The Honorable Karen Donohue

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
KING COUNTY

SARA L. LACY, in her Personal Capacity and as Personal Representative of the Estate of CECIL D. LACY, JR., deceased, Plaintiff, v. SNOHOMISH COUNTY, a political subdivision of the State of Washington; Defendant.	Case No. 16-2-21526-2 SEA DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff withdrew negligent training/supervision claims and acknowledged negligent use of force "is not a separate claim," but a subpart of general negligence claims against Snohomish County. Plaintiff's negligence claim fails because no duty was owed.

I. MOTION TO STRIKE

A. Defendant requests this Court strike exhibits D, I, L-M, O and R.

CR 56 (e) requires "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively the affiant is competent to testify to the matters stated therein." These exhibits are provided without accompanying declarations, personal knowledge, or authentication.

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Additionally, an officer's investigative summary is inadmissible hearsay not qualifying under business records exception. *In re Detention of Coe*, 160 Wn. App 809, 829, 250 P.3d 1056 (2011). The court should strike the layers of hearsay; no exception applies and there has been no showing admissible facts are unavailable. This hearsay evidence should be stricken. ER 801; 802.

B. The Court should strike the opinion testimony of Sue Peters and Dr. Strote, as inadmissible opinion on the issue of duty.

Legal opinions on the ultimate legal issue are not proper via expert testimony. *Terrell C. v State Dep't of Soc. and Health Servs.*, 120 Wn. App, 20, 30-31, 84 P.3d 899 (2004). Expert opinion consisting solely of legal conclusions cannot, by its very nature, create an issue of material fact. *See Orion Corp.*, 103 Wn.2d 441, 461–62, 693 P.2d 1369 (1985).

Peters' opinions about failure to call EMS, failure to recognize a health emergency, and alleged duty to maintain specific CPR training[1] are opinions of alleged duty owed. Peters' opinion invades the legal question the Court decides, and should be stricken.

Dr. Strote's opinion of Pendergrass' obligation to call EMS or recognize a medical condition should similarly stricken.

II. FACTS

Plaintiff's statement of facts is rife with errors, omissions and mischaracterizations. While the misstatements cannot all be countered within allotted limits, selected examples follow.

Plaintiff alleges Pendergrass knew Tribal Police ("TPD") were enroute, and laments failure to gather information or form a "tactical plan." Response, 2. Allegedly supporting this is a dispatcher's note saying "TRIBAL ADV," (no indication of TPD response or Pendergrass'

[1] Plaintiff withdrew negligent training, thus opinions regarding CPR training are irrelevant.

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knowledge), and deposition question/answer disregarding the lack of any communication system allowing Pendergrass to communicate with TPD.

Plaintiff plays games with timing, incorrectly alleging Pendergrass detained Lacy, who "repeatedly expressed" his desire to leave. Response, 2-3. The time Pendergrass spent alone with Mr. Lacy included no detention, and importantly, the dispatch log shows TPD arrived the same minute as Pendergrass. Dreveskracht Dec., Ex. C.

Plaintiff then offers "facts" directly contradicting the body-cam video-recording. Plaintiff falsely states there were "no discussions" about TPD taking lead. On video, Johnsen almost immediately states "we can give him a ride if that's okay with you," and "we can take him if that's cool." Malmstead Dec., Ex. A, Video Transcript, 1; Pendergrass Decl., Exhibit A. Pendergrass acquiesces to TPD's takeover request; "Ok. That's cool." *Id.* Plaintiff also denies discussion of Lacy's behavior, despite Pendergrass telling TPD: Pendergrass "turned the lights on and [Lacy] just b-lined for me." *Id.* Plaintiff suggests Pendergrass failed to discuss Lacy's mental health disclosure, but any such need is belied by video of Lacy telling Johnsen about his mental health history. Malmstead Dec., Ex. A, 3; Pendergrass Decl. Exhibit A.

Describing the struggle, Plaintiff also falsely states Pendergrass tased Lacy in the abdomen. Response, 4. In support, Plaintiff cites to erroneous and inadmissible investigative notes and ignores the Taser download data confirming the Taser was not activated this second time. Tempski Decl. Exhibit B.

Plaintiff misstates Pendergrass' testimony frequently. The most glaring falsehood is Plaintiff's contention, "Mr. Lacy was pinned in this control hold by Pendergrass – '[a]bout a minute, maybe a little bit longer.'" Response, 4. Pendergrass actually testified to 30 seconds of

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a control hold, followed by 20 – 25 seconds of talking to Lacy after he had calmed down and the pressure released. Pendergrass Dep., 67. The minute cited by Plaintiff is the total time "they" - Lacy and TPD – "were on the ground, total." *Id.*

Plaintiff's mischaracterization continues into description of Pendergrass' attempts to save Lacy's life. Ironically, Plaintiff complains "[i]nstead of rendering lifesaving aid," Pendergrass attempted to check if Lacy was conscious, directed TPD to check Lacy's pulse, and searched for CPR equipment. Response, 5. The evidence shows Pendergrass was the only among three trained officers doing anything to save Lacy. Pendergrass asked TPD to begin the CPR process, by checking Lacy's pulse. When he returned, TPD had not started CPR, and Pendergrass stepped in to begin. Casey Decl. Exhibit D, 68-69. Any CPR delay is only attributable to TPD, who had custody and control of Mr. Lacy, and had been asked to check his pulse.

II. REPLY

A. Plaintiff misapprehends the process for determining whether government has negligence liability.

Governments are "liable for damages arising out of their tortious conduct… to the same extent as if they were a private person or corporation." *See* RCW 4.96.010(1); *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012). The test is whether a private person would have negligence liability under the circumstances. *Id.* Plaintiff provided no authority to support a private person could be liable for failing to diagnose a medical emergency and summon aid for a third party.

Plaintiff alleges such duty arose under the common law duty of reasonable care. Response, 12. Under such theory, if defendant affirmatively acts with misfeasance, he cannot create peril or expose Plaintiff to it. *Robb v. City of Seattle*, 176 Wn.2d 427, 437–38, 295 P.3d

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212 (2013). When nonfeasance is alleged, duty arises only if defendant assumed a responsibility to protect plaintiff. *Id.,* at 435. Here, the allegation is upon contacting Lacy, Pendergrass should have diagnosed his condition and summoned aid. This is nonfeasance, like the "failure to remove a risk" in *Robb. Id.,* at 438. Pendergrass made no assumption of Lacy's protection, and had no duty.

The duty to be a reasonable police officer has no basis in common law, thus its basis must lie in statute. *See Munich*, 175 Wn.2d at 878 (citing RCW 36.28.010 as basis for general police duties). Under such circumstances, "a plaintiff must show the duty breached was owed to him or her in particular, and was not the breach of an obligation owed to the public in general." *Id.* Again, "a duty owed to all is a duty owed to none." *Id.*

No case or statute suggests that the limited contact Pendergrass had with Lacy before TPD took over establishes an individualized duty to diagnose a medical emergency. Each case cited deals with established exceptions to the public duty doctrine inapplicable here.

Plaintiff incorrectly argues the legislative intent exemption applies via RCW 9A.16.040. This exception allows a negligence claim when the cited statute "evidences an intent to identify and protect a particular and circumscribed class of persons," and that intent is "clearly expressed." *Boone v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 723, 741-742, 403 P.3d 873 (2017), published with modifications 199 Wn. App. 1049 (2017). Plaintiff argues RCW creates a duty to protect individuals from uses of force. A plain reading of 9A.16.040 demonstrates no language evidencing intent to protect any class of persons except law enforcement. *See, Jimenez v. City of Olympia, Jimenez v. City of Olympia*, No. C09-5363RJB, 2010 WL 3061799, at *15 (W.D.Wash. 2010) ("The language of the statute does not exhibit any legislative intent to identify and protect

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a particular and circumscribed class of persons other than officers"). The legislative exception does not apply. Plaintiff has not argued any other exceptions apply, nor do they.

Acting as a reasonable police officer and diagnosing a medical emergency are not duties owed by private persons and cannot support government liability without surviving the public duty doctrine analysis. Plaintiff's negligence claims fail.

B. Insufficient Causation Evidence

Dr. Omalu's opinions reflect critical unfamiliarity with material facts and should be stricken. *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 575, 719 P.2d 569 (1986) (Experts must base assumptions in fact). These flaws notwithstanding, his opinion remains insufficient to establish Pendergrass proximately caused Lacy's death. In addition to relying on baseless assumptions, Plaintiff references Omalu's testimony about *possible* outcomes. Omalu's factual assumption that the restraint was "sustained" for 3-5 minutes is insufficient. Qualifying "it could have been less" for Lacy is not a factually supported medical opinion, failing the legal standard. The record establishes a 30-second restraint, which Plaintiff's experts acknowledge is insufficient.

Dr. Strote disagrees about whether Pendergrass' restraint of Lacy caused his death, explaining when someone speaks, it proves movement of air through their lungs, and time needed for asphyxia becomes even longer. Page 22. Strote stated "[t]here's no definitive causative evidence to suggest that the kind of prone positions that – and weight – Pendergrass did in this case directly caused his death." Strote Dep., 70. Plaintiff's response includes a list of "causative" evidence, none of which specifically links death to Pendergrass' actions.

C. Intentional tort claims fail.

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Plaintiff attempts to protect her intentional tort claims, arguing she did not need to state a vicarious liability theory when outlining specific claims, and issues of fact save them. Response, 22-24.

Plaintiff argues her "version of the facts" relating to causation "is to be believed," thus a genuine issue of fact exists for battery. As noted, evidence is insufficient to support Plaintiff's cause of death theory. Omalu's inadmissible opinion relied on false assumptions. Strote admitted "[t]here's no definitive causative evidence." Strote Dep., 70. Plaintiff's complaint is prone positioning, but she offers no evidence Pendergrass caused this position. The record shows TPD took Lacy to the ground. Plaintiff offered no evidence regarding other force by Pendergrass.

Plaintiff now alleges her false imprisonment claim is based in Pendergrass' early roadside conversation with Lacy. Lacy was not detained by Pendergrass until after Lacy violently resisted TPD. Had detention been immediate, it would have remained lawful to investigate disorderly conduct. RCW 9A.84.030(1)(c). Plaintiff argues Lacy's mental health condition required immediate care to prevent harm, also creating cause for lawful detention. RCW 71.05.153(3)(a)(ii).

D. Insufficient Evidence of Outrage.

Plaintiff confirms this is not a bystander claim. Outrage requires proof the "emotional distress must be susceptible to medical diagnosis and proved through medical evidence." *Kloepfel v. Bokor*, 149 Wn.2d 192, 196-97, 66 P.3d 630 (2003). Plaintiff offers no such evidence regarding Mr. Lacy's distress.

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DATED this 16th day of July, 2018.

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I certify that this memorandum contains 1,750 words, in compliance with Local Civil Rules.

CERTIFICATE OF SERVICE

I hereby declare I served a true and correct copy of **Defendant's Reply in Support of Motion for Summary Judgment** upon the person listed by the method indicated:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 16th day of July, 2018.

Cindy Ryden, Legal Assistant

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