR
Department 3
Hearing Date: February 23, 2018 at 10:00 AM
With Oral Argument

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

Commissioner Eric Watness, as Personal Representative of the Estate of Charleena Lyles; Karen Clark, as Guardian Ad Litem on behalf of the four minor children of decedent, Plaintiff, v. The City of Seattle, a Municipality; Jason M. Anderson and Steven A. McNew, individually; Solid Ground, A Washington non-profit corporation, Defendants.	NO. 17-2-23731-1 SEA DEFENDANTS JASON M. ANDERSON AND STEVEN A. MCNEW'S MOTION TO DISMISS UNDER CR 12 (b)(6)

I. RELIEF REQUESTED

Under Civil Rule 12(b)(6), defendants Jason M. Anderson and Steven A. McNew, both Seattle Police Officers ("defendant Officers") respectfully request that the Court dismiss the claims set forth in plaintiffs' Second Amended Complaint (hereinafter Complaint") (Dkt. 29, filed on December 27, 2017) against them with prejudice. The Complaint against the defendant Officers

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

arises out of their encounter with Charleena Lyles, who summoned officers to her apartment complex by reporting a home burglary. At the end of their encounter, Ms. Lyles pulled out one or two knives and began "waving the knife/knives" around defendant Officers, who fired their weapons at Ms. Lyles, resulting in her death. (*Id.* at ¶¶ 4.56-4.57). Against the defendant Officers, plaintiffs' Complaint asserts three causes of action: (1) negligence (*Id.*, ¶¶ 5.3-5.23); (2) a violation of the Washington State Constitution, specifically Article 1, Section 3 (*Id.*, ¶¶ 5.23-5.30); and (3) Washington's Laws Against Discrimination (RCW 49.60) (*Id.*, intermixed in ¶¶ 5.23-5.30). The Complaint, quite intentionally, avoids alleging any claims against the officers for alleged violations of Ms. Lyles' rights under the U.S. Constitution, the breach of which gives rise to a cause of action under 42 U.S.C. § 1983.

There is no negligence claim for the actions of the defendant Officers in the intentional use of lethal force against Ms. Lyles. Washington State does not recognize a civil cause of action for damages under the State Constitution. Finally, plaintiffs have no cause of action under RCW 49.60. For these reasons, and for the reasons more fully set forth below, defendant Officers respectfully move this Court for an order dismissing plaintiffs' Complaint against them with prejudice under Civil Rule 12(b)(6), accepting as true all of the factual allegations therein.

II. INTRODUCTION

This case was initially filed on September 8, 2017, naming only defendants Anderson and McNew. On October 12, 2017, plaintiffs amended the complaint adding the City of Seattle as a defendant. A Second Amended Complaint was filed on December 27, 2017, adding Solid Ground (a non-profit that allegedly manages the apartment complex where Ms. Lyles lived and where this

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

incident occurred) as a defendant. Substantively, plaintiffs' claims against defendant Officers Anderson and McNew have not changed since the time the initial complaint was filed in September 2017. Despite three efforts at articulating cognizable claims in this action, plaintiffs purposely avoid making the claims properly asserted in these types of cases. Against defendant Officers Anderson and McNew, plaintiffs assert three claims: (1) negligence; (2) violation of the Washington State Constitution; and (3) violation of the Washington Law Against Discrimination.

III. FACTUAL BACKGROUND

The facts of this case have been widely disseminated in the media. In summary, as asserted in the Complaint, Charleena Lyles welcomed the officers into her apartment (*Id.*, ¶ 4.33), there being no burglary in process and "no imminent threat to life or safety involved at this point." (*Id.,* ¶ 4.28) Ms. Lyles "started waving the knife/knives around", threatened the officers who allegedly "completely lost their composure." (*Id.*, ¶ 4.37) The officers "shouted a few times for Charleena Lyles to 'get back', and [a]fter making no physical attempt to disarm Charleena Lyles, Defendants McNew and Anderson shot and killed her in front of two of her children and within the hearing of a third child." (*Id.*, ¶¶ 4.41-4.43).

In more detail, the substantive allegations in the Complaint with respect to defendant Officers begin in paragraph 4.44, where plaintiffs allege that "Charleena Lyles called 911 for help stating that 'an Xbox was missing' from her house and the door was open. She said that the incident had occurred about three hours earlier." There is no dispute that defendant Officers were dispatched in response to a residential burglary call made by Ms. Lyles.

There is also no dispute that the situation went from a peaceful effort on the part of

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

defendant Officers to gather information after entering Ms. Lyles' apartment to a rapid escalation resulting in the use of lethal force once she pulled out the knives. As noted in paragraph 4.53, "Everything started off fine and low key…No distress was noted." Shortly thereafter, Ms. Lyles' demeanor "…changed completely in terms of her interaction with Defendants McNew and Anderson." *Id.*, ¶ 4.55. Ms. Lyles, wielding knives, began "waving" them around defendant Officers Anderson and McNew. As the Complaint notes, "Her [Ms. Lyles] sole focus was on Defendants McNew and Anderson." *Id.*, at ¶ 4.55.

Plaintiffs contend that defendant Officers did not use de-escalation techniques. (*Id.*, ¶ 4.57). Further, plaintiffs contend that "Defendant McNew instructed Defendant Anderson to tase Charleena Lyles. Defendant Anderson responded that he did not have his taser. Later Defendant Anderson would try to cover up this breach (SPM 8.300.2) by saying he would not have used his taser anyway." *Id.*, ¶ 4.59. In addition, plaintiffs allege that defendant Anderson was "required to have it [his taser] on his person at all times. Defendant McNew instructed Defendant Anderson to use his taser precisely because Charleena Lyles was so tiny. It would quickly subdue her." *Id.*, ¶ 4.60.

In paragraph 4.61, plaintiffs contend that Officer McNew "mentally ran out of other options and pulled his gun. So did Officer Anderson. They shouted a few times for Charleena Lyles to 'get back.' But forgot to tell her to drop her weapon. Officer McNew was so rattled he forgot what to say." *Id*., ¶ 4.61. Plaintiffs argue in paragraph 4.61, that defendant Officers' "instructions to 'get back' did not constitute a meaningful warning." *Id.*, ¶ 4.61. Ms. Lyles was shot and killed while she was still armed. *Id.*, ¶ 4.63.

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

Plaintiffs allege that defendant Officers' actions were negligent and unreasonable. *Id.*, ¶¶ 5.3-5.23. Further, plaintiffs contend that Officer Anderson was "mandated" to carry a taser. *Id.*, ¶ 5.15. In addition, plaintiffs claim that "Defendants McNew and Anderson assaulted Charleena Lyles." *Id.*, ¶ 5.18. Plaintiffs further contend that defendant Officers actions "constitute recklessness, deliberate indifference and/or wanton or willful misconduct in regard to her [Ms. Lyles'] constitutional rights," and that "Defendants acted in a manner that deprived Charleena Lyles of her constitutionally protected rights to be free of discrimination and to life, all in violation of the WSLAD and Washington State Constitution." *Id.*, ¶¶ 5.34-5.35.

IV. ISSUE PRESENTED

Accepting as true all factual allegations set forth in plaintiffs' second amended complaint for purposes of Civil Rule 12(b)(6), does the Complaint state a claim upon which relief can be granted against either defendant Officer under any of the theories of liability asserted therein, namely negligence, violation of the Washington State Constitution, and violation of the Washington Law Against Discrimination?

V. AUTHORITY AND ARGUMENT

A. Standard of Review.

The standard for granting a motion to dismiss under Civil Rule 12(b)(6) is well established. *See, e.g. Havsy v. Flynn,* 88 Wn. App. 514, 945 P.2d 221 (1997). For purposes of defendants' motion, all of the factual allegations in the complaint will be accepted as true. *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 37 P.3d 309 (2001) (also accepted as true by appellate court); *Dennis v. Heggen*, 35 Wn. App. 432, 667 P.2d

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

131 (1983). Where there is no reasonable doubt that the plaintiff cannot prove facts consistent with the complaint that would entitle the plaintiff to the relief requested, the motion should be granted. *Parmelee v. O'Neel*, 145 Wn. App. 223, 186 P.3d 1094 (2008), *rev. granted*, 165 Wn.2d 1023, 203 P.3d 380 (2009); *Orwick v. City of Seattle*, 103 Wn.2d 249, 692 P.2d 793 (1984).

B. Plaintiffs Fail to State a Claim for Negligence Upon Which Relief Can Be Granted.

It is well established in Washington that a plaintiff may not base a claim of negligence on an intentional act. *See Willard v. City of Everett*, 2013 WL 4759064 at *2-*3 (W.D. Wash. Sept. 4, 2013). Characterizing an intentional act as negligence does not transform its fundamental character and does not expose a defendant to potential liability in negligence for intentional acts. *Ste. Michelle v. Robinson*, 52 Wn. App 309, 314-16, 759 P.2d 467 (1988); *and see O'Donohue v. Riggs*, 73 Wn.2d 814, 819, 440 P.2d 823 (1968) (plaintiff can establish negligent use of force claim upon showing that someone unintentionally but carelessly used excessive force). It is undisputed that defendant Officers Anderson and McNew intended to shoot Ms. Lyles after she brandished knives and disregarded their verbal commands to "get back." Plaintiffs cannot couch this as an intentional act for purposes of the complaint and discrimination claims, but then also aver the same action was mere negligence. *Boyles v. Kennewick*, 62 Wn. App. 174, 813 P.2d 178 (1991) (dismissing negligent use of force claim when facts alleged fit claim of assault and battery).

Indeed, under their "Negligence" claim, plaintiffs even allege in ¶ 5.18: "Defendants McNew and Anderson assaulted Charleena Lyles," but the Complaint states no assault and/or battery claim. An assault is an intentional act, which plaintiffs may not re-characterize as negligence.

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

Further, courts have found that the public duty doctrine bars liability for officers' use of force during an arrest. "[W]hile it is true that the officers owe a general duty to all citizens of the City to avoid the use of excessive force when effectuating an arrest, it cannot be said that they owe [the plaintiff] a specific duty." *James v. City of Seattle,* 2011 WL 6150567, 15 (W.D.Wash. 2011) (unpublished) (citing *Pearson v. Davis,* No. C06-5444RBL, 2007 WL 3051250, at *4 (W.D.Wash. 2007)); *see also Jimenez v. City of Olympia,* No. C09-5363RJB, 2010 WL 3061799, at *15 (W.D.Wash. 2010) ("It appears that the public duty doctrine bars a claim [for negligence arising out of the use of excessive force] against [the] [o]fficers ... and the City ..."); *Nix v. Bauer,* No. C05-1329Z, 2007 WL 686506, at *4 (W.D. Wash. 2007) (citing *Donaldson v. City of Seattle,* 65 Wn. App. 661, 831 P.2d 1098 (1992) ("[P]olice responsibility in regard to any further investigation becomes part of their overall law enforcement function and does not generate a right to sue for negligence.")

There is no duty on the part of a police officer to carry with them a particular piece of equipment, such as a taser. Nor is there a duty on the part of a police officer to use particular words or phrases when reacting to an individual that has started waving the knife/knives around defendant Officers as alleged in the Complaint, ¶¶ 4.56-4.57.

Plaintiffs are represented by highly sophisticated and experienced counsel, who are experts in handling federal civil rights claims brought under § 1983. As the Court is aware, in cases alleging excessive use of force (a Fourth Amendment claim) or alleged discrimination based on race (a Fourteenth Amendment claim), it is routine for plaintiffs' counsel to bring these as causes of action under § 1983. It is notable that no such claims have been asserted under this statute

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

against the defendant Officers despite the reference in the pre-suit claim filed with the City, and widely disseminated by plaintiffs' counsel in the media, to alleged civil rights violations. This is despite the reference in ¶ 5.30 that the defendant Officers "were acting under color of State law," an essential element of a claim under § 1983. Puzzlingly, plaintiffs' Complaint dresses a colorable excessive force claim under §1983 as a negligence claim, purposefully excluding such a claim from each of the three filed Complaints herein.

Nonetheless, the fact remains that plaintiffs have no cognizable claim for negligence as a matter of law. Accordingly, the Court should dismiss plaintiffs' negligence claim against defendant Officers Anderson and McNew.

C. A Washington State Constitutional Violation is Not a Cognizable Theory.

Under 42 U.S.C. § 1983, damages are awarded for the deprivation of rights secured by the United States Constitution and federal law. *Furfaro v. City of Seattle*, 144 Wn.2d 363, 374, 27 P.3d 1160 (2001). Because § 1983 allows for the recovery of damages for violation of rights secured by the United States Constitution and federal law, a claim under the Washington constitution does not come within its scope. *Id*. at 376-77.

Plaintiffs allege a violation of Article I, Sections 3 of the Washington state constitution, which states: "[n]o person shall be deprived of life, liberty, or property, without due process of law." Const. art. I, § 3. The Washington state constitution does not create a cause of action for money damages, without the aid of augmentative legislation. *Sys. Amusement v. State*, 7 Wn. App. 516, 517, 500 P.2d 1253 (1972). The Court should dismiss this unrecognized claim.

/ / /

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

D. WLAD Does Not Apply.

Washington State's Law Against Discrimination (WLAD) declares that each person has a right to be free from discrimination based on, among other things, race, creed, color, national origin, and mental disability. RCW 49.60.030. The statute itself only applies in certain, specific contexts, including employment, places of public resort, accommodation, assemblage, or amusement, real estate, credit, and insurance transactions, commerce, and breastfeeding mothers in places of public resort, accommodation, assemblage or amusement. RCW 49.60.030(1). Indeed, the purpose of statute is clear:

> A state agency is herein created with powers with respect to ***elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions*** because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

RCW 49.60.010 (emphasis added). The plain language detailing the purpose and application of WLAD is clear, as are the WLAD allegations laid out in plaintiffs' Complaint: WLAD simply does not apply. *Compare* RCW 49.60.010; RCW 49.60.030(1); plaintiffs' Complaint at ¶¶ 5.32-5.33; 5.35.

Even assuming, *arguendo,* that WLAD *could* apply to the facts of this case as pled, plaintiffs fail to meet the required elements of such a claim. Any person believing she has been discriminated against in violation of the WLAD may bring a civil action to recover the actual damages sustained, along with attorneys' fees and costs. RCW 49.60.030(2). For these claims,

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

Washington courts adopt the burden shifting scheme used by federal courts. *Demelash v. Ross Stores, Inc*., 105 Wn. App. 508, 524-25, 20 P.3d 447, 456 (2001), *review denied*, 145 Wn.2d 1004 (2001). First, a plaintiff must advance a prima facie case of discrimination. *Id.* The burden then shifts to the defense to present a legitimate nondiscriminatory explanation for its action. *Id.* The plaintiff may then show that the advanced reason is merely pretext for unlawful discrimination. *Id.*

To first advance a prima facie case of race or mental disability discrimination, a plaintiff must show (1) that (s)he is a member of a protected class; (2) the establishment is a place of public accommodation or assemblage; (3) the defendant discriminated against the plaintiff by not treating her in a manner comparable to the treatment it provides to persons outside that class; and (4) the protected status was a substantial factor causing the discrimination. *Demelash*, 105 Wn. App. at 456; *see also Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 637-40, 911 P.2d 1319 (1996) (prima facie case under RCW 49.60.215 requires comparability of treatment between those in and out of the protected class). In *Demelash*, the plaintiff sued a defendant shop owner, claiming, in part, that defendant unlawfully detained him on suspicion of shoplifting. *Id*. at 457. The court noted that to survive summary judgment, the plaintiff would need to produce competent evidence that the Ross Stores' conduct towards him differed from its treatment of non-Black and/or non-Ethiopian suspected shoplifters in addition to evidence that race/national origin constituted a substantial motivating factor in his detention. *Id*.; *cf., Turner v. City of Port Angeles*, 2010 WL4286239, at *2 & 9 (2010) (plaintiff's claim survived summary judgment because the police allegedly treated him differently than another suspect on scene and because police allegedly used racially charged and offensive language during the course of his arrest).

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

In paragraph 5.26, plaintiffs allege that "Charleena Lyles was entitled to be treated without discrimination on the basis of her race under RCW 49.60." In paragraph 5.27, plaintiffs allege that Ms. Lyles "was entitled to be treated without discrimination on the basis of mental health disability under RCW 49.60." Paragraph 5.29 then sets forth the conclusory allegation: "Defendants acted in a manner that deprived Charleena Lyles of her constitutionally protected rights to be free of discrimination and to life, all in violation of the WSLAD [RCW 49.60] and Washington State Constitution."

In order to advance an actionable WLAD claim, plaintiffs must meet each required element. First, plaintiffs must prove that Ms. Lyles was a member of a protected class. There is no dispute that Ms. Lyles was African-American. Plaintiffs also contend Ms. Lyles suffered from a mental disability. Taking the Complaint at face value and accepting as true for the limited purposes of Civil Rule 12(b)(6), Ms. Lyles was a member of a protected class.

Second, plaintiffs must establish that the alleged discrimination took place at an establishment which is a place of public accommodation or assemblage. It is undisputed that the events subject to plaintiffs' Complaint all took place on a private property, a residential complex operated by Solid Ground, a private, non-profit corporation. Second Amended Complaint at ¶¶ 2.8; 4.11. More specifically, the events at issue took place within Ms. Lyles' personal residence. Plaintiffs cannot meet this essential element under WLAD.

Third, plaintiffs must establish that the defendant Officers discriminated against Ms. Lyles by not treating her in a manner comparable to the treatment they provide to persons outside of her protected class. Again, taking all factual allegations in the Complaint as true for purposes of Civil

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

Rule 12(b)(6), the Complaint is utterly devoid of a single allegation against the defendant Officers which would reveal, let alone suggest, that defendant Officers Anderson and McNew treated Ms. Lyles differently on the basis of her race or her alleged mental disability. In fact, plaintiffs' Complaint extensively details prior responses from the Seattle Police Department and various social services that Ms. Lyles *did* receive. *See generally,* Second Amended Complaint. Plaintiffs cannot meet this essential element required to maintain a WLAD claim.

Finally, plaintiffs must prove that Ms. Lyles' protected status was a substantial factor in causing the alleged discrimination. Here, in addition to the lack of allegations addressing differential treatment by defendant Officers, plaintiffs' Complaint does not and cannot allege that Ms. Lyles' protected status was **the** "substantial factor" in any alleged discrimination. Simply no facts, nor allegations, exist, first, that Officers Anderson and McNew treated Ms. Lyles differently than they would treat a non-African-American or someone not experiencing a "mental health disability," or that Officers Anderson and McNew **did** treat Ms. Lyles different *because* she was African-American or was a person with a "mental health disability." The dearth of facts and allegations in plaintiffs' Complaint with respect to defendant Officers is fatal to plaintiffs' WLAD claims.

Here, the plain language of the statute dictates that it does not apply in this context. Even taking plaintiffs' Complaint at face value, there is no reasonable doubt that plaintiffs cannot prove facts consistent with and essential to a WLAD claim. Accordingly, the Court should dismiss plaintiffs' WLAD claim.

/ / /

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

VI. CONCLUSION

Plaintiffs assert three causes of action against the defendant Officers that are simply not actionable and are incongruent with the underlying event, namely the intentional use of lethal force against an individual that threatened them with knives and refused commands to stay back. Plaintiffs have no cause of action under the Washington State Constitution. Finally, Plaintiff cannot allege a WLAD claim against defendant Officers. Plaintiffs' claims against the defendant Officers should be dismissed with prejudice under CR 12(b)(6).

DATED this 26th day of January, 2018.

CHRISTIE LAW GROUP, PLLC

By /s/ Robert L. Christie
ROBERT L. CHRISTIE, WSBA #10895
Attorney for Defendants Jason M. Anderson and Steven A. McNew

I certify that this memorandum contains 3,311 words, in compliance with the Local Civil Rules.

CHRISTIE LAW GROUP, PLLC
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA 98109
206-957-9669

APPENDIX 6

2012 WL 6148866
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Tacoma.

Richard CONELY, Plaintiff,
v.
CITY OF LAKEWOOD, a municipal corporation, James Syler, in his official and individual capacity and Jane Doe Syler and their marital community, Defendants.

No. 3:11–cv–6064.
|
Dec. 11, 2012.

Attorneys and Law Firms

Erik Francis Ladenburg, Krilich, La Porte, West & Lockner, Tacoma, WA, for Plaintiff.

Amanda Gabrielle Butler, Stewart Andrew Estes, Keating Bucklin & McCormack, Seattle, WA, for Defendants.

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ROBERT J. BRYAN, District Judge.

***1** This matter comes before the Court on Defendants' Motion for Summary Judgment (Dkt.20). The Court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

FACTS

The incident that is the subject of the complaint occurred on September 26, 2009, when Plaintiff was injured by police dog Astor, who was under the control of Officer James Syler ("Syler").

On September 26, 2009, at about 9:30 PM, Lakewood Police officers went to a house where Plaintiff Richard Conely was located. Dkt. 21, at 5. Plaintiff was wanted on a no-bail felony warrant for failure to report to his Department of Corrections supervisor. Dkts. 22, at 4; 24, at 1. The felony warrant read:

> You are hereby commanded to forthwith arrest the said RICHARD MILTON CONLEY, for the crime(s) of UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE; DRIVING WHILE IN SUSPENDED OR REVOKED STATUS IN THIRD DEGREE; UNLAWFUL USE OF DRUG PARAPHERNALIA, said defendant having escaped from confinement/BTC as ordered by the court and bring said defendant into court to be dealt with according to law.

Dkt. 22, at 4.

An Incident Report written by Officer Jason Cannon, who was called to the scene of the arrest, states:

> LESA dispatch received information that Richard M. Conley 3–29–70 was at the residence and had several outstanding warrants for his arrest to include a DOC Felony Escape Warrant. The R/P also report that the suspect will run and is often armed with knives.

Dkt. 22, at 8.

Upon the officers' arrival at the residence, Syler stated in his declaration that Plaintiff fled out the back door only to see the officers guarding the back door, and ran back into the house. Dkt. 21, at 5. Syler described the encounter as follows:

> When we arrived at the residence I took K–9 Astor to the rear of the residence to watch the back while officers attempted contact at the front door. As officers made contact at the front door, I saw the suspect running through the back yard away from the residence. I identified myself as a Police Officer and ordered the suspect to stop or I would release my dog. The suspect

> stopped, looked at me and then turned and ran back towards the residence. I was able to identify the male as the warrant suspect from the previously viewed photograph. I released K–9 Astor and gave him the command to apprehend the fleeing suspect. K–9 Astor gave chase after the suspect but the suspect was able to enter the residence through a basement door and lock the door behind him before K–9 Astor to catch up [sic] to him.

Id.

Plaintiff, however, described, in his declaration, the initial contact with the officers as follows:

> [My friend and owner of the residence] has security cameras outside his house that are connected to his computer monitor. After dark that evening [my friend] noticed someone walking in near his driveway and front yard and asked that I check to see who was there. I left out the back door and walked towards the corner of the house until I could see toward the driveway. I saw several dark figures run in my direction. I was scared and I retreated back into the house. I then heard someone bang on the back door and say "open this is the police." I had a warrant for my arrest for missing an appointment with my probation officer. I did not want to be arrested.

***2** Dkt. 24, at 1.

Syler stated that the last remaining occupant of the residence walked outside leaving Plaintiff alone in the structure. Dkt. 21, at 5. The police report continued:

> There were several places inside the residence for the suspect to hide and lay in wait for us. The suspect had not been searched for weapons and it was still unknown if he was armed. It was unknown if there were any firearms or other weapons inside the residence. The suspect did have access to several household items that could be used as a weapon. Due to the danger this posed to searching officers, I decided to use K–9 Astor to assist in locating the suspect.

Id.

Syler stated that he gave Plaintiff a warning and then sent the dog inside to search the basement:

> I gave a loud verbal warning at the open basement door for the suspect to come out or I would send in my dog, warning him that the dog would find and bite him. After getting no response from inside, I deployed K–9 Astor into the residence and gave him the command to locale [sic] the suspect. K–9 Astor entered through the basement door and began searching the residence.

Id.

Officer Syler stated that the dog did not locate Plaintiff in the basement; the dog then proceeded to the second level, where officers discovered a closed and locked door:

> After clearing the basement, K–9 Astor made his way to the 2nd floor and indicated on a closed door in the upstairs hallway. I checked the door and found that it was locked. Officers contacted the homeowner at the front of the residence and advised that he did not know why the door was locked and had no way to unlock it. Based on K–9 Astor's indication on the door, I believed that the suspect was inside the room.

Id.

In the arrest report, Officer Cannon described the events as follows:

> K9 Astor searched the top floor and indicated on a locked bedroom near the front door. According to [the resident] that door should not have been locked. Ofc. Syler again gave several warnings that the room was going to be searched by a K9. We received no response and the door was forced. K9 Astor entered to search the room and made contact with Conley. Conley was taken into custody.

Dkt. 22, at 9.

Syler stated that he knocked on the door and gave another loud verbal warning "for the suspect to come out or I would send in my dog and he would bite him." Dkt. 21, at 5. There was no response from inside the room. *Id.*

Syler forced open the door and deployed K–9 Astor into the room.

> K–9 Astor located the suspect hiding inside this room. The suspect was actively hiding, lying on the floor with all the lights off inside the room. The suspect made no attempt to give up or announce his location prior to being located by K–9 Astor. K–9 Astor contacted the suspect on the left shoulder and began trying to pull him out from hiding. I ordered the suspect to show me his hands, to make sure he was not holding a weapon. As soon as I could see the suspect's hands, I immediately recalled K–9 Astor. The suspect was then taken into custody at this location by other officers.

***3** *Id.* at 6.

Plaintiff, however, described what happened after he hid in the top floor room, as follows:

> I hid in a small room used as a home office.... It contained a small table with a computer and a dog crate. There was no bed in the room.... I heard an officer knock on the door and shout for me to come out or he would send the dog in. I was scared for my life and did not know what would happen if I open [sic] the door. Instead I decided to give up by lying face down on the floor. I lied [sic] face down, with my arms and legs spread. My feet were directly in from of the door. The officer opened the door. I had to lift my feet up so the door had room to open. Once the officer opened the door all the way, I placed my feet down on the floor, in the door way between the hall and the room. The light from the hall lit the room. The dog came in the room and began sniffing my feet, then my legs, then my torso. The dog slowing walk [sic] around me, sniffing and worked his way up towards my head. I could feel the dog's breath on my face. I did not move. I did not say a word. About 10–15 seconds after the dog enter [sic] the room, he bit me. He tore into my upper arm with extreme force and violence. He pulled and ripped at my arm for several seconds before the officer called him off.

Dkt. 24, at 2. The Court will hereafter refer to this statement as "Plaintiff's testimony."

Syler stated that, once Plaintiff had been taken into custody, medical aid was called to the scene to treat his injuries. Dkt. 21, at 6. Plaintiff stated that he was not placed under arrest or read his Miranda rights. Dkt. 24, at 2. Syler stated that Plaintiff was treated at the scene by Lakewood Fire for the K–9 bite (Dkt. 21, at 6), and was then transported to Tacoma General Hospital where Plaintiff had three surgeries to repair his arm. Dkt. 24, at 2.

PROCEDURAL HISTORY

A. Complaint

On December 5, 2011, Plaintiff filed a civil complaint against the City of Lakewood, James Syler and Jane Doe

Syler, contending (1) that Syler, acting as an agent of the City of Lakewood ("City"), committed acts that constitute assault and battery; (2) that Syler and the City violated his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution; (3) that Syler was negligent when he failed to exercise control of police dog Astor during the encounter with Plaintiff; and that the City, as employer of Syler, who was acting within the scope of his employment, is liable for the negligence of Syler and Astor, under the theory of *respondeat superior;* (4) that Syler negligently used excessive force to arrest Plaintiff; and that the City, as employer of Syler, who was acting within the scope of his employment, is liable for the negligence of Syler and Astor, under the theory of respondeat superior; (5) that Syler's negligence and excessive force caused Plaintiff to suffer emotional distress; and that the City, as employer of Syler, who was acting within the scope of his employment, is liable for the negligence of Syler and Astor, under the theory of *respondeat superior;* and (6) that Defendants are strictly liable, pursuant to RCW 16.08.040, for the injuries inflicted by Astor. Dkt. 1–3, at 5–24.

***4** On December 28, 2011, Defendants removed the case to federal court on the basis of federal question jurisdiction under 28 U.S.C. § 1331. Dkt. 1.

On February 6, 2010, Defendants filed an answer. Dkt. 6. Defendants entered a general denial, but in their answer admit that Syler was acting within the scope of his employment. Dkt. 6, at 2.

B. Motion for Judgment on the Pleadings

On April 4, 2012, the City (not Syler) filed a Motion for Judgment on the Pleadings. Dkt. 12. On May 8, 2012, the Court granted in part and denied in part the claims against the City. Dkt. 17. The Court dismissed with prejudice the federal civil rights claims against the City and the direct liability state law claims against the City for assault and battery, negligence, negligent use of excessive force, intentional infliction of emotional distress, and negligent infliction of emotional distress. Dkt. 17, at 11. The court identified the remaining claims against the City, as follows: strict liability against the City pursuant to RCW 16.08.040; and vicarious liability claims against the City through a theory of *respondeat superior.* Dkt. 17. The Court also stated that "Plaintiff in his original complaint does not appear to make claims for liability of the City of Lakewood for the dog Astor," but "[b]ecause the City, as the moving party, does not appear to discuss these claims, any claims related to liability for the actions for the dog Astor are not before the court on the motion for judgment on the pleadings." Dkt. 17, at 9–10.

C. Motion to File Amended Complaint

On April 30, 2012, Plaintiff filed a Motion to File Amended Complaint. Dkt. 14. The proposed amended complaint eliminated the federal constitutional claim against the City (the court dismissed this claim in its May 8, 2012 order). Dkt. 14, at 2. On May 22, 2012, the Court denied the motion to file an amended complaint. Dkt. 19. Specifically, the Court stated that the amended state law claims did not clearly state "whether plaintiff is alleging liability on the basis of *respondeat superior* for Officer Syler's actions in controlling and handling Astor; whether plaintiff is alleging direct causes of action against the City of Lakewood, based upon Officer Syler's conduct (these direct causes of action were dismissed by the court's May 8, 2010 order); and/or whether plaintiff is alleging that the City of Lakewood has direct liability for Astor's conduct, independent of Officer Syler." Dkt. 19, at 4. The Court denied Plaintiff's Motion without prejudice, stating that Plaintiff should clarify his allegations if he wished to proceed with claims other than those in the original complaint. *Id.* Plaintiff did not file another motion to amend the complaint.

Neither the motion for judgment on the pleadings nor the motion to file an amended complaint affected the federal constitutional claims or the state law claims against Syler. Those claims remain a part of this case.

D. Motion for Summary Judgment

***5** On November 8, 2012, Defendants filed this Motion for Summary Judgment, requesting that all the remaining claims be dismissed. Dkt. 20. Defendants argue that (1) the City is not strictly liable for the actions of the police dog under RCW § 16.08.040 because Syler's use of the dog was lawful and Plaintiff provoked the dog by not obeying orders; (2) the City is not vicariously liable for the state law claims, on a *respondeat superior* theory, because Syler is not liable; (3) Syler is not strictly liable for the dog bite because he is not the owner of the dog; (2) Syler did not violate Plaintiff's Fourth or Fourteenth Amendment rights because he acted reasonably in using the police dog; (3) Syler is entitled to qualified immunity because he acted reasonably and was not on notice that any possible

unreasonable action was unlawful; (4) Syler did not owe Plaintiff a duty of care, and therefore, was not negligent; (5) negligent use of excessive force is not a tort; and (6) Syler did not act outrageously by using a police dog to apprehend a fleeing felon. *Id.*

In response, Plaintiff argues that there are issues of material fact regarding the reasonableness of Syler's use of the dog. Specifically, Plaintiff argues that (1) the City is strictly liable under RCW § 16.08.040 because Syler's use of force was unreasonable given that Plaintiff posed no danger or ability to flee once lying down on floor in the locked room; (2) Syler violated Plaintiff's Fourth Amendment right because Syler's actions in using the dog were unreasonable; (3) Syler is not entitled to qualified immunity because he acted unreasonably and the law concerning use of police dogs is clearly established; (4) negligent use of excessive force is a cause of action in these unique circumstances given that the injury was caused by a dog owned by one defendant and controlled by another, and therefore the City was negligent in its training of the dog; (5) the City and Syler were negligent in their training and use of the dog; (6) Syler is liable for outrage because he allowed the dog to bite Plaintiff while Plaintiff was lying on the floor consenting to arrest; (7) the Court did not dismiss the direct liability state law claims against the City deriving from the City's ownership and training of the dog in the Court's earlier rulings and Defendants did not argue these claims in the present Motion; and (8) Defendants did not address the assault and battery claim against Syler in its Motion. Dkt. 23.

In reply, Defendants first argue that the Declaration (Dkt.25) of Plaintiff's expert, Ernest Burwell, should not be considered because Plaintiff did not timely disclose this expert, and both the expert opinion disclosure deadline and discovery deadline has passed. Dkt. 26. Defendants also argue (1) that the disputed facts that Plaintiff has presented are not material facts; (2) that it was reasonable to use a dog to search the room where Plaintiff was located; (3) that the strict liability claim under RCW § 16.08.040 should be dismissed because Syler's actions were reasonable and because Plaintiff provoked the dog bite by disobeying orders; (4) that Syler is entitled to qualified immunity because he acted reasonably and the law was not clearly established; (5) that Plaintiff does not cite any case law showing that negligent use of excessive force is a cause of action; (6) that general police activities are not reachable in negligence; (7) that Plaintiff failed to provide comparative examples showing outrageous conduct; and (8) direct liability claims against the City stemming from the use of Astor and the assault and battery claims are "red herrings." Dkt. 26.

SUMMARY JUDGMENT STANDARD

***6** Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.,* 477. S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association,* 809 F.2d 626, 630 (9th Cir.1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson,* 477 U.S. at 254, *T.W. Elect. Service Inc.,* 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.,* 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not

be "presumed." *Lujan v. National Wildlife Federation,* 497 U.S. 871, 888–89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

DISCUSSION

A. Declaration of Expert Witness Ernest Burwell

Defendants argue that, because Plaintiff's expert witness, Ernest Burwell, was not disclosed to Defendants before the expert witness disclosure deadline of August 15, 2012 (Dkt.10), nor before the discovery cutoff deadline of October 15, 2012 (Dkt.10), Mr. Burwell's report (Dkt.25) containing his expert opinion on the use of police force should be excluded.

Federal Rule of Civil Procedure 37(c)(1) states

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use the information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or harmless.

***7** Defendants provide argument, but no evidence, showing that Plaintiff has not properly disclosed this expert. Therefore, the Court should not grant this motion to exclude the testimony of Mr. Burwell based on Plaintiff's alleged failure to adhere to deadlines. Defendants' motion to exclude Mr. Burwell's testimony on the basis that it was not properly disclosed is denied without prejudice. Whether Mr. Burwell may testify at trial, and to what he may testify, may be determined by motion *in limine* or other motion, at a later time.

That does not end the inquiry, however. In reviewing Mr. Burwell's proposed expert opinion/evidence, the Court should determine if Mr. Burwell's opinion can be properly considered under the *Daubert* standard. In deciding whether to admit scientific testimony or evidence, the trial judge must ensure that any and all scientific testimony or evidence admitted is relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Scientific evidence is reliable if it is based on an assertion that is grounded in methods of science-the focus is on principles and methodology, not conclusions. *Id.* at 595–96. In *Daubert,* the Supreme Court listed four non-exclusive factors for consideration in the reliability analysis: (1) whether the scientific theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether a particular technique has a known potential rate of error; and (4) whether the theory or technique is generally accepted in the relevant scientific community. *Id.* at 593–94.

In *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147–48, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), the Supreme Court extended *Daubert* 's standard of evidentiary reliability to all experts, not just scientific ones. That standard requires a valid connection to the pertinent inquiry as a precondition to admissibility. *Id.* Where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline. *Id.*

Plaintiff retained the services of Mr. Burwell, who stated in his report that he is a "Police Practices Expert." Dkt. 25. Mr. Burwell concluded in general that: "It is my opinion that excessive, unreasonable, and unnecessary force was used to affect the arrest of Mr. Conley." Dkt. 25, at 3.

Mr. Burwell's opinion does not meet the standard of evidentiary reliability in this case. The theory or technique he used to reach his conclusion is unclear, and there is no showing that it has been, or can be, tested. There is no showing that the theory or technique has been subjected to peer review or publication, or whether it has a rate of error. There is no showing that the theory or technique is generally accepted in the law enforcement community. In light of *Daubert* and *Kumho Tire,* it is simply not sufficient for a qualified expert to render an opinion based on an *ipse dixit* analysis. Mr. Burwell's opinion appears to be legal argument rather than expert analysis. It is not helpful to the court on this matter, and certainly, by itself, does not raise issues of fact.

***8** For these reasons, the Court will not consider the testimony of Mr. Burwell for the purposes of this Order.

B. Contested Claims

The parties dispute which claims are being contested on summary judgment. Defendants contend that they are contesting all remaining claims. Plaintiffs argue that the

Court did not dismiss the state law claims against the City for the actions of Astor, independent of Syler. Plaintiffs also argue that Defendants did not address the assault and battery claim against Syler, and therefore the Court should not address this claim on summary judgment.

In the Court's Order on Plaintiff's Motion to File Amended Complaint, the Court dismissed all claims against the City based on direct liability for the actions of Astor, except the strict liability claim under RCW § 16.08.040. The Court specifically noted that Plaintiff did not appear to make claims for liability on the part of the City for the dog Astor, and later informed Plaintiff that if he wished to allege such claims, he should allege the basis for those claims. Plaintiff was clearly on notice what he needed to do to plead any state law claims against the City for the actions of Astor, independent of Syler.

Therefore, the claims remaining against Syler are (1) violation of Plaintiff's Fourteenth Amendment right to be free of excessive force; (2) violation of Plaintiff's Fourth Amendment right to be free of excessive force; (3) negligence; (4) negligent use of excessive force; (5) negligent infliction of emotional distress; (6) intentional infliction of emotional distress; (7) assault and battery; and (8) strict liability under RCW § 16.08.040. The claims remaining against the City are (1) vicarious liability under *respondeat superior* for the five state law claims listed above against Syler, and (2) strict liability under RCW § 16.08.040.

C. Claims against Syler

1. *Excessive Force under the Fourteenth Amendment*

In its Motion, Defendants make passing reference to Plaintiff's unspecified Fourteenth Amendment claim. Dkt. 20, at 13. Defendants state that the standard for a Fourteenth Amendment excessive force claim is higher than that under the Fourth Amendment, but decline to further address this statement in their briefing. Plaintiff does not address the Fourteenth Amendment claim in his briefing.

As best the Court can tell, Plaintiff argues that Defendants violated his due process rights under the Fourteenth Amendment. The Supreme Court in *Graham v. Connor,* 490 U.S. 386, 393–94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) addressed the propriety of alleging excessive force claims under the Fourteenth Amendment, ruling that these claims should be brought under the Fourth or Eighth Amendments and not under general due process standards of the Fourteenth Amendment. An excessive force claim under the Fourteenth Amendment is not cognizable.

Therefore, the Court should grant summary judgment as to the excessive force claim under the Fourteenth Amendment, and dismiss the claim.

2. *Excessive Force under the Fourth Amendment*

***9** Plaintiff alleges that Syler used excessive force when Syler failed to stop Astor from biting Plaintiff. Defendants argue that Syler's use of Astor to locate and apprehend Plaintiff was reasonable. Although the parties do not specifically argue separate instances of excessive force, it appears that there are two series of events that give rise to potential excessive force claims. The first series of events started when Syler used Astor to locate Plaintiff and ended when Astor entered the room where Plaintiff was hiding. The second series of events began when Astor entered the room and ended when Astor stopped biting Plaintiff. The Court will examine both uses of force in determining Syler's liability.

a. Qualified Immunity

Defendants argue that Syler is entitled to qualified immunity because his use of Astor was reasonable given that Plaintiff was an escaped felon, had a propensity to carry knives, evaded arrest, and hid in a dark room after repeated orders to show himself. Defendants also argue that, even if Syler violated Plaintiff's rights, Syler was reasonably mistaken because the law was not clearly established. Plaintiff argues that Syler is not entitled to qualified immunity because Syler's use of Astor was unreasonable under Plaintiff's testimony. Plaintiff also argues that the law regarding use of force with police dogs was clearly established at the time of the incident.

Defendants in a Section 1983 action are entitled to qualified immunity from damages for civil liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). The existence of qualified immunity generally turns on the objective reasonableness of the actions,

without regard to the knowledge or subjective intent of the particular official. *Id.* at 819.

In analyzing an assertion of qualified immunity, the Court must determine: (1) whether a constitutional right would have been violated on the facts alleged, taken in the light most favorable to the party asserting the injury; and (2) whether the right was clearly established when viewed in the specific context of the case. *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). While the sequence set forth in *Saucier* is often appropriate, it should no longer be regarded as mandatory. *Pearson,* 129 S.Ct. at 811.

i. Alleged Violation of Plaintiff's Fourth Amendment Right when Syler Used Astor to Locate Plaintiff

The first question is whether a constitutional right would have been violated on the facts alleged, taken in the light most favorable to plaintiff. *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). The use of force implicates the Fourth Amendment protections that guarantee citizens the right to be secure in their persons against unreasonable seizures of the person. *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The reasonableness of the force used to effect a particular seizure is determined by carefully balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The force applied must be balanced against the need for that force. *Liston v. County of Riverside,* 120 F.3d 965, 976 (9th Cir.1997).

***10** In determining the reasonableness of officers' actions, the court (1) assesses the severity of the intrusion on the individual's Fourth Amendment rights by considering the type and amount of force inflicted; (2) analyzes the government's interests by considering the severity of the crime, whether the suspect posed an immediate threat to the officers' or public's safety, and whether the suspect was resisting arrest or attempting to escape; and (3) balances the gravity of the intrusion on the individual against the government's need for that intrusion. *Espinosa v. City and County of San Francisco,* 598 F.3d 528, 537 (9th Cir.2010). Other factors that may be considered are: whether the officers gave a warning to the injured party, and whether there were alternative methods of capturing or subduing a suspect. *Smith v. City of Hemet,* 394 F.3d 689, 701 (9th Cir.2005); *Deorle v. Rutherford,* 272 F.3d 1272, 1283–84 (9th Cir.2001). The totality of the circumstances of each case must be considered. *Fikes v. Cleghorn,* 47 F.3d 1011, 1014 (9th Cir.1995).

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham,* 490 U.S. at 396. In addition, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97. The question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them. *Id.* at 397.

In the first series of events, ending once Astor entered the room, the parties do not dispute the material facts. Taking the facts in the light most favorable to the injured party, the severity of intrusion and amount of force inflicted during the first series of events was insubstantial, and the government had a strong interest in using Astor to locate Plaintiff because he was fleeing from arrest. The evidence submitted clearly shows that Syler acted reasonably when he used Astor to locate Plaintiff, and did not violate Plaintiff's Fourth Amendment right in doing so.

The Court need not address whether the law regarding the use of Astor to locate Plaintiff was clearly established, because, on the facts alleged, Syler did not violate Plaintiff's Fourth Amendment rights in the first series of events. Therefore, the Court should grant qualified immunity for Syler when he used Astor to locate Plaintiff, and dismiss this portion of the excessive force claim.

ii. Alleged Violation of Plaintiff's Fourth Amendment Right when Astor Bit Plaintiff

In the second series of events, beginning when Astor entered the room, the parties dispute the facts. If the facts are as Plaintiff contends in Plaintiff's testimony, and applying the *Espinosa v. City and County of San Francisco and Smith v. City of Hemet* factors, a reasonable fact finder could find that Syler's use of Astor to bite Plaintiff was excessive force.

***11** For these reasons, the Court should find, for purposes of this Order only, that Syler's use of Astor after Astor entered the room, based on Plaintiff's testimony, violated Plaintiff's Fourth Amendment right to be free of excessive force.

iii. Clearly Established law

"The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). "This does not mean that any official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it does require that in the light of pre-existing law the unlawfulness must be apparent. [Therefore], when the defendant's conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Mendoza v. Block,* 27 F.3d 1357, 1361 (9th Cir.1994) (internal citations and quotations omitted). The Ninth Circuit has analogized the use of police dogs to the use of other police weapons.

> The reasonableness of force is analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted. This analysis applies to any arrest situation where force is used, whether it involves physical restraint, use of a baton, use of a gun, or use of a dog. We do not believe that a more particularized expression of the law is necessary for law enforcement officials using police dogs to understand that under some circumstances the use of such a "weapon" might become unlawful. For example, no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control. An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.... We therefore hold that the deputies' use of the police dog is subject to excessive force analysis, and that this law is clearly established for purposes of determining whether the officers have qualified immunity.

Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir.1994).

In reference to the *Mendoza* rule, the court in *Watkins v. City of Oakland, Cal.,* 145 F.3d 1087, 1093 (9th Cir.1998) held that "it was clearly established that excessive duration of the [dog] bite and improper encouragement of a continuation of the attack by officers could constitute excessive force that would be a constitutional violation."

Here, although the parties do not address this specific argument, the use of a police dog to apprehend a suspect is not meaningfully indistinguishable from any other method used to apprehend a suspect, such as by physical force, a baton, pepper spray, or a taser. The law is clear in stating that officers are not to use weapons when suspects are consenting to arrest. *Davis v. City of Las Vegas,* 478 F.3d 1048, 1052 (9th Cir.2007).

***12** Even when suspects do not initially consent to arrest, the law is clear regarding excessive force. *See, e.g., Chew,* 27 F.3d at 1436, 1443 (holding that, under *Graham,* the fact that the defendant officer used "severe force" to arrest a suspect who did not pose an immediate threat to the safety of police officers was sufficient to preclude summary judgment for the officer, notwithstanding the fact that the suspect had attempted to flee and was the subject of three outstanding felony warrants).

Based upon Plaintiff's testimony, Syler's use of Astor after Astor entered the room could be considered so patently violative of the Fourth Amendment that reasonable officials would know that the action was unconstitutional. The law regarding use of police dogs and dog bites is clearly established.

b. Conclusion

At this point, Syler is not entitled to qualified immunity for his use of Astor after Astor entered the room. The

Court should deny summary judgment on the Fourth Amendment claim to that extent. Because the Court construed the disputed facts in favor of Plaintiff, this Order should not preclude Defendants, as the factual record develops, from raising qualified immunity at trial.

3. *Negligence*

The state law negligence claims are against Syler, and, on the basis of *respondeat superior,* against the City. Based on Plaintiff's testimony, there are issues of material fact on duty, breach, and causation. The public duty doctrine gives no relief to Defendants because any duty breached was owed to Plaintiff, not to the general public. *Garnett v. City of Bellevue,* 59 Wash.App. 281, 796 P.2d 782 (1990).

The Court should deny summary judgment as to the state law negligence claim against Syler.

4. *Negligent Use of Excessive Force*

The negligent use of excessive force claim is not a separate claim, but is an issue within the general negligence claim. Therefore, the Court should not grant summary judgment as to the negligent use of excessive force claim against Syler, but will not treat this claim as a separate claim.

5. *Negligent Infliction of Emotional Distress*

Although Defendants state in this Motion that they request summary judgment on all claims, neither party specifically addresses the negligent infliction of emotional distress claim.

Generally, a "plaintiff may recover for negligent infliction of emotional distress if she proves negligence, that is, duty, breach of the standard of care, proximate cause, and damage, and proves the additional requirement of objective symptomatology." *Strong v. Terrell,* 147 Wash.App. 376, 387, 195 P.3d 977 (2008).

This claim, also, is not truly a separate claim, but is a statement of a type of damage Plaintiff claims he suffered. Therefore, the Court should not grant summary judgment as to the negligent infliction of emotional distress claim against Syler, but will not treat this claim as a separate claim.

6. *Intentional Infliction of Emotional Distress*

***13** This is a so-called "outrage" claim. "To establish a tort of outrage claim, a plaintiff must show (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff." *Reid v. Pierce County,* 136 Wash.2d 195, 202, 961 P.2d 333 (1998). "Liability exists only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson,* 85 Wash.2d 52, 59, 530 P.2d 291 (1975).

Here, even under Plaintiff's testimony, Syler's use of Astor does not meet the high threshold of conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Washington courts have dismissed claims of outrage on much more egregious conduct than that which is presented in this case. *See, e.g., Babcock v. State By & Through Dept. of Soc. & Health Services,* 112 Wash.2d 83, 90, 768 P.2d 481 (1989) *reconsidered on other grounds, Babcock v. State,* 116 Wash.2d 596, 809 P.2d 143 (1991).

For this reason, the Court should grant summary judgment as to the intentional infliction of emotional distress claim against Syler, and this claim should be dismissed.

7. *Assault and Battery*

Defendants argue that the assault and battery claim is a "red herring." Plaintiff does not address this claim.

"A battery is a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent. An assault is any act of such a nature that causes apprehension of a battery." *McKinney v. City of Tukwila,* 103 Wash.App. 391, 408, 13 P.3d 631 (2000) (internal citations and quotations omitted). If a police officer's use of force was unreasonable, then that officer is not entitled to qualified immunity and is liable for assault and battery. *Brooks v. City of Seattle,* 599 F.3d 1018, 1031 (9th Cir.2010) *on reh'g en banc sub nom. Mattos v. Agarano,* 661 F.3d 433 (9th Cir.2011); *Staats v. Brown,* 139 Wash.2d 757, 780, 991 P.2d 615 (2000).

The Court should deny summary judgment as to the assault and battery claim against Syler.

8. *Strict Liability under RCW § 16.08.040*

Plaintiff argues in his complaint that Syler is strictly liable for his use of Astor, but in his Response Plaintiff does not address this claim. Defendants argue that RCW § 16.08.040 does not apply to Syler because the City, not Syler, is the owner of Astor.

RCW § 16.08.040 (subsequently amended) stated, at the time of the arrest and when the complaint was filed, that

> The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

***14** Only the owner of a dog can be liable under RCW § 16.08.040. *See Saldana v. City of Lakewood,* 11–CV–06066 RBL, 2012 WL 2568182 (W.D.Wash. July 2, 2012). Because Syler does not own Astor, Syler cannot be liable under RCW § 16.08.040.

The Court should grant summary judgment as to the strict liability claim against Syler under RCW § 16.08.040, and this claim should be dismissed.

D. Claims against the City

1. *State Law Claims under Respondeat Superior*

Under a *respondeat superior* theory, Plaintiff claims that the City is liable for assault and battery, negligence, negligent use of excessive force, intentional infliction of emotional distress, and negligent infliction of emotional distress. Because Defendants have admitted that Syler was acting within the scope of his employment, the City's liability as to these claims rise and fall on Syler's liability as to these claims.

Accordingly, the Court should deny summary judgment as to the negligence, negligent use of excessive force, negligent infliction of emotional distress, and assault and battery claims against the City. The Court should grant summary judgment as to the intentional infliction of emotional distress claim against the City.

2. *Strict Liability under RCW § 16.08.040*

Plaintiff argues that the City is strictly liable for Syler's unlawful use of Astor. Defendants argue that Syler's use of Astor was reasonable and that Plaintiff provoked the use of Astor.

Washington federal district courts have ruled on the liability of municipalities, as owners of police dogs, under RCW § 16.08.040. If the officer's use of the dog is lawful, then the city is not liable. *Saldana,* 2012 WL 2568182, at *4. The Ninth Circuit in *Miller v. Clark County* has held that a police officer's use of a police dog is lawful if the officer's ordering the dog to bite was reasonable under the Fourth Amendment. 340 F.3d 959, 968 n. 14 (9th Cir.2003).

Further, RCW § 16.08.060 states that "[p]roof of provocation of the attack by the injured person shall be a complete defense to an action for damages." Here, Plaintiff, by fleeing and locking himself inside a room, provoked the use of Astor to find where Plaintiff was located. The facts, however, do not show that Plaintiff provoked the actual bite, given Plaintiff's testimony. There is no indication of provocation in these facts that would warrant a defense.

Therefore, the City's liability under RCW § 16.08.040 hinges on whether Syler's actions were reasonable under the Fourth Amendment. Accordingly, the Court should deny summary judgment as to the strict liability claim under RCW § 16.08.040 against the City.

Accordingly, it is hereby **ORDERED** that

Defendants' Motion to Strike the declaration of Plaintiff's expert witness Ernest Burwell as untimely disclosed (Dkt.26) is **DENIED,** but the declaration was not considered because it did not meet evidentiary standards.

Defendants' Motion for Summary Judgment (Dkt.20) is **GRANTED IN PART** and **DENIED IN PART.**

***15** The Motion for Summary Judgment is **GRANTED** as to (1) the Fourteenth Amendment excessive force claim

against Syler; (2) the Fourth Amendment excessive force claim against Syler as to Syler's use of Astor to locate Plaintiff; (3) the intentional infliction of emotional distress claims against the City and Syler; and (4) the strict liability claim under RCW § 16.08.040 against Syler. These claims are dismissed with prejudice.

The Motion for Summary Judgment is **DENIED** as to (1) the Fourth Amendment excessive force claim against Syler as to Syler's use of Astor once Astor entered the room; (2) the negligence claims against the City and Syler; (3) the negligent use of excessive force claims against the City and Syler; (4) the negligent infliction of emotional distress claims against the City and Syler; (5) the assault and battery claims against the City and Syler; and (6) the strict liability claim under RCW § 16.08.040 against the City.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

All Citations

Not Reported in F.Supp.2d, 2012 WL 6148866

APPENDIX 7

2013 WL 1497343
Only the Westlaw citation is currently available.
United States District Court,
E.D. Washington.

Michael KIRBY, Plaintiff,
v.
CITY OF EAST WENATCHEE, and
Officer James Marshall, Defendants.

No. CV–12–190–JLQ.
|
April 10, 2013.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; AND DENYING DEFENDANTS' MOTION TO EXCLUDE TESTIMONY

JUSTIN L. QUACKENBUSH, Senior District Judge.

***1 BEFORE THE COURT** are Defendants' Motion for Summary Judgment (ECF No. 75) and Motion to Exclude Testimony of Plaintiff's Blood Spatter Expert (ECF No. 86). On March 27, 2013, the court heard oral argument on the Motion for Summary Judgment. Julie Kays appeared on behalf of Plaintiff. Jerry Moberg and James Baker represented Defendants.

Through 42 U.S.C. § 1983 claims, Plaintiff asserts a violation of his Fourth Amendment right to be free from excessive force, a claim for municipal liability against the City, and state common law claims against both Defendants for negligence. (ECF No. 61, Second Amended Complaint). Defendants' Motion for Summary Judgment seeks judgment as a matter of law on all claims. The court has reviewed the entire record, including the supplemental materials filed after the hearing on Plaintiff's state law negligence claims against the City. The following Order is intended to supplement and memorialize the oral rulings of the court.

I. FACTS

This case involves Defendant City of East Wenatchee Police Officer James Marshall's intentional use of lethal force, from his perimeter position of traffic-control over 70 yards away, with a single rifle shot to the head of Plaintiff, Michael Kirby, a 49–year old man who had been contemplating suicide. The following are undisputed facts:

On April 5, 2009 around 6:39 p.m., Plaintiff's former wife, Kim Kirby, called 911, reporting that Kirby was in the living room of a house on 723 Lynn Street in the city of Wenatchee, Washington with a "revolver" to his head and in possession of a shotgun. Wenatchee Police Officers Brian Chance and Ron Wilson responded to the call at 6:40 p.m., and requested additional personnel "for containment." Wilson went to a perimeter position behind a vehicle, directly across the street from Kirby's residence, and was armed with a bean bag shotgun. He had a partial view of Kirby's front door. Chance took cover behind a van in the neighbor's driveway, East of Kirby's residence. There were shrubs and trees in Chance's line of sight.

At 6:40 p.m. dispatch updated responding officers reports that Kirby was in possession of a revolver and a shotgun, that he was "HBD" (had been drinking), and on medications. At 6:43 p.m. Chance requested responding units block off the nearby intersections of Methow Street and Lynn Street, as well as Cascade Street and Lynn Street. Chance also radioed a request for minimal use of sirens, so as to reduce the risk of agitating Kirby. (ECF No. 78, Ex. 9, Track 7). During this time, Kim Kirby exited Kirby's residence and made contact with Officer Chance.

Defendant Marshall was in the area and though he was an officer with the neighboring city of *East* Wenatchee, he was authorized to respond to the call for assistance. He arrived in his patrol vehicle at the area at approximately 6:46 p.m. He positioned himself in the intersection of Cascade and Lynn Street, facing north and in sight of the Kirby residence (3 residences and approximately over 70 yards away). Chance radioed Marshall to make him aware of the location of the Kirby residence. (ECF No. 78, Ex. 9, Track 8). Marshall's incident report indicates that upon arrival he exited his vehicle with his patrol rifle and maintained traffic control.

***2** At 6:49 p.m., Chance attempted several calls to Kirby's cell phone with negative results.

At 6:52 p.m., Wenatchee Police officer Tracy Martin arrived in her patrol car to relieve Officer Marshall who was detailed to another call. Upon arriving, she observed a fire truck staged to the North of Cascade Street and

Hainsworth Street. Marshall and Martin had a brief discussion regarding the location of Kirby's residence and her duties at the intersection. Marshall returned to his vehicle and then opened his laptop to view his next assignment and changed his radio frequency. Officer Martin returned to her car, which she had planned to move into Marshall's position at the intersection when he left. Once inside her car, Martin looked over at Kirby's residence and saw him exit the front door and "raise a long barreled gun in [their] direction." [ECF No. 78, Ex. 3]. It is undisputed that Mr. Kirby stepped out onto his front porch, and that when he exited the house, he was carrying a shotgun in his hands. The position of the gun and Plaintiff's conduct with the gun is in dispute. Martin then "punched" the gas pedal of her car and lurched forward in order to get "out of the line of fire." *Id.*

Martin exited her patrol car in a low position and at 18:52:55 radioed her observations: "he's at the door with the gun aiming at us." (ECF No. 78, Ex. 9, Track 11). According to Martin, she observed that Marshall was not moving from his seated position inside his car with his head bent down, so she low crawled over to Marshall's driver's side door (30–40 feet away), and alerted him by banging on his window, telling him to get out of the car and that Kirby was pointing a gun at them. *Id.* Marshall exited his patrol car with his rifle. Martin crouched low taking cover behind the engine of Marshall's car. Marshall then rose from his squatted position, aimed and fired one shot striking Kirby in the left side of the face. According to 911 radio entries, "Shots fired Rivercom. Suspect down" was radioed at 18:53:15, just 20 seconds after Martin's earlier radio traffic. (ECF No. 78, Ex. 9, Track 11 (00:51)).

Marshall admitted during his deposition that he opted not to maintain a position of cover (as was Martin). (ECF No. 90 at 221). Instead, Marshall's incident report states:

> I looked toward the suspect's house and saw a white male on the porch shouldering a long gun at me. I could see that the weapon was made of wood composite. I could also see clearly that the weapon was shouldered and in the aiming position ready to fire....I raised my rifle to the shouldered position ... and acquired him in my sights. I could clearly see that the suspect was pointing his rifle at me and that we were now facing barrel to barrel.

After being shot, Kirby was transported to a local hospital. The bullet shattered his jaw, and left Kirby with a life altering disability severely hindering his ability to eat, drink and speak. An Ithaca Model 37 12–gauge pump shotgun was seized from the scene.

***3** Plaintiff's account of the incident varies from Marshall's. His declaration states that after he stepped out onto his front porch holding a shotgun in his hands, an officer began speaking with him from behind a large tree in his yard. (ECF No. 90, Ex. 1). Officer Chance denies having any conversation with Kirby between the time he arrived and the time of the shooting. However, Kirby asserts the officer convinced him that his "life was worth living" and instructed him to put down the shotgun.

> I told him that I was concerned that the shotgun's sensitive mechanism would cause it to go off after I put it down, and that had to remove a bullet from the chamber before putting the gun on my porch. While the shotgun remained pointed vertically toward the sky, I used my right hand (index finger) to release the bullet from the chamber. The gun remained in a vertical position while I did that. I turned away from the direction of the tree and turned to my left, setting the gun (still pointing up) next to the right side of my front door. I then turned and began facing the direction of the tree when I suddenly felt the blow of Marshall's rifle shot to the left side of my face and fell down.

Id.

Witnesses located at the Preciado residence directly across the street from Kirby's residence also provide varying accounts. Aida Preciado watched the incident from an upstairs living room window, which has a direct view of the Kirby's front porch. Ms. Preciado states in her declaration she saw Kirby on the front of the house with a gun pointed "straight up to the sky" and that she never

saw Kirby point or aim the gun at anyone. (ECF No. 90, Ex. 13 at 171).

Marco Preciado states in his Declaration that he heard an officer yell something like "come out with your hands up" and something like "you're going to get shot" and then witnessed Kirby come out on to the front step with a weapon on his right side "pointed up towards the sky." He recalls hearing an officer telling Kirby "about a beanbag gun," "they did not want to use it on Mike," and tell Mike to come talk to him. He then recalls watching Kirby put his left hand toward the middle of the weapon, then slightly lower the gun a few inches down. He heard a shot and saw Kirby fall to the ground and the gun drop from his hand. His Declarations states he "never saw Mike aim his gun at anyone."

Cristhian Preciado recounts also watching Kirby walk out his front door with a rifle "angled slightly downwards." He states he never saw Kirby point the gun at anyone nor "aim the gun, as if in a shooting position," nor "aim the weapon up the street towards Cascade and Lynn." (ECF No. 90, Ex. 14 at 175).

b. After the Shooting

Both the Wenatchee and East Wenatchee Police Departments investigated the shooting and concluded Marshall's use of force was reasonable. No discipline was imposed.

On June 9, 2010, the Chelan County Prosecuting Attorney filed a criminal Information against Plaintiff, which stated:

> ***4** That the said defendant, ... on or about the 5th day of April, 2009, did then and there unlawfully, feloniously and intentionally assault an employee of a law enforcement agency who was performing his [sic] official duties at the time of the assault: Officer Tracy Martin of the Wenatchee Police Department; contrary to the form of the statute RCW 9A36.031(1)(g) in such cases made and provided against the peace and dignity of the State of Washington.

ECF No. 78, Ex. 4. Plaintiff pleaded guilty to Assault in the Third Degree by Alford plea. In his Statement on Plea of Guilty, Plaintiff admitted:

> The judge asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: I held a gun in m hands while standing on m front porch. I was distraughtand confused. I put the gun down buf the officers were concerned for their safety. One of them shot me. I did not intend to harm anyone.

ECF No. 78, Ex. 5. Chelan County Superior Court entered a felony judgment and sentenced Plaintiff to 12 months probation.

c. Training and Policies

Marshall attended the Reserve Police Officer Academy through Tacoma Community College from March 2000 to September 2000. From May to June 2002, he worked as a reserve police officer for the Coulee Dam, Washington Police Department. From July 2003–April 2007, he worked for the Clyde Hill, Washington Police Department. He attended the Washington State Basic Law Enforcement Academy from March 2004 to August or September 2004. From April 2007–May 2008 he worked for the Medina, Washington Police Department, and left there for employment with the East Wenatchee Police Department. Marshall had training on the use of force, including 16 hours of crisis intervention at the Police Academy and 20 hours of crisis intervention at the Reserve Academy. He attended a course in August 2006 titled "Interacting with Persons with Developmental Disabilities and Mental Illness." He estimated he had over 100 hours of training on the use of force.

Unlike the Wenatchee Police Department, the City of East Wenatchee did not have a specific written policy or procedure for interaction with suicidal or depressed subjects until November 2012, at which time the City's General Orders Manual was amended to include such a provision. In the four-year period from 2006 through 2009, the department averaged 75 "mental health assists" per year.

East Wenatchee Police Chief Randy Harrison testified at his deposition that in his role as Chief he was responsible for establishing policies and procedures for the police department. During his tenure as Chief from 1995 to 2012 the department never held any training for their officers on the subject of interacting with mentally ill people. He testified in his deposition that he "did not until last fall begin to think about a policy a ... written policy, on dealing with the mentally ill." He acknowledged that his department provided annual training on firearms tactics, blood borne pathogens and use of force, and that the use of force training was immediately prior to firearms instruction, lasted ten minutes, and consisted of officers reading the use of force policy to themselves from the General Orders Manual.

***5** East Wenatchee Police Department Policy provides that "[t]he protection of life is at all times more important than either the apprehension of criminal offenders of the protection of property. The member's responsibility to protect life must include his/her own life."; "The use of Deadly Force is authorized ... In all cases, use of force is limited to the reasonable amount of force necessary to lawfully accomplish arrest, overcome resistence to arrest, defend you from harm or to control a situation."; "Deadly force may only be used under the following circumstances: A. When reasonably necessary to protect the member or others from what he or she reasonably believes is an imminent threat of death or serious physical injury."

Both sides have proffered experts in police policies and practices, as well as in blood stain analysis, whose reports are included in the record and discussed in more detail in the context of the court's analysis below.

II. SUMMARY JUDGMENT STANDARD

The court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable fact-finder to return a verdict for the nonmoving party. *Id.* When parties submit cross-motions for summary judgment, as here, the Court must consider each motion on its own merits. *Fair Housing Council of Riverside County, Inc. v. Riverside Two,* 249 F.3d 1132, 1136 (9th Cir.2001). In addressing the parties' cross-motions for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 255 (1986). Nevertheless, the non-moving party "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 248. Factual assertions in the moving party's affidavits may be accepted as true unless the opposing party submits its own evidence to the contrary.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. *Heck v. Humphrey*

Defendants first argue Plaintiff's excessive force claim is barred under *Heck v. Humphrey,* 512 U.S. 477, 487 (1994), where the Supreme Court held that Section 1983 plaintiffs are barred from advancing claims that, if successful, "would necessarily imply the invalidity" of a prior conviction or sentence. Defendants contend that Plaintiff's conviction for Third Degree Assault would be rendered invalid if he prevails on the claim.

Kirby pleaded guilty to Third Degree Assault in Chelan County Superior Court in violation of RCW 9A.36.031, which provides:

> (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
>
> ***6** ...
>
> (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault ...

RCW 9A.36.031. Because "assault" is not defined in the statute, courts resort to the common law definitions. *State v. Byrd,* 125 Wash.2d 707, 712, 887 P.2d 396 (1995). In Washington, the common law definition of assault encompasses: "(1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm." *State v. Walden,* 67 Wash.App. 891, 893–94, 841 P.2d 81 (1992). Specific intent is an essential to all forms of assault.

A person must have intended to cause bodily harm or specifically intended to create an apprehension of bodily harm.

The Information to which Kirby entered his Alford Plea states in relevant part that Kirby "did ... unlawfully, feloniously and intentionally assault an employee of a law enforcement agency who was performing his official duties at the time of the assault, to wit: Officer Tracy Martin of the Wenatchee Police Department ..." (ECF No. 78, Ex. 4). As part of his Alford plea, Kirby admitted: "I held a gun in my hands while standing on my front porch. I was distraught and confused. I put the gun down but the officers were concerned for their safety. One of them shot me. I did not intend to harm anyone." (ECF No. 78, Ex. 5).

The critical question here is whether a jury's finding that Marshall's use of force was objectively unreasonable would necessarily call into question the validity of Kirby's conviction for third degree assault upon Officer Martin? If it is possible for Kirby to have assaulted Martin and for Marshall's shooting of Kirby to have been objectively unreasonable, then *Heck* does not bar Kirby's claim.

In addressing the scope of *Heck,* the Ninth Circuit in *Smith v. City of Hemet* recognized that an allegation of excessive force by a police officer would not be barred by *Heck* if it were distinct temporally or spatially from the factual basis for the person's conviction. 394 F.3d 695, 699 (9th Cir.2005). The court noted that the plaintiff would be allowed to bring a § 1983 action, if the use of excessive force occurred *subsequent* to the conduct on which his conviction was based." *Id.* at 698 (emphasis added). Here, Plaintiff attempts to temporally distinguish the facts by contending that whatever the basis for Kirby's assault on Officer Martin, it was complete *before* Marshall's use of force, and therefore a jury's determination that the officer's actions were unreasonable *after* Martin sensed the harm would not be inconsistent with the assault conviction. The court agrees.

A third degree assault conviction does not require a firearm to have been pointed at a victim in order to put another in apprehension of harm. The elements of third degree assault upon Martin were satisfied in the moment Kirby wielded the gun *within the sight* of Officer Martin, while she was seated in her own patrol car and over twenty seconds prior to the shooting. From then on, Martin remained out of Kirby's sight. In this case, it will be for the jury to determine the circumstances thereafter facing *Marshall* after Martin spoke to him, after he exited his own vehicle, and after he decided to obtain Kirby in his sight instead of maintaining a position of cover. A finding that Marshall's use of force was unreasonable would not imply that Plaintiff did not put Martin in fear of harm when she saw him with the gun.

***7** The nature of Kirby's conviction and these facts distinguish this case from the single provocative act or single transaction cases applying *Heck.* This case is more factually analogous to *Ballard v. Burton,* 444 F.3d 391 (5th Cir.2006), where the Plaintiff was also a suicidal man with a rifle who was shot in the face by the Defendant officer, after driving through town and firing his rifle near responding police officers. The plaintiff entered into an Alford plea to a simple assault on a *different* police officer admitting only that he had put that officer in fear and that he fired his rifle several times while near law enforcement officers. Critical to the court's decision was that the plaintiff's behavior satisfied the elements for simple assault both before and after the Defendant Officer had arrived at the scene. The Fifth Circuit held Plaintiff's claim was not barred by *Heck* as it was possible that both the Defendant's shooting of the Plaintiff was objectively unreasonable, and that the Plaintiff had assaulted the other officer by pointing the gun in that officer's direction and firing the gun in the presence of law enforcement.

As in *Ballard,* the court concludes Plaintiff's claim for excessive force is not barred by *Heck v. Humphrey.*

B. § 1983 Excessive Force—Qualified Immunity

Under 42 U.S.C. § 1983, police officers, as representatives of the government, are liable for the deprivation of rights guaranteed by the Constitution. However, 42 U.S.C. § 1983 does not create substantive rights, but rather provides remedies for deprivations of other constitutional rights. *Albright v. Oliver,* 510 U.S. 266, 271 (1994). A police officer is entitled to qualified immunity unless his conduct violates clearly established rights of which a reasonable officer would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Qualified immunity is a question of law, and it offers immunity from suit rather than a mere defense to liability. *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). Courts employ a two-step analysis to determine whether a government official is protected by qualified immunity. The first part of the

analysis is to determine whether the facts alleged show the officer's conduct violated a constitutional right. *Saucier v. Katz,* 533 U.S. 194, 200–01 (2001). Next, the court must determine whether the constitutional right at issue was clearly established. *Id.* Both steps of this analysis must be conducted in the light most favorable to the *Plaintiff.*

1. Violation of a Constitutional Right

Both parties agree that the use of excessive or deadly force under § 1983 invokes the Fourth Amendment's guarantee of the right to be free from unreasonable seizures. To establish an unconstitutional seizure, a plaintiff must prove that his person was seized and that seizure was unreasonable. See generally, *Katz v. United States,* 389 U.S. 347 (1967). Neither party disputes that Marshall's use of lethal force against Kirby constituted a seizure of his person. The use of deadly force by a police officer is a seizure. The right to be free from excessive force is a clearly established right protected under the Fourth Amendment's prohibition of unreasonable seizures. However, the parties contest the reasonableness of Marshall's actions, with Defendants averring his use of deadly force was reasonable and Plaintiff claiming it was unreasonable.

***8** In evaluating a Fourth Amendment claim of excessive force, courts ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham v.. Connor,* 490 U.S. 386, 397 (1989). This inquiry "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 396 (*quoting Tennessee v. Garner,* 471 U.S. 1, 8 (1985)). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97. Reasonableness therefore must be judged from the perspective of a reasonable officer on the scene, "rather than with the 20/20 vision of hindsight." *Id.* at 396, (*citing Terry v. Ohio,* 392 U.S. 1, 20–22 (1968)).

The analysis involves three steps. First, the court must assess the severity of the intrusion on the individual's Fourth Amendment rights by evaluating 'the type and amount of force inflicted.' " *Espinosa v. City and County of San Francisco,* 598 F.3d 528, 537 (9th Cir.2010) (*quoting Miller v. Clark Cnty.,* 340 F.3d 959, 964 (9th Cir.2003)). "[E]ven where some force is justified, the amount actually used may be excessive." *Santos v. Gates,* 287 F .3d 846, 853 (9th Cir.2002). The second step, requires an evaluation the government's interest in the use of force. *Graham,* 490 U.S. at 396. Finally, "we balance the gravity of the intrusion on the individual against the government's need for that intrusion." *Miller,* 340 F.3d at 964.

In addition to the major *Graham* factors, the Ninth Circuit has noted a number of other factors relevant to a *Graham* analysis. Mental illness "is a factor that must be considered in determining, under *Graham,* the reasonableness of the force employed." *Drummond v. City of Anaheim,* 343 F.3d 1052, 1058 (9th Cir.2003) (internal citation omitted). Courts must consider whether reasonable officers would have been aware that the suspect is an "emotionally distraught individual" as opposed to "an armed and dangerous criminal," *Deorle v. Rutherford,* 272 F.3d 1272, 1282 (9th Cir.2001); *see also Glenn v. Washington Cty.,* 673 F.3d 864, 874 (9th Cir.2011) (holding that the fact that "[the victim]'s family did not call the police to report a crime at all, but rather to seek help for their emotionally disturbed son" was relevant to a Graham analysis). Further, although officers are not required to use the absolute minimum force necessary to subdue a suspect, before using force they must consider "the availability of alternative methods of capturing or subduing a suspect." *Smith v. City of Hemet,* 394 F.3d 689, 703 (9th Cir.2005).

a. *Quantum of Force*

***9** There can be no dispute the nature of the intrusion on Kirby's Fourth Amendment interests was significant requiring a correspondingly significant justification. There is no dispute that Marshall intentionally used deadly force when he aimed and shot Kirby from over 70 yards away. The use of a firearm as deadly force is governed specifically by *Garner* and its progeny When a suspect is not attempting to escape, the Ninth Circuit has emphasized that an officer may not fire "unless, at a minimum, the suspect presents an *immediate* threat to the officer or others." *Harris v. Roderick,* 126 F.3d 1189, 1201 (9th Cir.1997) (emphasis added).

Defendants contend that Kirby posed an immediate threat of serious injury "to Officer Marshall, Officer Martin and others including members of the public." However, this is presuming Marshall's account that he was "barrel to

barrel" with Kirby is true. However, viewing the evidence in the light most favorable to *Plaintiff,* as the court must at this stage, there is an undeniable question of fact on whether there was an immediate threat of harm. Plaintiff's account suggests he was not aiming at or threatening anyone and that Marshall rose up to expose himself and use lethal force without consideration of any alternative. Plaintiff's account has its own support in the record beyond his own affidavit, including the testimony of eye witnesses and the testimony of blood spatter expert Ross Gardner.

Both the Ninth Circuit and the Supreme Court have noted that even when circumstances dictate that an officer may use a firearm, "whenever practicable, a warning must be given before deadly force is employed." *Harris,* 126 F.3d at 1201 (*citing Garner,* 471 U.S. at 11–12). The Ninth Circuit has defined the warning required before using force—even force that does not qualify as deadly force—as a "warning of the imminent use of such a significant degree of force." *Deorle,* 272 F.3d at 1285. It is undisputed that there was no warning provided by Marshall to Kirby, nor did Marshall warn fellow officers of his intent. The parties have hired police practices experts who disagree as to whether any form of warning was appropriate and whether an alternative was available.

b. Government's Interest in the Use of Force

The governmental interests at stake are measured by evaluating a range of factors including (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether he was actively resisting arrest or attempting to evade arrest by flight, and any other exigent circumstances that existed at the time of the arrest. *Deorle,* 272 F.3d at 1279–80.

The character of the offense is often an important consideration. In this case, officers were not called to make an arrest of an armed and dangerous criminal, but to help a suicidal person in a mental health crisis. They were aware he had been drinking and was on medication. They were not investigating a crime.

***10** As to the immediacy of the threat, there is a material issue of fact as to whether Plaintiff was or was not displaying the gun in a threatening manner and whether he was being compliant in putting the weapon down or whether he was "barrel to barrel" with Marshall threatening the safety of those in the area. Plaintiff and witnesses say he was not. Defendants allege he was. The resolution of this question rests entirely on whose version of the story a fact-finder deems more credible.

c. Balancing the Need for the Intrusion

In light of the foregoing analysis, the balancing task articulated by *Graham* must be completed by a jury in this case. Unresolved factual questions are crucial to evaluating the first and second subfactors in assessing the government's interest. Defendants' argument presumes their version of the facts are correct. However, a reasonable fact finder could conclude, taking the evidence most favorable to Plaintiff, that Marshall's use of force was unreasonable, and therefore excessive. As the court cannot conclude as a matter of law that Marshall's conduct was reasonable, Defendants are not entitled to summary judgment on Plaintiff's claim of excessive force.

2. Clearly Established Right

Having determined that Plaintiff has alleged a Fourth Amendment violation, the next question under the second *Saucier* prong is whether Defendant Marshall is nonetheless entitled to qualified immunity. That is, even assuming there was a constitutional violation, Marshall contends he is still entitled to qualified immunity because "[i]t cannot be said that 'every reasonable' police officer in Marshall's position would have understood that using deadly force on plaintiff was a violation of plaintiff's constitutional rights."

A government official's conduct "violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.' " *Ashcroft v. alKidd,* 131 S.Ct. 2074, 2083 (2011) (modification in original) (citing *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). "[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne,* 526 U.S. 603, 615 (1999). Although the Supreme Court does "not require a case directly on point" to define the right at issue and the violation of that right, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd,* 131 S.Ct. at 2083. Whether the law was clearly established is an objective standard.

The parties have engaged experts on police practices. Defendants rely upon Thomas Ovens (ECF No. 78, Ex. 23) who opines that a reasonable officer would believe that Marshall acted reasonably in employing deadly force (even though "it was not Officer Marshall's role to resolve the crisis situation ..."). Plaintiff's policies and practices experts include T. Michael Nault and Susan Peters (ECF No. 90, Ex. 8). Peters opines that there were reasonable alternatives short of the use of lethal force available to Marshall, while the defense expert opines there were not. Peters also opines Marshall put himself in a vulnerable position, did not consider alternatives, and failed to adhere to basic law enforcement principles in doing so.

***11** The law regarding excessive force for a law enforcement officer was clearly established at the time of this incident by *Graham* and its progeny in the Ninth Circuit. Here, Plaintiff had a clearly established constitutional right to be free from the use of excessive force. As recognized in *Doerle v. Rutherford,* 272 F.3d 1272, 1285 (9th Cir.2001), every police officer should know that it is objectively unreasonable to shoot "an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals." Here, according to Plaintiff, all of these factors were present. He claims he was complying with instructions to put his weapon down and was responding to the Wenatchee officers trained in resolving such situations. The unresolved material issues of fact as to whether there existed excessive force, are also "material to a proper determination of the reasonableness of the officers' belief in the legality of their actions." *Espinosa v. City and County of San Francisco,* 598 F.3d 528, 532 (9th Cir.2010). Accordingly, the court must deny Defendants' Motion for Summary Judgment based upon qualified immunity. *See generally, A.D. v. Cal. Highway Patrol,* —— F.3d ——, 2013 WL 1319453 (9th Cir.2013) (affirming denial of qualified immunity raised in post-verdict motion after jury found officer had fatally shot suspect with the purpose to harm and without a legitimate law enforcement objective).

C. Municipal Liability Under § 1983

In order to establish a claim against a municipality under § 1983, a plaintiff must show that he was deprived of his constitutional rights and that this deprivation was proximately caused by an official policy, custom or practice, that amounts to deliberate indifference. *Monell v. Dep't of Soc. Serv. of New York,* 436 U.S. 658, 690–91 (1978). Plaintiff herein seeks to establish municipal liability based on three alleged omissions: 1) the failure to offer any training to officers on responding to individuals facing a mental health crisis; 2) the failure to adequately train on the use of lethal force; and 3) the failure to adopt and implement policies on dealing with the mentally ill. Plaintiff alleges that this "institutionalized ignorance" resulted in Marshall's "improper handling of" and use of force against Kirby, and that such a confrontation was foreseeable, avoidable, and ultimately caused the deprivation of Kirby's rights against unreasonable seizure.

Pursuant to *Monell,* a public entity defendant cannot be held liable under a theory of respondeat superior; rather, a defendant must act as a lawmaker or one "whose edicts may fairly be said to represent official policy." *Id.* at 693. A plaintiff may establish the policy, practice, or custom requirement for municipal liability under 42 U.S.C § 1983 through proof that (1) a public entity employee committed the alleged constitutional violation pursuant to a formal policy or a longstanding practice or custom, which constitutes the standard operating procedure of the local government entity; or (2) an official with final policy-making authority ratified a subordinate's unconstitutional decision or action. *Avalos v. Baca,* 596 F.3d 583, 587–88 (9th Cir.2010). To prevail on a municipal liability claim, a plaintiff must show

***12** (1) plaintiff's constitutional rights were violated

(2) the municipality had customs or policies in place at the time that amounted to deliberate indifference, and

(3) those customs or policies were the moving force behind the violation of rights.

See Estate of Amos ex. rel. Amos v. City of Page, 257 F.3d 1086, 1094 (9th Cir.2001).

As the court has already concluded a question of fact exists as to whether the Plaintiff's constitutional rights were violated, the court focuses here on the deliberate indifference element, which requires a high degree of culpability on the part of the policymaker and is an onerous burden for a plaintiff. " '[D]eliberate indifference' is a stringent standard of fault, requiring proof that

a municipal actor disregarded a known or obvious consequence of his action." *Board of Comm 'rs of Bryan Cty. v. Brown,* 520 U.S. 397, 410 (1997). "Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program." *Connick v. Thompson,* 131 S.Ct. 1350, 1360 (2011). "The city's 'policy of inaction' in light of notice that its program will cause constitutional violations 'is the functional equivalent of a decision by the city itself to violate the Constitution.' " *Id.* (*quoting City of Canton,* 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part)). "A less stringent standard of fault for a failure-to-train claim 'would result in de facto respondeat superior liability on municipalities....' " *Id.* (*quoting City of Canton,* 489 U.S. at 392); *see also Pembaur v. Cincinnati,* 475 U.S. 469, 483(1986) (opinion of Brennan, J.) ("[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by [the relevant] officials....").

The required level of notice to demonstrate deliberate indifference is rarely demonstrated by a single incident of constitutionally deficient action or inaction. *Oklahoma City v. Tuttle,* 471 U.S. 808, 823 (1985). Actual or constructive notice of the need for a particular type of training may be plainly obvious where a pattern of constitutional violations exists such that the municipality knows or should know that corrective measures are needed. Here, as noted by the City, Plaintiff lacks any evidence of other prior incidents of excessive force involving the mentally ill, and cannot establish an ongoing pattern of misconduct. The City therefore contends Plaintiff therefore lacks evidence the City had notice its policies would result in the use of lethal force against suicidal subjects.

Instead of relying upon a pattern of similar violations, Plaintiff relies on the "single incident liability" that the Supreme Court hypothesized about in *City of Canton v. Harris,* 489 U.S. 378 (1989) and discussed in *Connick v. Thompson,* 131 S.Ct. 1350 (2011). These cases left open the possibility, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations. As an example, the Supreme Court in *Canton* referenced the obvious need to train police officers on the constitutional limitations on the use of deadly force, when the city provides the officers with firearms and knows the officers will be required to arrest fleeing felons. *Id.* at 390 n. 10. In *Connick,* the Court rejected the notion that the failure to provide additional training of prosecutors in their *Brady* obligations falls within this narrow range of potential liability theorized in *Canton,* in part because lawyers are trained to be able to obtain the legal knowledge that is required to perform their jobs.

***13** The Supreme Court also denied certiorari in a Fifth Circuit case raising a similar challenge to the claim made here. In *Valle v. City of Houston,* the Plaintiffs alleged the City was liable for failing to adequately train its patrol supervisors in crisis intervention team (CIT) tactics for working with the CIT trained officers. 613 F.3d 536 (5th Cir.2010). Plaintiffs presented sufficient evidence that the chief was aware of the need for training related to mental health (as there had been policy proposals previously considered) and that there were recurring situations involving mental health crises. The Valle plaintiffs claim failed because they did not present sufficient evidence of deliberate indifference showing there was an obvious need for more training. The court held that Plaintiffs could not demonstrate that the shooting of their mentally ill son was a "highly predictable consequence" of sending the non-CIT officers in response to their call for help.

Plaintiff Kirby's evidence to establish his failure-to-train theory is narrow. Plaintiff does not argue that the basic and field training police officers receive in the state of Washington is insufficient as a matter of content; Plaintiff presents no evidence of any past specific proclivities of Defendant Marshall; and it is undisputed that prior to Kirby's shooting Chief of Police John Harrison never analyzed, considered, addressed or contemplated separate training or drafting a policy regarding the mental ill. He testified that he reviewed every report of his officers and none suggested to him his officers were acting inappropriately.

Nevertheless, unlike in *Valle,* the facts of this case involve a complete absence of any policy and the complete absence of any training in dealing with persons in a mental health crisis. Plaintiff has produced data on the relative frequency with which the City's officers encountered mentally ill people. Plaintiff also has produced police practices experts, including T. Michael Nault, who makes

the observation that law enforcement's response to people mental illness has become an issue of national concern. Nault opines that due to the foreseeability of encounters with the mentally ill, "the need for policy and training is profoundly evident" and that the City's failure to have policies and training regarding handling mentally disturbed persons and more training on the use of deadly force, failed to comply with generally accepted police practices and standards of care articulated by the International Association of Chiefs of Police and other publications. Plaintiff's experts' opinions on the appropriate de-escalation and scene evaluation practices in dealing with the mentally ill contradict the training Marshall states in his Declaration that he received and relied upon "that once someone aimed a firearm at me or another ... this is an act of use of deadly force and I should respond immediately." Additional evidence of "obviousness" presented by Plaintiff includes the fact that the adjacent city of Wenatchee had a policy on encounters with the mentally ill, as well as the post-incident fact that the Defendant City eventually did in fact adopt a written policy.

***14** The court has reviewed the large body of municipal liability jurisprudence shedding light on the issue of deliberate indifference in the context of tragic encounters between police officers and mentally ill individuals. Construing the facts in the light most favorable to Plaintiff, the court concludes Plaintiff's claim falls within the narrow range of circumstances in which a City's failure to address encounters with mentally ill either in a written policy or in its training may reasonably be seen by a jury as deliberate indifference to a foreseeable need. *See Newman v. San Joaquin Delta Community College Dist.,* 814 F.Supp.2d 967 (E.D.Cal.2011) (failure to have any continuing education training on handling mentally ill people and the failure to address the issue at all in the police manual created at least triable issues). Ultimately, there are questions of fact as to whether the need for additional training was so patently obvious so as to raise the City's neglect to the level of deliberate indifference; whether the failure to have a policy on such interventions would likely result in officers making choices in violation of constitutional rights; and whether these failures were the "moving force" behind Kirby's constitutional rights violation.

D. State Law Claims

1. Negligence Claim Against Marshall and Vicarious Liability Against the City

As there are questions of fact as to the resolution of Plaintiff's excessive force claim (as discussed above), Defendants' Motion for Summary Judgment is denied as to the state law claim negligence claim against Marshall and *vicarious liability* claim against the City.

2. Negligence Against the City for Failure to Train

The Second Amended Complaint also alleges the City was negligent in failing to properly train, supervise and adopt policies and customs "to protect the citizens whom its EWPD employees are assigned to serve." (ECF No. 61 at 13–14). In its Motion for Summary Judgment, the City contended this claim should be dismissed under the discretionary governmental immunity and public policy doctrines, and for lack of evidence of a failure to train and proximate cause. The court inquired of this claim at the hearing and requested supplemental briefing from the parties. Interestingly, Plaintiff's supplemental brief states that his negligence claim against the City is *not* based upon any inaction by the City (or nonfeasance) and the brief only describes a claim based upon respondeat superior (the "failure to act with reasonable care during their interactions with *Michael Kirby."*). Plaintiff apparently concedes the dismissal of the claim against the City based upon a negligent failure to train, which as Defendants point out would clearly be labeled an omission. In any case, Washington tort law does not permit individual negligence claims against a government entity predicated upon a duty to the general public or "predicated on their *failure* to take affirmative action ..." *Coffel v. Clallam County,* 47 Wash.App. 397, 735 P.2d 686 (1987) (emphasis in original); *Robb v. City of Seattle,* 295 P.3d 212 (2013).

E. Conclusion

***15** This case is necessarily fact-intensive and as such, difficult to resolve on summary judgment. Remaining questions of material fact material to the qualified immunity, *Monell* liability, and state law negligence determinations preclude summary judgment. Accordingly, as set forth above, Defendants Motion for Summary Judgment is denied except as to Plaintiff's state law claim against the City based upon the alleged failure to train.

IV. MOTION TO EXCLUDE TESTIMONY OF BLOOD SPATTER EXPERT

Defendants separately move the court to exclude the testimony of Plaintiff's "blood spatter" expert, Ross Gardner.

A. Legal Standard

Federal Rule of Evidence 702 provides as follows:

> A witness qualified as an expert by knowledge, skill, experience, training, or education ma testify thereto in the form of an opinion or otherwise, if (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods, and (d) the expert has applied the principles and methods to the facts of the case.

In *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993), the Supreme Court identified four non-exclusive factors that may be helpful to the court in assessing the relevance and reliability of expert testimony, including (1) whether a theory or technique has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential error rate and the existence and maintenance of standards controlling the theory or technique's operation; and (4) the extent to which a known technique or theory has gained general acceptance within a relevant scientific community. *Id.* at 593–94.

In its "gate-keeping" role, a trial court must evaluate the relevance and reliability of all expert testimony, whether the testimony offered is "scientific" or not. *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 147 (1999). That said, the Daubert factors do not constitute a "definitive checklist or test." *Id.* at 150. Indeed, the court's fundamental objective is to generally evaluate, based on whatever factors are important to the particular case, the relevancy and reliability of the testimony and not necessarily to explore factors that might not be relevant to a particular case, such as whether the expert's methods are subject to empirical testing. *Id.* at 151. That is, the court is to ensure that the proffered testimony is reliable and relevant and that the expert, whatever his or her field, "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152.

The proponent has the burden of establishing that the pertinent admissibility requirements have been meet by a preponderance of the evidence. Fed.R.Evid. 104.

B. Discussion

***16** Ross Gardner is a consultant in crime scene reconstruction and bloodstain pattern analysis. He teaches nationwide, has been retained as an expert witness in other cases, authored three reference books on the subject of crime scene analysis, and written multiple peer-reviewed journal articles on the methodologies for both disciplines. Defendants do not challenge Mr. Gardner's qualifications.

Mr. Gardner was hired by Plaintiff to analyze the crime scene "artifacts" with the following investigative question: "Is there evidence supporting the statement that Mr. Kirby was holding a long gun (shotgun) in an elevated, firing position at the time of his wounding?" (ECF No. 90, Ex. 9). Gardner obtained and reviewed digital crime scene photographs, EMT statements, selected medical records of Kirby, the gun Kirby possessed on the porch (Ithaca Model 37 12–gauge shotgun), and the two shirts he was wearing at the time of his wounding.

Gardner performed a blood stain analysis using what he referred to as "standard Event Analysis methodology." As to the condition of the two shirts, his report states:

> The post-condition of the two shirts worn by Mr. Kirby shows evident radiating spatter on both shirts. Some of these stains are directional while others are not. The specific source event of these stains is limited [sic] one of two possibilities: a) Impact spatter resulting from the gunshot or b) Expectorate stains from Mr. Kirby breathing subsequent to injury.

The report also finds:

> Examination of the left sleeve of the black t-shirt, resulted in locating a single directional spatter on the lower aspect of the t-shirt. However the directional orientation was downward and not outward. The upper aspects of the sleeve as well as the left front shoulder were void of spatter.
>
> ...
>
> Several small spatter were located in lower areas on the left side of the t-shirt and are consistent with expectorate stains raining down from above as Mr. Kirby was breathing at some point.

As to the condition of the gun, his report states:

> I found no evidence of patent spatter or skeletonized spatter on the weapon. It should be noted that the single stain observed in Image 0020 ... was no longer resent. A swabbing of the-left side of the stock and receiver of the shotgun failed to react to a presumptive test for blood.
>
> The photograph of the base of the stock of the shotgun shows what appears to be a single directional spatter. This stain is positioned behind the base of the stock grip, and crosses the base of the weapon, rising onto the right side.

Gardner then hypothesizes two scenarios: 1) Kirby holding a long gun in firing position (elevated, right side of his face against the stock) at the time of his wounding; and the inverse, 2) Kirby "not holding a long gun in firing position." As to each "hypothesis," Gardner predicts a likely spatter trajectory if spatter were present. In the first scenario, Gardner predicts: the left side of the weapon "will be exposed to directional spatter ... with the long axis of the spatter oriented primarily toward the muzzle of the gun"; the left anterior sleeve and front left shoulder of Kirby's shirt will be exposed to directional spatter; and possibly, the right shoulder will not have directional spatter (other than downward) present on it, as it should be protected by the stock of the weapon."

***17** As to the scenario where Kirby was not holding a gun in firing position, Gardner surmises: the left sleeve and left shoulder of his shirt, as well as the left side of the weapon, will not be exposed to directional spatter from the impact or immediate expectorate activity; and the weapon may have directional expectorate spatter from being in close proximity to Kirby after his wounding.

Gardner then analyzed whether the blood stains on the gun and the shirts aligned with any of his "predictions." Ultimately, Gardner concluded that based on the available documentation "there is no physical evidence supporting a standing point-shoulder firing position and no evidence refuting that the weapon was positioned in some other orientation at the moment of wounding."

Defendants' initially contend Mr. Gardner's testimony should be excluded because he "based his opinions on blood stains on plaintiff's shotgun and clothes" and "completely ignored the testimony of neutral witness Officer Tracy Marshall of the Wenatchee Police Department and contemporaneous radio recordings seconds before and after the shooting." (ECF No. 86 at 2). However, the nature of expert witness testimony is specific to their expertise. The fact that an expert's expertise and analysis is specific to discrete topics is the nature of scientific analysis, and is not grounds for exclusion.

Next, Defendants contend Gardner's opinion should be excluded because it is unreliable due to questions concerning the integrity of the blood stains and chain of custody of the gun. Chain of custody evidence is a legal inquiry relevant to authenticity of the underlying subject matter. Normally it goes to weight not admissibility of evidence.

Defendants lastly argue that Gardner's opinion is nothing but conjecture and about mere possibilities. In their Reply, Defendants quote from Gardner's own book and contend he violated "one of his own cardinal rules of blood stain analysis": the presence of spatter resulting from gunshot for head wounds cannot be predicted. Defendants have also supplied the report of their own blood stain expert, Det. Donald Ledbetter, who is critical of numerous aspects of Gardner's report. (ECF No. 97, Ex. 25). Det. Ledbetter opines that, at best, the blood stain evidence is inconclusive as to all hypotheses.

The court will not engage in a credibility analysis of the competing experts. To do so would amount to improper fact-finding. In the case of conflicting expert opinions, it is for a jury to evaluate what weight and credibility each expert opinion deserves. Given the capabilities of jurors and the liberal thrust of the rules of evidence, any doubt

regarding the admissibility of scientific evidence should be resolved in favor of admission, rather than exclusion. Accordingly, the court denies Defendants' Motion to Exclude the Testimony of Ross Gardner.

V. CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED:**

***18** 1. Defendants' Motion for Summary Judgment (ECF No. 75) is **DENIED,** except it is **GRANTED** as to Plaintiff's state law negligence claim asserted against the City in the Second Amended Complaint predicated upon the failure to train.

2. Defendants' Motion to Exclude Testimony of Blood Spatter Witness (ECF No. 86) is **DENIED.**

The Clerk of the Court shall enter this Order and provide copies to counsel.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1497343, 91 Fed. R. Evid. Serv. 123

End of Document

APPENDIX 8

2012 WL 12957382
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Glen FOLSOM, Plaintiff,
v.
PIMA COUNTY, a governmental body, by and through its agents; Sheriff Clarence W. Dupnik, in his representative capacity as Pima County Sheriff; Deputy Eric Heath (#1339) and Deputy Doug Gifford (#1322), Defendants.

No. CV 08-524-TUC-FRZ
|
Signed 09/13/2012

Attorneys and Law Firms

Joseph Peter St. Louis, Nesci St. Louis & West PLLC, Richard J. Gonzales, The Gonzales Law Firm PC, Tucson, AZ, for Plaintiff.

Dennis Carlton Bastron, Nancy Jane Davis, Pima County Attorneys Office, Tucson, AZ, for Defendants.

ORDER

Frank R. Zapata, Senior United States District Judge

***1** Before the Court for consideration is Defendants' Motion for Partial Summary Judgment filed pursuant to Rule 56, Fed.R.Civ.P.

Plaintiff Glen Folsom filed this action against Pima County, Sheriff Clarence Dupnik in his representative capacity as Pima County Sheriff, and Pima County Deputy Sheriffs Eric Heath and Doug Gifford, alleging excessive force claims which arise out of events which occurred on June 2, 2007, when Plaintiff was stopped and arrested by Deputy Heath for driving under the influence (DUI). Plaintiff alleges that Deputy Heath and Deputy Gifford used excessive force in arresting him, in violation of his civil rights and negligently caused him physical, emotional and mental injury.

Defendants contend that the force used to arrest Plaintiff was reasonable, justifiable, and not excessive.

Defendants concede there is a triable issue of fact as to the civil rights claim of excessive force alleged against Defendant Deputy Heath which is not subject to this motion.

Factual Background

On June 2, 2007, Defendant Deputy Eric Heath stopped Plaintiff Glenn Folsom's vehicle after purportedly observing the vehicle speeding. Plaintiff's vehicle was pulled over in the parking lot of the apartment complex where Plaintiff resided at the time of the stop.

Upon making contact with Plaintiff, Defendant Heath initiated a DUI investigation.

According to Plaintiff, Defendant Heath asked Plaintiff if he had anything to drink, to which Plaintiff responded that he had two beers with dinner. Plaintiff testified that Defendant Heath then told him, in a "gruff" manner, "like a military command," to get out of the car. Plaintiff complied with Deputy Heath's directive.

Once out of the car, Plaintiff testified that Defendant Heath asked him to submit to an eye stagmus test, to which Plaintiff agreed. Following the eye stagmus test, Defendant Heath asked Plaintiff to do a walk and turn test, which Plaintiff also complied with. Plaintiff testified that Defendant Heath then told him he could smell alcohol on his breath and that he was under arrest for DUI.

Plaintiff further testified that when Defendant Heath pulled out a writing pad and started asking Plaintiff a question, he interrupted Defendant Heath and said "sir, you have no right to be asking me any questions without me having a lawyer." Plaintiff testified that, while saying this, he was pointing his finger to make his point and denies that he put his finger in Defendant Heath's face or that he touched Deputy Heath. Plaintiff further testified that Defendant Heath was about eighteen (18) inches away from him.

According to Plaintiff's testimony, Defendant Heath told Plaintiff to put his hand down, and then grabbed Plaintiff's hand, swung him around, pushed Plaintiff's hand up behind him as hard as he could, and pushed him forward.

Plaintiff then testified that Defendant Deputy Gifford was pulling into the parking lot at that time and that he landed on top of the hood of Defendant Gifford's patrol car. Plaintiff testified that he received a cut over his right eye, which bled excessively, while being handcuffed and forcefully placed face down on the patrol car. Defendant Heath handcuffed Plaintiff and placed him in a patrol car.

***2** The paramedics were called, arriving shortly thereafter, and Plaintiff was taken out of the patrol car. Plaintiff testified that his left wrist was in pain, but he declined all requests to go to a hospital for the cut on his eye or his arm pain. Plaintiff testified he refused treatment and did not want to go anywhere but home. The paramedics left without giving Plaintiff any treatment.

Plaintiff further testified that after the paramedics left, "they said, well, lets take blood from him" and leaned Plaintiff over the police vehicle, face forward, and put a needle in his right arm to draw blood. Plaintiff testified he believed it was Defendant Gifford that did the blood draw. Thereafter, Plaintiff was released to go home, in the apartment complex where the stop occurred.

The next day, Plaintiff drove himself to Tucson Medical Center, where x-rays were taken, revealing that Plaintiff had a fractured left wrist. The cut over Folsom's right eye did not require any medical treatment. Plaintiff's wrist was placed in a splint at the hospital.

During a medical followup, Plaintiff's arm was placed in a cast. Approximately six weeks later, the cast was removed and Plaintiff was given specific exercises to do and also received physical therapy. Plaintiff was subsequently discharged from care, and has not been advised that he has any permanent injury; nor has any medical restrictions or limitations been placed on Plaintiff's activities.

When asked at the time of his deposition what he claims Defendant Gifford did that constituted excessive force, Plaintiff answered in part that a needle was pushed in his arm while he was in pain and complaining about the pain.

The blood draw was done on the right arm; not the left wrist which was fractured.

Plaintiff further testified that he was not exactly sure which of the Defendants, Heath or Gifford, did what, because the deputies were behind him where he could not see them, but testified that both deputies were behind him pushing against his body when he was leaning against the car and that both deputies "most certainly were manhandling me."

Plaintiff characterized the Defendant deputies' actions, at the time of his deposition, as abusive during the blood draw under the given circumstances and the injuries he had sustained.

Legal Standard

A party seeking summary judgment pursuant to Rule 56 "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions [in the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. V. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986); Rule 56(c). The moving party is only entitled to summary judgment if the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Id.* No genuine issue of material fact exists for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. V. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

A genuine issue of material fact will be found to exist if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve a relevant material fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986); *T.W. Elec. Service Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.3d 626, 630 (9th Cir. 1987).

Discussion

***3** The First Amended Complaint alleges two separate counts for relief based on allegations of unreasonable and excessive force. Count I alleges violations of Plaintiff's Fourth Amendment rights pursuant to 42 U.S.C. § 1983 based on the use of excessive force. Count II alleges a state negligence claim based on the use of unreasonable and excessive force.

Defendants Pima County, Sheriff Dupnik and Deputy Gifford request that the Court: (I) dismiss any claim brought under 42 U.S.C. § 1983 which is based on alleged emotional or mental assault, asserting such does not state a legally cognizable claim; (II) dismiss the excessive force claim against Deputy Gifford based on insufficient evidence to create a triable issue of fact as to whether he committed excessive force; (III) dismiss Plaintiff's state claim of gross negligence in the use of unreasonable and excessive force, because excessive force is an intentional tort, and there is no such tort as negligent and/or grossly negligent excessive force; (IV) find that there are no alleged claims against the Sheriff other than a claim of vicarious liability for the state torts of his deputies; and (V) grant summary judgment in favor of Pima County because Plaintiff has failed to allege a policy, practice, or custom claim, nor is there any evidence of such a claim, and therefore Pima County cannot be held vicariously liable for the state torts of the Sheriff or its deputies.

I. Excessive Force/Failure to Exercise Due Care Claim – 42 U.S.C. § 1983

Defendants first argue that it is unclear as to what Plaintiff is alleging in Count I, specifically paragraph 33 of the First Amended Complaint, which states:

> Deputy Heath and Deputy Gifford[ ], while in the course of their employment with the Pima County Sheriff's Office, and acting under color of law, did use unreasonable and excessive force in arresting Plaintiff in violation of the Fourth Amendment and Sheriff's civil rights[ ] and abusive actions constitute physical, emotional, and mental assault on Mr. Folsom.

Defendants argue that, if Plaintiff is alleging physical excessive force resulting in physical, emotional and mental injury, then Defendants agree that this would be a valid civil rights claim; however, citing *Oltarzewski v. Ruggiero,* 830 F.2d 136, 139 (9th Cir. 1997), if the Plaintiff is claiming that the excessive force consisted, not only of physical force, but also "mental and emotional assault" in violation of his civil rights, then summary judgment should be granted as to the alleged mental and emotional assault claim, because verbal harassment or verbal abuse is not sufficient to state a constitutional violation under § 1983.

In response, Plaintiff argues that he is alleging what the Defendants agree is a valid civil rights claim, that "[t]he excessive force employed and the grossly negligent manner in which this entire incident was handled caused physical injury and both emotional and mental injury." Plaintiff specifies that "[t]he emotional and mental injury was the result of the physical force being employed, together with the unnecessary exchanges prompted by [Defendant] Heath which were designed to provoke Folsom so that additional force could be utilized."

The facts and allegations of this case are distinguishable from *Oltarzewski*, in which verbal harassment and the use of "vulgar language" were found not to state a constitutional deprivation under § 1983. Plaintiff alleges that the verbal taunting by Defendant Deputy Heath was "designed to provoke Folsom so that additional force could be utilized." Plaintiff's testimony at the time of his deposition sets forth facts showing that he was subjected to more than just verbal harassment, distinguishing the present case from *Oltarzewski*. Moreover, Defendants' argument relies more on semantics than substantive factual disputes.

***4** Based on the foregoing, the Court finds that Defendants have failed to show that summary judgment should be granted as a matter of law as to Count I.

II. Excessive Force Claims against Defendant Gifford

Defendants argue that there is no material issue of fact as to whether Deputy Gifford used excessive force, evidenced by Plaintiff's own testimony at the time of his deposition. Defendants cite to Plaintiff's responses to questions regarding what actions Deputy Gifford took which constituted excessive force.

In reference to Plaintiff's testimony regarding pain as a result of the blood draw, Defendants argue that under Arizona law, a deputy trained as a phlebotomist is entitled to draw blood from the operator of a vehicle arrested for DUI, A.R.S. §§ 28-1321, 28-1388, and contend that the blood draw was done on Plaintiff's right arm, not the left wrist that was later found to be injured. Moreover, in regard to Plaintiff's testimony that "he was not 100 percent sure" what Defendant Gifford did, because the deputies were behind him pushing against his body when he was leaning against the car, Defendants argue that

there is no evidence that any alleged pushing against the Plaintiff's body caused any injury.

Defendants argue that, while the Fourth Amendment prohibits the use of unreasonable or excessive force, not every push or shove violates the Fourth Amendment, citing *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865 (1989), and conclude that Plaintiff has failed to present evidence creating a triable issue of fact as to whether Deputy Gifford used excessive force against him; therefore, summary judgment should be granted on the § 1983 claim against Defendant Gifford.

Plaintiff cites federal and state caselaw in support of his position, that under the circumstances, and given the risk and intrusive nature of blood draws in the field, that "it simply cannot be said that there is no disputed material issue of fact" as to whether the blood draw by Defendant Gifford was unreasonable.

The Court finds that questions of material fact have been raised based on the evidence submitted by Defendants, specifically the deposition testimony of the Plaintiff regarding the alleged actions of both Defendant Deputies during the incident of arrest at issue.

The factual allegations of the First Amended Complaint raise allegations of the unreasonableness of the actions of both Defendant Deputies Heath and Gifford in the field blood draw from the Plaintiff. Defendants have failed to demonstrate the absence of genuine issues of material fact in regard to Defendant Gifford. Accordingly, Defendant Gifford is not entitled to judgment as a matter of law.

III. Claim of Gross Negligence Based on Alleged Excessive Force

Defendants argue that Plaintiff's claim, that the use of excessive force entitles him to recover under the state tort theory of gross negligence, should be dismissed because excessive force is an intentional tort, not a negligence tort. Relying on Eleventh Circuit caselaw, Defendants conclude that a claim of negligent and/or grossly negligent use of excessive force does not state a claim upon which relief can be granted, reasoning that a state claim of excessive force is a battery claim, which is an intentional tort, and that there is no negligent commission of an intentional tort. See *Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1294 (11th Cir. 2009); see also *City of Miami v. Sanders*, 672 So.2d 46 (Fla 1996). Defendants submit *Shope v. City of Lynnwood,* 2011 WL 115447 (W.D.Wash.) as supplemental legal authority in support of their motion for partial summary judgment.

***5** Plaintiff argues in opposition that because the Defendants acted with knowledge that their conduct would create an unreasonable risk of harm and that there was a substantial probability that substantial harm would result, there is a disputed issue of material fact, at the very least, whether Defendants Heath and Gifford were grossly negligent; thus summary judgment should be denied. See *Tissicino v. Peterson*, 211 Ariz. 426, 121 P.3d 1286 (App. 2005). Citing *Walls v. Arizona Dept. of Public Safety*, 170 Ariz. 591, 826 P.2d 1217 (Ariz. App. 1991), Plaintiff properly argues that he need only establish that the Defendants acted or failed "to act when he knows or has reason to now facts which would lead a reasonable person to realized that his conduct not only creates an unreasonable risk of bodily harm to others but also involves a high probability that substantial harm will result." 170 Ariz. at 595, 826 P.2d at 1221. Summary judgment is only appropriate "when no evidence is introduced that would lead a reasonable person to find gross negligence." *Id.*

Based on the foregoing, the Court finds that Defendants are not entitled to summary judgment on Count II.

IV. Vicarious Liability of the Sheriff For The State Claim Against The Deputies

Next, Defendants submit that the only allegation against the Sheriff, set forth in paragraph 4 of the Complaint, is as follows:

> "Pima County Sheriff Clarence W. Dupnik (hereinafter, "Sheriff Dupnik") is an elected governmental official responsible for overseeing and maintaining control, administration, policies and procedures, training, management of employees, including deputies, and all other aspects of the operation of the Pima County Sheriff's Office and is named in this action in his representative capacity and pursuant to the doctrine of respondeat superior."

Defendants argue that the only basis of liability being asserted against the Sheriff is vicarious liability pursuant to the doctrine of respondeat superior, and reason that since there is no respondeat superior liability under § 1983, *Monell v. Department of Social Services,* 436 U.S. 658, 691,

98 S.Ct. 2018 (1978), "the only claim of liability being asserted against the Sheriff is vicarious liability for the alleged state torts of the deputies." Defendants conclude that, if the state claim of gross negligence is dismissed against the Deputies, then likewise the same claim should be dismissed against Sheriff Dupnik.

Plaintiff does not oppose Defendants' position, and further reasons that the claim against Sheriff Dupnik survives, as does the claims of gross negligence against Defendant Deputies Heath and Gifford.

Upon consideration of the foregoing, and this Court's finding regarding the state law claim of gross negligence, the Court finds Defendant Dupnik is entitled to summary judgment only as to Count I.

Based on the Court's finding that questions of genuine fact exist in regard to the allegations of gross negligence alleged in Count II, the allegations also survive against Defendant Sheriff Dupnik under the doctrine of respondeat superior.

V. Summary Judgment Should Be Granted To Pima County

Defendants correctly submit that a governmental body is not liable for a civil rights violation unless its policy or custom caused the constitutional injury. *Leatherman v. Tarrant County Narcotics & Coordination,* 507 U.S. 163, 166, 113 S. Ct. 1160 (1993). Defendants argue that Plaintiff does not allege a civil rights violation against the Pima County based on policy or custom; nor is there any evidence of such a civil rights violation by the county. Acccordingly, Defendants contend that summary judgment should be granted in favor of Pima County with respect to Plaintiff's civil rights claim.

Moreover, as Defendants argue, under Arizona law, A.R.S. § 441, a county cannot be held liable under the doctrine of respondeat superior for the torts of the sheriff or his employees in the performance of those duties. *See Fridena v. Maricopa County,* 18 Ariz. App. 527, 504 P.2d 58 (1972); *Yamamoto v. Santa Cruz County Bd. of Sup.,* 124 Ariz. 538, 606 P.2d 28 (App. 1980); *Hernandez v. Maricopa County,* 138 Ariz. 143, 673 P.2d 341 (App. 1983).

***6** In his response in opposition, Plaintiff submits "there is a custom which has been approved by Pima County which resulted in the constitutional injury.... [and that] [f]or quite some time now, Pima County has turned a 'blind eye' to the practice of the Pima County Sheriff's Department which allows deputies to conduct compelled field blood draws."

Plaintiff however has failed to make any showing that a policy or custom existed to lead a trier of fact to find that such exists. Accordingly, Defendant Pima County shall be granted summary judgment on both Counts of the First Amended Complaint.

Based on the foregoing,

IT IS ORDERED that the Defendants' Motion for Partial Summary Judgment [Doc. #53] is **GRANTED in part** and **DENIED in part**;

IT IS FURTHER ORDERED that Defendant Sheriff Dupnik is granted summary judgment as to Court I;

IT IS FURTHER ORDERED that Defendant Pima County is granted summary judgment as to Count I and Count II, and thereby dismissed from this action;

IT IS FURTHER ORDERED that summary judgment is denied as to Defendant Gifford;

IT IS FURTHER ORDERED that this case shall proceed to trial on Count I against Defendants Heath and Gifford and on Count II against Defendants Sheriff Dupnik and Deputies Heath and Gifford;

IT IS FURTHER ORDERED, in accordance with the Court's Scheduling Order (Doc. 44), the proposed Joint Pretrial Order shall be filed on or before October 15, 2012;

IT IS FURTHER ORDERED that all other provisions of the Court's Scheduling Order shall remain in effect.

All Citations

Slip Copy, 2012 WL 12957382

End of Document

APPENDIX 9

1990 WL 186232
Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

Eric MEDLIN, Plaintiff,
v.
CITY OF NEW YORK, New York City Police Department, Jeffrey Roelofsen, and Gary Switzer, Defendants.

No. CV–89–1442.
|
Nov. 20, 1990.

MEMORANDUM AND ORDER

SIFTON, District Judge.

***1** This matter is before the Court on defendants' motion for summary judgment, made after completion of discovery, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This lawsuit generally arises out of injuries sustained by the plaintiff when a New York City police officer, defendant Jeffery Roelofsen, attempted to stop the plaintiff as he rode by the officer on his bicycle on a busy Manhattan thoroughfare. In the original complaint, plaintiff alleged five causes of action against defendants Roelofsen, the City of New York, the New York City Police Department, and a second officer, Gary Switzer. Those causes of action were: (1) violation of 28 U.S.C. § 1983 in the form of excessive force, false arrest, false imprisonment, and assault and battery (hereafter, Claim ## 1); (2) violation of 28 U.S.C. § 1985 in the form of a conspiracy to violate plaintiff's civil rights (hereafter, Claim # 2); (3) an action under 28 U.S.C. § 1988 for attorney's fees (hereafter, Claim # 3); (4) a pendant state law claim alleging the same elements as Claim # 1 (hereafter, Claim ## 4); and (5) a pendant state law claim for negligence (hereafter, Claim ## 5). Plaintiff seeks both compensatory and punitive damages against all parties.

Following substantial discovery and defendants' motion seeking summary judgment on all but Claim # 5, plaintiff concedes that summary judgment should be granted as to some of the causes of action initially asserted. In particular, plaintiff concedes that the complaint should be dismissed as against the New York City Police Department; that the first, second, and third causes of action should be dismissed as against the City of New York; that the second cause of action should be dismissed as to Roelofsen and Switzer; and that the fifth cause of action should be dismissed as against Switzer alone. In the interest of clarity, that leaves the following claims still to be resolved:

(1) Claim # 1 asserted against Roelofsen and Switzer;

(2) Claim # 3 asserted against Roelofsen and Switzer;

(3) Claim # 4 asserted against Roelofsen, Switzer and New York City;

(4) Claim # 5 asserted against Roelofsen and New York City.

DISCUSSION

Summary judgment may be granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party has the burden of demonstrating the absence of any disputed material facts, *Schering Corp. v. Home Insurance Co.,* 712 F.2d 4, 9 (2d Cir.1983), and the Court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought. *Beacon Enterprise, Inc. v. Menzies,* 715 F.2d 757, 762 (2d Cir.1983). To defeat a motion for summary judgment, however, the opposing party may not rest upon the conclusory allegations or denials set forth in the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Rule 56(e); *Schering, supra,* 712 F.2d at 9.

For purposes of this motion only, I accept plaintiff's version of the facts of the case as may be inferred from the depositions and supporting affidavits. As noted above, the injury plaintiff is alleged to have suffered occurred when Officer Roelofsen reached out with one hand to "grab" plaintiff as plaintiff coasted slowly by Roelofsen's parked police cruiser on Broadway between 39th and 40th Streets in Manhattan. At the time of the incident, plaintiff was operating his bicycle outside of the prescribed bicycle lane. As a result of the officer's action, plaintiff "fell" or was knocked from his bicycle and sustained a broken ankle.

Defendants allege, and the plaintiff denies, that Officer Roelofsen signaled plaintiff to stop prior to grabbing his arm.

***2** After the fall, plaintiff was helped into the police cruiser and eventually transported to the hospital by ambulance. At his deposition, plaintiff testified that he overheard a second officer at the scene, presumably Switzer, advise Officer Roelofsen to issue plaintiff a ticket for operating his bicycle outside of the bicycle lane, in order to avoid "getting into trouble" for having knocked plaintiff to the ground. Sometime thereafter, plaintiff was issued a traffic summons by Officer Roelofsen. With these facts in mind, I turn now to defendants' arguments in favor of summary judgment.

Claim # 1

Claim # 1, now asserted only against Officers Roelofsen and Switzer, alleges that defendants violated 28 U.S.C. § 1983 through the use of excessive force, false imprisonment, false arrest, and by assault and battery. Defendants contend that summary judgment should be granted on this claim, as to each specific act alleged, and on a variety of grounds.

First, defendants argue that the claim of excessive force made against Officer Roelofsen cannot stand since Roelofsen's behavior was at most "negligent" and not "intentional." In *Daniels v. Williams,* 474 U.S. 327 (1986), and *Davidson v. Cannon,* 474 U.S. 344 (1986), the Supreme Court held that in order to establish a due process violation under § 1983, a defendant must have behaved in an intentional manner and that merely negligent conduct will not satisfy the statute. The Court of Appeals acknowledged these rulings in *Dodd v. City of Norwich,* 827 F.2d 1, 8 (2d Cir.1987) (on reargument), and held that the Supreme Court's due process analysis, eschewing negligence in favor of intentionality, applies with equal force to alleged violations of the fourth amendment prohibition on unreasonable seizures. Although plaintiff does not specify in his complaint the constitutional provision upon which his § 1983 claim rests, the logical choice is the fourth amendment. *See Graham v. Connor,* 109 S.Ct. 1865, 1871 (1989). The gravamen of defendants' first argument is that grabbing the operator of a slow-moving bicycle by the arm might well be negligent, but it does not rise to the level of intentionality required by the fourth amendment and under § 1983 because the likelihood of resulting harm is so minimal.

In support of this contention, defendants point to other cases in which the issue of excessive force arose. In *Dodd,* for example, the court held that no constitutional violation had occurred where a police officer accidentally shot and killed an alleged burglar while in the process of handcuffing him. *Dodd, supra,* at 7. The defendants assert that the lack of intentionality found in *Dodd,* i.e., that the pulling of the trigger by the officer was reactive and "instinctive[ ]" as opposed to "intentional," is comparable to the behavior of Officer Roelofsen here.

On the face of the complaint and in light of the testimony given by various parties, there is at least a triable issue of fact whether Officer Roelofsen's actions on December 2, 1989, were merely negligent or, rather, were intentional to an extent sufficient to implicate the fourth amendment. The issue to be decided is whether or not the officer was attempting to effect a "stop," i.e., a seizure of the body, in reaching out and grabbing the plaintiff or whether he was merely attempting, as he claimed in deposition, to prevent plaintiff from running into him with his bicycle and, thus, perhaps behaving in an instinctive/reactive fashion. In his opposition papers, plaintiff asserts that, at a minimum, Officer Roelofsen's actions were grossly negligent and that gross negligence is sufficient to sustain a § 1983 claim. The Second Circuit has not reached this question as of yet, *see Dodd, supra,* at 4, and in light of my ruling as to intentionality, there is no reason to do so at this juncture.

***3** Assuming for present purposes that Officer Roelofsen acted intentionally in causing the plaintiff to come to a stop, defendants assert that they are still entitled to summary judgment on the excessive force claim in light of the prevailing fourth amendment standard enunciated by the Supreme Court in *Graham, supra,* and *Tennessee v. Garner,* 471 U.S. 1 (1985). In particular, they urge that Officer Roelofsen's actions were " 'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to his underlying intent." *Graham,* 409 S.Ct. at 1872. In *Graham,* the Supreme Court held that § 1983 liability for excessive force must be determined by a "careful balancing of the 'nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 1871 (citations omitted).

The Supreme Court spoke at some length about the elements involved in the balancing test it prescribed. It stated that courts should consider the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 1872. The Court also noted that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments ... about the amount of force that is necessary in a particular situation." *Id.* Finally, the Court found the subjective intent of a police officer to be largely irrelevant to the outcome. "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force." *Id.* In short, as the Second Circuit Court of Appeals quoted from *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973), " 'not every push or shove' is excessive" force sufficient to create a fourth amendment violation. *Calamia v. City of New York,* 879 F.2d 1025 (2d Cir.1989).

With these principles in mind, I will consider whether summary judgment under the fourth amendment reasonableness test is appropriate on these facts. To begin, there is no dispute that Officer Roelofsen's touching of the plaintiff, whether characterized as a "grab" or otherwise, caused the plaintiff to fall from his bicycle and sustain a broken ankle. As the defendants point out, plaintiff in his deposition makes no allegation that he was ripped with particular brutality from his bicycle but only that the "grabbing" of his right arm caused him to turn his front wheel slightly to the right and fall from the slow-moving bike. To be sure, this is not the sort of force which ordinarily expresses itself in § 1983 cases. *See, e.g., Garner, supra* (shooting) and *Graham, supra* (handcuffing and repeated shoving). However, the relatively minor nature of the intrusion here must be regarded, consistent with *Graham,* in light of the "severity of the crime" and the risk of flight. "The crime," such as it was, involved bicycling on Broadway outside of the prescribed lane of bicycle traffic; the notion of attempted flight is in dispute insofar as defendant Roelofsen testified that he signaled plaintiff to stop prior to "seizing" him, while the plaintiff testified that he did not. Finally, there is a triable issue of fact as to whether, as Roelofsen claims, plaintiff's behavior constituted a threat to the officer's safety.

***4** In light of these facts and the balancing that is required in these cases, I cannot conclude that the officer's behavior was reasonable under the fourth amendment as a matter of law. "It is for the jury to determine" whether the objective reasonableness test is met on these facts. *Calamia,* 879 F.2d at 1035. The facts surrounding the "seizure" coupled with the nature of the alleged "crime" are such that different juries could reach different conclusions on this point.

There is no merit to the assertion that the defendant Roelofsen is shielded from liability for using excessive force based on the doctrine of qualified immunity. As the Second Circuit Court of Appeals noted in *Calamia,* qualified immunity for government actors only operates where (1) the alleged conduct does not violate a clearly established right, or (2) the rights at issue were clearly established, but where it was objectively reasonable for the actor to believe that his conduct did not violate those rights. *Calamia,* 879 F.2d at 1025. Obviously, "[t]he right of an individual not to be subjected to excessive force has long been clearly established." *Id.* As for the notion of whether it was objectively reasonable for the officer to believe that he was not violating constitutional rights, what has been said concerning the objective reasonableness of defendant's conduct under the fourth amendment suffices to explain why qualified immunity is not available. [1]

Having determined that summary judgment is not appropriate on the claim of excessive force brought against Officer Roelofsen, I consider that same claim against Officer Switzer. Notwithstanding extensive discovery by both sides in this case, plaintiff has failed to produce evidence that Officer Switzer engaged in the use of force against plaintiff. Indeed, plaintiff offers no proof of defendant Switzer's having committed any of the acts enumerated in Claim # 1—excessive force, false arrest, false imprisonment, or assault and battery. The only allegation that plaintiff makes against Switzer is that he counselled Officer Roelofesen to issue plaintiff a summons in order to shield Roelofsen from responsibility for plaintiff's injury. At most, this allegation is relevant proof of a conspiracy to violate plaintiff's civil rights, but the plaintiff has conceded that summary judgment against his § 1985 claim is appropriate. In light of the foregoing, summary judgment in favor of the defendant Switzer on Claim # 1 is appropriate.

Finally, there remain claims of false arrest and false imprisonment against defendant Roelofsen. To begin,

the record is uncontroverted that the plaintiff was never arrested. The only instance that could be construed as imprisonment or custody occurred when the plaintiff was "helped" by two officers into a police cruiser in order to remove him from the roadway. The plaintiff testified that he was not handcuffed and that he was not taken to the stationhouse, and nowhere in plaintiff's opposition papers does he argue that sitting in the police cruiser was a "false imprisonment." In light of the foregoing, no triable issue of fact exists on plaintiff's § 1983 claim against Roelofsen, and summary judgment dismissing this claim against him, is appropriate.

Claim # 3

***5** As noted previously, Claim # 3 seeks an award of attorneys fees. Since defendants make no argument that summary judgment should be granted in favor of Officer Roelofsen on all claims against him and since plaintiff's excessive force claim survives defendants' motion, summary judgment on the issue of § 1988 attorneys' fees is denied.

Claim # 4

Claim # 4 is the state common law analogue of Claim # 1. These pendant state law claims include claims of false imprisonment, false arrest, and assault and battery against defendants Switzer, Roelofsen, and the City of New York.

As to defendant Switzer, for essentially the same reasons set forth in the section marked "Claim # 1," *supra,* summary judgment is granted.

As to the defendant Roelofsen, for essentially the same reasons set forth in the section marked "Claim # 1," *supra,* summary judgment is granted as to the claims for false arrest and false imprisonment but denied as to the claim of assault and battery.

As to the defendant the City of New York, defendants challenge the claims for punitive damages set forth in Claims # 4 and # 5. In a unanimous decision, the New York State Court of Appeals held that punitive damages are not available against the "State or its political subdivisions" under New York law. *Sharapata v. Town of Islip,* 56 N.Y.2d 332 (1982). This result is consistent with federal case law as well. *See City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247 (1981). Thus, any claims for punitive damages lodged in this case against the City of New York must be dismissed.

To summarize, summary judgment in favor of the defendants is granted as to:

(1) the claims of false arrest and false imprisonment described in Claim # 1 and Claim # 4 and the entirety of Claim # 2 against defendant Roelofsen;

(2) the false arrest, false imprisonment, assault and battery, and excessive force claims described in Claim # 1 and Claim # 4, the entirety of Claim # 2, the entirety of Claim # 3, and the entirety of Claim # 5 against defendant Switzer;

(3) all claims against the New York City Police Department;

(4) Claims # 1, # 2, # 3 in their entirety, as well as all punitive damages claims against the defendant City of New York.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

1 In a recent case, the Second Circuit Court of Appeals expressly declined to consider the issue of the consistency of the two "objective reasonableness" standards at issue here, the fourth amendment standard and the qualified immunity standard. In *Finnegan v. Fountain,* No. 89–7832, slip op. 6667, 6682 (2d Cir. Oct. 1, 1990), the Court concluded that it "need not take up the knottier issue whether a finding that a[n] ... officer acted objectively unreasonably in the use of force [under the fourth amendment] forecloses a finding under the second prong of the [qualified immunity] defense that it was objectively reasonable for him to believe his actions were lawful."

All Citations

Not Reported in F.Supp., 1990 WL 186232

APPENDIX 10

2010 WL 1936200
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. New York.

Mary Jane GLOWCZENSKI, and Jean Griffin, Individually and as the Co–Administratrix of the Estate of David Glowczenski, Plaintiff(s),
v.
TASER INTERNATIONAL INC., Village of Southampton, Southampton Village Police Department, Police Officer Brian Platt in his individual and official capacity, Police Officer Marla Donovan, in her individual and official capacity, Police Officer Chris Wetter, in his individual and official capacity, Police Officer Arthur Schucht, in his individual and official capacity, County of Suffolk, Suffolk County Police Dept., Lieutenant Jack Fitzpatrick, in his individual and official capacity, Lieutenant Howard Lewis, in his individual and official capacity, John Does 1–10, who are known by name to the Defendants but as of yet are not fully known to the Plaintiffs, Office of the Suffolk COunty Medical Examiner, James C. Wilson, M.D., Deputy Medical Examiner, in his individual and official capacity, Southampton Village Volunteer Ambulance (a.k.a. Southampton E.M.T. Unit), Melissa Croke, EMT, in her individual and official capacity, Keith Phillips, EMT, in his individual and official capacity, Tim Campbell, EMT, in his individual and official capacity, and James Moore, Ambulance Driver, in his individual and official capacity, Defendant(s).

No. CV04–4052(WDW).
|
May 13, 2010.

Attorneys and Law Firms

Rutherford & Christie, LLP, Lewis R. Silverman, Esq., N.Y., for Brian Platt.

Devitt Spellman Barrett, LLP, Diane K. Farrell, Esq., Jeltje deJong, Esq., Smithtown, NY, for Village and Police Defendants.

Law Offices of Frederick K. Brewington, Frederick K. Brewington, Esq., Hempstead, NY, for Plaintiffs Mary Jane Glowczenski and Jean Griffin.

MEMORANDUM & ORDER

WALL, United States Magistrate Judge.

***1** Before the court is a motion for partial summary judgment by defendants Village of Southampton, Southampton Village Police Department, Police Officer Marla Donovan, Police Officer Christopher Wetter, Sgt. Arthur Schuct and Lt. Howard Lewis, in their individual and official capacities ("the Village defendants"). DE[103] & [105]. Also before the court is a motion for partial summary judgment by defendant Police Officer Brian Platt. DE[110] & [116]. The motions are opposed by the plaintiffs. DE[68], [136] & [135]. The parties have consented to my jurisdiction for all purposes.

For the reasons set forth herein, the motions are **GRANTED IN PART AND DENIED IN PART,** as follows:

(1) Summary judgment is granted on the false arrest claims;

(2) summary judgment is denied as to the negligence claims, with the proviso that no negligence claims based on intentional conduct or on the false arrest claim will go to the jury;

(3) summary judgment on the negligent failure to hire or train claim against the Police Department and the Village is denied;

(4) summary judgment on the *Monell* failure to train claim is denied;

(4) to the extent that Platt has moved for summary judgment on the claim of excessive force, the motion is denied.

BACKGROUND

This lawsuit arises from the death of plaintiffs' decedent, David Glowczenski, on February 4, 2004. David Glowczenski was a 35 year old man with a history of schizophrenia, described by the plaintiffs as an "Emotionally Disturbed Person" ("EDP"). The plaintiffs are his mother, Mary Jane Glowczenski, and sister, Jean Griffin. Many of the following facts are taken from the exhibits provided by the Village defendants and are reported to set forth the documentary history of the Village Police with the Glowczenski family. The parties agree that most or all of the individual defendant officers were familiar with Glowczenski and his mental problems.

Glowczenski was in a psychiatric facility for the first time when he was 11 or 12 years old, and had been hospitalized at various institutions, including Pilgrim State Psychiatric Center, Kings Park Psychiatric Center, Stony Brook University Hospital, Eastern Long Island Hospital and the Lake Grove Treatment Center, over the years. *See* DE[68], Vill. Defs. Ex. D, 51:9–20; Vill. Defs. Ex. F, pp. 1, 92, 133–34. Mr. Glowczenski was no stranger to the Village Police prior to February 4, 2004. In 1994, complaints about Glowczenski were made to the police by Glowczenski's father, Theodore Glowczenski, in 1994 and 1995, and, in June 1994, the Village Police transported Glowczenski to Kings Park Hospital when the ambulance company refused to transport a patient deemed violent. Defs. Ex. H. Additional complaints by Glowczenski's father were filed in the summer of 1995. *See* Defs. Exs. I, J. In August 1995, Glowczenski was arrested for Criminal Mischief in the fourth degree after he threw a telephone at a wall and created a hole in the wall. Defs. Exs. J, K. On the same date, his father filed a complaint of harassment in the second degree, alleging that Glowczenski had threatened to kill him and burn the house down. Defs. Ex. K.

***2** On September 29, 1995, Glowczenski was arrested for striking a police officer in the shoulder with his fist and resisting arrest by kicking the police officers. Defs. Ex. N. In connection with that incident, Glowczenski's doctor, Nicholas H. Pott, M.D. wrote a letter to the Southampton Town Court, stating that Glowczenski suffered from bipolar disorder, and that when he took his medication he was, for the most part, "rational and appropriate in his behavior." Defs. Ex. O. He further reported that Glowczenski had discontinued his medication about six weeks prior to the incidents leading to his arrest. The doctor reported that as of the date of the letter, October 24, 1995, Glowczenski was "clear in his mind that he must continue to take his medication, and in this state I do not see him as a threat to himself or to the public order." *Id.*

The next indication of police involvement with the Glowczenskis that appears in the record was in April 2000, when Glowczenski's sister, the plaintiff Jean Griffin, complained that he was drunk and had threatened to kill her. Defs. Ex. P. On August 8, 2000, the police responded to a complaint that Glowczenski had telephoned a man named Mark Snyder and threatened to shoot Snyder and a woman named Gail. Defs. Ex. Q. On June 12, 2002, the police responded to a complaint by Glowczenski's brother, Teddy, that Glowczenski had pushed him. The report states that both brothers were drunk and Teddy chose not to press charges. Defs. Ex. S. On January 30, 2003, Mary Jane Glowczenski called the police and reported that Glowczenski had punched Teddy in the nose and had menaced her and Teddy with a hammer. Defs. Ex. S. Teddy had allegedly hit Glowczenski in the head with a metal cane. Mrs. Glowczenski further stated that Glowczenski had told her that if she called the police, he would kill her. Both brothers were taken into custody. *Id.*

Mary Jane Glowczenski testified at her deposition that following the incident in 2003, Glowczenski was given the option of going into a rehab program and he was admitted to the Lake Grove Treatment Center from February 2003 until September 2003. The treatment there included AA meetings. *See* Defs. Ex. D, 78–80. She further testified that Glowczenski had stopped taking his medication several days before the February 4, 2004 incident because he was afraid that the medication would cause him to develop diabetes. Defs. Ex. D, 82:1–83:17.

At approximately 9:00 a.m. on the morning of February 4, 2004, the Village Police Department received a 911 call from Mrs. Glowczenski saying that David Glowczenski was having a "psychotic episode," and was hearing voices. Defs. Ex. C. The transcript of the call reports Mrs. Glowczenski as saying that Glowczenski was "very psychotic" and that she "did not know if he [would] harm himself." *Id.* She reported that he "had been up all night and for about two or three days he's been getting worse." *Id.* She also reported that they were going to take him to the doctor that day, but "he just took off." *Id.* At her deposition, Mary Jane Glowczenski testified

that she called the police because she feared that her son "might get victimized or something," and she wanted him in protective custody. Defs. Ex. D, 21:19–22:4. The police responded to the call at the Glowczenski home, but Glowczenski was not there when they arrived. Mary Jane Glowczenski testified that her son came home while the police were there, and that she told the police the family would handle the situation themselves. Defs. Ex. D. 92:11–16. The 911 records state that at 9:20 a.m., Mary Jane Glowczenski called and said Glowczenski had returned home, and that at 9:28 a.m., police officer 233 "advised that the subject is OK in residenc[e] and is seeking psychiatric help." Defs. Ex. C. Mary Jane Glowczenski called the police a third time, at about 10:30 a.m., saying that he had "fled again" and was heading toward North Main St., still hearing voices and in an agitated state. *Id.*

***3** Non-party witness Julie Bradshaw, a teacher at Our Lady of the Hamptons School in Southampton, was outside the school on the morning of February 4, and testified that she heard incoherent shouting and screaming. *See* Defs. Ex. DD. She saw a "pretty big man" who was "stumbling and yelling and screaming incoherently," and "looking crazed." *Id.* 19:3–23. She testified that he was close to the school, and that she was "scared ." She further testified that she saw Officer Donovan and another officer and was relieved that they were there. The plaintiffs state that Ms. Bradshaw's reliability is in dispute. Pls. Mem. in Opp., DE[136] at 11.

The events from this point on are subject to dispute, and I turn now primarily to the plaintiffs' version of events, as I must on this motion for summary judgment. Where the defendants have come forward with evidence that varies from the plaintiffs' version, it will be noted.

On the morning of February 4, 2004, Defendant Police Officer Marla Donovan was outside of Our Lady of the Hamptons School. She testified that she had monitored the police radio and was aware of a call from the Glowczenski house that Glowczenski was hearing voices. Pls. Ex. JJ, 25:5–16 [1]. She also stated that the dispatcher had sent out a message that Glowczenski had returned home. *Id.,* 27:8–10. She noted as well the third call, that Glowczenski had left the house again. At about 10:20, Donovan saw Glowczenski come out of some bushes in front of a residence. She turned on her police car lights and turned the car around. *Id.,* 29:11–31:7. She testified that at that time he was "screaming incoherently," and was holding a Bible and a Grateful Dead book. She called dispatch and said that she had located Glowczenski. She rolled down her window and asked him to "hold up." She reports that he then came over to the car and tried to open the door. She was afraid, and jumped out of the car. *Id.,* 33:12–34:14. Donovan and Glowczenski were standing on the sidewalk in front of the school when Defendant Police Officer Platt arrived in another police vehicle and began talking with Glowczenski. Platt told Glowczenski that his family wanted him to go to the doctor, and Glowczenski told Platt that he did not want to go. Pls. Ex. EE 122:2–9. While Platt was speaking with Glowczenski, Defendants Wetter and Schuct arrived at the scene.

1 The plaintiffs' voluminous exhibits have been filed in hard copy, not electronically.

Schuct testified that Glowczenski asked if he could go to his grandmother's house, but the officers told him he had to go to the hospital to get help. Pls. Ex. II, 23:8–24:14. Schuct testified further that Glowczenski then began to back away, and Schuct grabbed his left arm. *Id.* Glowczenski pulled away, turning his body, and came into contact with Donovan, who, at some point, fell to the ground. Schuct testified that after Glowczenski began to turn around, Schuct "grabbed the back of his shirt up by his collar with both my hands, and then with my left leg I swept both of his legs from left to right and put David on the ground." *Id.* 25:19–27:22. Glowczenski was on the ground face down. Schuct was lying catty-corner across Glowczenski's body. Schucht and Donovan tried to get Glowczenski's left arm out from under him. Schuct then told Platt, who was carrying a Taser, to "take the probes out and drive stun him." *Id.,* 29:17–32:11. Platt used the Taser on Glowczenski several times, with Schuct still lying on his body. The plaintiffs' expert report states that Glowczenski was shot "multiple times in rapid succession." Pls. Ex. DD, p. 6 ¶ 8. Donovan says the Taser was shot 2 or 3 times into Glowczenski's back. Pls. Ex. JJ, 55:5–56:16. Platt himself testified that "it may have been two [or] three times," but he "really didn't remember." Pls. Ex. EE, 153:21–154:17. In their supplemental "Counter Statement of Material Facts in Dispute," the plaintiffs state that Glowczenski suffered " '18 electrical burns ... evidencing al least 9 separate applications of Taser gun at extremely close range or probably by directly touching the body." DE[136–1] at 14, ¶ 13 (citing to Pls. Exs. A & B, the Glowczenski autopsy report and photos; bolding in plaintiff's counterstatement omitted).

***4** After Platt had used the Taser on Glowczenski, Defendant Office Wetter sprayed Glowczenski with pepper spray and Glowczenski was restrained with handcuffs behind his back and zip ties to his legs, still lying face down. *See* Pls. Ex. BBB, 45:9–22; 50:9–17; 57:21–58:12. The defendants state that they took these measures because Glowczenski continued to struggle violently, kicking and shouting. The plaintiffs say that the police themselvescreated the exigency of the situation and that the measures taken were unnecessary.

At some point, defendant Howard Lewis,[2] as well as non-party Detective Lamison arrived at the scene, and someone—perhaps Schuct—called for an ambulance. Wetter Dep. Tr., Pls. Ex. KK, 56:8–18. The events underlying the emergency medical assistance are set forth in the Order regarding the Ambulance/EMT defendants' motion for summary judgment and need not be repeated here. Those emergency efforts were unsuccessful, and David Glowczenski was pronounced dead at 11:20 a.m. The plaintiffs claim that Glowczenski's death was a homicide in police custody.

2 Although the Village defendants have moved for summary judgment on behalf of all of the individual Village defendants, including Lt. Lewis, on the false arrest and negligence claims, the record before the court does not reflect that Lt. Lewis was involved in the alleged false arrest, having arrived after the fact.

Based on these facts, the plaintiffs assert claims of false arrest, excessive force, violations of the Fourteenth Amendment, negligence, wrongful death and battery against the Village defendants, and claims of negligent hiring and supervision and failure to train against the municipality and the Police Department. *See* Amended Complaint, DE[9]. The Village defendants now move for partial summary judgment, seeking dismissal of the claims of false arrest and negligence, as well as dismissal of the claim of negligent hiring and supervision insofar as that claim alleges failure to train police officers in dealing with emotionally disturbed persons, and dismissal of the *Monell* failure to train claim against the Village and the Police Department. Officer Platt moves for partial summary judgment, seeking dismissal of the claims of false arrest, negligence and "constitutional claims." *See* DE[110], Platt Notice of Mtn. Inasmuch as Platt has incorporated the Village defendants' arguments into his papers in support, and there are few if any differences between the claims against the Village Police Officers and Officer Platt for the purposes of these motions, the two motions for summary judgment are herein addressed as one unless otherwise noted.

DISCUSSION

Summary Judgment Standards

" 'Summary judgment is appropriate where there are no genuine disputes concerning any material facts, and where the moving party is entitled to judgment as a matter of law.' " *Jamaica Ash & Rubbish Removal Co. v. Ferguson,* 85 F.Supp.2d 174, 180 (E.D.N.Y.2000) (quoting *In re Blackwood Assocs., L.P.* 153 F.3d 61, 67 (2d Cir.1998) and citing Fed.R.Civ.P. 56(c) and *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)). In deciding a summary judgment motion, the district court must resolve all ambiguities and draw all reasonable inferences in the light most favorable to the opposing party. *See Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.,* 150 F.3d 132, 137 (2d Cir.1998). If there is evidence in the record as to any material fact from which an inference could be drawn in favor of the non-movant, summary judgment is unavailable. *See Holt v. KMI–Continental, Inc.,* 95 F.3d 123, 128 (2d Cir.1996). The applicable substantive law determines which facts are critical and which are irrelevant. *See Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986).

***5** The trial court's responsibility is " 'limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution.' " *B.F. Goodrich v. Betkoski,* 99 F.3d 505, 522 (2d Cir.1996) (quoting *Gallo v. Prudential Residential Servs., L.P.,* 22 F.3d 1219, 1224 (2d Cir.1994)). The court "is not to weigh the evidence, but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty America v. Town of W. Hartford,* 361 F.3d 113, 122 (2d Cir.2007). When, however, there is nothing more than a "metaphysical doubt as to the material facts," summary judgment is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). "Rather, there must exist 'specific facts showing that there is a genuine issue for trial' in order to deny summary judgment as to a particular claim." *Jamaica Ash & Rubbish,* 85 F.Supp.2d at 180 (quoting *Celotex,* 477 U.S. at 322). A moving party may obtain summary judgment

by demonstrating that little or no evidence may be found in support of the non-moving party's case. "When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." *Marks v. New York Univ.,* 61 F.Supp.2d 81, 88 (S.D.N.Y.1999).

False Arrest Claim

False arrest claims are analyzed under the law of the state in which the arrest occurred, here, New York. *See Jaegly v. Couch,* 439 F.3d 149, 151–52 (2d Cir.2006). The elements of false arrest in New York are (1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the the confinement was not otherwise privileged. *See Curry v. City of Syracuse,* 316 F.3d 324, 335 (2d Cir.2003). Under New York law, the existence of probable cause is an absolute defense to a false arrest claim. *Jaegly,* 439 F.3d at 149.

Here, only the fourth element of the false arrest claim is at issue. New York Mental Hygiene Law Section 9.41 authorizes a police officer, when acting pursuant to his or her special duties, to take into custody any person who appears to be mentally ill and is conducting himself in a manner which is likely to result in serious harm to the person or others. The phrase "serious harm is likely to result is defined in the Mental Hygiene Law as "a substantial risk of physical harm to the person as manifested by threats or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself." N.Y. Ment. Hyg. Law § 9.01. If applicable, section 9.41 would be a privilege that justified the police taking Glowczenski into custody.

***6** To determine whether the defendants are entitled to the section 9 .41 privilege, the court must determine whether the police defendants had probable cause to conclude that Glowczenski was acting a manner that invoked section 9.41. *See Kerman v. City of New York,* 261 F.3d 229, 240 n. 8 (2d Cir.2001). And, an objective reasonableness standard is applied to police behavior under section 9.41 as well as to claims under the Fourth Amendment. *Id.* Thus, before a person can be seized and detained for psychiatric evaluation, an official must have probable cause to believe that the person is dangerous to himself or others. *See Bayne v. Provost,* 2005 WL 1871182, at *6 (N.D.N.Y. Aug. 4, 2005). "For Fourth Amendment purposes, the reasonableness of an officer's belief must be assessed in light of the particular circumstances confronting the officer at the time." *Kerman,* 261 F.3d at 235 (citations omitted).

Here, the defendants argue that each of them was aware of Glowczenski's "long history of mental illness, violent behavior and substance abuse," and the possible ramifications of his ceasing to take his medication. DE[103–2] at 17. They knew from Mary Jane Glowczenski's phone calls and from speaking with her at her home on February 4, 2004 that Glowczenski had stopped his medication. Further, she reported that her son was having a "psychotic episode," and was hearing voices. Village Defs. Ex. C. As noted earlier, the transcript of the call reports Mrs. Glowczenski as saying that Glowczenski was "very psychotic" and that she "did not know if he [would] harm himself." *Id.* She reported that he "had been up all night and for about two or three days he's been getting worse." *Id.* She also reported that they were going to take him to the doctor that day, but "he just took off." *Id.* When Mary Jane Glowczenski called the third time on that day, she stated that her son had "fled again" and was heading toward North Main St., still hearing voices and in an agitated state. *Id.* The defendants state that all of the officers knew of these reports, and that even if some of them did not, the "collective or imputed knowledge doctrine" applicable to the determination of probable cause applies here, where there is no dispute that at least some of the officers did know about the reports. See DE[105] at 3 (citing *Zellner v. Summerlin,* 494 F.3d 344, 369 (2d Cir.2007)). Under these circumstances, they argue, they had probable cause to believe that Glowczenski was mentally ill and was conducting himself in a manner which demonstrated that he was dangerous to himself, and it was objectively reasonable for them to take Glowczenski into custody pursuant to Mental Hygiene Law section 9.41. *See* N.Y. Ment. Hyg. Law § 9.01.

The plaintiffs argue that there are material issues of fact that preclude judgment on the false arrest claim. DE[136] 8–11. They say that the defendants were not aware of a history of violence or substance abuse, but even accepting that as true, there is no doubt that the officers were aware of Glowczenski's long history of mental illness and that they had interacted with him on numerous occasions. The plaintiffs further argue that on February 4, 2004, Glowczenski exhibited no signs of violence or

indications that he was dangerous to others, and that he had committed no crimes. Taking those allegations as true, we are still left with the fact that the officers knew Glowczenski's history of mental illness and had ample reason to think that he might be a danger to himself. Indeed, his family expressed that very fear in their phone calls to the police, who had assisted in the past. The plaintiffs also argue that the defendants did not decide to take Glowczenski into custody at the scene, based on the circumstances before them, but that they had decided it earlier, when Glowczenski had committed no crime and "was not a danger to himself or anyone else." DE[136] at 10. They do not explain, however, why the officers should not have considered their long history with Glowczenski and his problems in planning a course of action on that day or why he was not a danger to himself.

***7** Even giving the plaintiffs every inference to which they are entitled, and recognizing that issues of fact exist as to the level of violence, if any, exhibited by Glowczenski on that day, the record amply supports a finding that the defendants were objectively reasonable in deciding that Glowczenski was mentally ill and a danger to himself and thus had probable cause to confine him in reliance on New York Mental Hygiene Law section 9.41. [3] The level of force used for that confinement is, of course, an entirely separate question that does not enter into the issue of probable cause for confinement and one that will be addressed at trial.

3 Indeed, if the police had let Mr. Glowczenski go free and he had been injured, they might have been subject to different claims by the family for failing to provide the protective intervention that they had offered in the past.

Finally, even if the defendants' actions here were not supported by probable cause, the fact that they were objectively reasonable under the circumstances would entitle them to a finding of qualified immunity. Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on "the 'objective legal reasonableness' of the action ... assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton,* 483 U.S. 635, 639 (1987). As noted, the officers were objectively reasonable in believing that their arrest of Glowczenski was justified under New York Mental Hygiene Law section 9.41. Thus, they are entitled to qualified immunity as an alternative basis on which to dismiss the plaintiffs' false arrest claim.

The claims against the defendants for false arrest, under both federal and state law, are dismissed.

The Negligence Claims

The plaintiffs assert negligence claims against the Police Officers, the Village and the Police Department defendants, as well as other defendants, in Counts 4 and 5 of the Amended Complaint. There are two "Fourth Count[s]" in the Amended Complaint. The first Fourth Count alleges violations of Section 1983 by various groups of defendants. The second Fourth Count alleges negligence on the part of the Police Officers, stating that they "had a duty not to shock, chemically spray, beat or otherwise abuse [Glowczenski] in such a way that would summarily cause his death," and a duty to not use excessive force or otherwise violate Glowczenski's constitutional and civil rights, and that they breached those duties. Amended Complaint, DE[9], ¶ 108. The Fifth Count alleges a duty on the part of all defendants to "properly investigate, act within the scope of their authority, and not to falsely arrest, falsely imprison, use excessive force or otherwise violate Glowczenski's Constitutional and civil rights, and they breached that duty." *Id.* ¶ 120.

To establish a prima facie case of negligence, a plaintiff must show: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) injury proximately resulting therefrom. *Solomon by Solomon v. City of New York,* 66 N.Y.2d 1026, 1027 (1985). If the plaintiff alleges intentional conduct in support of a claim for excessive force or battery, he may not also base a claim for negligence on that same conduct. *Morgan v. Nassau County,* 2009 WL 2882823, *19 (E.D.N.Y. Sept. 2, 2009). The defendants here argue that the negligence causes of action are based on alleged intentional conduct and must thus be dismissed [4]. New York, they argue, has adopted the view that once intentional offensive conduct is established, the actor is liable for assault and not negligence, even when the physical injuries were inflicted inadvertently. *Id.; see also Trott v. Merit Dept. Store,* 106 A.D.2d 158, 160 (1st Dept.1985). And the Second Circuit has recognized the mutual exclusivity of negligence and battery, because "negligence is unintentional." *United*

National Insurance Co. v. Tunnel, Inc., 988 F.2d 351, 353 (2d Cir.1993).

4 The defendants also argue that under New York law, when an arrestee is negligently injured as the result of his resisting arrest or attempting to escape from custody, public policy bars any recovery, and that the negligence claims should be dismissed on that ground. *See* DE[103–2] at 20 (citing *Farley v. Town of Hamburg,* 34 A.D.3d 1294 (4h Dept.2006). Inasmuch as there are material issues of fact as to whether Glowczenski resisted arrest or attempted to escape, this ground has not been considered.

***8** The plaintiffs argue that their negligence claims are not founded upon the Officers' intentional conduct in taking Glowczenski into custody, but upon the breach of their duty to follow widely recognized law enforcement policies and procedures with respect to the handling of emotionally disturbed persons, prevention of positional asphyxia, the use of multiple, rapid succession application of TASER weapons, continuum of force, and restraint of sick or injured persons. DE[136] at 26–28. They further argue that if, for example, the jury found that the officers had been trained in handling emotionally disturbed people, they might also find that the officers negligently failed to apply that training.

The defendants are correct that to the extent that the negligence claims are duplicative of the false arrest, excessive force, or battery counts, or are based on intentional conduct, they should not (and will not) go to the jury. However, the court will not dismiss them outright, as there may be viable negligence claims at trial based on the jury's findings of fact.

Failure to Hire and/or Train Claims:

The Village and the Village Police Department defendants move for dismissal of the plaintiffs' "Monell claim insofar as Count III of the Amended Complaint Alleges a Failure to Train by the Village with Respect to the use of Force Against Mentally Ill Persons Including David Glowczenski." DE[103–2] at 21, Point IV Heading. In Count Three, the plaintiffs claim that the Village and Police Department were "reckless, negligent or deliberately indifferent in their training, hiring and supervision of their police officers .. with respect to the use of force against mentally ill and other minority persons ..." Amended Compl. DE[9], ¶ 88. A claim of inadequate training by a municipality will trigger liability when "the failure to train amounts to deliberate indifference to the rights" of those with whom municipal employees come into contact. *See City of Canton, Ohio v. Harris,* 489 U.S. 378, 379 (1989). "Deliberate indifference" requires that the policy maker must have made a "deliberate choice ... from among various alternatives not to fully train employees." *Id.* The Second Circuit has identified three requirements that must be met before a municipality's failure to train or supervise constitutes deliberate indifference to the constitutional rights of citizens. The plaintiff must show (1) that a policymaker knows "to a moral certainty" that its employees will confront a given situation; (2) that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult, or there is a history of employees mishandling the situation; and (3) that the wrong choice by the municipal employee will frequently cause the deprivation of a citizen's constitutional right. *See Walker v. City of New York,* 974 F.2d 293, 297 (2d Cir.1992). At the summary judgment stage, a plaintiff must identify a specific deficiency in a municipality's training program and establish that the deficiency is closely related to the ultimate injury, such that it caused the constitutional violation. *Jenkins v. City of New York,* 478 F.3d 76, 94 (2d Cir.2007) (citing *Green v. City of New York,* 465 F.3d 65, 81 (2d Cir.2006)).

***9** The defendants argue that their long history with Glowczenski prior to February 4, 2004 demonstrates that they dealt with him effectively and that the Glowczenski family expressed its confidence in the ability of the police officers to handle Glowczenski. This, they argue, establishes as a matter of law that the Village did not exhibit deliberate indifference by failing to train its officers in the use of force to be used with an emotionally disturbed person like Glowczenski and that the incident on February 4 was an isolated event insufficient to raise a genuine issue of fact as to deliberate indifference. DE[103–2] at 22–23. The fact that no problems arose prior to February 4, 2004 does not, however, address the question of adequate training and there is a material issue of fact as to what training, if any, most of the defendants received in regard to dealing with mentally ill citizens, including the use of force.

The plaintiffs argue that the history of contact with Glowczenski establishes that the Village knew to "a moral certainty" that contact with mentally ill people would (and did) arise, that the situation created difficult choices

that training could have made less difficult, and that the wrong choice by an untrained employee would frequently result in a deprivation of constitutional rights[5]. The plaintiffs have raised issues of material fact as to how "a hypothetically well-trained officer would have acted under the circumstances" and whether excessive force occurred as a result of training deficiencies. *See Amnesty America,* 361 F.3d at 130–31(quoting *City of Canton,* 489 U.S. at 391).

5 They support their argument with reference to a report by Edward Mamet of ECJM Consultants, an expert for the plaintiffs. Mr. Mamet's report is, however, unsworn and inadmissible on this motion and will not be considered for the reasons set forth in the order denying the Taser defendants' motion.

The defendants argue that, whatever questions might exist in regard to EDP/excessive force training, no inference can be drawn from circumstantial proof of a single incident. DE[105] at 9 (citing *Oklahoma City v. Tuttle,* 471 U.S. 808 (1985)). The plaintiffs argue that a single instance of deliberate indifference to subordinates' actions can provide a basis for municipal liability. DE[136] at 21 (citing *Amnesty America,* 361 F.3d at 126). *Amnesty America* sets forth the proposition that "a single action taken by a municipality is sufficient to expose it to liability," but is not clear whether the court intended to hold that a failure to train could be considered a "single action" for municipal liability purposes. Nonetheless, the Second Circuit also explained that where a "city is aware that its policy may be unconstitutionally applied by inadequately trained employees but the city consciously chooses not to train them," there may be municipal liability. 361 F.3d at 125. Here, the plaintiffs have raised issues of material fact and/ or sufficient inferences to withstand summary judgment on this issue.

Additional Constitutional Claims

Neither the Village Defendants nor Officer Platt moved for summary judgment on the excessive force claim, although in his Notice of Motion Platt refers to vague "constitutional claims." See DE[110]. Nonetheless, in their memoranda of law in opposition to the motions, the plaintiffs included lengthy argument as to why the excessive force claim should not be dismissed. In his reply memorandum, Platt then argued that any excessive force claim pursuant to the fourteenth amendment, as opposed to the fourth amendment, should be dismissed. DE[116] at 1–2. While that may well be true, the court will not now consider the argument, because it was raised in a reply brief and not on the original motion. The excessive force claim will go to the jury, and the question of which constitutional amendment such a claim must be considered under can be determined at a later date.

***10 SO ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2010 WL 1936200

End of Document

APPENDIX 11

695 Fed.Appx. 197
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

YOUNG HAN, individually and as successor-in-interest to decedent Joseph Han; et al., Plaintiffs-Appellants,
v.
CITY OF FOLSOM, a municipal corporation; et al., Defendants-Appellees.

No. 15-16078
|
Argued and Submitted April 21, 2017 San Francisco, California
|
Filed May 30, 2017

Synopsis
Background: Family of deceased brought action against city for federal claims and state wrongful death and negligent infliction of emotional distress claims for shooting death of deceased. The United States District Court for the Eastern District of California, Morrison C. England, J., 2011 WL 5510810, granted summary judgment to city. On appeal, the Court of Appeals, 551 Fed.Appx. 923, affirmed dismissal of federal claims but reversed dismissal of state claims. On remand, the District Court, England, J., 2015 WL 1956521, granted summary judgment to city on state claims. Family appealed.

[Holding:] The Court of Appeals held that fact issues precluded summary judgment on issue of whether officer's use of force against deceased was reasonable under totality of the circumstances.

Reversed and remanded.

***198** Appeal from the United States District Court for the Eastern District of California, Morrison C. England, Jr., District Judge, Presiding, D.C. No. 2:10-cv-00633-MCE-GGH

Attorneys and Law Firms

John L. Burris, Esquire, Benjamin Nisenbaum, Esquire, Attorney, Ayana C. Curry, Attorney, The Law Offices of John L. Burris, Oakland, CA, for Plaintiffs-Appellants

Bruce Daniel Praet, Attorney, Ferguson, Praet & Sherman, Santa Ana, CA, for Defendants-Appellees

Before: THOMAS, Chief Judge, MURGUIA, Circuit Judge, and BAYLSON, * District Judge.

* The Honorable Michael M. Baylson, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

MEMORANDUM **

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

This case returns to us after a prior remand. Plaintiffs Young, Nam, and David Han (collectively, "the Hans") brought federal claims and state wrongful death and negligent infliction of emotion distress claims against the City of Folsom, the Chief of Police, and Officers Barber, Peterson, and Prociw (collectively, "the City") for the shooting death of Joseph Han. The district court granted summary judgment to the City on all claims. The Hans appealed. A three-judge panel of this Court affirmed the dismissal of the federal claims, but reversed the dismissal of the state law wrongful death and negligent infliction of emotional distress claims, and remanded for further proceedings in light of the California Supreme Court's decision in *Hayes v. County of San Diego*, 57 Cal.4th 622, 160 Cal.Rptr.3d 684, 305 P.3d 252 (2013). *Han v. City of Folsom*, 551 Fed.Appx. 923 (9th Cir. 2014). On remand, the district court granted summary judgment on the state law claims, and this appeal followed. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand. Because the parties are familiar with the facts of this case, we need not recount them here.

I

The City contends that it was entitled to summary judgment because the police officers owed no duty to Joseph Han and, therefore, his negligence claims must fail. The City is incorrect. Under California law, public employees "are statutorily liable to the same extent as private persons for injuries caused by their acts or omissions, subject to the same defenses available to private persons." *Hayes*, 160 Cal.Rptr.3d 684, 305 P.3d at 255; *see also* Cal. Gov. Code § 820. In addition, "public entities are generally liable for injuries caused by the negligence of their employees acting within the scope of their employment." *Id.*; *see also* Cal. Gov. Code § 815.2. California applies the familiar common law elements of the tort of negligence: a duty to use care, a breach of that duty, and a requirement that the breach was the proximate or legal cause of the resulting injury. *Id.* California also "has long recognized that peace officers have a duty to act reasonably when using deadly force." *Id.*, 160 Cal.Rptr.3d 684, 305 P.3d at 256. "The reasonableness of an officer's conduct is determined in light of the totality of the circumstances." *Id.* In police cases, as well as others, the conduct in question "must always be gauged in relation to all the other material circumstances surrounding it and if such other circumstances admit of a reasonable doubt as to whether such ***199** questioned conduct falls within or without the bounds of ordinary care such doubt must be resolved as a matter of fact rather than of law." *Grudt v. City of Los Angeles*, 2 Cal.3d 575, 86 Cal.Rptr. 465, 468 P.2d 825, 831 (1970) (quoting *Toschi v. Christian*, 24 Cal.2d 354, 149 P.2d 848, 852 (1944)).

In *Hayes*, the California Supreme Court held that an officer's "tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability." *Hayes*, 160 Cal.Rptr.3d 684, 305 P.3d at 263. As the California Supreme Court summarized, "peace officers have a duty to act reasonably when using deadly force, a duty that extends to the totality of the circumstances surrounding the shooting, including the officers' preshooting conduct." *Id.,* 160 Cal.Rptr.3d 684, 305 P.3d at 262. In assessing the standard of care, "[i]t is universally accepted that the standard of care in a particular industry may be established by its practitioners." *Cty. of Mariposa v. Yosemite W. Assocs.*, 202 Cal.App.3d 791, 806, 248 Cal.Rptr. 778 (Ct. App. 1988); *see also Grudt*, 86 Cal.Rptr. 465, 468 P.2d at 831 (error not to admit police tactical manual as evidence of standard of care).

In short, California recognizes that peace officers have a duty to act reasonably when using deadly force, and reasonableness is determined in light of the totality of the circumstances, including consideration of tactical and preshooting actions.

II

[1] Given the existence of a duty under California negligence law, and following *Hayes*' guidance that we must consider the reasonableness of the officer's actions under the totality of the circumstances, the question then is whether there are triable issues of material fact that preclude summary judgment. [1] In this case, Han tendered expert evidence that the police actions were not reasonable under the totality of the circumstances under generally accepted police practices. The expert opined that even though the Officers were warned in advance that Joseph was acting strangely, that he was in possession of a hunting knife, and that his family was concerned about his well-being and his potential reaction to police presence, "the officers failed to use reasonable and generally accepted police practices for dealing with someone they believed was a person of diminished capacity." He further opined, among other matters, that the officers made conscious choices that unreasonably escalated the situation; that the use of deadly force was contrary to generally accepted police practices; and that the City made a conscious choice not to provide field officers with proper tactical tools and decision making techniques. He testified that "[t]hese decisions and unreasonable ***200** actions created the subsequent deadly force incident that resulted in Joseph Han's death."

1 We must reject the City's assertion, without legal support, that we are limited to reviewing only those facts set forth in the previous panel's memorandum disposition and those facts summarized by the district court in its second summary judgment order. Our remand in *Han v. City of Folsom*, 551 Fed.Appx. 923 (9th Cir. 2014), did not alter or limit the record before the district court, and we conduct a *de novo* review of the district court's summary judgment order, *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915,

> 920 (9th Cir. 2008), which requires consideration of the full record, not just the facts as summarized by the district court. And, in reviewing a grant of summary judgment, an appellate court "may examine the record *de novo* without relying on the lower courts' understanding." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466 n.10, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992). We therefore review the full record as developed before the district court.

[2] The record also discloses genuine disputes as to material facts, such as whether the bedroom door was open or closed when the officers approached it, whether the officers provided a warning, whether they saw the knife, and the position of the victim when he was shot. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Even taking only the undisputed facts into consideration, the circumstances in this case bear a strong resemblance to the situation in *Hayes*, which also involved the fatal shooting of a knife-wielding individual.

Given all of these considerations, the entry of summary judgment was inappropriate in this case.

REVERSED AND REMANDED.

All Citations

695 Fed.Appx. 197

APPENDIX 12

2014 WL 12589650
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

William F. HOWARD
v.
COUNTY OF RIVERSIDE,
Armando Munoz, and Does 1 to 10

EDCV 12-00700 VAP (OPx)
|
Filed 05/07/2014

Attorneys and Law Firms

Dale K. Galipo, Dale K. Galipo Law Offices, Woodland Hills, CA, Vicki I. Sarmiento, Vicki I. Sarmiento Law Offices, Alhambra, CA, for William F. Howard.

Christopher D. Lockwood, Arias and Lockwood, John M. Porter, James C. Packer, Lewis Brisbois Bisgaard and Smith LLP, San Bernardino, CA, for County of Riverside, Armando Munoz, and Does 1 to 10.

PROCEEDINGS: MINUTE ORDER DENYING MOTION FOR SUMMARY JUDGMENT (IN CHAMBERS)

HONORABLE VIRGINIA A. PHILLIPS, U.S. DISTRICT JUDGE

***1** Before the Court is Defendant Sergeant Randall Wedertz's Motion for Summary Judgment. ("Motion" or "Mot.") (Doc. No. 68.) The matter came before the Court for hearing on May 5, 2014. After consideration of the papers filed in support of, and in opposition to, the Motion, and the arguments put forth at the hearing, the Court DENIES the Motion.

I. BACKGROUND

On April 7, 2011, County of Riverside Deputy Armundo Munoz shot Plaintiff William H. Howard ("Plaintiff") while attempting to apprehend him pursuant to a felony arrest warrant. On September 30, 2013, Plaintiff filed a Fourth Amended Complaint alleging claims of (1) violation of 42 U.S.C. § 1983, use of excessive force, against Defendant Munoz; (2) negligence against Defendants County of Riverside, Deputy Munoz, and Sergeant Wedertz; and (3) battery against the County of Riverside and Deputy Munoz. [1] ("4AC") (Doc. No. 63.)

1 On March 13, 2014, the parties agreed to dismiss Plaintiff's second and third claims alleged in the Fourth Amended Complaint. (See Doc. No. 67.)

On March 27, 2014, Sergeant Wedertz filed this Motion for Summary Judgment, a Statement of Undisputed Material Facts ("DSUF") (Doc. No. 69); Evidence in Support of the Motion and Exhibits 204, 1136, 1143, 1147, 1149, 1154, and 1155 (Doc. No. 70); and a Proposed Statement of Uncontested Facts and Conclusions of Law (Doc. No. 71). On April 7, 2014, Plaintiff filed his Opposition to the Motion ("Opp'n.") (Doc. No. 72); Plaintiff's Separate Statement of Disputed ("SGI") and Undisputed Material Facts ("PSUF") (Doc. No. 73); Declaration of Vicki Sarmiento and Exhibits 1-3 ("Sarmiento Decl.") (Doc. No. 74); and the Declaration of Roger Clark ("Clark Decl.") (Doc. No. 75). On April 11, 2014, Sergeant Wedertz filed his Reply ("Reply") (Doc. No. 76); his Response to Plaintiff's Disputed Facts ("Response to SGI") (Doc. No. 78); and Objections to the Clark Declaration ("Clark Evidentiary Objs.") (Doc. No. 77).

II. LEGAL STANDARD

A motion for summary judgment or summary adjudication shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson, 477 U.S. at 250.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998); Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Where the non-moving party has the burden at trial, however, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. Celotex, 477 U.S. at 325. Instead, the moving party's burden is met by pointing out that there is an absence of evidence supporting the non-moving party's case. Id.

***2** The burden then shifts to the non-moving party to show that there is a genuine issue of material fact that must be resolved at trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256. The non-moving party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252. See also William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial § 14:144. "This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." In re Oracle Corp. Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010) (citing Anderson, 477 U.S. at 252).

A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. In ruling on a motion for summary judgment, a court construes the evidence in the light most favorable to the non-moving party. Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991); T.W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

III. EVIDENTIARY RULINGS

Sergeant Wedertz objects to many of the statements in Mr. Clark's Declaration on a variety of evidentiary grounds. (See Clark Evidentiary Objs. ¶¶ 18, 21, 22, 23, 24, 25, 26.) Mr. Clark was retained by Plaintiff as a police practices expert to render an opinion with respect to the tactics employed by Sergeant Wedertz in the search and apprehension of Plaintiff. (Clark Decl. ¶¶ 2, 5.) Mr. Clark reviewed a variety of documents and other information from the case file, and based on his review of these materials, offered his opinions as to the police tactics used by Sergeant Wedertz. (Clark Decl. ¶¶ 6, 7.) As an expert witness, Mr. Clark may rely on hearsay evidence in forming his opinions. Thus, Mr. Clark's opinions are admissible evidence and are not hearsay. Moreover, Mr. Clark's descriptions of evidence in the case file are relevant to explain how he formed his opinions and the basis for his opinions. Mr. Clark's descriptions of evidence, however, are hearsay because they are based only on his review of case file and not his personal knowledge of what happened.

For example, Mr. Clark reviewed statements of eyewitnesses. According to Mr. Clark, several eyewitnesses did not hear Officer Santos commanding Plaintiff to exit the shed. Mr. Clark declares that, "Deputy Santos testified that he was giving commands for Mr. Howard to come out, however, some of the witness statements I have reviewed state that they did not hear any commands by the deputies prior to the shooting. Other witnesses state they did hear commands. Thus, evidence with respect to whether or not commands were given is in dispute and will be left to the trier of fact to sort out." (Clark Decl. ¶ 18.) Plaintiff then relies on Mr. Clark's description of these witness statements as evidence that there is a genuine issue of material fact as to whether Deputy Santos gave commands. (See SGI ¶¶ 9, 17.) Mr. Clark's summary of the witness statements is hearsay. Under Federal Rule of Evidence 802, hearsay may not be offered for the truth of the matter asserted; i.e., that some eyewitnesses did not hear Deputy Santos give commands to Plaintiff to exit the shed. See United States v. Velasquez, 2011 WL 5573243, at *3 (N.D. Cal. Nov. 14, 2011) (Expert's opinion may be based on hearsay but expert may not "simply transmit the hearsay to the jury."). Thus, the Court sustains Sergeant Wedertz's evidentiary objection to Mr. Clark's descriptions of witness testimony. Plaintiff has not provided admissible evidence to dispute the fact that Deputy Santos gave commands to Plaintiff to exit the shed.

***3** Similarly, the Court sustains Sergeant Wedertz's hearsay objections to Mr. Clark's description of evidence and the events that occurred on April 7, 2011, to the extent these descriptions are offered for the truth of the matter asserted. (See PSUF ¶¶ 2[2], 3[3], 4[4], 5[5], 6[6], 7[7], 8[8], 11[9], 12[10], 14[11], 19[12].)

2 "During the morning of April 7, a briefing was held regarding the Operation Plan put into place for Mr. Howard's arrest." (PSUF ¶ 2.)

3 "Deputy Armando Munoz and Sgt. Wedertz were present at the briefing, along with Deputies Tijerina, Santos, and Willow." (PSUF ¶ 3.)

4 "Based on his rank and position, Sgt. Wedertz would have been responsible for approving tactical decisions regarding the operation for affecting Mr. Howard's arrest." (PSUF ¶ 4.)

5 "After the briefing, deputies situated themselves throughout the city pursuant to the Operation Plan." (PSUF ¶ 5.)

6 "Just prior to 1 p.m., deputies had a visual sighting of someone believe to be Mr. Howard walking on Cathedral Canyon Drive near Tahquitz Road in Cathedral City." (PSUF ¶ 6.)

7 "No deputy or civilian reported seeing Mr. Howard with a gun or any other weapon that day. No one reported seeing Mr. Howard committing any crime that day." (PSUF ¶ 7.)

8 "Upon reaching 68461 Tahquitz Road, Deputy Munoz joined Deputies Tijerina, Santos, and Sgt. Wedertz in the search for Mr. Howard." (PSUF ¶ 8.)

9 "After Deputies Santos, Tijerina and Munoz arrived to the shed area, Sgt. Wedertz assumed a position at the north end window, and Deputy Santos and Tijerina were positioned at the west wall, near an open window." (PSUF ¶ 11.)

10 "The entrance to the shed was located at the south entrance which was secured by a locked security screen door. Deputy Munoz was asked to enter the shed because he is small in stature." (PSUF ¶ 12.)

11 "The shed had 6 closets door and had a tarp and mattress where a person could easily hide." (PSUF ¶ 14.)

12 "One of the doors did not have a dead bolt which Deputy Munoz thought that Mr. Howard may possibly be hiding in." (PSUF ¶ 19.)

Next, Sergeant Wedertz objects to Mr. Clark's opinion that it was possible for a second deputy to have been inside the shed and providing cover for Deputy Munoz. (See Clark Evidentiary Objs. ¶¶ 21, 22, 24, 25.) Sergeant Wedertz objects to this opinion on the basis that the photographs of the shed show that it was impossible for more than one deputy to be safely in the shed at one time. After review of the photographs, it is not clear that Mr. Clark's opinion is contrary to what is depicted in the photos. Unlike the cases Sergeant Wedertz cites, Mr. Clark's opinion is not in direct contradiction to a videotape of what happened during the incident. See Scott v. Harris, 550 U.S. 372, 380 (2007) (a videotape of the incident "blatantly" contradicted Plaintiff's version of the facts to the extent that no reasonable jury could have believed him.). Rather, it is an opinion that could be formed after review of the photographs of the shed and the case file. The objection is overruled.

Finally, Sergeant Wedertz also objects that many of Mr. Clark's opinions are based on factual assumptions with no support in evidence. First, Sergeant Wedertz objects to Mr. Clark's opinion that is was unreasonable for Deputy Munoz to open the closet door without cover when there were available personnel to provide the necessary cover. (See Clark Evid. Objs. to ¶¶ 22, 28.) Sergeant Wedertz objects on the basis that this opinion assumes a fact —that there was a place another deputy could have safely provided cover from inside the shed—that is not supported by evidence. The Court overrules the objection because it is disputed whether more than one officer could have been inside the shed at the same time, and it is disputed whether it was possible for another deputy to provide cover from inside the shed. Thus, although it is Defendant's opinion that a second deputy could not safely fit inside the shed, Mr. Clark's opinion that a second deputy could have fit is not based on assumptions contrary to evidence. [13]

13 In his Reply, Sergeant Wedertz argues that Mr. Clark did not explicitly opine that another officer could safely fit in the shed, however, in light of the fact that Mr. Clark is suggesting alternative configurations that he believes would have been more appropriate, it is reasonable to infer that he believes these configurations were safe. (See Reply at 2.) Thus, there is a dispute as to (1) whether a second deputy would have fit in the shed, and (2) whether it would have been safe to have a second deputy in the shed.

***4** Second, Sergeant Wedertz objects to Mr. Clark's opinion that the deputies did not need to search the shed quickly because Sergeant Wedertz's fear that Plaintiff would injure or take someone hostage was unjustified. (See Clark Evidentiary Objs. ¶ 23.) Sergeant Wedertz argues this opinion assumes facts contrary to evidence because Plaintiff was wanted for armed robbery and had been caught the day before the incident with burglary tools. These facts do not demonstrate that Mr. Clark's

expert opinion is based on assumed facts not in the record, rather, Mr. Clark formed an opinion based on facts in the record that differs from Sergeant Wedertz's opinion. Cf. Guidroz-Brault v. Missouri Pac. R. Co., 254 F.3d 825, 830 (9th Cir. 2001) (expert opinion that a train lookout should have been able to see a track separation was excluded when there was no evidence that a track separation, or any other visible tract defect, existed). Accordingly, this objection is overruled.

Third, Sergeant Wedertz objects to paragraph 27 of Mr. Clark's Declaration on the basis that the entire statement assumes facts contrary to the evidence. Mr. Clark opines that even if it would have taken an hour for a police dog to arrive at the shed, the search could have continued in other areas while some deputies held the shed. Sergeant Wedertz argues this opinion assumes facts contrary to evidence because "the only evidence shows that it would have taken at least an hour for a dog to arrive." (Clark Evidentiary Objs. ¶ 27.) Mr. Clark's opinion is in fact partly based on the fact that it would take an hour for a police dog to arrive, accordingly, this opinion is not based on facts unsupported by evidence and the Court overrules this objection.

IV. FACTS

A. Uncontroverted Facts

Both sides cite facts that are not relevant to resolution of the Motion. [14] To the extent certain facts, or conclusions, are not mentioned in this Order, the Court has not relied on them in reaching its decision. In addition to considering the evidentiary objections raised by the parties, the Court has independently considered the admissibility of the evidence underlying both parties' Statement of Undisputed Facts, and has not considered facts that are irrelevant or based upon inadmissible evidence. The following material facts are supported adequately by admissible evidence and are uncontroverted. They are "admitted to exist without controversy" for the purposes of this Motion. See L.R. 56-3.

14 Both parties included compound facts in their statements of undisputed facts in violation of the Court's Standing Order. (See Standing Order ¶ 4(b).)

On April 7, 2011, Sergeant Wedertz was the head of the Special Enforcement Team of the Riverside County Sheriff's Department. (PSUF ¶ 1. [15]) On April 7, 2011, the Special Enforcement Team sought to arrest Plaintiff. (PSUF ¶ 1.) Sergeant Wedertz was aware that there was an outstanding felony arrest warrant for Plaintiff based on an armed robbery, and he was aware that Plaintiff was considered armed and dangerous. (DSUF ¶ 2. [16]) Sergeant Wedertz was also aware that on April 6, 2011, other deputies had apprehended a woman named Lilian Gallegos, but a male suspect with her had fled. (DSUF ¶ 3. [17]) The male suspect dropped a backpack as he was fleeing. (DSUF ¶ 3.) The backpack contained burglary tools and documents which identified the owner as Plaintiff, William Howard. (DSUF ¶ 3.) Ms. Gallegos also identified the man who had fled as Plaintiff. (DSUF ¶ 3.)

15 Sergeant Wedertz has not responded to Plaintiff's Statement of Undisputed Facts apart from the evidentiary objections to Mr. Clark's Declaration. Thus, to the extent Plaintiff's Statements of Fact are supported by admissible evidence, they will be considered undisputed for the purpose of this motion. See Fed. R. Civ. P. 56(e)(2); L.R. 56-3; Standing Order ¶ 4.

16 Plaintiff disputes that Sergeant Wedertz was aware that Plaintiff was considered armed and dangerous. Plaintiff cites to Mr. Clark's Declaration in support of this objection. Mr. Clark opines that Plaintiff should not have been treated as armed and dangerous because based on his review of the case file, no deputy or civilian reported seeing Plaintiff with a gun or any other weapon on April 7, 2011. (Clark Decl. ¶ 10.) This opinion does not contradict Sergeant Wedertz's declaration that he was aware that Plaintiff, rightly or wrongly, was considered armed and dangerous. Accordingly, it is undisputed that Sergeant Wedertz was aware that Plaintiff was considered armed and dangerous. The Court also notes that Sergeant Wedertz argues that Mr. Clark admitted in his deposition testimony that Plaintiff was properly considered armed and dangerous, but the pages of Mr. Clark's deposition attached to support this assertion are not properly authenticated, and the portion provided is incomplete. (Response to SGI ¶ 2.)

17 Plaintiff does not dispute this fact but raises evidentiary objections on relevance, hearsay, and lack of foundation grounds. The relevance objection is overruled as the information known by Sergeant

> Wedertz at the time he formed a tactical plan is relevant to whether the plan was reasonable. The statement is not hearsay because it is offered for the effect on the listener; not the truth of the matter asserted. Finally, the basis for Plaintiff's lack of foundation is not clear, but Sergeant Wedertz has personal knowledge of what he knew about Plaintiff on April 6, 2012. Accordingly, Plaintiff's evidentiary objections are overruled.

***5** On April 7, 2011, Sergeant Wedertz was one of several deputies assigned to try to apprehend Plaintiff. (DSUF ¶ 4.) Sergeant Wedertz was informed that two other deputies had seen a man they suspected was Plaintiff flee into an apartment complex. (DSUF ¶ 5.) Other deputies set up a perimeter around the apartment complex to try to prevent Plaintiff from escaping. (DSUF ¶ 6.) Sergeant Wedertz was assigned, along with at least three other deputies, to search for Plaintiff inside the perimeter. (DSUF ¶ 7.) Deputies searched several apartment units, including a vacant unit. (PSUF ¶ 9.)

One of the possible places into which Plaintiff could have fled was what appeared to be an old laundry room which had been converted to a storage shed. (DSUF ¶ 8.) The size of the shed was approximately 7 feet by 21 feet. (DSUF ¶ 12.) Sergeant Wedertz did not know whether Plaintiff had actually entered the storage shed, but identified it as one possible location where he could be hiding. (DSUF ¶ 8.) Sergeant Wedertz focused his attention on the shed and "held" the shed as he waited for other deputies to arrive. (PSUF ¶ 10.)

The other deputies that were near the storage shed were Deputy Munoz, Deputy Santos, and Deputy Tijerina. (Wedertz Decl. ¶ 5.) Deputy Santos gave repeated loud commands for Plaintiff to come out of the storage shed, but there was no response. (DSUF ¶ 9. [18]) The door to the storage shed was locked. (DSUF ¶ 11.) The shed had two small windows that did not have glass inside the panes. (DSUF ¶ 15.) The shed contained several items, including a mattress and a tarp. (DSUF ¶ 13; PSUF ¶ 14.) In addition, there were five or six closets inside the shed, all of which provided potential hiding places. (DSUF ¶ 13; PSUF ¶ 14.)

18 As the Court ruled above, Plaintiff's objection to this fact is based on Mr. Clark's description of witness statements and therefore is not supported by admissible evidence.

Deputy Munoz was the only deputy small enough to enter the shed through the windows. (DSUF ¶ 15.) Sergeant Wedertz directed Deputy Munoz to enter the storage shed through the window. (DSUF ¶ 16.) Before Deputy Munoz entered the shed, Sergeant Wedertz did not discuss whether, once inside, Deputy Munoz should open the security door to allow another deputy to enter the shed. (DSUF ¶ 13.) Sergeant Wedertz thought that the security door could only be unlocked with a key, and did not have a turn bolt on the inside of the door. (PSUF ¶ 28.)

Sergeant Wedertz assumed a position at the north window and Deputies Santos and Tijerina assumed a position near the other window, where Munoz entered the shed. (DSUF ¶ 16; PSUF ¶¶ 11, 22.) The deputies assumed these positions to attempt to provide cover for Deputy Munoz. (DSUF ¶ 16. [19]) The purpose of cover is to allow a deputy to focus on one area while the cover deputies watch areas behind or to the side of the deputy. (DSUF ¶ 25.)

19 Plaintiff objects to this fact on the basis that Mr. Clark concluded that it was impossible for the deputies to provide cover from the windows. (SGI ¶ 16.) The Court modified the language to state the deputies "attempted" to provide cover to reflect this disputed fact.

Deputy Santos continued to give repeated commands to Plaintiff to come out of the shed and show his hands while Deputy Munoz was searching the shed. (DSUF ¶ 17. [20]) Sergeant Wedertz was directing Deputy Munoz's search of the shed. (PSUF ¶ 13.) Deputy Munoz searched the mattress, tarp, other items on the floor, and then began to search the closets. (DSUF ¶ 18; PSUF ¶ 17.) Deputy Munoz did not specifically communicate with Sergeant Wedertz or the other deputies with respect to searching the closets. (PSUF ¶ 18.) Approximately three of the closets were locked, but one closet did not have a deadbolt and appeared to be unlocked. (Ex. 2 to Sarmiento Decl. ("Munoz Dep.") at 91:22-24; 93:11.)

20 As the Court ruled above, Plaintiff's objection to this fact is based on Mr. Clark's description of witness statements and therefore is not supported by admissible evidence. (See supra n. 18.)

***6** Deputy Munoz did not communicate with Sergeant Wedertz or the other deputies about opening the unlocked closet. (PSUF ¶ 20.) There was no communication between the deputies that they should change position

so someone else besides Deputy Munoz could see into the closet when the door was opened by Deputy Munoz. (PSUF ¶ 21.) Deputy Munoz knew that when he opened the unlocked closet, the other deputies would not be able to see into the closet and he would not have any cover. (PSUF ¶ 23.) There was no communication between the deputies as to whether Deputy Munoz would have cover when he opened the closet door because it was obvious that he would not. (PSUF ¶ 24.)

Sergeant Wedertz knew that when Deputy Munoz opened the unlocked closet door, Sergeant Wedertz's and the other deputies' view of the inside of the closet would be blocked by the door. (PSUF ¶¶ 25, 26.) The portion of the shed directly opposite the closet in which Plaintiff was found hiding was occupied by a table covered with a water heater, an ironing board, and other items. (DSUF ¶ 21.) No matter where a cover deputy was stationed, Deputy Munoz's attention would have been on the inside of the closet when he opened the door. (DSUF ¶ 25.) Sergeant Wedertz is not sure why there was not a deputy providing cover on the south side of the shed, where the security door was located. (PSUF ¶ 27.) Sergeant Wedertz does not recall if he considered that, tactically, Deputy Munoz should try to open the security door, thus allowing another deputy to provide cover, before Deputy Munoz opened the unlocked closet. (PSUF ¶ 31.)

After Deputy Munoz opened the unlocked closet, Sergeant Wedertz heard a single shot and saw Deputy Munoz step back with a gun in his hand. (DSUF ¶ 20.) Deputy Munoz fired only one shot, without warning, hitting Plaintiff in the face. (PSUF ¶ 33; Munoz Dep. 152:7.) Deputy Munoz did not see a weapon or anything that looked like a weapon in Plaintiff's hands. (PSUF ¶ 34.) After the shooting Deputy Willow entered the shed and handcuffed Plaintiff. (PSUF ¶ 36; Ex. 3 to Sarmiento Decl. ("Santos Dep.") 31:19-25.) Deputy Santos entered the shed after Deputy Willow pulled Plaintiff out of the shed. (PSUF ¶ 36; Santos Dep. 32:23-25.)

Police dogs can be used in the apprehension of suspects. (PSUF ¶ 39.) The County of Riverside Sheriff's Department has police dogs and Sergeant Wedertz could have asked for a dog to assist in apprehending Plaintiff. (PSUF ¶ 39.) It would have taken at least an hour for a police dog to arrive. (DSUF ¶ 26. [21])

21 In support of Plaintiff's objection to this fact Plaintiff cites to Mr. Clark's opinion that the deputies could have waited for a police dog to arrive, even if it took the police dog one hour to arrive. (See SGI ¶ 26.) This opinion does not support the existence of a genuine dispute of material fact as to how long it would have taken for a police dog to arrive at the shed.

B. Disputed Facts

The parties generally agree on the events leading up to Deputy Munoz shooting Plaintiff. For the purposes of this Motion, the parties dispute (1) whether the deputies needed to search the shed quickly because Plaintiff was considered armed and dangerous and there was a significant risk that Plaintiff would injure someone or take someone hostage if not apprehended (SGI ¶ 10); (2) whether the deputies were able to provide cover for Deputy Munoz from their positions at the windows (SGI ¶¶ 16, 18); (3) whether it was possible for another deputy to safely be in the shed and provide cover to Deputy Munoz while he searched for Plaintiff (SGI ¶ 22); (4) whether the cover the deputies provided through the two windows was the same as the cover that could have been provided from inside the storage shed (SGI ¶ 23); and (5) whether opening the security door before opening the closet where Plaintiff was hiding would have actually provided Deputy Munoz with additional cover. (SGI ¶ 24.) The parties also dispute the length of time between when Deputy Munoz opened the door and when he shot Plaintiff. (See DSUF ¶ 20; PSUF ¶ 32.)

V. DISCUSSION

***7** Sergeant Wedertz moves for summary judgment on Plaintiff's negligence claim because he asserts that, based on the undisputed facts recited above, his actions were objectively reasonable as a matter of law. Plaintiff argues there are triable issues of fact as to whether Sergeant Wedertz's tactical plan amounted to negligence because Sergeant Wedertz's plan unnecessarily escalated the situation and contributed to Deputy Munoz unreasonably shooting Plaintiff.

A. Allegations Against Sergeant Wedertz in the Fourth Amended Complaint

Plaintiff's only claim against Sergeant Wedertz is negligence under California state law. Plaintiff also brings

a negligence claim against Deputy Munoz, which is not at issue in this Motion. In the Fourth Amended Complaint, Plaintiff alleges Defendants "assumed a duty of care towards Mr. Howard in which they were required to use reasonable care, lawful tactics, and lawful force in detaining him and/or taking him into custody." (4AC ¶ 49.) In regard to Sergeant Wedertz specifically, Plaintiff alleges that he "owed a duty to Plaintiff to act reasonably with regard to the tactics and decisions employed in the attempt to arrest Plaintiff." (Id. ¶ 51.) Plaintiff alleges that Sergeant Wedertz engaged in "pre-shooting negligence by the totality of his actions and omissions" and that his "poor tactics and poor planning contributed to the unnecessary use of force by Deputy Munoz." (Id. ¶¶ 51-52.)

B. Duty to Act Reasonably When Using Deadly Force

Under California law, the elements of a negligence claim are: (1) a legal duty to use due care; (2) a breach of that duty; and (3) the breach was the proximate or legal cause of the resulting injury. See Ladd v. County of San Mateo, 12 Cal. 4th 913, 917 (1996); Nally v. Grace Cmty. Church, 47 Cal. 3d 278, 292 (1988). The existence of a duty of care is a question of law. Ballard v. Uribe, 41 Cal. 3d 564, 573 (1986). Police officers have a duty "to act reasonably when using deadly force." Hayes v. Cnty. of San Diego, 57 Cal. 4th 622, 629 (2013); Brown v. Ransweiler, 171 Cal. App. 4th 516, 534 (2009) (police officers have "to use reasonable care in deciding to use and in fact using deadly force."); Munoz v. City of Union City, 120 Cal. App. 4th 1077, 1101 (2004) (tracing California Courts' recognition of police officers' duty to "to use reasonable care in employing deadly force."). "The reasonableness of an officer's conduct is determined in light of the totality of circumstances." Hayes, 57 Cal. 4th at 629.

In Hayes, the Supreme Court of California clarified that, "preshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct." Id. at 632 (citing Grudt v. City of Los Angeles, 2 Cal. 3d 575, 585-88 (1970)). The Supreme Court held that "law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. Such liability can arise, for example, if the tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable." Hayes, 57 Cal. 4th at 639. The Supreme Court, however, declined to reach the question of whether police officers had a "separate preshooting duty." Id. at 631. Instead, the Supreme Court emphasized that when a plaintiff only alleges one injury—the improper use of deadly force—preshooting conduct is not considered in isolation and is relevant only to the extent it shows that the shooting itself was negligent. Id. "Thus, a final determination that the shooting was not negligent would preclude plaintiff from pursuing a separate theory of liability based on the preshooting conduct alone." Id.

***8** In Hayes, as well as the majority of other cases that have considered liability for preshooting conduct, the issue presented was whether the jury could consider the preshooting conduct of the officers who used the force alleged to be excessive. See 57 Cal. 4th at 627 (preshooting conduct of two deputies that simultaneously fired shots at plaintiff); Grudt, 2 Cal. 3d at 586 (whether two officers acted in a manner consistent with their duty of due care when they decided to apprehend Grudt, approached his vehicle with drawn weapons, and shot him to death); Hernandez v. City of Pomona, 46 Cal. 4th 501, 507 (2009) (whether to consider preshooting conduct of officers, all of which, except for one officer who had been voluntarily dismissed from the case, had fired shots at plaintiff); Munoz, 120 Cal. App. 4th at 1101 (whether to consider pre-shooting conduct of officer who fired shots). Here, however, according to the undisputed facts, Sergeant Wedertz did not use any force against Plaintiff. Thus, Plaintiff is alleging that Sergeant Wedertz breached his duty not to use unreasonable force by devising a tactical plan that caused Deputy Munoz to use unreasonable force against Plaintiff. Plaintiff bases this theory on the language in Hayes that directs consideration of the totality of the circumstances, including tactical decisions, when Plaintiff has alleged only one injury—the unreasonable use of deadly force.

In Hayes, the California Supreme Court's reasoning was grounded in the definition of a "cause of action" under California law; and that one injury, or violation of a primary right, gives rise to only one indivisible cause of action. Id. at 631. Under California law, a "cause of action" is comprised of "a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." Id. at 630 (quoting Crowley v. Katleman, 8

Cal. 4th 666, 681 (1994)). A cause of action "is the right to obtain redress for a harm suffered" and "even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." Id. (quoting Crowley, 8 Cal. 4th at 681.) Accordingly, a plaintiff may bring a single cause of action against multiple defendants, and may allege multiple legal theories against each defendant.

Here, as in Hayes, Plaintiff only seeks to recover from the injuries suffered as a direct result of the shooting. Plaintiff does not allege an additional injury as a result of Sergeant Wedertz's tactical planning before the shooting; instead, he argues that Sergeant Wedertz's conduct caused the shooting. Thus, as in Hayes, "this case involves only a single indivisible cause of action, seeking recovery for a single wrong—the shooting itself." Id. at 630.

Plaintiff is alleging multiple theories of recovery for this injury: (1) the shooting was an unreasonable use of force because it was excessive and (2) the shooting was an unreasonable use of force because Sergeant Wedertz negligently provoked, created, or contributed to a situation in which deadly force was used. (4AC ¶¶ 24 (excessive force); 52 (negligence); 56 (battery).) The fact Sergeant Wedertz did not actually fire a shot is not necessarily determinative of his liability since Plaintiff is alleging that considering the totality of the circumstances, Sergeant Wedertz breached his duty to use reasonable force because his actions caused, or contributed to, the unreasonable use of deadly force against Plaintiff.

For example, in Munoz v. Olin, the Supreme Court of California recognized that a jury could find, based on the evidence presented at trial, that in a negligence action for unreasonable use of force, an officer who did not fire any shots was negligent in the identification of the plaintiff as a suspected arsonist and in his failure to warn or use other means of apprehending the plaintiff. 24 Cal. 3d 629, 636 (1979); see also Dorger v. City of Napa, 2013 WL 5804544, at *10 (N.D. Cal. Oct. 24, 2013) (applying Hayes and denying summary judgment in favor of officer who did not use actual force because whether the officer's preshooting conduct "played a role in negligently provoking a dangerous situation that resulted in the use of reasonable or unreasonable use of lethal force, is relevant under the totality of the circumstances test.").

***9** Accordingly, it is possible, as a matter of law, that under the totality of the circumstances test, Sergeant Wedertz breached his duty to act reasonably when using deadly force by negligently employing tactics that resulted in the use of unreasonable force against Plaintiff.

C. Whether Sergeant Wedertz's Actions Were Objectively Reasonable

The reasonableness of an officer's conduct is determined in light of the totality of the circumstances; and there "will virtually always be a range of conduct that is reasonable." Brown, 171 Cal. App. 4th at 537-38. "As long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the 'most reasonable' action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence." Hayes, 57 Cal. 4th at 632 (quoting Brown, 171 Cal. App. 4th at 537-38). "Law enforcement personnel have a degree of discretion as to how they choose to address a particular situation." Id. Summary judgment is appropriate when, viewing the facts most favorably to the plaintiff, "no reasonable juror could find negligence." Id.

Sergeant Wedertz moves for judgment as a matter of law on the basis that his decisions and directions regarding the search of the shed were objectively reasonable. (Mot. at 12.) Sergeant Wedertz argues (1) it was objectively reasonable to search the shed quickly and not wait for a police dog; (2) it was objectively reasonable to send Deputy Munoz into the storage shed while providing cover through the windows; (3) it was objectively reasonable to direct Deputy Munoz to open the door to the closet where Plaintiff was hiding while cover was provided from the windows; and (4) it was objectively reasonable not to wait for a police dog or air support.

Plaintiff has raised several disputed facts regarding cover, and the amount of cover Deputy Munoz should have had when he opened the closet door. As Sergeant Wedertz argues in his reply, it is undisputed that the purpose of providing cover is to allow the searching deputy to focus on the area being searched without fear of being ambushed from behind or from the side. (Reply at 2.) It is also undisputed that no matter what the cover configuration was, Deputy Munoz would have focused his attention on the inside of the closet when he opened

the door. Thus, Sergeant Wedertz argues that Plaintiff has failed to prove causation; i.e., even if all factual disputes regarding cover are resolved in favor of the Plaintiff, no cover configuration would have changed what happened because no other deputy would have been able to see inside the closet when Deputy Munoz opened the door. Therefore, Sergeant Wedertz argues that he is entitled to summary judgment on the basis of causation because it is undisputed that his tactical decisions regarding the positioning of officers, and whether to send a second officer inside the shed, would not have changed the amount of cover Deputy Munoz had when opened the door.

At the hearing, Plaintiff argued that if Deputy Munoz had opened the security door, and a second officer had been in the shed when he opened the closet door, the second officer would have been able to position himself to see inside the closet when the door was opened. Sergeant Wedertz argues that this configuration was impossible because it was physically impossible for a second officer to be safely in the shed. After review of the photographs of the shed, however, the Court finds that a reasonable jury could find that it was possible for a second officer to be in the shed, and see inside the closet, when Deputy Munoz opened the closet door.

***10** Furthermore, Sergeant Wedertz's argument is premised on the reasonableness of: (1) Sergeant Wedertz sending Deputy Munoz into the shed to search, and (2) Deputy Munoz opening the unlocked closet door. Plaintiff, however, has raised genuine issues of material fact as to whether it was possible to provide Deputy Munoz with *any* kind of cover from the windows. Resolving this factual dispute in favor of the Plaintiff, a reasonable jury could find that it was unreasonable to send a deputy into a small space, where a suspect who was considered armed and dangerous may be hiding, without any cover. Similarly, a reasonable jury could find that it was negligent to direct Deputy Munoz to enter the shed, knowing that Deputy Munoz would not have cover once he was inside, instead of waiting for a police dog, even if the police dog would have taken one hour to arrive. Finally, even assuming that the deputies could provide cover from the windows, it remains undisputed that, under that configuration, Deputy Munoz was without cover when he opened the closet door. A reasonable jury could conclude that Sergeant Wedertz was negligent in directing Deputy Munoz to open the closet door, knowing that Deputy Munoz would not have cover as to what was inside the closet and that a suspect, who was considered armed and dangerous, may be hiding inside. A reasonable jury could find that Sergeant Wedertz's decisions to direct Deputy Munoz to enter the shed and to open the closet door were a substantial factor in causing Plaintiff's injuries. Accordingly, Sergeant Wedertz is not entitled to judgment as a matter of law.

VI. CONCLUSION

For the foregoing reasons, the Court DENIES Sergeant Wedertz's Motion for Summary Judgment.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2014 WL 12589650

APPENDIX 13

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CESAR BELTRAN-SERRANO, an incapacitated person, individually, and BIANCA BELTRAN as guardian ad litem of the person and estate of CESAR BELTRAN-SERRANO,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

No. 95062-8

RULING GRANTING REVIEW

Cesar Beltran-Serrano, individually and through his guardian ad litem, Biana Beltran, seeks direct discretionary review of a Pierce County Superior Court order granting the city of Tacoma's motion for partial summary judgment as to Mr. Beltran-Serrano's negligence claim against the city. Mr. Beltran-Serrano's action arises from his nonfatal shooting by a city police officer. At issue here substantively is whether the city owed Mr. Beltran-Serrano an actionable duty of care to not negligently employ deadly force against him, and relatedly whether the public duty doctrine bars the negligence claim. Procedurally related to these issues is whether, if discretionary review is justified, to retain the case in this court or transfer it to the Court of Appeals for review in the first instance. RAP 4.2(a). Review is granted and the case is retained in this court for reasons explained below.

The underlying facts need not be related in detail. Mr. Beltran-Serrano, an apparently homeless Hispanic man with possible mental health problems and possibly no English communication skills, was shot multiple times by a police officer after an initial encounter between the officer and Mr. Beltran-Serrano went awry. Mr. Beltran-Serrano subsequently filed an action against the city sounding in tort, asserting a claim of negligence. The city answered that it owed no cognizable duty of care and that Mr. Beltran-Serrano's negligence action was barred by the public duty doctrine. The matter proceeded to two motions for partial summary judgment: Mr. Beltran-Serrano's motion concerning the reasonableness of special medical expenses, and the State's motion (the one at issue here) on whether Mr. Beltran-Serrano had an actionable negligence claim under the theories and defenses asserted. The trial court granted both motions, the result being in relevant part dismissal of Mr. Beltran-Serrano's negligence claim.

Mr. Beltran-Serrano filed a motion for certification of appealability under RAP 2.3(b)(4) as to both partial summary judgment orders. Mr. Beltran-Serrano also requested a stay in the trial court pending this court's decision on an implicitly anticipated motion for discretionary review as to the negligence issue, or if the court grants review, a decision on the merits. In response, the city agreed that RAP 2.3(b)(4) certification as to both partial summary judgment orders was appropriate. The city did not discuss discretionary review by this court or the issue of a stay. The trial court granted the motion and issued an order that both summary judgment orders met the criteria for certification under RAP 2.3(b)(4). With respect to the negligence issue, the trial court framed the issue as, "whether a police officer owes a duty of reasonable care to act reasonably when using deadly force." Order re: Plaintiff's Motion to Certify, at 2 (App. at 690).

The city filed a motion for discretionary review of the medical expense issue in the Court of Appeals. No. 51317-0-II. In the meantime, Mr. Beltran-Serrano filed the instant motion for direct discretionary review in this court. The Court of Appeals has not yet ruled on the city's motion for discretionary review, and at Mr. Beltran-Serrano's request, the court stayed the matter pending resolution of Mr. Beltran-Serrano's motion in this court. Oral argument on the instant motion was heard telephonically on December 14, 2017.

Mr. Beltran-Serrano argues that discretionary review is justified because the trial court committed obvious error that renders further proceedings useless and because the trial court certified and the parties stipulated that the challenged order implicates a controlling legal question where there is a substantial basis for a difference in opinion and immediate appellate review may materially advance resolution of the litigation. RAP 2.3(b)(1), (4).

A superior court commits "obvious error" under RAP 2.3(b)(1) only where its decision is clearly contrary to statutory or decisional authority with no discretion involved. *See* I Washington Appellate Practice Deskbook, § 4.4(2)(a) at 4-34 to 4-35 (4th ed. 2016). Having reviewed the briefing and records provided in this matter, I am not persuaded that the trial court committed obvious error on what is a plainly unsettled legal question—one Mr. Beltran-Serrano describes as a novel issue of first impression—involving the complex interplay between common law tort principles, the duties of a municipal police officer, and the meaning and scope of the public duty doctrine. RAP 2.3(b)(1).

As for certification under RAP 2.3(b)(4), it is important to note that such certification is no guarantee that an appellate court will grant review. Rather, trial court certification is one of several factors a court may consider in determining whether to grant review, and denial of discretionary review may be based on other prudential

considerations. *See Katz v. Carte Blanche Corp.* 496 F.2d 747, 754 (3d Cir. 1974) (noting that under the parallel federal procedure in 28 U.S.C. § 1292(b), denial of permission to appeal may be based upon a different assessment than that of the district court, but that "leave to appeal may be denied for entirely unrelated reasons such as the state of the appellate docket or the desire to have a full record before considering the disputed legal issue"). In this case, however, I agree that the partial summary judgment order as to negligence turns on controlling but debatable questions as to whether a municipality, acting through a law enforcement officer, has a potentially actionable duty of care when deploying potentially deadly force against a member of the public and whether the public duty doctrine applies to such a scenario, and that prompt resolution of these interrelated issues will materially advance the outcome of this controversy. RAP 2.3(b)(4); *see, e.g., Munich v. Skagit Emergency Comm. Ctr.*, 175 Wn.2d 871, 886-92, 288 P.3d 328 (2012) (Chambers, J., concurring, joined by four other justices, discussing purpose and limits of public duty doctrine); *Hayes v. County of San Diego*, 305 P.3d 252, 263 (Cal. 2013) (liability can arise under California law, if officer's tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable). Accordingly discretionary review of the partial summary judgment order as to negligence is justified.

The next question is whether review should be in this court or in the Court of Appeals in the first instance. RAP 4.2(a). Mr. Beltran-Serrano argues that direct review is required to resolve conflicts among Court of Appeals decisions or to clarify inconsistencies in the court's decisions. RAP 4.2(a)(3). But Mr. Beltran-Serrano fails to identify such conflicts or inconsistencies, relying heavily on decisions that do not fall within this rule.

The city argues that in the interest of judicial economy the negligence issue should be decided concurrently with the medical expense issue currently being

considered in the Court of Appeals. The city has a point, and the Court of Appeals is capable of deciding this thorny issue in the first instance.[1] But early resolution of the negligence issue in this court will arguably affect the damages issue. This view is consistent with the Court of Appeals stay of consideration of the medical expense issue pending action in this court on the negligence issue.[2]

More fundamentally, the negligence issue goes to the core controversy in this case, which has statewide, and arguably nationwide, implications. No one can deny that controversies involving police shootings, fatal and nonfatal, is a recurring issue that troubles the nation. Thus, even if the Court of Appeals decides this issue in the first instance, it seems all but inevitable that the aggrieved party will file a petition for review, which this court is likely to grant in order to decide the issue as one of substantial public interest. RAP 13.4(b)(4). In light of these observations, and mindful of the serious and recurring nature of this issue, I conclude that the negligence issue in this case involves a "fundamental and urgent issue of broad public import" that requires this court's prompt and ultimate determination. RAP 4.2(a)(4).

Accordingly, the motion for discretionary review is granted and the case is retained in this court for a determination on the merits. The Clerk is requested to calendar the case for oral argument and set a perfection schedule.

COMMISSIONER

December 15, 2017

[1] I disagree with the implied suggestion that the Court of Appeals is somehow less capable than this court in resolving the negligence issue.

[2] I offer no view on whether, if this court retains the case, the pending medical expenses matter in the Court of Appeals should be transferred here or whether discretionary review of that issue is warranted.

APPENDIX 14

2009 WL 10417809 (Wash.Super.) (Trial Order)
Superior Court of Washington.
King County

Sean R. KITELEY and Tracey A. Kiteley, a married couple, Plaintiffs,
v.
Rayburn J. LEE, an individual, and Zachary J. Lee, an individual, Defendants.

No. 06-2-34414-6 KNT.
May 27, 2009.

Findings of Fact and Conclusions of Law

Kimberley Prochnau, Judge.

***1** THIS MATTER was tried to the Honorable Kimberly Prochnau, without a jury, from May 18, 2009 through May 19, 2009. Plaintiffs Sean Kiteley and Tracey Kiteley appeared personally and through their attorneys of record Anthony A. Todaro and Kelby D. Fletcher of Peterson Young Putra. Defendants appeared personally and through their attorney of record, Soloman Kim.

BASED ON the evidence admitted during the trial, the Court makes the following:

Findings of Fact

1. On March 7, 2006, at around 9:15 a-m., plaintiff Sean Kiteley was stopped at a red traffic signal at the intersection of 356 th and Pacific Highway in Federal Way, Washington. Mr. Kiteley was on his way to work at Les Schwab Tire Center in Federal Way. While Mr. Kiteley was waiting for the traffic signal to turn green, defendant Rayburn Lee crashed his Volkswagen Corrado into the back of Mr. Kiteley's car. After crashing into Mr. Kiteley's car, Rayburn Lee turned his car around and fled from the collision scene. Mr. Kiteley did nothing to cause Rayburn Lee to flee.

2. Mr. Kiteley called 911 to report the collision to the police. Mr. Kiteley then turned his car around to follow Rayburn Lee and get his license plate number. Mr. Kiteley lawfully followed Rayburn Lee into a nearby parking lot at "The Heights" apartment complex. While Mr. Kiteley was waiting for the police in the parking lot of "The Heights," Rayburn Lee intentionally rammed his car into Mr. Kiteley's car two times and then fled from the parking lot

3. Police responded and met Mr. Kiteley in the parking lot of "The Heights." Mr. Kiteley did not have his insurance information in Ms car so he called his wife, plaintiff Tracey Kiteley. Ms. Kiteley and the couple's 4-year-old son drove to "The Heights" to deliver the insurance information to Mr. Kiteley and the police officers. After talking to Mr. Kiteley and some of the employees at The Heights, the police officers left. Sean and Tracey Kiteley spoke for a few minutes in the parking lot and then said their good-byes.

4. Once Mr. Kiteley said good-bye to his wife and started to walk back to his car, he heard running footsteps and saw Rayburn Lee sprinting towards him. Rayburn lifted his shirt and pulled out a pistol and "pistol-whipped" Mr. Kiteley across the face, injuring Mr. Kiteley. Mr. Kiteley yelled to his wife to "get out of here" with their 4-year-old son. Tracey Kiteley saw Rayburn Lee "pistol-whip" and punch Sean Kiteley in the face.

5. While Rayburn Lee repeatedly punched Mr. Kiteley in the face, Mr. Kiteley felt sharp stabs in his back. Mr. Kiteley looked over his shoulder and saw defendant Zachary Lee with a shiny knife. Rayburn Lee severely and intentionally beat Mr. Kiteley's face and Zachary Lee stabbed Mr. Kiteley six times with a 4-inch knife blade.

6. When Rayburn and Zachary Lee were finished attacking Mr. Kiteley, Rayburn Lee got into Mr. Kiteley's car and intentionally crashed the car into another car in the parking lot Mr. Kiteley managed to get away and climbed up some stairs at the apartment complex to look for a safe place to hide from defendants. Tenants at the apartment complex called 911 and tried to help Mr. Kiteley stop the profuse bleeding. Tracey Kiteley ran up the stairs after her husband and also tried to help him. Tracey Kiteley saw her husband bleeding profusely while they waited for the medics to arrive.

***2** 7. Medics arrived within a few minutes and immediately intubated Mr. Kiteley. He was airlifted to Harborview Medical Center in Seattle where he was diagnosed with a deviated septum and six deep stab wounds - five stab wounds in his back and one stab wound on his left elbow, which severed his ulnar nerve. Mr. Kiteley spent one week at Harborview and underwent two surgeries.

8. Mr. Kiteley's deviated septum and the stab wounds on his back have healed with residual scarring. Mr. Kiteley's left ulnar nerve is permanently damaged. He has significantly reduced sensation and motor skills in his left arm and hand. Mr. Kiteley lost his job at Les Schwab Tire Center because of his permanent ulnar nerve injury.

9. Defendants Rayburn Lee and Zachary Lee engaged in extreme and outrageous conduct and intentionally or recklessly caused emotional distress to plaintiffs. Defendants' conduct was the proximate cause of severe emotional distress to plaintiffs Sean Kiteley and Tracey Kiteley. Sean Kiteley was a direct recipient of the extreme and outrageous conduct and Tracey Kiteley was an immediate family member present at the time the conduct occurred.

10. Tracey Kiteley viewed her husband, Sean Kiteley, while defendant Rayburn Lee attacked Mr. Kiteley without provocation. Tracey Kiteley also viewed her husband, Sean Kiteley, shortly after the attack by defendants when Mr. Kiteley was bleeding at the apartment complex while waiting for the medics to arrive. Tracey Kiteley was present at the scene of the attack and shortly thereafter, and she has suffered from objective symptoms of emotional injury including depression, sleeplessness, anxiety and nightmares. Ms. Kiteley did take prescription medication for these symptoms from March 9, 2006 until the family moved to Georgia in 2008.
11. Photographs were admitted of Mr. Sean Kiteley's recovery at the hospital and at home after the assault (Plaintiffs' Exhibit No. 15).

12. After Mr. Sean Kiteley's release from the hospital, within a month and a half, Mr. Kiteley returned back to work at Les Schwab tire center in Federal Way. Shortly thereafter, Mr. Kiteley's employment at Les Schwab was terminated and that the proximate cause of that termination were the injuries suffered due to the assault. Mr. Kiteley later found another employment during his residence in Washington State and then later moved from Washington to Georgia in April 2008.

13. Defendants have admitted by way of failing to respond to Requests for Admission that $70,650.13 of Sean Kiteley's past medical expenses were proximately caused by defendants' conduct and were both reasonable and necessary. The total amount for the payments made by the health insurance provider was § 58,770.91. This amount of 558,770.91 was ordered to be repaid by both Mr. Rayburn Lee and Zachary Lee by an Order Setting Restitution through their criminal trial on February 20, 2007 by the Sentencing Judge, the Honorable James Cayce. This restitution amount is a subrogation obligation to be paid back to BlueCross BlueShield and this obligation to repay Mr. Kiteley's medical treatment costs is a joint and several obligation between both Defendants. (Defendants' Exhibit No. 12). In order to avoid a double recovery, it is appropriate that judgment be ordered for the difference between the restitution ordered and the total medical bills defendant has admitted to in the amount of $11,879.22.

***3** 14. The Kiteleys received $10, 698.32 from the Crime Victims Fund (Ex 12) to reimburse them for expenses caused by the assault The court has insufficient evidence to conclude that the Kiteleys suffered economic damages including medical bills, time lost from work, and out of pocket expenses from the time of the assault up to the time of the restitution order that was not covered by the Crime Victims compensation program.

15. Mr. Sean Kiteley testified to medications he is presently taking and being prescribed to date. He suffers constant pain due to the damage to the ulnar nerve and takes methadone for this pain. He must pay for the methadone out of pocket $160 every two weeks.

16. Mr. Kiteley, his identical twin brother and his wife all testified to the dramatic changes in his mood and outlook on life as a result of the assault, and the dramatic change in the quality of life enjoyed by himself and his family as a result of his severe emotional distress. Mr. Kiteley is extremely anxious as a result of the attack and has isolated himself from family and social activities. He is concerned for his safety and the safety of his family. After a period of marital counseling, the Kiteleys determined that they needed to leave the area as a result of their ongoing emotional distress that was proximately caused by the assault. They incurred $7000 in travel costs to move to Georgia. The court finds the assault is a proximate cause of these costs.

17. Sean Kiteley is currently 30 years old. No experts have testified that his life expectancy is reduced. According to the Insurance Commissioner's Life Expectancy Table, October 28, 2004, Mr. Kiteley's life expectancy is 46.20 years.

18. (Any Conclusions of Law which were erroneously designated as Findings of Fact herein shall be deemed to be included, and made part of, the Conclusions of Law set forth below. Any Findings of Fact erroneously designated as a Conclusion of Law should be deemed to be included, and made part of, the Findings of Fact set for the above.)

CONCLUSIONS OF LAW:

1. This Court has jurisdiction of the Parties and the subject matter of these proceedings as a matter of law.

2. Defendants were and are collaterally estopped from contesting liability with respect to Plaintiff, Sean Kiteley's claims of assault and outrage per this Court's prior order granting summary judgment on this legal issue entered on September 14, 2007. The Defendants are therefore liable to Mr. Sean Kiteley for assault and outrage. Defendants' violent and intentional attack on Sean Kiteley was a proximate cause of Mr. Kiteley's injuries and plaintiffs have established causes of action of assault and outrage by defendants.

3. Defendants' assault upon Mr. Sean Kiteley was extreme and outrageous that was the proximate cause of severe emotional distress to plaintiffs Sean Kiteley and Tracey Kiteley. Plaintiffs have established a cause of action of outrage by defendants.

4. Defendants' violent attack on Sean Kiteley was witnessed by Tracey Kiteley and was the proximate cause of objective symptoms of emotional injury for Tracey Kiteley. She not only witnessed the attack and called 911 but underwent added trauma by being required to attempt to staunch her husband's life threatening wounds at the scene of the attack, while her child was in her car at the scene and the assailants were at large. Plaintiffs have established a cause of action of negligent infliction of emotional distress by defendants.

***4** 5. The Court imposes the sanction of $2,500 against both Defendants for failing to pay the travel costs for the Plaintiffs as ordered on April 10, 2009 and any other documented costs incurred by the Plaintiffs in the amount of $1540. This amount ordered shall be incorporated to the final Judgment awarded in this case.

6. As a result of the assault outrage, and negligent infliction of emotional distress by Defendants, the Plaintiffs axe entitled to an award of damages as follows:

a. *Economic Damages:* For past and future economic and special damages which are calculated and/or determined to be proven and established in the amount of $11,879.22. in medical costs, $7000 for the move to Georgia, and 115,000 in methadone costs.

b. *Non-Economic Damage:* For past and future non-economic and general damages to include, but not limited to: pain, suffering, inconvenience, mental anguish, disability, disfigurement, and loss of enjoyment of life experience by Sean Kiteley and with reasonable probability to be experienced in the future in the amount of $ 360,000.

c. For Tracy Kiteley's mental anguish and emotional distress in the amount of $120,000.

d. To avoid a double recovery the court is not awarding those damages that are covered by the restitution award. Nothing in this order affects defendants' responsibilities under the restitution award or criminal sentence.

5. The Plaintiffs shall be awarded a final judgment against the Defendants in conformity with this final decision and adjudication of this Court after fully being advised in the premises hereof and examination of all evidence provided to this Court after a full trial on the merits. Plaintiffs shall submit a Judgment to this Court for entry in accordance with these findings.

DONE IN OPEN COURT this *22* day of May, 2009.

<<signature>>

JUDGE KIMBERLEY PROCHNAU

APPENDIX 15

2010 WL 457438
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. Washington.

Ronald L. CAMPBELL, Plaintiff,
v.
CITY OF SPOKANE, Brian Eckersley, and Kevin King, Defendants.

No. CV-08-134-JPH.
|
Feb. 3, 2010.

Attorneys and Law Firms

Richard D. Wall, Richard D. Wall, PS, Spokane, WA, for Plaintiff.

Ellen M. O'Hara, Spokane City Attorney's Office, Spokane, WA, for Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION **(Ct.Rec.59)**

ROBERT H. WHALEY, District Judge.

***1** BEFORE THE COURT is the Report and Recommendation to deny defendants' motion for summary judgment as to all federal claims and grant summary judgment as to all state claims (Ct.Rec.59). Defendant's moved for summary judgment on July 23, 2009 (Ct.Rec.36). On October 9, 2009, plaintiff filed a response (Ct.Rec.47). Magistrate Judge James P. Hutton heard oral argument on defendants' motion on December 16, 2009 (Ct.Rec.58). His report and recommendation, filed on December 23, 2009 (Ct.Rec.59), recommends defendants' summary motion be denied as to all federal claims. On January 11, 2010, defendants timely filed objections to this portion of the magistrate judge's report (Ct.Rec.60).

Defendants raise objections rearguing points rejected by the magistrate judge. First, the magistrate judge found plaintiff shows genuine issues of material fact exist with respect to his claim defendants used excessive force, namely, whether plaintiff posed an immediate threat to the officers' safety and whether he resisted arrest (Ct. Rec. 59 at 13-14). Defendants fail to show the determination is incorrect.

Second, plaintiff claims defendants failed to adequately train and supervise its officers in the use of force, specifically, when removing an object from a subject's mouth (Ct. Rec. 59 at 14), a claim defendants deny. The magistrate judge found "issues involving the use of force, after arrest, in the drive stun tasering, in squeezing (or choking) a subject's throat and/or using a flashlight to pry open their jaw, are matters better left to the trier of fact in determining if the absence of training and supervision directly and proximately resulted in the excessive use of force against the Plaintiff." The magistrate judge also noted, correctly, "whether the absence of any policy amounts to deliberate indifference to the constitutional rights of citizens is generally a jury question sufficient to preclude summary judgment" (Ct. Rec. 59 at 14). Defendants' objection is not well taken for the reasons cited in the report.

Last, defendants object the report fails to address qualified immunity (Ct. Rec. 60 at 9-11). Defendants fail to recognize the "determination of whether a reasonable officer could have believed lawful the particular conduct at issue" (Ct. Rec. 60 at 9, citing *Sloman v. Tadlock,* 21 F.3d 1462, 1467 (9th Cir.1994) depends on the trier of fact's determination of the officers' conduct at the time of arrest.

Having reviewed the Report and Recommendation and the files and records herein, and finding the objections are not well taken, the Court adopts the magistrate judge's report and recommendation in its entirety.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendants' Motion for Summary Judgment (Ct.Rec.36) as to all federal claims is **DENIED,**

2. Defendants' Motion for Summary Judgment as to all state claims is **GRANTED** (Ct.Rec.36).

Plaintiff's state claims are dismissed.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and forward copies to counsel for the parties and the magistrate judge.

REPORT AND RECOMMENDATION TO DENY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT **(CT.REC.36)**

JAMES P. HUTTON, United States Magistrate Judge.

***2** On December 16, 2009, the Court heard oral argument on defendants' motion to dismiss under Fed.R.Civ.P. 12(b)(6) and (c); alternatively, for summary judgment pursuant to Fed.R.Civ.P. 56, filed on July 23, 2009 (Ct. Recs. 18 at 5, 36, 38 at 1). Plaintiff filed a response in opposition on October 9, 2009 (Ct.Rec .47). Richard D. Wall appeared on behalf of plaintiff. Ellen M. O'Hara appeared on behalf of defendants. The parties have not consented to proceed before a magistrate judge.

Plaintiff brings his claim pursuant to 42 U.S.C. § 1983 and under state law for assault and battery. He alleges defendants deprived him of his rights to due process and equal protection by using excessive force during his arrest, and by failing to adequately train or supervise its officers on the use of force. (Ct. Recs. 13 and 32 at 1-2; 47 at 6-8, 10-17 (force), 17-22 (training).) He alleges the officers inflicting physical injury while acting under color of state law, causing "severe pain and suffering, and emotional and psychological harm" (Ct. Rec. 13, 32 both at 1-2).

I. *Background*

[Except as noted, the facts are taken from plaintiff's LR 56 statement of facts at Ct. Rec. 46.] On April 30, 2005, the events giving rise to this action took place at a garage in Spokane, Washington. Officers of the City of Spokane Police Department went to an address on West Gardner looking for plaintiff, who had a number of active warrants for his arrest. They located the address and found plaintiff in a garage behind the residence. (Ct. Recs. 38 at 1, 46 at 1, 48 at 1-2.) Plaintiff had several tools in his hand when the police arrived. (*Id.*) Upon being ordered by the police to drop the tools, he did so. (Ct. Rec. 46 at 1, 48 at 2.) Plaintiff removed a baggie of marijuana from his pocket and "threw it away" from him. (Ct. Rec. 46 at 2, 48 at 2.) He then removed another baggie from his pocket and put it in his mouth. (Ct. Rec 46 at 2.)

Officer Eckersley shot plaintiff with a TASER. The probes struck on the left side of his body, causing plaintiff to immediately fall to the floor face down. (Ct. Rec. 48 at 2.) While on the floor and still immobilized by the TASER, the officers handcuffed plaintiff's hands behind his back. (Ct. Rec. 46 at 2, 48 at 2.) Officer King began choking plaintiff while shouting at him to spit out the baggie. (Ct. Rec. 46 at 2.) The choking consisted of Officer King grabbing plaintiff around the throat and squeezing just below the jaw in an effort try to prevent swallowing. (Ct. Rec. 46 at 2-3.) This action caused plaintiff to swallow the baggie. (Ct. Rec. 48 at 2.)

While Officer King continued choking plaintiff, he instructed Officer Eckersley to TASER plaintiff in hopes it would force Mr. Campbell to spit out the baggie. (Ct. Rec. 46 at 3.) Officer Eckersely used the TASER device in the "drive-stun" mode, applying it directly to plaintiff's skin, striking him four times in the back. (Ct. Rec. 46 at 3, 47 at 16, 18.)

***3** Continuing the effort to force plaintiff's mouth open to dislodge the baggie, Officer King struck plaintiff in the face and mouth 6 or 7 times with a flashlight, causing one of plaintiff's teeth to puncture his upper lip and breaking one of his false teeth. (Ct. Rec. 46 at 3.)

After officers determined plaintiff had swallowed the baggie, they transported him to the hospital and asked to have plaintiff's stomach pumped to retrieve the baggie. (Ct. Rec. 46 at 3, 48 at 3.) A doctor denied their request. Plaintiff was transported to jail. (Ct. Rec. 46 at 4.)

Plaintiff first filed suit against the defendants on April 24, 2008, alleging the defendants' use of force and their training in the use of force violated his rights to due process and equal protection, causing injury. (Ct.Recs.9, 13, 32.)

II. *Claims*

On July 23, 2009, defendants filed a motion for summary judgment seeking dismissal of all claims. (Ct.Rec.36). Plaintiff alleges that his rights to due process under the Fourth and Fourteenth Amendment were violated by

officers' use of excessive force during his arrest. (Ct. Recs. 9, 13, 32, 47 at 6-7.) Second, plaintiff alleges his right to equal protection was violated by defendants' failure to adequately train or supervise the officers regarding the appropriate use of force. (Ct. Recs. 9,13,32 at 6, 47 at 19-20.) Plaintiff's response to defendants' summary judgment motion further asserts the officers were improperly trained and supervised with respect to "how an officer should respond" when a subject "has placed a potentially dangerous object in their mouth." (Ct. Rec. 47 at 20.)

III. *Legal Standard*

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' " *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp.,* 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

***4** If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Fed.R.Civ.P. 56(e); *Matsushita,* 475 U.S. at 586 n. 11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Wool v. Tandem Computers, Inc.,* 818 F.2d 1433, 1436 (9th Cir.1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv.,* 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Matsushita,* 475 U .S. at 587 (quoting Fed.R.Civ.P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed.R.Civ.P. 56(c). The evidence of the opposing party is to be believed, *Anderson,* 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita,* 475 U.S. at 587 (citing *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (per curiam). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines,* 602 F.Supp. 1224, 1244-45 (E.D.Cal.1985), *aff'd,* 810 F.2d 898, 902 (9th Cir.1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita,* 475 U.S. at 587 (citation omitted).

IV. *Discussion*

Substantively, Plaintiff alleges officers' use of excessive force when they arrested him, and their inadequate training and supervision in the appropriate use of force, violated his rights to due process and equal protection. There is an initial procedural basis upon which Defendants base their motions.

Statute of Limitations

***5** Procedurally, Defendants' summary judgment memorandum alleges plaintiff's claims are barred by the applicable statutes of limitation (Ct. Rec. 38 at 6-8). Plaintiff responds his claims are timely because on June 5, 2008 (Ct. Rec. 47, referring to Ct. Rec. 10), the Court granted him 60 days to amend his complaint. At the time of the Court's order to amend or voluntarily dismiss (Ct.Rec.10), plaintiff was proceeding *pro se.* Defendants did not reply to plaintiff's responsive argument until oral argument.

Initially, Plaintiff filed his Complaint By a Prisoner on April 24, 2008 (Ct.Rec.1). This was accomplished within 3 years of Plaintiff's arrest on April 30, 2005. Although Plaintiff corresponded with the Court, and filed a second copy of the "Complaint By a Prisoner" on June 5, 2008, he did not serve either document on any Defendant. (LR 56 # 32). The Court generated and filed its Order To Amend Or Voluntarily Dismiss Complaint on June 5, 2008. (Ct.Rec.10). That Order gave the Plaintiff 60 days to file his amended complaint and Plaintiff, by then represented by counsel, filed his First Amended Complaint and jury demand on August 1, 2008, within the 60 days allowed. (Ct.Rec.13). On September 29, 2008, Plaintiff served the Defendant with a Notice of Lawsuit and Request for Waiver of Service and Summons. (Ct.Rec.50, Ex. 4). The executed Waiver of Service and Summons was returned by Defendants' counsel and dated on October 6, 2008 and specifically recites that the Defendants' counsel had "received a copy of the complaint in the action." Simultaneously, it appears, Defendants' counsel executed and filed a "Notice of Appearance" (Ct.Rec.17) that purports *not* to waive objection as to improper service. Perhaps more curious, the Defendants take the position for purposes of the pending motion that they were not served with the First Amended Complaint until October 20, 2008 (Ct.Rec.38, p. 6).

Defendants' procedural motion to dismiss on a statute of limitations basis takes two paths. First, Defendants allege that because Plaintiff has pled state law torts of "assault and battery" and since RCW 4.16.100 provides that an action for such an intentional tort must be filed within *two years* of its occurrence, that Plaintiff's state law claim must be dismissed. In this instance, Defendants are correct. Plaintiff, acting pro se, did not file his original Complaint until one week shy of *three* (3) years after the incident on April 30, 2005. He never perfected service of the original Complaint. Once the First Amended Complaint was filed, it could, at best, relate back to the date of filing of the Complaint, which was filed too late and after the statute of limitations had run on the intentional torts of assault and battery. Plaintiff does not respond to the motion to dismiss the state law claims. His state law claims are untimely and must be dismissed.

Conversely, Plaintiff's federal claims are not subject to dismissal. The Civil Rights Act, 42 U.S.C. s.1983, contains no statute of limitations and the federal courts use the applicable statute of limitations from the state in which they sit. In Washington the statute of limitations for filing a civil rights action is *three* years. *Rose v. Rinaldi,* 654 F.2d 546 (1981). See RCW 4.16.080. In this case, Plaintiff originally commenced his federal claims within 3 years of the date of the occurrence by filing his original Complaint. Upon receiving the Court's Order to Amend Or Voluntarily Dismiss Complaint on June 5, 2008, the Plaintiff timely complied on August 1, 2008. Plaintiff apparently chose to amend rather than voluntarily dismiss because dismissal may have imperiled his right to proceed in the face of a statute of limitations claim. The Court's Order (Ct.Rec.10) specifically provided that the amended complaint "will operate as a complete substitute for (rather than a mere supplement to) the present complaint." Moreover, within 60 days of the filing of the First Amended Complaint, the Defendant was served with a copy of the First Amended Complaint and a Notice of Lawsuit and Request for Waiver of Service and

Summons. (Ct.Rec.50, Ex. 4). The waiver was signed by Defendants' counsel on October 6, 2008. The Defendants should not now be heard to say that they did not get served until October 20, 2008, nor that the time ran within which suit could be commenced when the Court's Order of June 5, 2008 clearly gives the Plaintiff an additional 60 days to cure any deficiencies in his complaint. Further, if an analysis pursuant to FRCP 15(c)(1)(B) is undertaken, the First Amended Complaint relates back to the initial Complaint filed by the Plaintiff within the statute of limitations as to the federal claims. Even if the Defendants had not waived under FRCP 4(m), they were served well within 120 days of the filing of the First Amended Complaint. Plaintiff's federal claims are not time barred.

Substantive Claims

A. *Fourth Amendment-material issue of facts*

***6** Plaintiff argues defendants violated his protections guaranteed by the Fourth Amendment when they used excessive force to "effect a seizure," that is, arrest him. (Ct. Rec. 47 at 6.) Defendants allege the officers' use of force was reasonable.

The standard for analyzing excessive force claims was established by the Supreme Court in *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Such claims are to be evaluated using the Fourth Amendment's reasonableness standard:

> The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Graham, 490 U.S. at 397 (citation omitted); *Beaver v. City of Federal Way,* 507 F.Supp.2d 1137, 1143 (2007). *Graham* instructs that reasonableness must be assessed from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, and must allow for the fact that "police officers are often forced to make split-second judgmentsin circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Graham,* 490 U.S. at 397; *Beaver,* 507 F.Supp.2d at 1143. Factors relevant to determining reasonableness include [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham,* 490 U.S. at 396.

The Ninth Circuit has added considerations. *Beaver,* 507 F.Supp.2d at 1143. The inquiry should begin with assessing the quantum of force used. (*Id.,* citing *Davis v. City of Las Vegas,* 478 F.3d 1048, 1055 (9th Cir.2007). Additionally, when assessing the reasonableness of an officer's actions, "the availability of alternative methods of capturing or subduing a suspect may be a factor to consider." *See Chew v. Gates,* 27 F.3d 1432, 1441 n. 5 (9th Cir.1994).

The parties differ as to whether Mr. Campbell posed an immediate threat to the officers' safety and whether he actively resisted arrest. Taking the facts in the light most favorable to the nonmoving party (as the Court must): (1) Mr. Campbell dropped the tools in his hands when commanded (2) put a baggie into his mouth (3) Officer Eckersley fired a Taser shot in probe mode and struck plaintiff, causing him to immediately fall face down on the floor (4) officers handcuffed plaintiff's hands behind his back as he lay immobilized on the floor (5) Officer King squeezed plaintiff around the throat, trying to keep him from swallowing the baggie; King shouted at plaintiff to spit it out (6) while continuing to "choke" plaintiff, King told Eckersley to use the Taser, hoping to force plaintiff to spit out the baggie (7) Eckersley shot the Taser (in drive-stun mode) 4 times into plaintiff's back by applying it directly to the skin (8) King struck plaintiff in the mouth and face with a flashlight 6 or 7 times, trying to force plaintiff's mouth open, and (9) as a result, plaintiff suffered a punctured upper lip, a broken false tooth, bruises and contusions on the face and mouth, and significant bruising and contusions on the left side of his face from having his face forced against the garage floor. (Ct. Rec. 46 at 1-8.)

***7** Whether plaintiff posed an immediate threat to the officers' safety is a disputed issue of material fact. If plaintiff's version is credited, he dropped the tools (possibly dangerous weapons) immediately upon request. After plaintiff was struck by the first Taser shot fired, he was handcuffed while lying on the floor. At this point plaintiff presented little to no immediate threat to the officers' safety. The officers' actions thereafter, shooting plaintiff with the Taser four times (in drive-stun mode), choking or squeezing him around the throat and neck, and striking his mouth and face with a flashlight is not

objectively reasonable in light of the lack of an immediate threat to officer safety.

Similarly, plaintiff contends he did not resist arrest. The actions taken by the officers after plaintiff was handcuffed and laying face down on the floor do not appear objectively reasonable as a means to contain or subdue a person resisting arrest.

Plaintiff asserts when the police told him to drop the tools, he did, meaning he was unarmed. He asserts after being handcuffed and while in a prone position, the officers applied additional force. If true, plaintiff makes out a viable claim of excessive force. According to defendants, when plaintiff was told to drop the tools in his hands, he did not. If defendants' assertion is correct, the officers' use of force on a person armed and resisting arrest may have been reasonable. No clearer demonstration of the existence of genuine issues of material fact need be shown than the discrepancies between the police report attached to the Declaration of Richard Wall (Ct.Rec.50, Ex. 1) and the Declaration of Officer King (Ct. Rec 43). In the police report written one day after the incident, Officer King states that upon Plaintiff being tasered the first time while he was still standing, "Campbell immediately dropped to the ground and Officer Eckersley and I prone cuffed him." In his declaration (Ct.Rec.43), authored after the passage of 17 months from the incident, Officer King describes what happened after Plaintiff had been tasered the first time and was on the ground as follows: "I attempted to help Officer Eckersley get Campbell into handcuffs in the prone (face down) position. I am not certain when exactly the cuffs were successfully put in place." (Ct.Rec.43, p. 19) The inference is that Plaintiff continued to struggle after being tasered, but it is precisely those inferences that should be decided by the trier of fact and not this Court on summary judgment.

Plaintiff raises genuine issues of material fact regarding the use of force.

B. *Training and Supervision in the use of force*

Plaintiff alleges defendants failed to adequately train and supervise its officers in the reasonable use of force as regards removing an object from a subject's mouth. In this instance, and for purposes of summary judgment, the Court must accept the Plaintiff's version of the facts that he was prone handcuffed and on the ground when the officers began to attempt to remove the baggie from his mouth. Nowhere in the officers' declarations do they state that they have received any training regarding what actions should be taken when a subject has placed an object in their mouth. At the same time, the declarations of Officer Eckersley and Officer King make it clear that it is not unusual for officers to be faced with having to deal with similar circumstances when carrying out their official duties. Thus, in the absence of any policy, they are left to their own devices. In sum, it is the Court's view that issues involving the use of force, after arrest, in drive stun tasering, in squeezing (or choking) a subject's throat and/or using a flashlight to pry open their jaw are matters better left to the trier of fact in determining if the absence of training and supervision directly and proximately resulted in the use of excessive force against the Plaintiff. Further, whether the absence of any policy amounts to deliberate indifference to the constitutional rights of citizens is generally a jury question sufficient to preclude summary judgment. *Berry v. Baca,* 379 F.3d 764 (9th Cir.2004).

C. *De Minimus Nature of Plaintiff's Injuries*

***8** Defendants did not brief the issue of whether Plaintiff's injuries sustained were of such a superficial nature that his lawsuit cannot be maintained. Rather, counsel for the Defendants raised the issue at oral argument. In the Court's view, and again taking the evidence in a light most favorable to the non-moving party, whether an individual being tasered four times in "drive-stun" mode after being taken to the ground and handcuffed, choked around the throat and having a flashlight forced between his clenched teeth with enough force to cause a broken tooth and a puncture of his lip, together with superficial facial bruises and abrasions, is enough for consideration by a trier of fact. "A plaintiff who establishes liability for deprivations of constitutional rights actionable under 42 U.S.C. s.1983 is entitled to recover compensatory damages for all injuries suffered as a consequence of those deprivations." *Borunda v. Richmond,* 885 F.2d 1384, 1389 (9th Cir.1988).

V. *Conclusions and Recommendations*

The Court has reviewed the record and heard the arguments of counsel. Plaintiff, as the opposing party, has the burden of establishing that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus.*

Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). This means plaintiff must show a fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party [in this case, Mr. Campbell], *Wool v. Tandem Computers, Inc.,* 818 F.2d 1433, 1436 (9th Cir.1987). It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Electric, 809 F.2d at 631.

After viewing the facts and inferences in the light most favorable to plaintiff, this Court finds plaintiff demonstrates a genuine issue of material fact for trial, because the facts in contention are material, that is, might affect the outcome of the case, and present a genuine issue for trial, because a rational trier of fact could find in the plaintiff's favor.

It is therefore **RECOMMENDED that:**

(1) Defendants' motion to dismiss the Plaintiff's state law claims for assault and battery be GRANTED based on the statute of limitations defense and (2) Defendants' motion for dismissal and, alternatively, for summary judgment (Ct.Rec.36), as to all federal claims, be DENIED.

VI. *Objections*

Any party may object to a magistrate judge's proposed findings, recommendations or report within **fourteen (14)** days following service with a copy thereof. Such party shall file written objections with the Clerk of the Court and serve objections on all parties, specifically identifying the portions to which objection is being made, and the basis therefor. Any response to the objection shall be filed within **fourteen (14)** days after receipt of the objection. Attention is directed to FED. R. CIV. P. 6(d), which adds additional time after certain kinds of service.

***9** A district judge will make a de novo determination of those portions to which objection is made and may accept, reject, or modify the magistrate judge's determination. The judge need not conduct a new hearing or hear arguments and may consider the magistrate judge's record and make an independent determination thereon. The judge may, but is not required to, accept or consider additional evidence, or may recommit the matter to the magistrate judge with instructions. *United States v. Howell,* 231 F.3d 615, 621 (9th Cir.2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P. 72; LMR 4, Local Rules for the Eastern District of Washington.

A magistrate judge's recommendation cannot be appealed to a court of appeals; only the district judge's order or judgment can be appealed.

The District Court Executive is directed to enter this report and forward copies to the parties and the referring judge.

DATED this 23rd day of December, 2009.

All Citations

Not Reported in F.Supp.2d, 2010 WL 457438

End of Document

APPENDIX 16

294 Fed.Appx. 259
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Ninth
Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

Carla ARCE; Joana Arce; Odelia Arce;
Robert Arce, Plaintiffs—Appellees,
v.
Michael BLACKWELL; Leonard Cardinale;
Michael Carmody; City of North Las Vegas;
Joseph Forti; Mark Hoyt; North Las Vegas
Police Department; Brian Sachs; Shayne
Skipworth, Defendants—Appellants,
Mark Suranowitz, Defendant—Appellant,
and
State of Nevada, Defendant,
Joey Tillmon, Defendant.

No. 06–17302.
|
Argued and Submitted Aug. 14, 2008.
|
Filed Sept. 19, 2008.

Synopsis

Background: Widow sued city police officers pursuant to § 1983, alleging that their use of excessive force deprived her husband of his constitutional rights and caused his death by restraint or positional asphyxiation. The United States District Court for the District of Nevada, James C. Mahan, J., denied officers' motion for summary judgment based on qualified immunity defense. Officers brought interlocutory appeal.

Holdings: The Court of Appeals held that:

[1] factual issues precluded summary judgment for officers based on qualified immunity defense, and

[2] unconstitutionality of officers' alleged conduct was clearly established, for purposes of qualified immunity defense, at the time of husband's arrest.

Affirmed.

Attorneys and Law Firms

***260** Cal J. Potter, III, Esquire, Potter Law Offices, Las Vegas, NV, for Plaintiffs–Appellees.

Robert W. Freeman, Jr., Esquire, Law Offices of Robert W. Freeman, Ltd., Henderson, NV, for Defendant–Appellant.

Appeal from the United States District Court for the District of Nevada, James C. Mahan, District Judge, Presiding. D.C. No. CV–04–00425–JCM.

Before: SILER[*], McKEOWN and CALLAHAN, Circuit Judges.

[*] The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

MEMORANDUM[**]

[**] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

****1** Officers of the North Las Vegas Police Department brought an interlocutory appeal from the district court's denial of their motion for summary judgment in a wrongful death civil rights action brought by Joana Arce under 42 U.S.C. § 1983. Arce alleged that the police officers' use of excessive force deprived her deceased husband Roberto of his rights under the Fourth and Fourteenth Amendments and caused his death by restraint or positional asphyxiation. We review *de novo* the district court's decision to deny the officers qualified immunity, *Bingham v. City of Manhattan Beach,* 341 F.3d 939, 945 (9th Cir.2003), and we affirm.

We agree with the district court that there are genuine issues of material fact making summary judgment inappropriate. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157–160, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)

(moving party has the burden of showing the absence of a genuine issue as to any material fact, and all evidence must be viewed in the light most favorable to the opposing party); *see also Smith v. City of Hemet,* 394 F.3d 689, 701 (9th Cir.2005) (en banc) (because the excessive force inquiry "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom," summary judgment "should be granted sparingly") (quoting *Santos v. Gates,* 287 F.3d 846, 853 (9th Cir.2002)).

[1] The police officers argue that the district court failed to undertake the appropriate analysis under *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Although the district court's discussion of *Saucier* was brief, it nonetheless properly analyzed the record under ***261** *Saucier's* two-part test for qualified immunity.

Saucier instructs that we must first determine whether, "[t]aken in the light most favorable to the party asserting the injury ... the facts alleged show [that] the officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. To determine whether the force used by the officers was excessive under the Fourth Amendment, we must assess whether it was objectively reasonable "in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation." *Graham v. Connor,* 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "We first assess the quantum of force used to arrest [the plaintiff]" and then "measure the governmental interests at stake by evaluating a range of factors." *Deorle v. Rutherford,* 272 F.3d 1272, 1279–80 (9th Cir.2001); *see also Graham*, 490 U.S. at 394, 109 S.Ct. 1865 (discussing factors).

Construing the evidence in the light most favorable to the plaintiffs, we conclude that, under this standard, the evidence supports a finding of a constitutional violation. *See Drummond v. City of Anaheim,* 343 F.3d 1052, 1056–57 (9th Cir.2003) (finding a constitutional violation in similar circumstances and noting other cases of "compression asphyxia," where "prone and handcuffed individuals in an agitated state have suffocated under the weight of restraining officers") (citing cases).

****2** **[2]** If a violation is found, the next sequential step is to ask "whether the right was clearly established ... in light of the specific context of the case" such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Headwaters Forest Defense v. County of Humboldt,* 276 F.3d 1125, 1129 (9th Cir.2002) (quoting *Saucier,* 533 U.S. at 202, 121 S.Ct. 2151). In assessing the reasonableness of an officer's conduct where there is no case law directly on point, "the salient question that the Court of Appeals ought to ... ask[ ] is whether the state of the law [at the time of the alleged wrong] gave [the defendants] fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope v. Pelzer,* 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (rejecting requirements that previous cases be either "fundamentally similar," or have "materially similar" facts).

We have had similar cases in the past that would have put reasonable police officers on notice that their response to Arce—keeping an individual who is in a state of excited delirium restrained with his chest to the ground while applying pressure to his back and ignoring pleas that he cannot breathe—constituted excessive force under the Fourth Amendment. *See Drummond,* 343 F.3d at 1056–57. *Drummond* articulated the parameters of reasonableness that the officers' conduct breached: "The officers allegedly crushed Drummond against the ground by pressing their weight on his neck and torso, and continuing to do so despite his repeated cries for air, and despite the fact that his hands were cuffed behind his back and he was offering no resistance. Any reasonable officer should have known that such conduct constituted the use of excessive force." *Drummond,* 343 F.3d at 1061. *Drummond* is well-settled law, and a reasonable officer should have known that such conduct was unlawful.

The police officers overreach in their comparison of this situation to that in *Gregory v. County of Maui,* 523 F.3d 1103 (9th Cir.2008), where we distinguished *Drummond* because Gregory was armed, had trespassed, and had assaulted someone earlier in the day. ***262** *Gregory,* 523 F.3d at 1109. Significantly, unlike in *Drummond,* 343 F.3d at 1056–57, or here, the police officers in *Gregory* "ceased using force once Gregory was handcuffed," even though Gregory continued to resist throughout the encounter. 523 F.3d at 1109. *Gregory* was also decided only after this appeal was brought, so any rule it may have established cannot be said to be well-settled law that would have informed the officers' understanding of the reasonableness of their conduct.

[3] The police officers also challenge the district court's consideration of much of Arce's evidence. Though the police officers raised some of these objections below, this challenge is not referenced in the opening brief and there is no mention on appeal until the officers' reply brief. These arguments are therefore waived. *See Indep. Towers of Wash. v. Wash.,* 350 F.3d 925, 929 (9th Cir.2003) ("[W]e 'review only issues which are argued specifically and distinctly in a party's opening brief.' ") (quoting *Greenwood v. Fed. Aviation Admin.,* 28 F.3d 971, 977 (9th Cir.1994)). Though exceptions from this rule may be made if failure to consider these arguments would result in "manifest injustice," *Alcaraz v. INS,* 384 F.3d 1150, 1161 (9th Cir.2004), this exception is not a concern here; issues of material fact emerge from the evidence not challenged by the police officers, particularly from the conflicts among the various eyewitness testimonies.

****3 AFFIRMED.**

All Citations

294 Fed.Appx. 259, 2008 WL 4298576

APPENDIX 17

2012 WL 2892021
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Robert L. TRAVERSO, Plaintiff,
v.
CITY OF ENUMCLAW, et al., Defendants.

No. C11–1313RAJ.
|
July 16, 2012.

Attorneys and Law Firms

Aaron J. Winkelhake, Tanya Ann Khodr, Khodr & Winkelhake, Seattle, WA, for Plaintiff.

Amanda Gabrielle Butler, Stewart Andrew Estes, Keating Bucklin & McCormack, Seattle, WA, for Defendants.

ORDER

RICHARD A. JONES, District Judge.

I. INTRODUCTION

***1** This matter comes before the court on a motion for summary judgment (Dkt.# 24) from Defendant Eric Sortland, a motion for judgment on the pleadings (Dkt.# 22) from another Defendant, the City of Enumclaw (the "City"), and a motion to compel discovery responses (Dkt.# 33) from Plaintiff Robert Traverso. No party requested oral argument, and the court finds oral argument unnecessary. For the reasons stated herein, the court GRANTS in part and DENIES in part Lt. Sortland's summary judgment motion, DENIES the City's motion for judgment on the pleadings, and DENIES Mr. Traverso's motion to compel.

II. BACKGROUND

Mr. Traverso claims that he received inadequate medical treatment in confinement at the Enumclaw City Jail (the "Jail") for about five days in June 2008. Mr. Traverso was in custody at the jail after his arrest on an outstanding bench warrant. For purposes of these motions, no one disputes that Mr. Traverso suffered from bipolar disorder. He claims that the failure of Jail staff to give him adequate medical treatment exacerbated his symptoms, leading to a period of institutionalization at a local hospital and a twelve-week period of unpaid medical leave.

The disputes the parties have brought before the court in these motions do not address the substance of Mr. Traverso's claims. Instead, they address minor disputes over discovery and pleading.

Mr. Traverso first sued in King County Superior Court in June 2011. His first complaint named the City of Enumclaw (the "City"), its Chief of Police, Jim Zoll, and another police officer, Lieutenant Eric Sortland. The complaint also alleged claims against unnamed members of the Jail staff. Defendants removed the case to this court because Mr. Traverso had accused some Defendants of violating 42 U.S.C. § 1983. Mr. Traverso also stated Washington law claims for negligence, negligent supervision, negligent retention, and various forms of infliction of emotional distress.

In January 2012, Mr. Traverso requested leave of court to amend his complaint to state additional claims against Nona Zilbauer and Quintin Stewart. Both were Enumclaw corrections officers who dealt with Mr. Traverso directly during his confinement at the Jail. The court granted leave to amend on February 29, noting that the parties' inability to agree on a routine amendment to a complaint reflected a lack of "reasonable communication, cooperation, and compromise." Dkt. # 21.

Defendants knew that Mr. Traverso would file an amended complaint no later than March 6; the City nonetheless filed a motion for judgment on the pleadings on March 1. Rule 12(c) of the Federal Rules of Civil Procedure permits a motion for judgment on the pleadings only "[a]fter the pleadings are closed." At the same time, Lt. Sortland filed a motion for summary judgment. Lt. Sortland contended that because he was not a policymaker for the City, had no role in Mr. Traverso's treatment at the Jail, and did not supervise the Jail staff who treated Mr. Traverso, he could not be liable via § 1983. He also contended that he could not be liable on the Washington law claims because if any party was liable to Mr. Traverso, it was the City. The motion for judgment on the pleadings contended that the City could not be directly liable via Washington law because to the extent its employees had

done anything wrong to Mr. Traverso, they had done so in the scope of their employment.

***2** While Defendants' motions were pending, Mr. Traverso filed his amended complaint. In conjunction with his opposition to the City's motion for judgment on the pleadings, he purported to file a motion to amend his amended complaint. He did not, however, separately note his motion to amend for the court's consideration. He did, however, separately file a motion to compel discovery responses.

Mr. Traverso's amended complaint (the only one he filed with the court's leave) is in most respects materially identical to his original complaint. Like its predecessor, it states a § 1983 claim against the City and the same set of Washington-law claims against the City, Chief Zoll, and Lt. Sortland. It adds § 1983 claims against Ofc. Zilbauer and Ofc. Stewart, and eliminates the claims against unnamed Jail staff. The amended complaint describes, in some detail, how Ofc. Zilbauer had notice of Mr. Traverso's mental condition and his need for treatment, but nonetheless failed to provide treatment. There are similar allegations about Ofc. Stewart's knowledge of Mr. Traverso's condition and his failure to ensure that he received proper treatment.

The amended complaint (like its predecessor) does not allege that Lt. Sortland had any direct role in the treatment of Mr. Traverso. Instead, it alleges that Lt. Sortland (along with Chief Zoll) was responsible for "operating, administering, and supervising" the Jail. Amend. Compl. (Dkt.# 26) ¶ 4.28. There are no allegations that Lt. Sortland was responsible for supervising or retaining Ofc. Stewart or Ofc. Zilbauer. The only evidence on the issue is that Lt. Sortland signed various documents in Ms. Zilbauer's personnel file, including several employment offer letters. Khodr Decl. (Dkt.# 41), Exs. 1–5. Another email, from 2010, suggests that Lt. Sortland had some responsibility for training jail staff. *Id.,* Ex. 7.

Mr. Traverso's motion to compel seeks production of the personnel files for each of the named Defendants as well as three non-party officers with whom Mr. Traverso had contact at the Jail. He asks for any written Jail policies in effect during his confinement in 2008. He also seeks better responses to his contention interrogatories.

The court now considers the parties' motions, beginning with Mr. Traverso's motion to compel.

III. ANALYSIS

A. Mr. Traverso's Motion to Compel

The court will not dwell on the arguments the parties present in Mr. Traverso's motion to compel. A motion to compel should identify what discovery requests are in dispute, explain why the material requested is discoverable, and reflect the parties' reasonable efforts to narrow their disputes without court intervention. Mr. Traverso's motion does not meet this basic standard.

For example, Mr. Traverso narrowed his request for personnel files to seven people: the four named Defendants as well as three non-parties who apparently worked at the Jail during Mr. Traverso's confinement. The City *agreed* to produce the files for the named Defendants, although it had not yet produced the files as of the noting date of the motion to compel. Mr. Traverso scarcely mentions the City's agreement. He does not address whether that agreement moots his concerns as to the four named Defendants. He does not state that he has any reason to doubt that the City will follow through with its agreement. He complains that the City redacted portions of Ofc. Zilbauer's personnel file, but does not explain what the City redacted or whether the redactions make any difference. As to the three non-parties, Mr. Traverso provided virtually no explanation of why their personnel files are relevant. He merely states that he "had contact" with each of these three employees during his confinement in the Jail. Khodr Decl. (Dkt.# 34), Ex. 10. This bare assertion is not nearly enough to justify the production of these employees' complete personnel files.

***3** The court orders the City to produce personnel files for each of the named Defendants to the extent it has not already done so. The City need not provide personally identifying information (addresses, telephone numbers, social security numbers), and may redact that information from any documents it produces. If Mr. Traverso demonstrates a need for identifying information (for example, the telephone number or last address of an employee who no longer works for the City), the City shall provide that information. The City need not produce personnel files for the three non-parties.

The City has already produced its current Jail manual, an 89–page document. That manual generally indicates the most recent revision date for each of its many sections. The City has averred that it does not have complete past versions of its manuals, including the manual as it existed in June 2008. Mr. Traverso offers no reason to doubt that assertion. The City is willing to search for 2008 versions of specific portions of the manual that are relevant to Mr. Traverso's claims; it has merely asked him to identify the sections in the current manual that he believes are relevant to his claims. There is no dispute that most of the policies and procedures in the manual have no relevance to Mr. Traverso's claims. For reasons the court cannot fathom, Mr. Traverso has refused the City's reasonable request to identify the portions of the manual that are relevant to his claims. Mr. Traverso is entitled to discovery of relevant Jail policies in effect during his confinement. So far, he has not engaged in reasonable efforts to discover that information. The court will not prohibit him from engaging in those efforts, but will order no relief until he does so.

The court will order no relief as to Mr. Traverso's contention interrogatories. Mr. Traverso has not even identified which interrogatories are at issue, much less explained why the responses he already has are inadequate.

B. Lt. Sortland's Summary Judgment Motion

Lt. Sortland contends that he cannot be liable via § 1983, which gives a cause of action to a plaintiff whose suffered a violation of his constitutional rights at the hands of a person acting under color of law. He bases that contention on the notion that because there is no evidence that he was either a policymaker for the Jail or directly involved in Mr. Traverso's treatment, he cannot be liable as a matter of law. *See, e.g., Redman v. County of San Diego,* 942 F.2d 1435, 1446 (9th Cir.1991) ("A supervisor may be liable if there exists *either* (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.") (emphasis in original, citation omitted). He believes he is entitled to summary judgment, a remedy available where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a).

***4** Lt. Sortland might have relied on a simpler argument: Mr. Traverso did not state a § 1983 claim against him. His amended complaint, which is the operative pleading, states only that Lt. Sortland (along with Chief Zoll) is "liable to the plaintiff for his loss of income, services, protection, care, assistance, society and expenses *under state law* for negligence, negligent supervision and/or retention and negligent infliction of emotional distress." Amend. Compl. (Dkt.# 26) ¶ 8.2 (emphasis added). The court can only speculate as to why neither Mr. Traverso nor Lt. Sortland acknowledge the absence of a § 1983 claim against Lt. Sortland. In any event, the court declines to consider granting summary judgment against a claim that does not exist.

Mr. Traverso could perhaps cure his failure to state a § 1983 claim by amending his complaint. He attempted to do so in the proposed second amended complaint that he attached to his opposition to the City's motion. The proposed second amended complaint, for the first time in this litigation, states a § 1983 claim against Lt. Sortland. But, as the court has already noted, Mr. Traverso did not properly move to amend his complaint a second time.

The court will permit Mr. Traverso, if he chooses, to file a proper motion for leave to amend. If he does, he must explain why he failed to include a § 1983 claim against Lt. Sortland in his first two complaints, and he must explain why his amendments would not be futile. Mr. Traverso concedes that Lt. Sortland was not an official policymaker, and he does not purport to sue him in his official capacity. His bases his § 1983 claim, it would appear, solely on the allegation that Lt. Sortland was a supervisor, evidence that Lt. Sortland signed various employment documents for Ofc. Zilbauer, and evidence that Lt. Sortland had some training responsibilities. This is inadequate, as a matter of law, to constitute the personal participation necessary for individual liability under § 1983. *See, e.g., Larez v. Los Angeles,* 946 F.2d 630, 646 (9th Cir.1991) (requiring personally culpable inaction or action in the training or supervision of subordinates, acquiescence in a constitutional violation, or reckless indifference to the rights of others). Perhaps Mr. Traverso has a reasonable basis to believe that Lt. Sortland has participated in an actionable way in the deprivation of his constitutional rights. The court places Mr. Traverso on notice that it will consider 28 U.S.C. § 1927 sanctions he persists in stating an invalid § 1983 claim against Lt. Sortland.

The court will address Mr. Traverso's Washington law claims against Lt. Sortland in the following section, which considers his Washington law claims against the City. [1]

1 Mr. Traverso filed a surreply to Lt. Sortland's motion, and Lt. Sortland followed with a surreply of his own. The court finds that neither surreply was necessary, and denies Mr. Traverso's request that the court strike part of the Lt. Sortland's reply brief.

C. The City's Motion for Judgment on the Pleadings

The court could simply deny the City's improper motion for judgment on the pleadings. The City knew when it filed the motion that Mr. Traverso's amended complaint was forthcoming; it thus knew that pleadings were not "closed," a necessary prerequisite to a motion for judgment on the pleadings. Fed.R.Civ.P. 12(c). The City points out, correctly, that there is no material difference between Mr. Traverso's original complaint and his amended complaint with respect to the claims at issue in the motion. The court thus treats the City's motion as a motion to dismiss for failure to state a claim.

***5** Fed.R.Civ.P. 12(b)(6) permits a court to dismiss a complaint for failure to state a claim upon which the court can grant relief. It requires the court to assume the truth of all of the complaint's factual allegations and to credit all reasonable inferences arising from those allegations. *Sanders v. Brown,* 504 F.3d 903, 910 (9th Cir.2007). The plaintiff must point to factual allegations that "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 568, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). If the plaintiff does so, the complaint survives dismissal as long as there is "any set of facts consistent with the allegations in the complaint" that would entitle the plaintiff to relief. *Id.* at 563; *Ashcroft v. Iqbal,* 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.").

Mr. Traverso states negligence and "negligent supervision and/or retention" claims against both the City and Lt. Sortland. Amend. Compl. ¶¶ 6.2, 8.2. He also raises a claim of negligent infliction of emotional distress against Lt. Sortland and a claim of outrage (or intentional infliction of emotional distress) against the City. *Id.*

There are many reasons the City might have attacked these claims. For example, Mr. Traverso makes no attempt in his amended complaint to explain the basis for his standalone negligence claims as opposed to his claims for negligent retention or supervision. What acts attributable to either the City or Lt. Sortland, other than their alleged negligence in the retention and supervision of Jail staff, were negligent? The amended complaint does not answer that question. The court also queries how, in a complaint where Mr. Traverso makes no claim against any of the City's employees for outrage, he nonetheless contends that the City is liable for outrage. The City acts only through its agents, and the complaint is silent as to which of the City's agents committed acts of outrage. The City's motion raises none of these issues.

Instead, the City's bases its motion (along with the portion of Lt. Sortland's motion devoted to Mr. Traverso's state law claims) entirely on distinctions between direct and vicarious liability. The City admits that its employees acted within the scope of their employment in all of their acts that had an impact on Mr. Traverso. The employees agree, and Mr. Traverso makes no attempt to avoid these admissions. Employers are liable for their employees' negligent acts in the scope of their employment; this species of vicarious liability is known as *respondeat superior. Rahman v. State,* 170 Wash.2d 810, 246 P.3d 182, 184 (Wash.2011). An employer can also be liable where an employee acts beyond the scope of his employment. In that case, a plaintiff can invoke the essentially equivalent torts of negligent hiring, retention, or supervision to impose liability on an employer. *See, e.g. Thompson v. Everett Clinic,* 71 Wash.App. 548, 860 P.2d 1054, 1058 (Wash.Ct.App.1993) (recognizing tort of negligent supervision of employee); *Niece v. Elmview Group Home,* 131 Wash.2d 39, 929 P.2d 420, 426 (Wash.1997) (noting that "negligent hiring, retention, and supervision" arise from the employer's duty to protect foreseeable victims from harm from its employees); *Betty Y. v. Al–Hellou,* 98 Wash.App. 146, 988 P.2d 1031, 1033 n. 3 (Wash.Ct.App.1999) (recognizing equivalence of negligent hiring and negligent retention).

***6** Lt. Sortland claims that he cannot be liable for negligence or negligent infliction of emotional distress because he admits that he acted within the scope of his employment to the extent he acted wrongfully. Thus, in his view, any negligence claims should be against the City (which is vicariously liable via *respondeat superior*) rather

than against him. As to Mr. Traverso's negligent hiring and negligent retention claims against him, Lt. Sortland argues that those claims lie only against an employer (the City, in this case), not against an individual supervisor.

Lt. Sortland is wrong in his assertion that Mr. Traverso cannot sue him for negligence because the City bears *respondeat superior* liability for his negligence. *Respondeat superior* makes employers vicariously liable for the negligent acts of their employees; it does not shield employees from suits for their negligence. Lt. Sortland cites no authority, and the court is aware of none, requiring (or even permitting) a court to dismiss a negligence suit against an employee simply because his employer is vicariously liable. It is perhaps pointless to sue an employee individually where his employer has admitted vicarious liability for the employee's acts. It is perhaps pointless to file a motion to dismiss claims against the employee where the employee's dismissal would make no apparent difference. In any event, Lt. Sortland has cited no authority that prohibits a suit against an employee whose employer is vicariously liable.

Lt. Sortland's position looks more suspect when juxtaposed with the City's position as to Mr. Traverso's standalone negligence claim. The City contends that the court should dismiss Mr. Traverso's negligence claim against it because the City cannot be vicariously liable for its employees' negligence except where its employees' act *beyond* the scope of their employment. The City seems to believe that no one, not the City and not its employees, can be liable for its employees' standalone negligence in the scope of their employment. The City is wrong. The court denies both the City's and Lt. Sortland's motions to the extent they target Mr. Traverso's standalone negligence claims.

The court agrees, however, that to the extent Mr. Traverso can state a Washingtonlaw claim for negligent supervision or negligent retention, those claims lie solely against the City, not against Lt. Sortland. So far as the court is aware, claims of negligent supervision, hiring, or retention invariably lie against an employer, not the individual responsible for supervision, hiring, or retention.

Finally, the court considers whether the admission that all of the City's employees acted in the scope of their employment bars Mr. Traverso's negligent retention and supervision claims. Again, the court must acknowledge that these claims are probably pointless. The City has admitted vicarious liability, via *respondeat superior,* for all of its employees' acts in this case. With that admission, there is no reason for a negligent supervision or retention claim, because it is of no benefit to Mr. Traverso. Courts almost invariably discuss negligent supervision claims in the context of acts outside the scope of employment, likely because few plaintiffs would consider taking Mr. Traverso's path and insisting that the City is vicariously liable in two different ways. But there is no doctrinal reason that employers cannot be liable for negligent supervision where its employees act negligently in the scope of their employment. Indeed, at least one court's enumeration of the elements of a negligent supervision claim makes no mention of the scope of employment. *Steinbock v. Ferry County Pub. Util. Dist. No. 1,* 165 Wash.App. 479, 269 P.3d 275, 281–82 (Wash.Ct.App.2011).

***7** Again, the court finds itself in the unpleasant position of deciding between sustaining a pointless claim and granting a pointless motion to dismiss it. Whether the court grants or denies the City's motion makes no difference. Mr. Traverso will still have the same likelihood of succeeding on the merits and the same likelihood of recovering damages from the City. The City will remain a Defendant, because Mr. Traverso has stated a § 1983 claim against it. The City seems to believe that the evidence admissible at trial will change depending on the outcome of this motion, but the court finds that argument premature at best. If some evidence is unduly prejudicial, the City remains free to move to exclude it before trial. If it does so, it will have to point to specific evidence, rather than rely on generalized argument as it has done in this motion.

Putting aside the court's questions about the need for the City's motion, the court declines to grant it. At least one Washington court has held that it is reversible error for a trial court to refuse to dismiss a superfluous negligent supervision claim against an employer where a negligence claim is pending against its employee. *LaPlant v. Snohomish County,* 162 Wash.App. 476, 271 P.3d 254, 256–58 (Wash.Ct.App.2011) (remanding, on discretionary review of trial court's denial of motion to dismiss, for purpose of dismissing claim against employer).[2] But the *LaPlant* court distinguished a case where a judge in this District refused to dismiss a negligent supervision claim because there was no standalone

negligence claim against the employee. *LaPlant,* 271 P.3d at 258 (citing *Tubar v. Clift,* No. C05–1154JCC, 2008 U.S. Dist. LEXIS 101130, at *22–26,2008 WL 5142932 (W.D.Wash. Dec. 4, 2008). In this case, Mr. Traverso has not stated standalone negligence claims against either Ofc. Zilbauer or Ofc. Stewart. His negligent retention and supervision claim is thus his only means of recovering against the City for their negligence. The court will not dismiss this claim.

2 Another Washington courts has acknowledged that a court *may* dismiss a superfluous negligent supervision claim. *Gilliam v. Dep't of Social & Health Servs.,* 89 Wash.App. 569, 950 P.2d 20, 28 (Wash.Ct.App.1998). Another court found that instructing a jury on negligent training, supervision, and hiring where the employer had admitted vicarious liability was harmless error because the claims were merely redundant. *Joyce v. Dep't of Corrections,* 116 Wash.App. 569, 75 P.3d 548, 599 (Wash.Ct.App.2003).

IV. CONCLUSION

For the reasons stated above, the court DENIES Mr. Traverso's motion to compel (Dkt.# 33), GRANTS Lt. Sortland's summary judgment motion (Dkt.# 24) only as to Mr. Traverso's negligent supervision and retention claims and DENIES it in all other aspects, and DENIES the City's motion for judgment on the pleadings.

All Citations

Not Reported in F.Supp.2d, 2012 WL 2892021

End of Document

APPENDIX 18

2013 WL 6631898
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Myesha MITCHELL, Plaintiff,
v.
The CITY OF TUKWILA, et al., Defendants.

No. C12–238RSL.
|
Dec. 17, 2013.

Attorneys and Law Firms

Angel N. Vasilev, Matthew Robinson, Edward C. Chung, Chung Malhas Mantel & Robinson, PLLC, Seattle, WA, for Plaintiff.

Jeremy W. Culumber, Keating Bucklin & McCormack, Seattle, WA, Shelley M. Kerslake, Kenyon Disend, Issaquah, WA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS *IN LIMINE*

ROBERT S. LASNIK, District Judge.

***1** This matter comes before the Court on "Defendant's Motions *in Limine* " (Dkt.# 63) and "Defendants' Supplemental Motion *in Limine* Re: Yeoman Testimony" (Dkt.# 79). Having reviewed the memoranda, declarations, and exhibits submitted by the parties and the remainder of the record and having considered the arguments presented during the pretrial conference, the Court finds as follows:

1. Officer Gurr's Prior Disciplinary History

Defendants seek to exclude evidence related to prior allegations against Officer Gurr that he used unlawful force as improper character evidence under Federal Rule of Evidence ("Rule") 404. Officer Gurr's prior disciplinary record reveals no sustained complaints of excessive force against Officer Gurr between January 2009 and February 2010 and no liability resulting from litigation. Plaintiff's § 1983 claim against the City of Tukwila (the "City") has been dismissed and the City's only remaining potential for liability is under a theory of respondeat superior as Officer Gurr's employer. [1] Whether the City had notice of any allegedly unlawful conduct is not relevant to the remaining claims against Officer Gurr and the Court finds that unsustained allegations of prior use of excessive force is prohibited under Rule 404(b). Defendants' first motion *in limine* is GRANTED.

2. Other Taser Applications by Tukwila Police Officers

The only substantive claims remaining are Plaintiff's claims against Officer Gurr regarding his use of a taser when he arrested Plaintiff in February 2010. These claims consist of negligent infliction of emotional distress, intentional infliction of emotional distress, or "outrage," use of excessive force, assault, battery, and general negligence. There are no substantive claims of negligence against the City remaining. Evidence of Defendants' knowledge regarding prior, unrelated taser deployments by Tukwila Police officers other than Officer Gurr does not tend to make a fact of consequence more or less probable. Defendants' second motion *in limine* is therefore GRANTED.

3. Officer Gurr's Training History

Despite Defendants' arguments to the contrary, the Court finds Officer Gurr's training records relevant to the issues remaining for trial. While it is true that there is no negligent training or supervision claim against the City remaining, evidence regarding how and when Officer Gurr received taser training is relevant to Plaintiff's remaining claims against him. The Court therefore DENIES Defendants' third motion *in limine.*

4. Post–Arrest Contact with Tukwila Police Department

Defendants seek to prevent Plaintiff from presenting evidence that Tukwila Police Department officers ignored Plaintiffs complaints about Officer Gurr's arrest and attempted to intimidate her after the incident. Dkt. # 63 at 2–3. Contrary to Defendants' arguments, the Court finds evidence regarding Plaintiff's post-arrest complaints to the City probative of Plaintiff's claims and Officer Gurr's malicious prosecution counterclaim. Defendants may pursue Plaintiff's "unsubstantiated" allegations of intimidation, dkt., # 63 at 3, during cross-examination.

5. Plaintiff's Allegations about Treatment in Jail

***2** Defendants contend that testimony regarding the manner in which Plaintiff was treated while incarcerated following her arrest is not relevant and should be excluded under Rule 403 because it would unfairly influence the jury. Dkt. # 63 at 3. In light of the scope of Plaintiff's claim for emotional distress damages, the Court finds that the probative nature of evidence related to Plaintiff's incarceration outweighs the risk of undue prejudice. The precise nature of Plaintiff's alleged mistreatment in prison and Officer Gurr's role in that alleged mistreatment are proper subjects for crossexamination. Defendants' fifth motion *in limine* is DENIED.

6. Tukwila Police Department Policies

Although Plaintiff's *Monell* claim against the City has been dismissed, Tukwila Police Department policies regarding use of force and use of a taser are relevant and probative of whether Officer Gurr's conduct was negligent. The Court therefore DENIES Defendants' sixth motion *in limine.*

7. Post–Arrest Joke by Officer

Defendants seek to exclude references to and evidence that after Plaintiff was tased and arrested an officer on the scene said "moose move." Dkt. # 63 at 4–5. While it is true that Officer Gurr, the only individual defendant, did not make the comment and the Plaintiff's § 1983 claim against the City was dismissed, evidence reflecting the officers' interactions at the time of and shortly after Plaintiff's arrest is relevant to Plaintiff's claims against Officer Gurr. This evidence shows the context of the events that are at the heart of this case. Thus, the Court finds that the probative value of the evidence outweighs the risks of unfair prejudice and jury confusion and DENIES Defendants' seventh motion *in limine.*

8. Plaintiff's History of Arrests and Contacts with Police

Defendants seek an order allowing them to present evidence regarding Plaintiff's prior arrests and criminal history because it is relevant to Plaintiff's state of mind at the time of the incident, her credibility, and her claim for damages. Dkt. # 63 at 5–11. Based on the broad nature of her claim for emotional distress damages, Plaintiff has opened the door to evidence related to her criminal history and the number of times she has been arrested. Counsel may present evidence regarding the number of times Plaintiff has been arrested, the dates of those arrests, and the number of times she has been arrested or cited for Driving While License Suspended ("DWLS"). Balancing the probative value and the potential prejudice to Plaintiff, the Court finds that Defendants may not refer specifically to Plaintiff's arrests for prostitution or driving under the influence. Defendants may question Plaintiff about the August 2009 arrest and resulting impound of the Dodge Durango, but they may not refer to the circumstances surrounding the arrest.

Defendants' eighth motion *in limine* is GRANTED IN PART.

9. Non–Expert Testimony about Medical and Psychological Diagnoses

***3** Defendants seek an order prohibiting Plaintiff and other lay witnesses from testifying about Plaintiff's medical diagnoses based on what others told her about her condition. Dkt. # 63 at 11. Because statements by Plaintiff about what her medical providers told her constitute hearsay and Plaintiff has not identified an exception that applies, the Court GRANTS Defendants' ninth motion *in limine.* Plaintiff is prohibited from offering testimony regarding what others may have told her about her medical condition to show the truth of those statements.

10. Plaintiff's Responses to Requests for Admission

Defendants seek to preclude Plaintiff from presenting evidence contrary to facts admitted by Plaintiff based on her failure to deny or object to Defendants' requests for admission in a timely manner. Dkt. # 63 at 11–13. It is well established under Ninth Circuit law that "failure to answer or object to a proper request for admission is itself an admission: the Rule itself so states." *Asea, Inc. v. Southern Pacific Transp. Co.,* 669 F.2d 1242, 1245 (9th Cir.1982). Rule 36(a) of the Federal Rules of Civil Procedure provides that "[a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney." Fed.R.Civ.P. 36(a)(3). Additionally, "[a] matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." Fed. R. Civ. P 36(b).

Plaintiff does not dispute that Defendants served their requests for admission on June 6, 2012, and she did

not respond to these requests within thirty days as required. Dkt. # 70 at 10. Rather, Plaintiff contends that her untimely responses should be excused because Plaintiff's counsel filed a notice of unavailability on June 7, 2012. *Id.* Plaintiff, however, neglects the fact that this notice indicated that Plaintiff's counsel would be unavailable between June 28, 2012 and July 13, 2012. Dkt. # 18 at 1. Thus, Plaintiff's counsel had slightly more than three weeks to respond to Defendants' requests for admission. Because Plaintiff has not filed a motion asking the Court to withdraw her admissions, the matters in Defendants' requests for admission are deemed conclusively established and Plaintiff may not present evidence or argument to the contrary.

Defendants' tenth motion *in limine* is GRANTED.

11. Existence of Probable Cause

Based on the state court's multiple findings of probable cause and Plaintiff's own stipulation that Officer Gurr had probable cause to arrest her, the Court previously found that probable cause existed for Officer Gurr to arrest Plaintiff. Dkt. # 33 at 5. Thus, the Court GRANTS Defendants' eleventh motion *in limine.* Plaintiff is prohibited from presenting evidence that Officer Gurr lacked probable cause to arrest Plaintiff when she was tased.

12. Testimony of Plaintiff's Expert Sue Peters

***4** Defendants do not ask the Court to preclude Plaintiff's expert witness, Sue Peters, from testifying at all, but rather, they ask that the Court prohibit Ms. Peters from offering her opinion that Officer Gurr's use of the taser was unreasonable. Defendants argue that this testimony is inappropriate because it invades the province is the ultimate issue for the jury to decide and Ms. Peters lacks specialized knowledge or training to support her conclusion. Dkt. # 78 at 11.

The Court finds that it will likely qualify Ms. Peters as an expert in police practices based on her 29 years of experience working in law enforcement, most recently as a major crimes detective in the King County Sheriff's Office. Dkt. # 63 at 45. Ms. Peters has the experience to provide the jury with informative testimony on considerations for determining "necessary" as opposed to "excessive" force. While Ms. Peters may assist the jury in understanding the different factors that concern decisions regarding what constitutes necessary force, she will not be permitted to instruct the jury on the ultimate issue in this case, whether Officer Gurr's use of the taser was unreasonable or constitutes excessive force. *Nationwide Transport Finance v. Cass Info. Sys., Inc.,* 523 F.3d 1051, 1058 (9th Cir.2008) ("an expert witness cannot give an opinion as to her *legal conclusion,* i.e., an opinion on an ultimate issue of law. Similarly, instructing the jury as to the applicable law is the distinct and exclusive province of the court.") (internal quotation marks and citation omitted). Thus, while Ms. Peter's testimony may embrace an ultimate issue to be decided by the jury, Fed.R.Evid. 704(a), she may not give her opinion as to whether or not Officer Gurr's use of force was reasonable.

Defendants also seek to prohibit Ms. Peters from offering any opinions on matters about which her opinion was not originally sought. Dkt. # 63 at 15–16. Plaintiff contends that Ms. Peters' testimony is necessary to clarify Plaintiff's claims beyond excessive force. Dkt. # 70 at 14. Ms. Peters's testimony shall be limited to the contents of her expert report. Defendants' twelfth motion *in limine* is therefore GRANTED.

13. Plaintiff's Negligence Claim

The Court DENIES Defendants' thirteenth motion *in limine* seeking to exclude Plaintiff's negligence claim against Officer Gurr. Defendants did not move to dismiss this claim or seek summary judgment on this claim, nor have they presented any authority supporting their position. Plaintiff is therefore permitted to present alternative theories of liability to the jury.

14. Plaintiff's Assault and Battery Claim

The Court DENIES Defendants' fourteenth motion *in limine* seeking to exclude Plaintiff's assault and battery claims for the reasons set forth in response to Defendants' thirteenth motion *in limine.*

15. Testimony of Liana Yeoman Regarding Post–Incident Interaction with Officer Gurr

***5** Defendants seek to exclude the testimony regarding Officer Gurr's interaction with Liana Yeoman, a barista who worked at the espresso stand at the gas station where Plaintiff was arrested, after Plaintiff was arrested because it is irrelevant and unduly prejudicial. Dkt. # 79 at 1–2. Plaintiff plans to elicit testimony from Ms. Yeoman

that Officer Gurr called her a scandalous barista, dkt. # 82 at 2, and she contends that this testimony is relevant because "this case relates in part as to how Sargent (sic) Gurr manages himself while on duty, specifically how he deals with the public at large." *Id.* While Ms. Yeoman's recollections of the day of the incident are relevant to the claims remaining, the Court finds that testimony regarding Officer Gurr's alleged comment is not. Furthermore, this evidence constitutes improper character evidence and therefore, is excluded pursuant to Rule 404(a)(1).

For all of the foregoing reasons, Defendants' motions *in limine* (Dkt.# 63, 79) are GRANTED IN PART and DENIED IN PART. [2]

All Citations

Not Reported in F.Supp.2d, 2013 WL 6631898

Footnotes

1 Despite Plaintiff's repeated arguments to the contrary, the Court finds that there are no substantive claims of negligence against the City remaining. The City admits that Officer Gurr's conduct occurred during the course of and in furtherance of his employment, thereby foreclosing any claim of negligent training or supervision. *See LaPlant v. Snohomish Cnty.,* 162 Wash.App. 476, 479–80, 271 P.3d 254 (2011) ("Under Washington law, therefore, a claim for negligent hiring, training, and supervision is generally improper when the employer concedes the employee's actions occurred within the scope of employment.").

2 The Court notes that the findings and conclusions in this order, like all rulings *in limine,* are preliminary and can be revisited at trial based on the facts and evidence as they are actually presented. *See, e.g., Luce v. United States,* 469 U.S. 38, 41, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984) (explaining that a ruling *in limine* "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling."). Subject to these principles, the Court issues this ruling for the guidance of the parties.

APPENDIX 19

470 Fed.Appx. 627
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Ninth
Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

Sanford TUCKER, individually, and as Special Administrator of the Estate of Keith Tucker, and as Guardian ad Litem of Frans Kai Mann Tucker, a minor, Plaintiff—Appellee,
v.
LAS VEGAS METROPOLITAN POLICE DEPARTMENT; Patrick Denney, Officer; Mark Hutchinson, Officer, Defendants—Appellants,
and
Taser International, Inc.; Bill Young, Sheriff, individually and in his official capacity, Defendants.

No. 09–17141.
|
Argued and Submitted Feb. 14, 2012.
|
Filed March 2, 2012.

Synopsis
Background: Administrator of decedent's estate brought § 1983 action against police department, two individual officers, and others, alleging use of excessive force, in violation of Fourth and Fourteenth Amendments. The United States District Court for the District of Nevada, Lloyd D. George, Senior District Judge, denied officers' qualified immunity-based motion for summary judgment. Officers appealed.

Holdings: The Court of Appeals held that:

[1] defensive force used prior to handcuffing arrestee was reasonable, but

[2] fact issues precluded summary judgment as to force used after handcuffing.

Affirmed in part and reversed and remanded in part.

Tallman, Circuit Judge, concurred and filed opinion.

Attorneys and Law Firms

***627** Eric Brent Bryson, Esquire, E. Brent Bryson, Ltd., John C. Funk, Cal J. Potter, III, Esquire, Potter Law Offices, ***628** Allen Lichtenstein, Las Vegas, NV, for Plaintiff–Appellee.

Peter Maitland Angulo, Esquire, Walter R. Cannon, Esquire, Olson, Cannon, Gormley & Desruisseaux, Las Vegas, NV, for Defendants–Appellants.

Appeal from the United States District Court for the District of Nevada, Lloyd D. George, Senior District Judge, Presiding. D.C. No. 2:05–cv–01216–LDG–RJJ.

Before: GRABER, BERZON, and TALLMAN, Circuit Judges.

MEMORANDUM [*]

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

****1** Keith Tucker ("Keith") died following an altercation with two police officers, Defendants Patrick Denney and Mark Hutchinson. Keith's father, Plaintiff Sanford Tucker ("Sanford") brought a wrongful death civil rights action under 42 U.S.C. § 1983, claiming that the force used by Officers Denney and Hutchinson deprived Keith of his right to be free from excessive force, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, and caused his death. [1] The officers brought this interlocutory appeal from the district court's denial of their motion for summary judgment on grounds of qualified immunity. We affirm in part, reverse in part, and remand.

1 Sanford also sued several other defendants on various legal theories not pertinent to this appeal.

As the parties moving for summary judgment, the officers bear "the burden of showing the absence of a genuine issue as to any material fact, and for these purposes

the material ... lodged must be viewed in the light most favorable" to Sanford. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Summary judgment " 'should be granted sparingly' " in excessive force cases, because the excessive force inquiry often " 'requires a jury to sift through disputed factual contentions, and to draw inferences therefrom.' " *Smith v. City of Hemet,* 394 F.3d 689, 701 (9th Cir.2005) (en banc) (quoting *Santos v. Gates,* 287 F.3d 846, 853 (9th Cir.2002)). In this case, we agree with the district court that, with respect to the force used after Keith was handcuffed, there are genuine issues of material fact rendering summary judgment inappropriate. We conclude, however, that there are no genuine issues of material fact concerning whether the force used before Keith was handcuffed was excessive, and that summary judgment should have been granted in favor of the defendants with regard to that period.

We use a two-pronged test to determine whether qualified immunity is justified: (1) we must decide whether the officer violated a plaintiff's constitutional right; and (2) we must determine whether the asserted right was " 'clearly established in light of the specific context of the case' at the time of the events in question." *Mattos v. Agarano,* 661 F.3d 433, 440 (9th Cir.2011) (en banc) (quoting *Robinson v. York,* 566 F.3d 817, 821 (9th Cir.2009)), *petitions for cert. filed,* —— U.S.L.W. —— (U.S. Jan. 11, 2012) (No. 11–1032), 80 U.S.L.W. 3457 (U.S. Jan. 17, 2012) (No. 11–898), —— U.S.L.W. —— (U.S. Feb. 21, 2012) (No. 11–1045). In determining whether an officer violated a plaintiff's right to be free from excessive force, we first assess the severity of the force used and then measure the governmental interests at stake by evaluating a range of factors. *See id.* at 441.

***629** **[1]** 1. The force used by the officers before Keith's handcuffing was reasonable under the circumstances of Keith's violent resistance. Sanford argues that the officers should be held liable for the defensive force they used in handcuffing Keith, because Officer Denney's decision to grab Keith's hand may have provoked the violent altercation that ensued. We disagree. "Where a police officer 'intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of force.' " *Espinosa v. City & Cnty. of San Francisco,* 598 F.3d 528, 538 (9th Cir.2010) (quoting *Billington v. Smith,* 292 F.3d 1177, 1189 (9th Cir.2002)), *cert. denied,* —— U.S. ——, 132 S.Ct. 1089, 181 L.Ed.2d 976 (2012). Officer Denney's decision to grab Keith's hand was not an intentional or reckless provocation that independently violated Keith's Fourth Amendment rights, *see Drummond ex rel. Drummond v. City of Anaheim,* 343 F.3d 1052, 1059 (9th Cir.2003), and therefore cannot "render the officer[s'] otherwise *reasonable* defensive use of force *unreasonable* as a matter of law," *Billington,* 292 F.3d at 1190–91.

****2** Summary judgment should therefore have been granted with respect to the force used before Keith was handcuffed.

[2] 2. A jury could, however, reasonably conclude that the officers used excessive force in tasing Keith and applying their body pressure to restrain him after he was handcuffed and face down on a bed. *See Drummond,* 343 F.3d at 1059–60. Although the officers testified that Keith continued to threaten their safety even after he was handcuffed, and that they exercised considerable restraint in their use of force, the district court accurately identified significant discrepancies and omissions in their respective accounts of the altercation. A jury, after hearing live testimony and cross-examination, might therefore discredit the officers' testimony and conclude that, in light of the degree of danger Keith posed once handcuffed, if any, and other pertinent circumstances (including Keith's apparent physical and mental state at the time), the degree of force used was excessive. *See Santos,* 287 F.3d at 852. Because genuine issues of material fact remain as to both the extent of the force used by the officers and the nature of the threat posed by Keith's handcuffed resistance, we cannot hold that the officers acted reasonably as a matter of law.

[3] 3. Turning to the clearly established law inquiry, we conclude that existing law recognized a Fourth Amendment violation where two officers use their body pressure to restrain a delirious, prone, and handcuffed individual who poses no serious safety threat. *See Drummond,* 343 F.3d at 1059–60. Keith, unlike Drummond, continued to resist the officers after handcuffs were applied, but this distinction does not, by itself, suffice to bring this case out of *Drummond's* orbit. *See Davis v. City of Las Vegas,* 478 F.3d 1048, 1057 (9th Cir.2007).

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Costs on appeal awarded to Plaintiff–Appellee.

TALLMAN, Circuit Judge, concurring:
I concur in the Court's disposition insofar as it deems summary judgment inappropriate in this case.

Excessive force cases involving a deceased victim "pose a particularly difficult problem [at the summary judgment stage] because the officer defendant is often the only surviving eyewitness." *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir.1994). I am ***630** bound by our precedent, which clearly says the court cannot simply take officers at their word. Rather, the court must "carefully examine all the evidence in the record ... to determine whether the officer's story is internally consistent and consistent with other known facts." *Id.* (citing *Hopkins v. Andaya,* 958 F.2d 881, 885–88 (9th Cir.1992); *Ting v. United States,* 927 F.2d 1504, 1510–11 (9th Cir.1991)). That is why most jurisdictions conduct a public inquest into deaths like these in police custody. *See* Nev.Rev.Stat. § 259.050.

In this case, there appear to be inconsistencies in the testimonies of Officers Denney and Hutchinson. While Officer Hutchinson stated that he placed light pressure on Tucker's back while Tucker was prone and handcuffed, Officer Denney stated that Hutchinson never placed pressure on Tucker's back. And while Officer Hutchinson claims he got off of Tucker as soon as he heard Tucker's pleas for air, Officer Denney never mentioned this fact in his deposition. I agree with the district court that the inconsistent testimony creates issues of fact that can only be resolved by a jury.

****3** I write separately, however, to note that police officers have no duty to retreat when threatened with physical assault. *See Reed v. Hoy,* 891 F.2d 1421, 1428 (9th Cir.1989) ("[Plaintiff] has not cited to this court a single case from any jurisdiction suggesting that police officers have the same duty to retreat as ordinary citizens."). Notwithstanding our decision in *Drummond v. City of Anaheim,* 343 F.3d 1052, 1059 (9th Cir.2003), officers need not flee from a suspect bent on continued attack, regardless of whether the suspect is handcuffed. Such a requirement would "be inconsistent with police officers' duty to the public," *Reed,* 891 F.2d at 1428, and would subject officers to unnecessary threats to their own health and safety. And I do not agree with the assumption implicit in the Court's disposition that a suspect, once handcuffed, no longer poses any danger to arresting officers. *See* George T. Payton & Michael Amaral, *Patrol Operations and Enforcement Tactics* 242 (11th ed. 2004) ("Even when cuffed, a prisoner could strike a heavy blow.... Handcuffs are not escape proof. They are meant to be a temporary restraint. Don't put too much faith in them.").

All Citations

470 Fed.Appx. 627, 2012 WL 690426

that Officer Gurr called her a scandalous barista, dkt. # 82 at 2, and she contends that this testimony is relevant because "this case relates in part as to how Sargent (sic) Gurr manages himself while on duty, specifically how he deals with the public at large." *Id.* While Ms. Yeoman's recollections of the day of the incident are relevant to the claims remaining, the Court finds that testimony regarding Officer Gurr's alleged comment is not. Furthermore, this evidence constitutes improper character evidence and therefore, is excluded pursuant to Rule 404(a)(1).

For all of the foregoing reasons, Defendants' motions *in limine* (Dkt.# 63, 79) are GRANTED IN PART and DENIED IN PART. [2]

All Citations

Not Reported in F.Supp.2d, 2013 WL 6631898

Footnotes

1 Despite Plaintiff's repeated arguments to the contrary, the Court finds that there are no substantive claims of negligence against the City remaining. The City admits that Officer Gurr's conduct occurred during the course of and in furtherance of his employment, thereby foreclosing any claim of negligent training or supervision. *See LaPlant v. Snohomish Cnty.,* 162 Wash.App. 476, 479–80, 271 P.3d 254 (2011) ("Under Washington law, therefore, a claim for negligent hiring, training, and supervision is generally improper when the employer concedes the employee's actions occurred within the scope of employment.").

2 The Court notes that the findings and conclusions in this order, like all rulings *in limine,* are preliminary and can be revisited at trial based on the facts and evidence as they are actually presented. *See, e.g., Luce v. United States,* 469 U.S. 38, 41, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984) (explaining that a ruling *in limine* "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling."). Subject to these principles, the Court issues this ruling for the guidance of the parties.