IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1)	MARGIE M. ROBINSON, as the Personal Representative of the Estate of Christina Dawn Tahhahwah, Deceased,	)	
	Plaintiff,	)	
vs.		)	Case No. CIV-16-869-F
(1)	THE CITY OF LAWTON, OKLAHOMA *et al.*,	)	
	Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT CITY OF LAWTON'S MOTION AND BRIEF FOR SUMMARY JUDGMENT

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Dated this 24th day of August, 2018.

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Plaintiff, Margie M. Robinson, as the Personal Representative of the Estate of Christina Dawn Tahhahwah, Deceased, submits the following Response in Opposition to Defendant The City of Lawton's Motion and Brief for Summary Judgment [Doc. 95].

Response to LCvR 56.1(b) Statement

1. Admitted.

2. Disputed. Defendants have attempted to support paragraph 3 by referencing the affidavits of Jessica Carter and Daniel Harter. Neither of these two persons are identified as witnesses by any of the Defendants. [Doc. 85]. Defendants cannot rely on affidavits from non-witnesses to support summary judgment. Such evidence is inadmissible not because it is in the form of an affidavit but because individuals who are not listed as witnesses are not permitted to testify. [Doc. 69 (stating that "Except for good cause shown, no witness will be permitted to testify . . . in any party's case in chief unless such witness . . . was included in the party's filed witness or exhibit list."].[1]

3. Admitted.

4. Disputed. Christina is deceased and cannot offer any testimony to contradict the officers' account of these events. However, a reasonable jury could reject their testimony that Christina was "coherent and responsive to the officers' questions." Christina made threats to kill people when she spoke to dispatch.[2] Later on in an interaction with

[1] Defendants support other paragraphs with the affidavit from Jessica Carter. Robinson admits some of these facts because they are proven by audio recordings in Robinson's possession. Robinson objects to Jessica Carter testifying as a witness since she was not identified on Defendants' Final Witness List.

[2] Doc. 92 at 7, ¶ 1; Doc. 92 at 15, ¶ 20

Defendant Lindsey Adamson at about 7:30 a.m. on November 14, Adamson told dispatch that Christina was "way, way worse" than she was yesterday and that Christina could "barely breathe just sitting there. Like, literally."[3] Once Christina arrived at the jail in the afternoon of November 14, she was unresponsive to Defendant Hallagin and just said "nonsense" and repeated the word "chlamydia."[4] Defendant Gordon's biased testimony[5] does not have to be credited in light of the evidence of Christina's erratic and concerning behavior, both before and after his interaction with her. The Court should "be cautious on summary judgment to ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—[the decedent]—is unable to testify." Abraham v. Raso, 183 F.3d 279, 294 (3d Cir. 1999) (internal quotation and citation omitted). "The court may not simply accept what may be a selfserving account by the officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story." Id. (internal quotation and citation omitted).

5. Admitted.

6. Disputed. Christina is deceased and cannot offer any testimony to contradict the officers' account of these events. However, a reasonable jury could reject their testimony that Christina was "coherent and responsive to the officers' questions." Christina

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[3] Appendix, Exhibit 28 at p. 4; and see Exhibit 6 at 180:20-181:22

[4] Appendix, Exhibit 5 at 122:2-10 and 143:22-144:1-3

[5] Officer Harter is not listed as a witness and his affidavit should not be considered.

made threats to kill people when she spoke to dispatch.[6] Later on in an interaction with Defendant Lindsey Adamson at about 7:30 a.m. on November 14, Adamson told dispatch that Christina was "way, way worse" than she was yesterday and that Christina could "barely breathe just sitting there. Like, literally."[7] Once Christina arrived at the jail in the afternoon of November 14, she was unresponsive to Defendant Hallagin and just said "nonsense" and repeated the word "chlamydia."[8] Defendant Gordon's biased testimony[9] does not have to be credited in light of the evidence of Christina's erratic and concerning behavior, both before and after his interaction with her. The Court should "be cautious on summary judgment to ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—[the decedent]—is unable to testify." Abraham v. Raso, 183 F.3d 279, 294 (3d Cir. 1999) (internal quotation and citation omitted). "The court may not simply accept what may be a selfserving account by the officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story." Id. (internal quotation and citation omitted).

7. Admitted but incomplete. During the 7:24 a.m. call, Christina was advised "you can get in trouble for calling on 9-1-1," and she responded by saying "you can get in

[6] Doc. 92 at 7, ¶ 1; Doc. 92 at 15, ¶ 20

[7] Appendix, Exhibit 28 at p. 4; and see Exhibit 6 at 180:20-181:22

[8] Appendix, Exhibit 5 at 122:2-10 and 143:22-144:1-3

[9] Officer Harter is not listed as a witness and his affidavit should not be considered.

trouble because I'm a US marshal." She also puts her grandfather (Edward Jerome Tahhahwah) on the line, who tells dispatch that Christina is in a bipolar state.[10]

8. Robinson denies that Adamson did not observe Christina in distress. During her radio contact with dispatch at 8:13:39, Officer Adamson said "Okay, she's like way worse today than yesterday."[11] During her radio contact with dispatch just a few minutes later at 8:32:54, Officer Adamson said "she's worse. Like way, way worse today." Officer Adamson also explained that Christina "can barely breathe just sitting there. Like, literally. She's talking to us and then you know, after a couple of words she has to take a big 'ole breath." Christina told Adamson that she could not afford her medications, but Adamson believed that she could afford it she just chose not to purchase her medications.[12]

9. Robinson admits that Adamson and Breaden left Christina without obtaining any medical help for her and that she called the Lawton Police Department requesting an ambulance.

10. Admitted.

11. Denied as immaterial. There is no indication that any of the defendants knew about the outcome of Christina's trip to the hospital. Therefore they could not have relied on the hospital's conclusions. Indeed, "reliance on a medical professional's opinion does

[10] Appendix, Exhibit 28 at 22-30. This transcript, along with dispatch notes, indicate that "Jeremy Day" was on the line. However, it is undisputed that the person who told dispatch Christina was in a bipolar state was Jerome Tahhahwah.

[11] Appendix, Exhibit 28 at p. 4; and see Exhibit 6 at 180:20-181:22

[12] Appendix, Exhibit 28 at p. 4; and see Exhibit 6 at 180:20-181:22

not foreclose a finding of deliberate indifference to a prisoner's serious medical needs in all circumstances." Vega v. Davis, 673 Fed. Appx. 885, 890–91 (10th Cir. 2016) (unpublished) (citing Farmer v. Brennan, 511 U.S. 825, 842 (1994)).

12. Admitted.

13. Denied as immaterial. "'[M]edical treatment for inmates' ... psychological or psychiatric care' is included as part of the medical care a State is constitutionally obligated to provide to incarcerated persons." Langford v. Grady Cty. Det. Ctr., 670 F. Supp. 2d 1213, 1232–33 (W.D. Okla. 2009) (citing Ramos v. Lamm, 639 F.2d 559, 574 (10th Cir. 1980)). The defendants had a constitutional obligation to provide medical and mental health care to Christina once she was arrested; whether or not she filled a prescription prior to her arrest is immaterial.

14. Admitted.

15. Admitted. Defendant City has omitted the following material fact that Defendants Short and Turner included in their brief: "The dispatcher informed the officers there was a domestic at the residence, to make contact with 'Anna' who says Christina Tahhahwah is there and is throwing cups of milk at her and making threats to kill people, no weapons.'"[13]

16. Disputed. Specifically, Robinson first disputes that Tahhahwah "was alert and did not appear to be in any type of distress." According to Defendant Short, Tahhahwah

[13] Doc. 92 at 16, ¶ 21

was nonresponsive to his questions for a few minutes.[14] According to Defendant Short, she had also defecated on herself.[15] She urinated on herself on the way to the jail.[16] Edward Jerome Tahhahwah, Christina's grandfather, told the officers that Christina was bi-polar, was off her medications, and she needed to go to Taliaferro.[17] Only a few hours before this, at approximately 7:30 a.m., Officer Lindsey Adamson observed Christina and stated that she was "way, way worse" than the day before, and that Christina could "barely breathe just sitting there. Like, literally."[18] Furthermore, Christina had been incoherent in her calls to the police department, and had repeatedly made threats to kill someone. Defendants Turner and Short further *knew* that Christina had threatened to kill someone and that she had assaulted who they believed was her grandmother.[19] A reasonable jury could reject the testimony that Christina "was alert and did not appear to be in any distress." A reasonable jury does not have to reject all of Christina's prior behavior over the past 24 hours just because two biased witnesses testify they did not observe it.

17. Robinson admits that Jerome Tahhahwah and Anna Chalepah told Defendant Short (and Defendant Turner) that Christina was not taking her medication and needed to

[14] Appendix, Exhibit 9 at 45:2-24

[15] Appendix, Exhibit 9 at 45:2-24

[16] Appendix, Exhibit 20

[17] Appendix, Exhibit 7 at 76:18-25

[18] Appendix, Exhibit 25 at p. 4; and see Exhibit 6 at 180:20-181:22

[19] Doc. 92 at 16, ¶ 21

go to Taliaferro. Robinson disputes that Defendant Short did not observe Christina make any statements indicating that she had an intent to harm herself or anyone else and that she did not have the means to do so. A reasonable jury could reject this testimony. See ¶¶ 16-17, above.

18. Disputed. A reasonable jury could reject the Defendants' testimony. See ¶¶ 16-17, above.

19. Robinson admits that Anna Chalepah filled out the form. Robinson denies that Jerome Tahhahwah and Anna Chalepah had the intent to arrest Christina. Jerome Tahhahwah testified that Defendants Turner and Short told him and Anna that the only way the officers could take Christina in to Taliaferro was if they filled out this form. Jerome Tahhahwah testified: "I told them that Christina was going into a bipolar state and that – and ask them if they could take her to Taliaferro. I told them that Taliaferro had all – knew all about – all about her and they would take her in. And one of the officers said – scratching his head, you know, and he said, well, we can't take her in. And he said, the only way we could take her in is you'll have to file charges against her. And I said, well, what kind of charges can I file against her? And he said, well, he said, you can file trespassing. Okay. And then they said, yeah, okay, well, we'll sign the trespassing charges for you to get her out. And I told them, would you – would you please take her to Taliaferro."[20] He explained

[20] Appendix, Exhibit 7 at 76:21-77:12

that Defendants Turner and Short did wrong by "not taking her to Taliaferro like I requested them to do."[21]

20. Admitted but this occurred before the police arrived.[22]

21. Admitted.

22. Robinson disputes that Anna Chalepah placed Christina under arrest for trespassing. See ¶ 20, above.

23. Admitted.

24. Robinson disputes that Hallagin planned to complete her booking process at a later time or allow someone else to complete the booking. There is evidence which demonstrates that he deliberately chose to disregard a serious and obvious risk to Christina's medical and mental health issues.

a. Hallagin does not know if he knew what constitutional rights a pretrial detainee has while detainees are incarcerated at the Lawton City Jail.[23]

b. When Christina arrived at the Lawton City Jail, she had urinated and defecated on herself.[24] Hallagin did not ask her any questions about it and didn't ask the transporting officer or the arresting officer any questions about it. He didn't know if she was drunk or not.[25]

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[21] Appendix, Exhibit 7 at 88:14-19

[22] Appendix, Exhibit 7 at 82:19-25

[23] Appendix, Exhibit 5 at 162:1-10

[24] Appendix, Exhibit 9 at 45:2-24

[25] Appendix, Exhibit 5 at 142:1-21

c. When Christina was booked into the jail, she wouldn't answer Hallagin's questions; she just kept repeating "chlamydia, chlamydia, chlamydia."[26] Her responses to his questions were just "nonsense."[27]

d. Hallagin chose not to ask Christina any questions about her medications or mental health condition.[28]

e. Hallagin learned that Christina was crying and asking about her medications from jailer Stacey McMillion. McMillion told Hallagin that Christina said the police officers kept her medications. When he learned about this, he did not inquire any further.[29] Hallagin chose to let Ms. Tahhahwah's medical condition be someone else's problem.[30]

25. Admitted. Defendant Stacey McMillion told Hallagin "I don't even know how to cuff her down, she's so big."[31]

26. Admitted.

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[26] Appendix, Exhibit 5 at 122:2-10

[27] Appendix, Exhibit 5 at 143:22-144:1-3

[28] Appendix, Exhibit 5 at 108:18-109:22

[29] Appendix, Exhibit 5 at 117:4-16 and 121:1-8

[30] Appendix, Exhibit 5 at 121:22-122:1

[31] Appendix, Exhibit 12 at 0:29:00 – 0:31:00; see also Appendix, Exhibit 18

27. Disputed. Defendant Sellers' testimony is unreliable and can be rejected by the jury. See Response to ¶¶ 34 and 35, below. It is important to note that after Christina was restrained during this time frame (November 13, 2014 at approx. 2:30 p.m.), officers and jailers made fun of her on video. One of the officers or jailers asked what her problem was, and the response was "She's a Tahhahwah!"[32] According to Hallagin, this cannot be interpreted any way other than in a derogatory manner.[33] One officer said "I've got PTSD."[34] Lt. Terry Sellers and the Watch Commander were present.[35]

28. Disputed. See ¶ 14, above.

29. Admitted but the Defendants have omitted a material fact. When Christina was released from handcuffs at approximately 1:45 a.m., Lt. Carney gave a very clear reason why she was released: the handcuffs were "too tight."[36] Robinson admits that Christina was only handcuffed about 40 minutes during the 1:00 a.m. hour. Robinson also admits that Christina was only handcuffed about 45 minutes during the 3:00 a.m. hour.

30. Denied as immaterial. It had been several years since Christina was booked into the Lawton City Jail.[37] Lt. Carney and Lt. Sellers do not provide any details about any

[32] Appendix, Exhibit 5 at 134:10-135:15; see also Appendix, Exhibit 12 at 0:36:30-0:37:30

[33] Appendix, Exhibit 5 at 134:10-135:15

[34] Appendix, Exhibit 5 at 138:17-22

[35] Appendix, Exhibit 5 at 148:14-22

[36] Appendix, Exhibit 13; see also Appendix, Exhibit 18

[37] Appendix, Exhibit 20 (City of Lawton's Response to Request for Admission No. 10)

prior cuffing incident. For example, neither person identifies what year any such cuffing occurred, how long the cuffing lasted, what position Christina was cuffed in, whether she arrived at the jail covered in her own urine and feces, gave "nonsense" answers to questions, continually repeated the word "chlamydia," or cried and talked about the police having her medication. There is also no indication as to whether her hands had ever turned purple during these purported cuffing incidents.[38] There is no description to show that these past incidents were in any way similar to what occurred on November 14, 2014.

31. Denied as immaterial. See ¶ 31, above.

32. Disputed. It is not possible to hear what is said in the jail video. However, Terry Sellers' credibility is severely compromised (see ¶¶ 34 and 35, below) and his testimony about asking Christina if she was "comfortable" could reasonably be rejected by a jury. Furthermore, the video does not appear to show Sellers checking the tightness of the handcuffs.[39] The video also shows Lt. Troy Carney pointing a yellow device that appears to be a Taser towards Christina.[40] The jail's taser log does not reflect that a taser was fired.

33. Disputed. Robinson acknowledges that Sellers provided this testimony. However, the jail video totally contradicts his testimony. Shortly after the beginning of the 8:00 a.m. video, Stacey McMillion can be heard saying "Christina. She keeps shaking 'em

[38] Doc. 96-10 at 20

[39] Appendix, Exhibit 23; see also Exhibit 18

[40] Appendix, Exhibit 23; see also Exhibit 18

and moving 'em where they're turning red."[41] She then returns to the cell run and observes Christina again; she comes back into the booking area and says "Hey LT [Lieutenant Sellers], we'll have to loosen Christina's a little bit . . . because [her hands are] turning colors." Sellers responds and says to let her out, but tell her if she does it again she'll be cuffed again.[42] McMillion and Stewart (black male jailer) then go and release Christina from her cuffs. Sellers does not participate.

34. Disputed. See ¶ 34, above.

35. Admitted.

36. Admitted.

37. Admitted.

38. Disputed. Defendants have cited to the affidavit of Darla Tosta. Darla Tosta is not identified as a witness on the Defendants' Final Witness List.[43] Accordingly, they cannot rely on her affidavit, which is inadmissible hearsay if she does not testify at trial. To the extent that this paragraph makes allegations based on Tosta's affidavit, those allegations are therefore disputed as inadmissible. Robinson admits that Tosta, an inmate, was assigned to monitor the area. Oklahoma jail regulations prohibit an inmate supervising

[41] Appendix, Exhibit 14 at 0:00:00 – 0:00:30; see also Appendix, Exhibit 18

[42] Appendix, Exhibit 14 at 0:03:10 – 0:03:35; see also Appendix, Exhibit 18

[43] See Doc. 85

another inmate. "A prisoner shall be prohibited from supervising, controlling, exerting or assuming any authority over another prisoner."[44]

39. Disputed. Defendants have cited to the affidavit of Darla Tosta. Darla Tosta is not identified as a witness on the Defendants' Final Witness List.[45] Accordingly, they cannot rely on her affidavit, which is inadmissible hearsay if she does not testify at trial. To the extent that this paragraph makes allegations based on Tosta's affidavit, those allegations are therefore disputed as inadmissible. Robinson admits that McMillion went into the cell run on three occasions. Before McMillion entered on the final occasion, the jail video shows Tosta massaging Christina's hands. Tosta and McMillion then appear to have an animated conversation.[46] This evidence contradicts McMillion's testimony Christina was not in any distress in the handcuffs.

40. Disputed. Defendants have cited to the affidavit of Darla Tosta. Darla Tosta is not identified as a witness on the Defendants' Final Witness List.[47] Accordingly, they cannot rely on her affidavit, which is inadmissible hearsay if she does not testify at trial. To the extent that this paragraph makes allegations based on Tosta's affidavit, those allegations are therefore disputed as inadmissible. Furthermore, Robinson disputes that Tosta "immediately notified the jailers" because it implies the jailers were paying attention.

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[44] Oklahoma Administrative Code ("OAC") 310:670-5-3(h).

[45] See Doc. 85

[46] Appendix, Exhibit 16 at 0:00:30 – 0:01:45; see also Exhibit 18

[47] See Doc. 85

To the contrary, jail video shows that it took numerous attempts for Tosta to get anyone's attention.[48] Sellers takes nearly four minutes to respond to the cell run after Tosta first knocks on the jail door.[49] Robinson admits that once Sellers finally went back to the cell area, he "found that Christina had scooted her back away from the bars and was unresponsive." Robinson admits that McMillion was in the cell run approximately 20 minutes before the trustee notified jailers that Christina had stopped talking and her hands turned blue. However, the jail cell video shows that moments before McMillion entered the cell area at that time, Tosta was rubbing Christina's hands and Tosta appears to get into an animated conversation with McMillion when some comes into the cell area.[50]

41. Denied as immaterial.

42. Disputed as immaterial. None of this evidence identifies the substance of training on the specific issue: the proper manner to restrain a mentally ill, obese person who presents with risks of sudden in-custody death syndrome. Indeed, Robinson's expert witness opined that *the only* safe way to restrain an individual such as Christina was in a restraint chair.[51] See also Allen v. Muskogee, Okla., 119 F.3d 837, 844 (10th Cir. 1997) ("The City points to evidence that the officers completed many hours of training, including

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[48] Appendix, Exhibit 17 at 0:03:10 – 0:06:50; see also Appendix, Exhibit 18

[49] Appendix, Exhibit 17 at 0:03:10 – 0:06:50; see also Appendix, Exhibit 18

[50] See ¶ 40, above

[51] See Plaintiff's SOF at ¶ 11, below

training on use of deadly force and dealing with upset or mentally disturbed people, but that cannot rebut the inference that the training was inadequate because it does not address the content of that training.").

43. Disputed as immaterial. See ¶ 43, above.

44. Disputed as immaterial. See ¶ 43, above.

45. Disputed as immaterial. See ¶ 43, above.

46. Disputed as immaterial. See ¶ 43, above.

47. Disputed as immaterial. See ¶ 43, above.

48. Disputed as immaterial. See ¶ 43, above.

49. Disputed as immaterial. Robinson does not rely on The Fidelis Group Report as evidence of improper training.

50. Disputed as immaterial. Robinson does not rely on The Fidelis Group Report as evidence of improper training.

51. Disputed as immaterial. Robinson does not rely on The Fidelis Group Report as evidence of improper training.

52. Disputed as immaterial. Robinson contends that this case fits within the "single incident" exception and a pattern of prior constitutional violations is therefore unnecessary.

53. Admitted.

Plaintiff's Statement of Disputed or Omitted Material Facts

1. Christina Tahhahwah was 5'3" and weighed 374 pounds. She had a body mass index (BMI) of 66. She would be considered severely morbidly obese.[52]

2. Christina's phone calls to the City of Lawton Dispatch reflect her deteriorating mental and physical health condition. On November 13, 2014 at approximately 1:37 a.m., Christina stated that she was about to kill her aunt, Anna Chelepah.[53] On that same night at 3:19 a.m., Christina called crying and asking for her husband to come and pick her up.[54] The dispatcher noted that Christina was "not making sense."[55] Christina called again at about 5:18 a.m. and said she may need to go back to the hospital.[56] This evidence, when considered together with other evidence in the summary judgment record about Christina's behavior and complaints, contradicts the officers' testimony that Christina was coherent and in no distress.

3. According to the Oklahoma Department of Health Jail Standards, "Prisoners who are mentally ill shall be separated from other prisoners. Every effort shall be made to contact a local hospital, clinic or mental health facility for the detention of the mentally

[52] Appendix, Exhibit 2 at 2

[53] Doc. 92 at 7, ¶ 1

[54] Doc. 92 at 8, ¶ 4

[55] Appendix, Exhibit 29

[56] Doc. 92 at 10, ¶ 9

ill."[57] Christina was not separated from other prisoners and the defendants made *no effort* to contact a local hospital, clinic, or mental health facility after Christina was arrested.

4. The City of Lawton Police Department's Policies and Procedures on Mental Health Offenders states as follows: "If an officer takes a person who appears to be mentally ill into custody after that person has committed a misdemeanor crime where charges might be filed, he will take the person to Taliaferro, inform the staff at Taliaferro that charges are pending including what the charges are, complete an EOD form, and request that the person be evaluated as soon as possible."[58]

5. The Lawton City Jail Policy and Procedures state that "It is recognized by the Lawton Police Department that the Lawton City Jail is not designed or staffed to house the mentally ill."[59]

6. Despite the jailers' knowledge of Christina's need for medications,[60] their knowledge that she urinated and defecated on herself,[61] none of the jailers performed a medical or mental health screening of Christina Tahhahwah at the time she was booked into the jail on November 13, 2014.[62] None of the jailers performed a medical or mental

[57] OAC 310:670-5-5(6).

[58] Doc. 95-25 at 4

[59] Appendix, Exhibit 24

[60] See ¶ 25, above

[61] See ¶ 25, above

[62] Appendix, Exhibit 21, Request for Admission No. 2

health screening of Christina Tahhahwah ***after*** she was booked into the Lawton City Jail and before she was reported as unresponsive.[63]

7. Christina was restrained on five occasions, but on none of those occasions was she restrained for more than one hour *except* on the fifth (and final) occasion, when she was restrained for approximately 1 hour and 16 minutes (from 11:48 a.m. to 1:04 p.m.).[64]

8. The Lawton City Jail's policies and procedures state that "The use of restraint equipment shall not be a means of punishment or discipline. When such devices are used, the inmate will be properly supervised."[65] The Lawton City Jail's policies and procedures state that "The use of restraint equipment is prohibited except when: A. The inmate is being transferred. B. The inmate attempts to hurt himself or others. C. The inmate is destructive to property. D. A medical authority has given approval."[66] According to Oklahoma Department of Health Jail Standards, a restraint to prevent prisoner self-injury, injury to others, or injury to property is only appropriate "with the approval of the jail administrator or designee."[67]

[63] Appendix, Exhibit 21, Request for Admission No. 3

[64] Doc. 96-11

[65] Appendix, Exhibit 26

[66] Appendix, Exhibit 26

[67] OAC 310:670-5-2(24)

9. The Lawton City Jail's written policies and procedures do not define how long any particular restraint may be applied to a detainee or inmate. Sellers restrained Christina for the length of time that he did because his on-the-job training told him that he could restrain inmates anywhere from one to two hours.[68] Sellers does not recall if the training mentioned that an inmate's size has any bearing on the length of time restraint is appropriate.[69] He is sure that he has had classes on the use of restraints in 19 years, but he doesn't recall anything specific.[70] He cannot recall anything specific that has changed over the course of the last 19 years in how he is supposed to restrain people.[71]

10. According to W. Ken Katsaris, the use of handcuffs to restrain a person to the cell bars "is barbaric and not a recognized, trained or accepted corrections practice."[72] He testified: "This practice of cuffing to the bars has not been used anywhere in the country that I am aware of, and I've consulted with hundreds of jails throughout the country from the world's largest jail, Los Angeles County Jail, to the smallest lockup. And, I have trained thousands of jail officers, commanders, and sheriffs throughout the nation for over 30 years – and obviously being aware of this dangerous practice not being used, or trained. It is not

[68] Appendix, Exhibit 3 at 62:13-63:1

[69] Appendix, Exhibit 3 at 62:24-63:3

[70] Appendix, Exhibit 3 at 63:4-15

[71] Appendix, Exhibit 3 at 63:16-19

[72] Appendix, Exhibit 1 at 9

a practice that any of the professional correctional organizations, such as the American Corrections Association, endorse, recommend, or for that matter even mention."[73]

11. The restraint chair is "the only safe available mechanism to use for restraint under Christina's circumstances."[74] Jailer Daniel Hallagin testified that the jail had a restraint chair at the time that was sitting in the closet collecting dust.[75] Hallagin said there was no policy on the proper use of the restraint chair in place so it could not be used.[76] However, Lt. Sellers testified that the jail did not obtain a restraint chair until after Christina's death.[77]

12. Law enforcement personnel in Oklahoma who attend CLEET are trained on Sudden In-Custody Death Syndrome. They learn through CLEET that there are a number of predisposing factors associated with Sudden In-Custody Death Syndrome, including a history of alcoholism, bizarre behavior, aggressive behavior, shouting, intensive physical activity, obesity, "Big Bellies," and antipsychotic drug use.[78] Law enforcement officers are also taught that "Respiratory Compromise may cause death through Positional Asphyxia (Hypoxia) when the position of the subject's body interferes with the muscular or

[73] Appendix, Exhibit 1 at 10

[74] Appendix, Exhibit 1 at 9

[75] Appendix, Exhibit 5 at 112:5-8

[76] Appendix, Exhibit 5 at 112:5-13

[77] Appendix, Exhibit 3 at 113:11-15

[78] Appendix, Exhibit 27 at 2

mechanical elements of respiration. This interference can result from a compromise to the air way or from a combination of these factors."[79] Officers are also taught that one area for concern in positional asphyxiation "is the diaphragm and lungs. The primary concern with the lungs involves the ability for adequate expansion of the ribcage. . . .When the diaphragm is unable to perform properly by displacing abdominal viscera, there is an insufficient amount of air inhaled."[80]

13. Defendant Sellers and McMillion both have been trained about positional asphyxiation.[81]

14. Defendant Sellers knew that "any labored breathing . . . would have been a red flag for me."[82]

15. Defendants Sellers' and McMillion's biased, interested testimony that Christina did not have any labored breathing can be rejected. There is substantial evidence that Christina had labored breathing, not the least of which being that she weighed almost 400 pounds. There is more specific evidence than this. Just the day before, Defendant Lindsey Adamson observed Christina sitting in a chair at her home and noticed that Christina "can barely breathe just sitting there. Like, literally. She's talking to us and then

[79] Appendix, Exhibit 27 at 5

[80] Appendix, Exhibit 27 at 1

[81] Appendix, Exhibit 3 at 109:15-24; Appendix, Exhibit 4 at 122:16-19

[82] Appendix, Exhibit 3 at 53:17-19

you know, after a couple of words she has to take a big 'ole breath."[83] A reasonable jury could conclude that Christina's "literal" inability to breathe did not just go away after a few hours. Furthermore, Defendant Sellers and McMillion have proven to be completely untrustworthy witnesses as described herein. See ¶ 20-21, above.

16. The restraint of Christina for an hour and sixteen minutes by handcuffing her to the jail cell bars in a compromising position caused her death.[84]

Argument and Authorities

Municipalities are liable for the constitutional violations committed by their employees when the violation is caused by a municipal custom, policy, or practice. Monell v. Dep't of Social Servs., 436 U.S. 658, 690-91 (1978). When a municipality's failure to train its employees reflects deliberate indifference to the plaintiff's constitutionally protected rights, that failure to train may "be properly thought of as a [municipal] policy" that is actionable under § 1983. City of Canton v. Harris, 489 U.S. 378, 389 (1989).

"[T]he inadequacy of police training may serve as a basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id. at 388. There are four essential elements to this type of claim. The plaintiff must present evidence sufficient to show the following: (1) City's officers violated Christina's constitutional rights, (2) the violations arose under circumstances that were usual and recurring situations for the City's police officers, (3) the

[83] Appendix, Exhibit 28 at p. 4; and see Exhibit 6 at 180:20-181:22

[84] Appendix, Exhibit 2

City's inadequate training or supervision of its officers demonstrates deliberate indifference to individuals with mental illness, and (4) there is a direct causal link between the constitutional deprivations and the inadequate training or supervision. Bryson v. Macy, 611 F.Supp.2d 1234, 1264 (W.D. Okla. April 30, 2009).

A. Constitutional Violation

Robinson has set forth sufficient evidence of a constitutional violation against Defendants Short, Turner, Sellers, McMillion, Hallagin, Adamson, Quisenberry, Carney, and Fisher for either excessive use of force or deliberate indifference to serious medical needs. Robinson will not recite the same arguments in this brief, but rather incorporates the arguments in Doc. 105 and 106 by reference herein.

B. Usual and recurring circumstance.

Defendant concedes in its motion that it "cannot in good faith dispute that City of Lawton officers and jailers deal with individuals that suffer from mental illnesses on a frequent and recurring basis."[85] This element has therefore been satisfied.

C. Deliberate indifference – Inadequate Training on Restraint Chair

The crux of Robinson's claim for municipal liability is the element of deliberate indifference. "The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." Bryson, 611 F.Supp.2d at 1264 (internal quotation omitted). Generally,

[85] Doc. 95 at 41.

notice may be established "by proving the existence of a pattern of tortious conduct." Id. (internal quotation omitted). However, "a pattern of constitutional violations is not necessary to put the City on notice that its training program is inadequate." Allen v. Muskogee, Okla., 119 F.3d 837, 842 (10th Cir. 1997). "Rather, evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability." Id.

In Allen, the Tenth Circuit (quoting City of Canton v. Harris, 489 U.S. 378 (1989)) explained "when inadequate police training constitutes city policy:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Allen v. Muskogee, Okl., 119 F.3d 837, 842 (10th Cir. 1997).

The Court held that the City of Muskogee's failure to train its officers on how to deal with mentally ill or emotionally upset persons who are armed with firearms could be considered a municipal policy. The Court primarily relied on the expert testimony of Dr. George Kirkham, who testified "that the officers' actions were reckless and totally contrary to proper police practices for dealing with armed mentally ill or emotionally upset persons." Dr. Kirkham said that the officers' "training was 'out of synch with the entire United States in terms of what police are being trained to do.'" Id. at 843. "Dr. Kirkham characterized the officers' actions in this case as diametrically opposed to proper police

procedures, out of synch with the rest of the police profession, and 'plain foolishness.'" Id. at 844. The Tenth Circuit considered this evidence to be "sufficient to support an inference that the need for different training was so obvious and the inadequacy so likely to result in violation of constitutional rights that the policymakers of the City could reasonably be said to have been deliberately indifferent to the need." Id.

In Olsen v. Layton Hills Mall, 312 F.3d 1304 (10th Cir. 2002), the Tenth Circuit addressed a claim that a county defendant had failed to adequately train its prebooking jail officers in addressing those with the mental illness of Obsessive Compulsive Disorder (OCD). The Court first noted that OCD appears in about 2% of the population, and then went on to recognize that the county defendant did not have appropriate training on booking individuals into the jail with this disease. The Court held:

> Given the frequency of the disorder [Obsessive Compulsive Disorder], Davis County's scant procedures on dealing with mental illness and the prebooking officers' apparent ignorance to [the plaintiff's] requests for medication, a violation of federal rights is quite possibly a plainly obvious consequence of Davis County's failure to train its prebooking officers to address the symptoms. And this is for a jury to decide.

Olsen, 312 F.3d at 1320 (internal quotation marks and citations omitted).

Here, Robinson has retained an expert witness on police and jail policy, procedure, and practices. W. Ken Katsaris is a recognized expert in the field with 30 years of experience. Defendants have not challenged his qualifications as an expert. In his expert report, Mr. Katsaris said that the use of handcuffs to restrain a person to the cell bars "is barbaric and not a recognized, trained or accepted corrections practice." His report continued: "This practice of cuffing to the bars has not been used anywhere in the country

that I am aware of, and I've consulted with hundreds of jails throughout the country from the world's largest jail, Los Angeles County Jail, to the smallest lockup. And, I have trained thousands of jail officers, commanders, and sheriffs throughout the nation for over 30 years – and obviously being aware of this dangerous practice not being used, or trained. It is not a practice that any of the professional correctional organizations, such as the American Corrections Association, endorse, recommend, or for that matter even mention."[86] Mr. Katsaris concluded that a restraint chair is "the only safe available mechanism to use for restraint under Christina's circumstances."

The City either had a restraint chair and did not have any policy on its use, such that it was collecting dust, or it did not have a restraint chair at all.[87] In either case, the City's inadequate training on the appropriate manner in which to restrain detainees or inmates, especially those who pose a risk of sudden in-custody death syndrome, is extremely likely to result in a violation of constitutional rights. The City knows "to a moral certainty" that its jailers will be required to restrain mentally ill, obese inmates. The need to train its officers on the safe ways to restrain these individuals—***as recognized by the entire United States correctional community***—is "so obvious" that the failure to do so is properly characterized as deliberate indifference to constitutional rights.

This problem was compounded at the City of Lawton in 2014 because it was the custom and practice, since 1999, for jailers to have discretion to restrain inmates for up to

[86] Plaintiff's SOF at ¶ 10

[87] Plaintiff's SOF at ¶ 11

two hours. This exacerbated the danger posed by restraining inmates to jail cell bars with handcuffs.

Like the City of Lawton in this case, the City of Muskogee "point[ed] to evidence that the officers completed many hours of training, including training on use of deadly force and dealing with upset or mentally disturbed people." However, the Court did not consider the evidence meaningful "because it does not address the content of that training." Allen, 119 F.3d at 844. The City of Lawton in this case cannot identify any training material on how to properly and safely restrain an inmate who is mentally ill, obese, and presents serious risk of sudden in-custody death syndrome. Indeed, Mr. Katsaris' report concludes that ***the only safe way*** is with a restraint chair. Any other way poses a significant risk of excessive force or improper punishment.

Robinson has also established that the City's inadequate training was the moving force behind the constitutional deprivations. Dr. Buck Hill's expert report concluded that Christina's compromised position led to her death.[88] Had Christina been restrained in the safe method of a restraint chair and appropriately monitored she would not have died in the custody of the Lawton City Jail.

II. DEFENDANT CITY IS NOT ENTITLED TO SUMMARY JUDGMENT ON ROBINSON'S STATE LAW CLAIM.

Defendant City argues that it is entitled to summary judgment on Robinson's negligent claim under state law.[89] Defendant City argues that Robinson cannot establish a

[88] Appendix, Exhibit 2

[89] Robinson does not assert a negligence claim based on false arrest.

violation of the City's duty to provide her with medical care, nor can Robinson establish causation. However, Defendant City is incorrect. Robinson's evidence establishes that Defendant City is responsible for its employees' negligence in rendering her medical care.

The evidence shows that the City's employees breached the standard of care. None of the City's employees ever conducted a medical or mental health screening, in violation of OAC 310:670-5-1. This is a mandatory requirement of Oklahoma state law. Jailers McMillion and Hallagin were also aware that Christina needed medications; they never followed up to determine what medications Christina might need, nor did they obtain any medications for Christina. Then, when Christina was restrained, they did not observe her during a critical time in the restraint—the very period where she had, only hours before, lost blood flow to her hand. Their negligence also caused Christina's death according to Dr. Hill. Robinson has stated a valid negligence claim against the City under Oklahoma law.

Defendant City also argues that it is entitled to immunity from Robinson's negligence claim under 51 O.S. § 155(25). However, this is not the case. Robinson's claim does not arise out of the provision, equipping, operation or maintenance of any jail. Instead, Robinson's claim arises out of several employees' failures to attend to serious medical needs. The failure to attend to serious medical needs cannot be said to be a part of the operation of any jail. Furthermore, Christina's injuries did not arise from the parole or escape of a prisoner, or injuries by a prisoner to any prisoner. Accordingly, § 155(25) does not apply.

Even if Defendant City is immune under the OGTCA, Robinson's claim may proceed as a claim under the Oklahoma Constitution for excessive force and/or failure to render medical care and treatment pursuant to the case Bosh v. Cherokee County Governmental Building Authority, 305 P.3d 994 (Okla. 2013). Christina was subjected to excessive force and a denial of medical treatment, and a Bosh claim would arise under such circumstances if the OGTCA provides complete immunity to Defendant City.

Defendant City may argue that Robinson's Complaint did not identify a Bosh theory. However, the facts give rise to such a claim and therefore the claim is properly before the Court.

Conclusion

For the reasons set forth herein, Plaintiff Margie M. Robinson, as the Personal Representative of the Estate of Christina Dawn Tahhahwah, Deceased, respectfully requests that the Court deny the Motion and Brief for Summary Judgment filed by Defendant The City of Lawton [Doc. 95].

Dated this 24th day of August, 2018.

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CERTIFICATE OF SERVICE

This is to certify that on this 24th day of August, 2018, a true and correct copy of the above has been delivered via ECF to all attorneys of record.

Kelea L. Fisher
Clay Hillis

s/Barrett T. Bowers