

The Honorable Karen Donohue
August 13, 2018
Without Oral Argument

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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 MOTION FOR
RECONSIDERATION AND
CLARIFICATION OF THE COURT'S
ORDER ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant Snohomish County respectfully requests the Court to clarify or reconsider its July 24, 2018 letter decision on Snohomish County's motion for summary judgment in the following respects: (1) clarify that the Court has ruled Defendant did not have a legal duty to summon aid for Mr. Lacy; (2) clarify that the Court is only allowing Plaintiff's claims stemming from factual allegations arising after Tulalip Tribal Police officers arrived on scene and assumed control of Mr. Lacy, to proceed; (3) clarify whether the Court is recognizing and allowing to go forward a cause of action for Negligent Use of Excessive Force; (4) clarify the Court's

1 decisions on Defendant's Motions to Strike, and; (5) clarify which legal duties the Court assigns
2 to Deputy Pendergrass.

3 II. EVIDENCE RELIED UPON

4 The County relies on the pleadings, declarations and exhibits submitted in support of
5 and in reply on Defendant's Motion for Summary Judgment, the pleadings and files on record,
6 and the Court's June 24, 2018 letter order on Defendant's Motion for Summary Judgment.
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8 III. AUTHORITY

9 Defendant seeks an order reconsidering the Court's July 24, 2018 letter decision on
10 Defendant's Motion for Summary Judgment, based on CR 59(a).

11 A. CR 59 Provides a Basis to clarify the Court's letter decision.

12 Civil Rule 59(a) provides that any decision or order may be vacated and reconsideration
13 granted when the substantial rights of the parties are materially affected by either:
14

15 (1) Irregularity in the proceedings of the court, jury or adverse party, or
16 any order of the court, or abuse of discretion, by which such party
was prevented from having a fair trial;

17 . . .

18 (7) That there is no evidence or reasonable inference from the evidence
19 to justify the verdict or the decision, or that it is contrary to law.

20 Motions for reconsideration are within the sound discretion of the trial court; a reviewing court
21 will not reverse a trial court's ruling absent a showing of manifest abuse of discretion. *See Pacific*
22 *Industries, Inc. v. Singh*, 120 Wn. App. 1, 86 P.3d 778 (2003); *Perry v. Hamilton*, 51 Wn. App.
23 936, 938, 756 P.2d 150 (1988). Generally, an issue may be raised in a motion
24 for reconsideration when the issue is closely related to an issue previously raised and no new
25 evidence is required. *Anderson v. Farmers Ins. Co.*, 83 Wn. App. 725, 734, 923 P.2d 713 (1996).
26

1 Defendant requests clarification of the Court's letter decision on summary judgment
2 because the order appears to contain irregularities and inconsistencies that leave unclear the
3 current posture of one of more of Plaintiff's claims. Defendant also requests clarification on
4 whether this Court intended to allow a cause of action for Negligent Use of Excessive Force to
5 proceed.

6 **B. Perceived Irregularities and Inconsistencies in the Court's order.**

7
8 1. Defendant requests clarification on the Court's holdings regarding the legal duty
9 allegedly owed by Deputy Pendergrass.

10 The Court has ruled that, as a matter of law, Deputy Pendergrass did not have a duty to
11 call for emergency medical services prior to Tulalip Tribal Police arriving on scene and assuming
12 responsibility for Mr. Lacy. "While Plaintiff is not claiming any violation of a statutory duty, the
13 Court finds that Deputy Pendergrass did not have a duty to call for a medical health team." Letter
14 decision, p. 2, ¶ 4.

15 The Court has also ruled that, to the extent such decision was made during the brief contact
16 with Mr. Lacy before Tulalip Tribal Police took over, Deputy Pendergrass acted reasonably in
17 deciding not to immediately involuntarily commit Mr. Lacy. "The decision to take Mr. Lacy home
18 or to a hospital was completely appropriate under this statutory scheme." Letter decision, p. 2, ¶
19 3.
20

21 Because Deputy Pendergrass did not have a duty to call for emergency medical services
22 during his initial contact with Mr. Lacy, Plaintiff's claim that Deputy Pendergrass was negligent
23 in his failure to summon aid is no longer viable. And because Deputy Pendergrass' actions during
24 his contact with Mr. Lacy before Tulalip Tribal Police assumed control of the scene were
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1 appropriate, no action for negligence may lie against Deputy Pendergrass based on his initial
2 contact with Mr. Lacy.

3 As the Court has found the decision to transport Mr. Lacy to his home rather than to a
4 hospital for an involuntary treatment evaluation, and thus to place him in custody in order to affect
5 his transport, was a lawful exercise of discretion, confusion arises with the Court's statement that
6 "No finding is being entered with regard to any claim of negligence or common law duty to act."
7 Defendant requests the Court confirm that the holding of the Court is that Deputy Pendergrass
8 did not owe or violate any duty to Plaintiff based on Deputy Pendergrass' initial contact and
9 interaction with Mr. Lacy prior to the arrival of Tulalip Tribal Police officers.
10

11 2. Is the Court recognizing a claim of Negligent Use of Excessive Force in the State of
12 Washington?

13 Plaintiff's Complaint alleges that Deputy Pendergrass engaged in the negligent use of
14 excessive force and presumptively will ask the trier of fact to consider such a claim. Defendant
15 requests the Court confirm whether or not the Court is recognizing and allowing a claim of
16 Negligent Use of Excessive Force to go forward in this case.
17

18 The Court also denies the motion for summary judgment on the negligence
19 claim.....The Court is not making a specific finding at this time as to a "totality
20 of the circumstances standard, but finds that it is appropriate for Plaintiff to plead
alternative theories."

21 Letter decision, p. 2, ¶ 5.

22 The Court also declined to adopt the "totality of circumstances" test from California tort
23 jurisprudence, advocated by Plaintiff in support of the Negligent Use of Excessive Force claim.
24 Except to the extent it generally denies summary judgment on Plaintiff's Negligence claims, the
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1 Court's ruling does not address Defendant's motion with regard to the Negligent Use of Excessive
2 Force claim raised separately in Plaintiff's Complaint.

3 Despite pleading it as a separate claim in the Complaint, Plaintiff indicated in her
4 pleadings that Negligent Use of Excessive Force claim collapses into her general Negligence
5 claim. Defendant seeks clarification regarding whether the Court holds Plaintiff to that position.
6

7 Per Defendant's understanding, the Court's letter decision permits Plaintiff to pursue a
8 general negligence claim, and perhaps a Negligent Use of Excessive Force claim, based Deputy
9 Pendergrass' restraint of Mr. Lacy, after Mr. Lacy launched out of the Tulalip Tribal Police
10 Department patrol car. The legality of an officer's restraint of a resistive individual is generally
11 not evaluated under a negligence standard.

12 Defendant requests clarification regarding the standard under which the fact-finder will
13 be asked to evaluate these acts, and whether the Court is permitting Plaintiff to present evidence
14 of a new Negligent Use of Force tort, not previously recognized in Washington, as a separate
15 claim.
16

17 3. The Court's decision to deny summary judgment on the claim of Unlawful
18 Imprisonment appears inconsistent with the Court's holding that the officers acted
19 appropriately in the decision to take Mr. Lacy to the hospital or home.

20 The Court's decision, on page 2, states:

21 RCW 71.05.153 provides law enforcement officers with the discretion to take
22 an individual into custody and deliver him or her to a triage facility, crisis
23 stabilization unit, evaluation and treatment facility, treatment program or an
24 emergency department of a hospital if the officer has reasonable cause to
25 believe that the individual is suffering from a mental disorder or substance use
26 disorder and the individual presents an imminent likelihood of serious harm or
27 is imminent danger because of being gravely disabled. The decision to take
Mr. Lacy home or to a hospital was completely appropriate under this statutory
scheme.

1 The Court's decision also denied summary judgment on Plaintiff's False Imprisonment,
2 citing a genuine issue of material facts. However, it appears contradictory to hold that the officers
3 decision to take custody of Mr. Lacy for the purpose of taking him to the hospital or home was
4 completely appropriate under the statutory scheme and thereby lawful, and then to find that
5 material facts exists precluding summary judgment on the false imprisonment claim.
6

7 "[T]he existence of probable cause is a complete defense," to false imprisonment.
8 *McBride v. Walla Walla Cty.*, 95 Wn. App. 33, 38, 975 P.2d 1029, 1032 (1999), as amended, 990
9 P.2d 967 (1999) (citing *Hanson v. City of Snohomish*, 121 Wn.2d 552, 563-64, 852 P.2d 295
10 (1993); *Fondren v. Klickitat County*, 79 Wn. App. 850, 856, 905 P.2d 928 (1995)).
11

12 Deputy Pendergrass had lawful authority to detain Mr. Lacy under RCW 71.05.153 (just
13 one among other sources of lawful detention in this matter) and the Court's decision seems to
14 confirm this. This authority arose very early in the contact, and did not dissipate. Such lawful
15 authority existing, any restraint of Mr. Lacy could not constitute false imprisonment.
16

17 Deputy Pendergrass did not handcuff Mr. Lacy, and Mr. Lacy was never placed in a
18 County vehicle. Indeed, Deputy Pendergrass did not actually become involved in any restraint of
19 Mr. Lacy until after he had jumped from the Tulalip Police vehicle and was already fighting with
20 the Tribal Officers. At that time, in addition to the lawful authority under RCW 71.05.153
21 already discussed, there existed probable cause to detain Mr. Lacy for numerous crimes
22 including, among others: Disorderly Conduct, RCW 9A.84.030, Assault in the Third Degree,
23 RCW 9A.36.031, and Obstructing, RCW 9A.76.020.
24

25 Courts review a police officer's determination of probable cause as a mixed question of
26 law and fact. *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 846, 43 P.3d 43 (2002).
27

1 In this case, for purposes of the Court's decision on probable cause as a defense to false
2 imprisonment, Mr. Lacy's actions are not in dispute, and Mr. Lacy's actions met the standard of
3 probable cause.

4 If the Court is allowing the false imprisonment claim to go forward based on Deputy
5 Pendergrass' restraint of Mr. Lacy after he launched himself out of the car, struck Sergeant
6 Johnson and caused Sergeant's body camera to be taken out of commission, Defendant asks the
7 Court to indicate specifically that this is the basis for the claim of false imprisonment against
8 Deputy Pendergrass.
9

10 There is no issue of fact regarding probable cause (a complete defense to the claim of
11 false imprisonment) at any point in the contact. The Court's decision appears inconsistent and
12 contradictory on this issue and Defendant requests the court reconsider and clarify this decision.
13

14 4. Defendant Seeks Clarification of the Court's order on Defendant's Motions to Strike.

15 Defendant moved to strike unauthenticated and improper materials Plaintiff submitted in
16 support of her response. During argument, the Court struck Exhibits D, I, L, M and R to the
17 Declaration of Ryan Dreveskracht, in support of Plaintiff's Response, as unauthenticated and
18 inadmissible. During oral argument, the Court seemed to indicate it would rule on Defendant's
19 motion to strike the improper opinions of Dr. Strote and Ms. Peters' on the dispositive legal
20 question of what duty is owed as part of the Summary Judgment decision. However, the court's
21 letter decision was silent on this issue. Defendant is requesting the Court clarify whether the Court
22 struck the opinions of Ms. Peters and Dr. Strote on questions of legal duty.
23

24 Further, given the Court's decision to strike the aforementioned exhibits to Plaintiff's
25 response, and the lack of clarity regarding the legal standards being applied in this unrecognized
26

1 area of law, it remains uncertain what facts have survived summary judgment. Defendant seeks
2 the Court's indulgence, and requests clarification regarding which issues of fact precluded
3 summary judgment. Such clarification would be helpful in narrowing the issues on which the
4 Parties will need to prepare for trial.

5 5. Remaining Questions Regarding Public Duty Doctrine and Common Law Duties.

6 The Court's decision cites to *Munich v. Skagit County* in support of its holding that
7 because Plaintiff claims she is not alleging a violation of a statutory duty, the Public Duty
8 Doctrine does not apply. *See*, 175 Wn.2d 871, 288 P.3d 328 (2012). The holding of *Munich* and
9 Justice Chambers concurrence in that case, did not limit the Public Duty Doctrine only to cases
10 in which Plaintiff alleges violation of a statutory duty. What Justice Chambers' concurrence says
11 is that the Public Duty Doctrine applies to cases in which the municipality acts according to a
12 statute. As in both *Munich* and this case, the Sheriff acts according to RCW 36.28.010, a statute
13 allowing County Sheriffs to act for the general public, to protect public safety. The *Munich*
14 decision was evaluating the "special relationship" exception to the Public Duty Doctrine. Plaintiff
15 did not establish any exception to the Public Duty Doctrine in this case.
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18 Additionally, if the Court is unpersuaded about the application of the Public Duty
19 Doctrine, Plaintiff still has the burden to establish a legal duty applies.¹ Plaintiff has not met that
20 burden. Plaintiff alleges Snohomish County's duty arises under the common law duty of
21 reasonable care. Under such theory, if defendant affirmatively acts with misfeasance, he cannot
22 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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25
26 ¹ The duty alleged by Plaintiff, "to act as a reasonable police officer," confirms the source of the duty cannot be a
27 common law duty applicable to all persons. Ordinary lay persons cannot have a duty to act as reasonable police
officers, as such police powers arise from statutes, like RCW 36.28.010.

1 212 (2013). When nonfeasance is alleged, duty arises only if defendant assumed a responsibility
2 to protect plaintiff. *Id.*, at 435. Deputy Pendergrass made no assumption of Mr. Lacy’s
3 protection, and had no duty to protect him. Up to the point when Deputy Pendergrass assisted the
4 Tulalip Officers when Mr. Lacy attacked them, all that has been alleged is nonfeasance, like the
5 “failure to remove a risk” in *Robb. Id.*, at 438. Regardless of whether evaluated under the common
6 law general duty of a reasonable person, or the Public Duty Doctrine triggering “duty to act as a
7 reasonable police officer,” Deputy Pendergrass had no duty to Mr. Lacy, particularly not before
8 Tulalip took over.
9

10 Defendant respectfully requests the Court reconsider its decision on whether Deputy
11 Pendergrass owed a general duty. If the Court holds the Public Duty Doctrine inapplicable,
12 Defendant requests clarification regarding which specific legal duties the Court finds were owed
13 by Deputy Pendergrass, at which point they were owed, and their source.
14

15 IV. CONCLUSION

16 For the foregoing reasons, Defendant Snohomish County respectfully requests the Court
17 to clarify or reconsider its July 24, 2018 letter decision on Snohomish County’s motion for
18 summary judgment in the respects outlined above.
19

20 DATED this 3rd day of August, 2018.

21 MARK K. ROE
22 Snohomish County Prosecuting Attorney

23 s/ Bridget Casey

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I certify that this memorandum contains 2423 words, in compliance with the Local Civil Rules

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CERTIFICATE OF SERVICE

I hereby declare I served a true and correct copy of the foregoing **Defendant's Motion for Reconsideration** upon the person/persons listed by the method(s) 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 3rd day of August, 2018.


Teresa Kranz, Legal Assistant