The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HAZEN SHOPBELL, et al., Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE, et al., Defendants.	NO. 2:18-cv-1758-BJR DEFENDANTS' REPLY IN SUPPORT OF ITS SECOND MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: November 13, 2020

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I. REPLY

There are four claims that remain against any Defendants in this matter: false arrest by Defendants Jaros, Myers, and Vincent under § 1983; civil conspiracy under §§ 1983 and 1985, which was apparently carried out by former Defendants Willette, Cenci, and Golden; Negligent training against Washington Department of Fish and Wildlife (WDFW), and general negligence against, apparently, former Defendant Willette. All four of these remaining claims must be dismissed because they are unsupported as a matter of law and because Plaintiffs have failed to demonstrate any genuine issues of material fact as to any of them. Moreover, the existence of probable cause to arrest and for the issuance of the search warrants leading to the arrests, requires dismissal of all claims against all remaining Defendants.

II. ARGUMENT

A. Plaintiffs Have Failed to Demonstrate the Absence of Probable Cause to Arrest the Plaintiffs

The state of mind of the arresting officers cannot invalidate an arrest supported by probable cause. That is, if the objective facts demonstrate the existence of probable cause, whether the arresting officer believed he or she had probable cause, is not dispositive. The Supreme Court described this standard far better than counsel for Defendants ever could:

> Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, " 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' " "[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."

Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (internal citations omitted).

Applied here, the depth of knowledge possessed by Defendants Jaros, Myers, or Vincent—or remembered by them at the time of their depositions—about the facts described in the search warrants, the affidavits supporting those warrants, or Detective Willette's other

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investigative materials, is not what gave these Defendants the probable cause to arrest Plaintiffs. Rather, it is the objective facts contained in the warrants, the affidavits supporting them, and the investigative materials—the objective facts—that establish the probable cause necessary to justify these arrests. And the existence of probable cause is a complete defense to Plaintiffs' false arrest claims. In order to prevail on a Section 1983 "False Arrest" claim, Plaintiff must "demonstrate that there was no probable cause to arrest him." *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998); *see Picray v. Sealock*, 138 F.3d 767, 770 (9th Cir. 1998).

Plaintiffs' police practices expert opines there was no probable cause and, if there were, Defendants should have first obtained "arrest warrants." Dkt. # 95-32 at p. 7. However, Plaintiffs' witness fails to demonstrate he possesses any education, training, or experience relating to police practices or standards in the State of Washington and his opinions should be stricken and disregarded for that reason alone. Moreover, Plaintiffs' witness fails to provide any analysis of the facts relating to Detective Willette's investigation and its associated warrants—all of which were reviewed and approved by judges—and why those warrants fail to establish objective probable cause. To the contrary, all of those materials which were the products of an intensive months-long investigation, established sufficient probable cause for the arrests. *See* Preliminary Report of Chris M. Nielsen (Nielsen Report), Ex. A to the Declaration of Eric A. Mentzer in Support of Reply (Mentzer Decl.) at pp. 22-23; Dkt. # 74 at pp. 4-5, 14-18.

Again, probable cause is a "practical, nontechnical conception." It exists when officers have "reasonably trustworthy information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense." *United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1296 (9th Cir. 1988); *see Beck v. State of Ohio*, 379 U.S. 89, 91 (1964) (same); RCW 10.31.100. At the core of this analysis is the rejection of "rigid legal rules" in favor of a "common sense" perspective that is "practical [and] nontechnical." *Illinois v. Gates*, 462 U.S. 213, 232, 235-236 (1983). "[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Id.* at 235. "Requiring more

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would unduly hamper law enforcement." *Beck*, 379 U.S. at 91, 85 S. Ct. at 226.

At the time of Plaintiffs' arrests there existed sufficient probable cause to believe Plaintiffs had committed violations of Title 77 RCW. RCW 10.31.100 allows for warrantless arrests in such circumstances: "A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant." And "[t]he usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony []." *United States v. Watson*, 423 U.S. 411, 417 (1976) (citing *Carroll v. United States*, 267 U.S. 132, 156 (1925)). "The necessary inquiry, therefore, was not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the arrest." *Watson*, 423 U.S. at 417. Washington law and the United States constitution allowed for the Plaintiffs' warrantless arrest because that arrest was supported by the probable cause outlined in Detective Willette's warrants and the corresponding affidavits. *See* Nielsen Report (Mentzer Decl., Ex. A), pp. 22-25. Plaintiffs' claims against Defendants Jaros, Myers, and Vincent should be dismissed.

B. Defendants Jaros, Myers, and Vincent Are Entitled to Qualified Immunity

"As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). An officer is entitled to qualified immunity on a false arrest claim "if it was objectively reasonable for him *to believe* that he had probable cause." *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1078 (9th Cir. 2011). "[T]he question in determining whether qualified immunity applies is whether all reasonable officers would agree that there was no probable cause in this instance." *Id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 739, 131 S. Ct. 2074, 2083 (2011)). "The qualified immunity test gives 'deference to the judgment of *reasonable* officer on the scene.' " *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009).

This Court has previously laid out the many facts that supported the probable cause for the issuance of the warrants upon which Defendants Jaros, Myers, and Vincent relied in determining they had probable cause to arrest. See Dkt. # 74 at pp. 4-5, 14-18. Several different

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state superior court judges agreed when they issued the several warrants connected with the investigation here. Nielsen Report (Mentzer Decl., Ex. A), pp. 16-19. Additionally, every one of the originally-named defendants also believed there existed probable cause in this case. Dkt. # 31 at pp. 1-2; Dkt. # 32 at p. 2; Dkt. # 33 at p. 2; Dkt. # 34 at p. 2; Dkt. # 35 at p. 2; Dkt. # 36 at pp. 1-2; Dkt. # 37 at pp. 1-2; Dkt. # 38 at pp. 1-2; Dkt. # 39 at pp. 1-2; Dkt. # 43 at p. 2; Dkt. # 44 at pp. 2-5, 7. Clearly any reasonable officer under the same circumstances would believe he or she had at least arguable probable cause, not only because Defendants' expert says so (Nielsen Report (Mentzer Decl., Ex. A), pp. 23-24), but because the objective facts support such a conclusion. Defendants Jaros, Myers, and Vincent are entitled to qualified immunity and Plaintiffs' claims against them should be dismissed.

C. Plaintiffs Cannot Establish the Existence of a Civil Conspiracy

In order to establish a civil conspiracy under § 1985(3), Plaintiffs must prove: (1) the existence of a conspiracy to deprive plaintiff of the equal protection of the laws; (2) an act in furtherance of the conspiracy; and (3) a resulting injury. *Addisu v. Fred Meyer, Inc*., 198 F.3d 1130, 1141 (9th Cir. 2000). In order for the conspiracy to exist here "[t]he defendants must have, 'by some concerted action, intend[ed] to accomplish some unlawful objective for the purpose of harming another which results in damage.' " *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1301 (9th Cir. 1999) (quoting *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999)). "While it is not necessary to prove that each participant in a conspiracy know the exact parameters of the plan, they must at least share the general conspiratorial objective." *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983).

In order for their § 1983 claim to survive summary judgment, Plaintiffs must present " 'concrete evidence' of an agreement or 'meeting of the minds' " between former defendants Willette, Cenci, and Golden to violate Plaintiffs' rights. *See Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 782 (9th Cir. 2001) (quoting *United Steelworkers of Am. v. Phelps Dodge Corp*., 865 F.2d 1539, 1540-41, 1543 (9th Cir. 1989)). However, all Plaintiffs have offered in support of their conspiracy theory is that former Defendants Cenci and Golden allowed Detective

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Willette to continue her investigation of Plaintiffs' activities. *See* Dkt. # 94 at pp. 17-18, 22. But Plaintiffs offer no facts tending to demonstrate *any* WDFW employee intended to violate *any* of Plaintiffs' rights or that there was a meeting of the minds to do so. To be sure there is no proof of a conspiracy, Plaintiffs themselves argue Detective Willette "is blind to her bias." *Id.* at p. 17. If Detective is "blind to her bias" she cannot have formed the requisite intent to violate Plaintiffs' rights as Plaintiffs have alleged. There is no evidence to support a conspiracy and this claim must be dismissed.

D. WDFW Was Not Negligent in Training Its Officers

It cannot be disputed that the existence of a duty is an issue of law that must be determined by the court. *Hutchins v. 1001 Fourth Ave. Assocs*., 116 Wash.2d 217, 220, 802 P.2d 1360 (1991). It also cannot be disputed that the Plaintiffs bear the burden of establishing the existence of a duty, a subsequent breach, proximate cause, and damages. *Patrick v. Sferra*, 70 Wash. App. 676, 683-684, 855 P.2d 320 (1993). It is the Plaintiffs' burden to demonstrate that their cause of action is securely rooted and recognized in the common law or by statutory creation. "A duty can arise either from common law principles or from a statute or regulation." *Murphy v. State*, 115 Wash. App. 297, 305, 62 P.3d 533 (2003); *Doss v. ITT Rayonier, Inc*., 60 Wash. App. 125, 129, 803 P.2d 4 (1991). Even assuming Defendant WDFW somehow owed Plaintiffs themselves, not the general public, a duty to train WDFW officers, there is no credible evidence Defendant WDFW breached that duty. The primary determination of whether a duty of care exists is a question of law the court decides. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

Legal causation is fluid concept grounded in "policy determinations as to how far the consequences of a defendant's acts should extend." *Wuthrich v. King County*, 185 Wash.2d 19, 28, 366 P.3d 926 (2016). "The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. A determination of legal liability will depend upon mixed considerations of logic common sense, justice, policy, and precedent." *Michaels v. CH2M Hill,*

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Inc., 171 Wash.2d 587, 611, 257 P.3d 532, 544-45 (2011) (citing *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wash.2d 468, 478–79, 951 P.2d 749 (1998)) (internal quotation marks omitted). Legal causation is a question of law. *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wash.2d 190, 204, 15 P.3d 1283 (2001).

" 'Cause in fact' refers to the actual, 'but for,' cause of the injury, i.e., 'but for' the defendant's actions [would] the plaintiff . . . be injured." *Schooley*, 134 Wash.2d at 754; *see also Estate of Bordon ex rel. Anderson v. State, Dep 't of Corr.*, 122 Wash. App. 227, 240, 95 P.3d 764 (2004). Cause in fact exists if a plaintiff's injury would not have occurred "but for" the defendant's negligence. *Walker v. Transamerica Title Ins. Co., Inc.*, 65 Wash. App. 399, 403, 828 P.2d 621 (1992). There is no cause-in-fact if the connection between an act and the later injury is indirect and speculative. *See Walters v. Hampton*, 14 Wash. App. 548, 555, 543 P.2d 648 (1975). To establish cause in fact plaintiff "must do more than simply show there is some metaphysical doubt as to the material facts." *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wash. App. 424, 430, 788 P.2d 1096 (1990) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986)). Plaintiffs must therefore put forth facts as would be admissible in evidence, and that are specific, detailed, and not speculative or conclusory. *Sanders v. Woods*, 121 Wash. App. 593, 600, 89 P.3d 312 (2004); CR 56(e). Plaintiffs' causation theory here is apparently that more or different training would have terminated or redirected the investigation in such a manner that Plaintiffs would have never been arrested. That argument, of course, is belied by the existence of probable cause and Plaintiffs' claims should be dismissed for that reason alone.

Moreover, Plaintiffs have failed to establish through credible and competent evidence that more or different training would have changed their lawful arrest and the legal investigation of them. It is undisputed that the named defendants, and the lead investigator Detective Willette, were at all material times experienced fully commissioned law enforcement officers certified under the laws of the State of Washington. See Myers Decl. (Dkt. # 37 and Dkt. # 87); Jaros Decl. (Dkt. # 35 and Dkt. # 88); Vincent Decl. (Dkt. # 43 and Dkt. # 89); and Willette Decl.

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(Dkt. #44). They all had been trained at Washington's Criminal Justice Training Commission Academy. *Id*. And all had extensive annual training that exceeded WSCJTC training standards. Nielsen Report (Mentzer Decl., Ex. A) at pp. 27-28.

Plaintiffs apparently attempt to meet their burden of establishing proximate cause, or at least create a question of material fact about it, by offering testimony of Mr. Williams. Mr. Williams generally opines on this issue as follows: "DFW failure to train in these areas falls below law enforcement standards." Dkt. # 95-32 at p. 8. But lacking from Mr. Williams' report are: any education, training, or experience with law enforcement standards in the State of Washington; an articulation of what the "law enforcement standards" in the State of Washington are; and precisely how the Defendant WDFW violated those standards. Mr. Williams conclusions are merely speculative if they are, indeed, that more training would have changed anything. "Speculation" is "no more than guesswork or conjecture." *State v. Uglem*, 68 Wash.2d 428, 436, 413 P.2d 643 (1966). "It is a mental process by which one reaches a conclusion as to the existence of an essential fact by [t]heorizing either on incomplete evidence or on [a]ssumed factual premises that are outside of and beyond the actual scope of the evidence." *Id*.

Conversely, Defendants' expert, Chris Nielsen, and the Washington Administrative Code, offers all those things lacking in Plaintiffs' expert's report. Importantly, Mr. Nielsen is specifically trained in Washington law enforcement Standards. Nielsen Report at pp. 1-5 (Mentzer Decl., Ex. A). In fact, Mr. Nielsen provides training at the WCJTC on the very subjects at issue here. See *id.* at p. 5. Second, WAC 139-05-250 and WAC 139-05-300 describe the training requirements in Washington. Plaintiffs' witness, however, makes no mention of these requirements or how any of the WDFW employees here fell short of even a single one of those requirements. Whereas Mr. Nielsen explains how the WDFW and each relevant employee met those standards. Nielsen Report at p. 28 (Mentzer Decl., Ex. A).

In *Mong Kim Tran v. City of Garden Grove*, No. SACV 11-1236 DOC (Anx), 2012 WL 40508 (C.D. Cal. Feb. 7, 2012), the plaintiff alleged that the defendant entity, "failed to train, supervise, and discipline police officers, including defendant Charles Starnes, as to prevent the

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unlawful stopping, detention, interrogation of plaintiff." *Id*. at *4. The Court found these allegations conclusory and insufficient. *Id*. In particular, the plaintiff "d[id] not plead with any specificity what the insufficient [training] practices were, how they were deficient, or how they specifically caused Plaintiff harm." *Id*.

There is no evidence to support a claim that Defendants negligently trained or supervised any of its officers. Plaintiffs' witness offers only unexplained opinions that, apparently, different or more training would have changed anything relevant here, avail Plaintiffs nothing in overcoming a motion for summary judgment. Opinions based on speculation by definition violate Rule 702 because they are "inherently unreliable and are unsupported by facts." *Ollier v. Sweetwater Union High School Dist*., 267 F.R.D. 339, 342 (S.D. Cal. 2010). *See also Mesfun v. Hagos*, No. CV 03-02182 MMM (RNBx), 2005 WL 5956612, at *11 (C.D. Cal. Feb. 16, 2005) (excluding testimony of an expert whose "opinions . . . are nothing more than rank speculation"); *In re REMEC Inc. Sec. Litig.*, 702 F.Supp.2d 1202, 1219-20 (S.D. Cal. 2010) (rejecting expert's opinion that rested "on his subjective belief or unsupported speculation"). Moreover, Plaintiffs' witness opines at three points in his report merely that "DFW's failure to do so in this matter, falls below law enforcement standards. Dkt. # 95-32 at p. 8. Even if that witness were qualified to express those opinions, those opinions fail to demonstrate the next element of proof: that meeting the standards as argued by Plaintiffs would have changed the outcome. Plaintiffs' have failed to demonstrate proximate cause and their negligent training claim must be dismissed.

E. No WDFW Employee Was Negligent in His or Her Interactions with or Investigation of Plaintiffs

With the narrow exception of DSHS investigations involving child abuse allegations, Washington courts "have not recognized a general tort claim for negligent investigation." *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wash.2d 589, 601, 70 P.3d 954, 960 (2003). A "claim of negligent investigation will not lie against police officers." *O'Brien v. City of Tacoma*, 247 Fed. Appx. 58, 60 (9th Cir. 2007); *Estate of Villarreal ex rel. Villarreal ex rel. Villarreal v. Cooper*, 929 F. Supp. 2d 1063, 1077 (E.D. Wash. 2013) (same).

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Notwithstanding Plaintiffs' arguments to the contrary, Plaintiffs' negligence claims are barred by Washington's public duty doctrine. Police investigate crimes for the benefit of the public, not due to any duty owed a particular victim of crime. Under the public duty doctrine, "no liability may be imposed for a public official's negligent conduct unless it is shown that 'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general.' " *Anderson v. City of Bellevue*, 862 F. Supp. 2d 1095, 1109 (W.D. Wash. 2012) (quoting *Taylor v. Stevens County*, 111 Wash.2d 159, 163, 759 P.2d 447 (1988)). Barring the creation of a special relationship (not alleged in this case), the public duty doctrine bars Plaintiffs' negligence claims because WDFW's investigation and subsequent arrest "was the performance of a duty owed to the public at large." *O'Brien*, 247 Fed. Appx. at 61 (applying Washington law). In general, the purpose of the public duty doctrine is to restrict governmental liability: "[t]he policy behind the public duty doctrine is that legislation for the public benefit should not be discouraged by subjecting the government to unlimited liability for individual damages." *Donohoe v. State*, 135 Wash. App. 824, 834, 142 P.3d 654 (2006) (citing *Taylor, supra*).

Furthermore, while WDFW may have a colloquial obligation to train officers, such does not create a "*legal* duty to prevent every foreseeable injury" that may result. *Osborn v. Mason County*, 157 Wash.2d 18, 28, 134 P.3d 197 (2006). Indeed, the public duty doctrine is designed precisely to "distinguish proper legal duties from mere hortatory 'duties.' " *Id.*; *see also Shope v. City of Lynnwood*, No. C10-0256RSL, 2011 WL 1154447, at *19-20 (W.D. Wa. Mar. 28, 2011) (holding no individualized duty to train, hire, retain or supervise an officer, but rather that these duties are owed to the broader public); *Freeman v. City of Seattle*, No. C07-0904RAJ, 2008 WL 4620211, at *14-16 (W.D. Wa. Oct. 17, 2008) (holding the same). Accordingly, Plaintiffs' broad claims of negligence against any WDFW employees—all of whom were acting within the scope of their employment—should be dismissed to the extent such are even legal duties, because such are "owed to the public at large, not to plaintiff individually." *Shope*, supra, at *6-7. Plaintiffs' claims of negligence should be dismissed as a matter of law.

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Similarly, Plaintiffs fail to demonstrate any WDFW was negligent in his or her actions. Plaintiffs' witness Mr. Williams offered essentially the following criticisms of the WDFW employees work here: they lacked probable cause to arrest Plaintiffs (Dkt. # 95-32, p. 7); they returned Plaintiffs to the boat launch for voluntary interviews (*id*.); they did not obtain a serch warrant (*id*.); Detective Willette obtained "excessive" warrants (*id*.); Detective Willette "shopped" for a prosecutor to file charges based on her investigation (*id*.); inadequate training (*id*. at 7-8); Detective Willette continued her investigation and investigated Plaintiffs for crimes other that fish crimes under Title 77 RCW (*id*. at 8); WDFW lacks training on implicit bias (*id*.); and WDFW employees lacked sufficient continuing education training (*id*.). However, Defendants' expert, who has directly relevant education, training, and experience specifically addressed each of those opinions and provided specific, detailed, factual analyses—not speculative conclusions—that refutes all of them. Nielsen Report at pp. 22-30 (Mentzer Decl., Ex. A). If there existed a duty owed to Plaintiffs individually, that duty was not breached. In addition, and again, Plaintiffs have also failed to demonstrate that any of those alleged failures proximately caused their injuries, which is their burden. Plaintiffs' general negligence claim must be dismissed.

III. CONCLUSION

For the foregoing reasons and the reasons described in Defendants prior submissions, Defendants respectfully request this Court dismiss all Plaintiffs' claims against them.

DATED this 13th day of November 2020.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will send notification of such filing to the following:

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