THE HONORABLE KAREN DONOHUE
AUGUST 13, 2018
WITHOUT ORAL ARGUMENT

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 SEA **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE COURT'S ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Motions for reconsideration are governed by CR 59. Defendants have set forth no evidence of any determination by this Court that has materially affected their substantial rights. CR 59(a). This Court has correctly denied, in part, Defendant's Motion for Summary Judgment. A second bite at the apple is not warranted and should be rejected.

II. RELIEF REQUESTED

Defendant's Motion For Reconsideration And Clarification Of The Court's Order On Defendant's Motion For Summary Judgment should be DENIED.

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III. STATEMENT OF ISSUES

Should this Court grant Defendant's Motion For Reconsideration And Clarification Of The Court's Order On Defendant's Motion For Summary Judgment? No.

IV. EVIDENCE RELIED UPON

Plaintiff relies on the pleadings, declarations, and exhibits submitted in support of Plaintiff's Response in Opposition to Defendant's Summary Judgment Motion and the pleadings and paper on record.

V. LAW AND ARGUMENT

A. APPLICABLE STANDARDS

1. Motion For Clarification

"No civil rule authorizes or addresses a motion for clarification." *Swenson v. Weeks*, 180 Wn.. App. 1024 (2014). Trial courts will nonetheless allow a request for clarification in order to define the rights which have already been given. *Rivard v. Rivard,* 75 Wn.2d 415, 418, 451 P.2d 677 (1969). As described in *Kemmer v. Keiski*,

> [A]n order "clarifying" a judgment explains or refines rights already given. It neither grants new rights nor extends old ones. Unlike a modification, amendment, or alteration, which must be accomplished under CR 59, CR 60, or some other exception to preclusion, a "clarification" can be accomplished at any time.

116 Wn. App. 924, 933, 68 P.3d 1138 (2003); *see also Clapp v. Blatter*, 86 Wn.. App. 1027 (1997) (a "motion to clarify . . . is not a motion for reconsideration"); *In re Marriage of Sushak & Beasley*, 168 Wn. App. 1010 (2012) ("A 'clarification' . . . is merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary.") (quotation omitted).

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2. Motion For Reconsideration

Civil Rule 59 governs motions for reconsideration, and provides eight limited circumstances under which a motion for reconsideration may be granted. CR 59(a). The grant or denial of a motion for reconsideration is within the discretion of the trial court and is subject to the "abuse of discretion" standard. *Lilly v. Lynch*, 88 Wn. App. 306, 321, 945 P.2d 727 (1997); *Schultz v. Werelius*, 60 Wn. App. 450, 454-55, 803 P.2d 1334 (1991). A trial court abuses its discretion if its decision is manifestly unreasonable or rests upon untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A motion for reconsideration "does not provide litigants with an opportunity for a second bite at the apple" and does "not permit parties to merely re-argue issues already addressed." 14A Wash. Prac., Civil Procedure § 22:25 (2d ed.) (citation omitted); *see also Anderson v. Farmers Ins. Co. of Washington*, 83 Wn. App. 725 (1996) (same).

Here, Defendant claims that it has been aggrieved due to: (1) an "[i]rregularity in . . . an[] order of the court," and (2) an order not supported by "evidence or reasonable inference from the evidence to justify . . . the decision, or that it is contrary to law."[1] For reasons discussed immediately below, Defendant's Motion must fail.

B. ARGUMENT

Defendant asks this Court to revisit the evidence and review issues already litigated. This Court exercised an abundance of diligence in considering the Defendant's motion for summary judgment, taking the briefing and arguments under advisement and setting over its ruling to carefully consider the summary judgment record. Defendant was allowed to put its best foot

[1] Def. Mot. Recons., at 2 (citing CR 59(a)(1), (7)). Arguably, this Court's letter ruling is not even subject to reconsideration. *Matter of Marriage of Peterson*, No. 75498-0-1, 3 Wn. App. 1011, 2018 WL 1719487, at *8 (Wash. Ct. App. Apr. 9, 2018).

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forward and designate any evidence or legal theory that warranted summary judgment, and was unable to do so. Defendant's second bite at the apple should be denied.

1. Even Had Defendant Brought A Proper Motion, Clarification Is Not Warranted.

Defendant has not sought a motion to clarify. It has instead sought only "an order reconsidering the Court's July 24, 2018 letter decision on Defendant's Motion for Summary Judgment, based on CR 59(a)."[2] Defendant acknowledges, in other words, that although the term "clarification" is used in the title of its motion, it is in fact seeking substantial and significant modification of this Court's letter ruling. This is not allowed.

At any rate, Defendant appears to be confused by this Court's straightforward letter ruling. As should be crystal clear at this point, Plaintiff is not asserting a violation of a statutory duty. And, as this Court acknowledged, nor would it be appropriate to do so. The only possibly applicable statute, RCW 71.05.153, instructs peace officers to take persons into custody when they have "reasonable cause to believe that such person is suffering from a mental disorder or substance use disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled." RCW § 71.05.153(3)(a)(ii). Notably, this emergency detention procedure has been legislatively omitted from judicial review. *In re Det. of June Johnson*, 179 Wn.. App. 579, 587, 322 P.3d 22 (2014). Thus, this Court's finding that Deputy Pendergrass had no *statutory* "duty to call for a medical health team" should come as no surprise.[3] As this Court clearly stated in the ensuing sentence, observance with this *statutory duty* has no bearing on "any claim of negligence or *common law duty* to act."[4]

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[2] Def. Mot. Recons., at 2.
[3] Letter Ruling, at 2; *see also* Def. Mot. Recons., at 6 ("[T]he officers decision to take custody of Mr. Lacy . . . was completely appropriate under the *statutory* scheme . . . .") (emphasis added).
[4] Letter Ruling, at 2 (emphasis added).

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As detailed below, Defendant's need for "clarification" stems entirely from this misunderstanding of this Court's letter ruling, and should be denied.

a. Defendant's "Remaining Questions"

A primer on Washington negligence law may shed light on the issues that Defendant seeks "clarification" on, as well as Defendant's "questions regarding [the] public duty doctrine and common law duties."[5] As made clear by this Court's letter ruling and discussion of *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 288 P.3d 328 (2012), the existence of a duty "does not depend on legislation." *Whaley v. State, Dep't of Soc. & Health Servs.*, 90 Wn. App. 658, 672, 956 P.2d 1100 (1998). Instead, every individual possesses a duty to "conform to a certain standard of conduct" that does not subject *anyone* to "unreasonable risks." *Daly v. Lynch*, 24 Wn. App. 69, 76, 600 P.2d 592 (1979) (quotation omitted). And, as a general rule, this duty *owed to everyone* requires a defendant to exercise the "degree of care which . . . a reasonable person of ordinary prudence would have exercised in the defendant's place in the same or similar circumstances." *Gates v. Jensen*, 92 Wn. 2d 246, 255, 595 P.2d 919 (1979).

Rules that make a common law duty more predictable in certain situations have, of course, developed over time. Statutes and government regulations intended to prevent injury are just one source of duty. RESTATEMENT (SECOND) OF TORTS, §§ 285(a), 286, 288, 288A (1965). Judicial precedent in a specific field is another source. *Id*. at. §§ 285(d), 328B(b). Another source is "standard industry practice." *Kill v. City of Seattle*, 183 Wn. App. 1008 (2014) (citing RESTATEMENT (SECOND) OF TORTS § 295A; *Helling v. Carey*, 83 Wn.2d 514, 518-19, 519 P.2d 981 (1974)). Finally, specially trained persons, including law enforcement officers, owe a common law "duty to exercise that degree of skill and knowledge normally possessed by members of their

[5] Def. Mot. Recons., at 8.

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profession." *Whaley*, 90 Wn. App. at 672 (citing RESTATEMENT (SECOND) OF TORTS, § 299A (1965)); *see also Cook, Flanagan & Berst v. Clausing*, 73 Wn. 2d 393, 395, 438 P.2d 865 (1968) ("Professional men in general, and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a [s]tandard minimum of special knowledge and ability.") (quotation omitted); *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn. 2d 545, 553, 192 P.3d 886 (2008) ("To meet its duty a municipality must exercise 'that care which an ordinarily reasonable person would exercise under the same or similar circumstances.'") (quoting *Berglund v. Spokane County*, 4 Wn.2d 309, 315, 103 P.2d 355 (1940)); *Young Han v. City of Folsom*, 695 F. App'x 197, 199 (9th Cir. 2017) ("[P]eace officers have a duty to act reasonably . . . . In assessing the standard of care, it is universally accepted that the standard of care in a particular industry may be established by its practitioners.") (quotation omitted); *Duran v. City of Maywood*, 221 F.3d 1127, 1132 (9th Cir. 2000) ("Ordinary or reasonable care is that care which law enforcement officers of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence."); *Doe v. Scott*, 221 Va. 997, 1000, 277 S.E.2d 159 (1981) ("The standard applicable to a police officer . . . is the same degree of care a reasonably prudent policeman would exercise under similar circumstances.").

Plaintiff does not deny that Defendant owes a statutory duty to a certain class of citizens under RCW 71.05.153, to the public in general under RCW 36.28.010,[6] and possibly to other individuals under other applicable statutes and regulations. But this is just one source of Defendant's duty—one that, again, Plaintiff does not allege was violated. Instead, Plaintiff asserts that Deputy Pendergrass had a duty "to exercise that degree of skill and knowledge normally possessed by members of [his] profession." *Whaley*, 90 Wn. App. at 672. And Plaintiff has adduced

[6] *Id.* at 8.

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testimony from experts familiar with Deputy Pendergrass' profession that Deputy Pendergrass' decision to approach and detain Mr. Lacy in a manner that precipitated/created a situation that put Mr. Lacy's life in jeopardy was not how a reasonably prudent officer would act under similar circumstances.[7]

To illuminate for Defendant "which specific legal duties . . . were owed by Deputy Pendergrass, at which point they were owed, and their source,"[8] Plaintiff responds as follows: Deputy Pendergrass owed Mr. Lacy a duty to act with reasonable care, at all times that Mr. Lacy was in Deputy Pendergrass' care, pursuant to well-established Washington common law.

b. *Common Law Duty To Respond With A Request For Emergency Medical Services*

Defendant urges this Court to materially modify its letter ruling to conclude "that Deputy Pendergrass did not owe or violate any duty to Plaintiff based on Deputy Pendergrass' initial contact and interaction with Mr. Lacy."[9] Again, this Court's conclusion that Deputy Pendergrass did not owe or violate a *statutory* duty is not to say that "Deputy Pendergrass did not owe or violate *any* duty."[10]

Deputy Pendergrass owed Mr. Lacy a duty to act with reasonable care, at *all times* that Mr. Lacy was in Deputy Pendergrass' care—including before and after Tulalip Tribal Police were present.[11] Plaintiff has adduced expert evidence that a reasonably prudent officer under similar circumstances would have recognized that Mr. Lacy was "exhibit[ing] signs and symptoms of a

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[7] *See generally* Pl.'s Resp. Opp'n Def.'s Mot. Summ. J., at 13 (citing evidence and authority).
[8] Def. Mot. Recons., at 9.
[9] *Id.* at 4.
[10] *Id.* (emphasis added).
[11] Defendant's continued assertion that Deputy Pendergrass' duty to Mr. Lacy somehow vanished when the Tulalip Tribal Police arrived on the scene finds no place in law or fact. *See generally* Decl. Ryan D. Dreveskracht Supp. Pl.'s Resp. Opp'n Def.'s Mot. Summ. J. ("Dreveskracht Decl."), Ex. J.

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person in need of immediate emergency medical services" while under Deputy Pendergrass' care, and that Deputy Pendergrass was therefore required to "immediately call[ed] for emergency medical services."[12] That Deputy Pendergrass did not violate a *statutory duty* imposed by RCW 71.05.153 does not negate his *common law* duty to act with reasonable care. No "clarification" is necessary.

c. *Negligent Use Of Excessive Force*

Defendant is correct that Plaintiff's Negligent Use of Excessive Force claim is "a general negligence claim."[13] It was pled as a separate claim, though, because it asks the jury to find that the preshooting circumstances created by Deputy Pendergrass rendered what might have otherwise been a reasonable use of deadly force unreasonable, in that Deputy Pendergrass himself, through his own negligence, created any perceived need to use deadly force. There is nothing novel about this theory of liability. *See, e.g., Hayes v. Cty. of San Diego*, 57 Cal. 4th 622, 638, 305 P.3d 252 (2013); *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). Defendant's only argument against evaluating Deputy Pendergrass' use of deadly force under this rubric is a blind assertion that it "is generally not" done.[14] But this is a contention without substance.

[12] Dreveskracht Decl., Ex. O, at 8; *see also id.*, Ex. B, at 117, 124-25 (Deputy Pendergrass admitting that the applicable standard of care requires officers to "immediately call for an EMT" when encountering a subject "probably exhibiting signs of excited delirium"); *id.*, Ex. N ("More likely than not, had a decision to call for EMS assistance been made soon after encountering Mr. Lacy and identifying his condition, he would not have died.").

[13] Def. Mot. Recons., at 5.

[14] *Id.*

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d. Unlawful Imprisonment

Defendant argues for the first time on reconsideration that this Court's denial of summary judgment on Plaintiff's unlawful imprisonment claim was improper because "Deputy Pendergrass had lawful authority to detain Mr. Lacy under RCW 71.05.153" and "the existence of probable cause is a complete defense to false imprisonment."[15] This is precisely the type of "second bite at the apple" that is not allowed on reconsideration. *In re Marriage of Bracken*, 157 Wn. App. 1070 (2010).

At any rate, Defendant conflates the issues. In order to lawfully take a person into custody under RCW § 71.05.153(3)(a)(ii), a peace officer must have "reasonable cause to believe that such person is suffering from a mental disorder or substance use disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled." Here, this Court found that such "reasonable cause" existed.[16] *Reasonable cause* is not, however, *probable cause*—a peace officer can meet the "lower standard, reasonable cause," without meeting the higher "probable cause" standard. *State v. Fisher*, 145 Wn. 2d 209, 227, 35 P.3d 366 (2001). This Court did not find, as Defendant misrepresents, that "Mr. Lacy's actions met the standard of probable cause."[17] It follows, then, that Defendant is not entitled to the "complete defense" that such a finding might otherwise warrant.[18]

e. Motion To Strike

At oral argument, Defendant moved to strike the expert reports of Dr. Jared Strote and Susan M. Peters, arguing that they are "improper" because they opine on "the dispositive legal question

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[15] *Id.* at 6 (quotation omitted).
[16] Letter Ruling, at 2.
[17] Def. Mot. Recons., at 7; *cf.* Letter Ruling, at 2.
[18] Def. Mot. Recons., at 6 (citing cases).

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of what duty is owed."[19] Now, on reconsideration, Defendant asks this Court to "clarify whether the Court struck the opinions of Ms. Peters and Dr. Strote on questions of legal duty."[20]

Obviously, this Court did not strike these opinions, nor had it any reason to. As discussed above, Defendant had a common law duty to act with reasonable care. This duty is well established. Experts are often necessary, however, to describe the "degree of care a reasonably prudent policeman would exercise under similar circumstances." *Doe*, 221 Va. at 1000. In fact, standard of care experts are often *required* in these circumstances. *See, e.g., D.C. v. Davis*, 386 A.2d 1195, 1200 (D.C. 1978). "Clarification" is unnecessary.

2. There Is No "Irregularity" In This Court's Letter Ruling.

"Irregularities" within the reach of CR 59(a)(1) concern departures from prescribed rules or regulations and involve procedural defects unrelated to the merits, as opposed to errors of law within the reach of CR 59(a)(7). The difference between the two standards is well established:

> [A]n error of law is committed when the court, either upon motion of one of the parties or upon its own motion, makes some erroneous order or ruling on some question of law which is properly before it and within its jurisdiction to make. . . . An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit or doing it in an unseasonable time or improper manner."

In re Ellern, 23 Wn. 2d 219, 222, 160 P.2d 639 (1945).

Here, Defendant does not cite a single prescribed rule or regulation that this Court has failed to adhere to. *Cf. Teter v. Deck*, 174 Wn. 2d 207, 223, 274 P.3d 336 (2012) (failure to adhere to evidence rules). Instead, Defendant solicits this Court to revisit its decisions on the merits of

[19] *Id.* at 7.
[20] *Id.*

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Plaintiff's claims, under the guise of a "clarification" request.[21] As discussed above, this is not allowed under CR 60(b)(1). Defendant's appeal to CR 60(b)(1) should be denied.

3. This Court's Letter Ruling Is Not Contrary To Law.

"A conclusion is contrary to law when the application of valid factual findings results in a holding inconsistent with a proper construction of the governing law." *Lewis v. City of Medina*, 13 Wn. App. 501, 504, 535 P.2d 150 (1975). Here, as discussed above, the Defendant has requested "clarification" on five issues identified in this Court's letter ruling, and has not identified any reason for reconsideration under CR 60(b)(7).[22] To the extent Defendant's requests for "clarification" may be construed as assignments of error, Defendant is mistaken, as discussed above. Defendant's appeal to CR 60(b)(7) should be denied.

V. CONCLUSION

A Proposed Order denying Defendant's Motion accompanies this Response.

Dated this 9th day of August, 2018.

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s/ Ryan D. Dreveskracht
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I certify that this memorandum contains 3,023 words, in compliance with the Local Civil Rules.

[21] *Id.* at 3-9.
[22] *Id.*

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CERTIFICATE OF SERVICE

I, Wendy Foster, 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 August 9, 2018, I emailed the foregoing documents to the following:

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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 August, 2018.

Wendy Foster

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