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

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

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS ADAMSON, QUISENBERRY, CARNEY, SELLERS, McMILLION, HALLAGIN AND FISHER'S MOTION AND BRIEF FOR SUMMARY JUDGMENT

COMES NOW Defendants Adamson, Quisenberry, Carney, Sellers, McMillion, Hallagin, and Fisher pursuant to LCv.R7.1(I), and submits this Reply in support of their Motion and Brief for Summary Judgment. [Doc.96]

I. Reply to Plaintiff's Response to Defendant's Statement of Facts

2. After Christina's grandfather (Edward Jerome Tahhahwah) told dispatch Christina was in a bipolar state, he told the dispatchers to "just disregard her calls" and to "come pick her up and take her to jail." [Doc. 107-28 at 30]

4. Plaintiff admits that "Adamson was still on scene responding to the [call].[Fact No. 5] Therefore, Adamson had not "left Christina" as incorrectly implied by Plaintiff.

9. Defendants note that evidence regarding Christina being treated and released by medical professionals within the timeframes in question is circumstantial

evidence that would support the very sworn testimony of the officers that Plaintiff is asking the Court to disregard.

10. **a.** Defendant notes that Edward Tahhahwah stated "well, what kind of charges can I file against her?" [Doc. 107-7, at 77] and "Anna said, okay, I'll file – I'll file trespassing charges against her (Christina)." [Doc. 108, Appendix, Ex.7 at 82: 3-8] **b.** Defendant Short did not think it was unusual for Christina to have defecated on herself because he has encountered other people who have defecated on themselves due to a variety of reasons. He also did not find it unusual that she would not respond to him because he has encountered people on domestic disturbance calls who chose not to talk to the police. [Doc. 92, Ex. 12, pg. 46, lines 6-19 and pg. 47, lines 18-25]

14. Plaintiff makes reference to unidentified officers or jailers making statements on a video but does not identify any Defendant officer or jailer as having made such statements. Furthermore, allegations of verbal harassment …without more simply do not show the invasion of any federally protected right. *Collins v. Haga*, 373 F.Supp. 923 (W.D.Va.1974) cited, with approval by *Coyle v. Hughs*, 436 F. Supp. 591, 593 (W.D. Okla. 1977).

19. Plaintiff has deliberately misstated facts in that the video in question shows Terry Sellers outside of the cell bent down, which would have been him checking the handcuffs as Christina was in a seated position. [Doc. 107-23, video at 2:26]

25. Darla Tosta is on Plaintiff's final witness list [Doc. 83] and Defendants' final witness list include "all witnesses, including experts, endorsed by Plaintiff, not objected to by Defendants" (which would include Darla Tosta). [Doc. 85]

26. See ¶ 25. Also, Defendant would note that Plaintiff's attorney has improperly attempted to characterize the conversation between McMillion and the trustee as "animated" in an effort to discredit McMillion's testimony/affidavit. However, although Plaintiff's attorney had possession of said video during McMillion's deposition, no questions were asked about the "animated" conversation. Plaintiff's attorney should not be allowed to now substitute his biased observation for that of a witness he failed to question about an incident.

27. See ¶ 25. Also see ¶ 26.

II. Response to Plaintiff's Statement of Disputed or Omitted Material Facts

1. Admitted.

2. Plaintiff presents no evidence to show that the named officers and jailers were aware of all (or any) of Christina's phone calls to City of Lawton dispatch. In fact, Plaintiff's expert specifically notes that dispatchers did not convey cumulative information to the officers. [Doc. 107-1, pg. 6]

3. Denied. Christina Tahhahwah was placed in her own cell.

4. Defendants do not deny the content of the City's policy, however, if the officer does not observe behavior that indicates that a person "appears to be mentally ill" at the time of his/her encounter with the person, this provision is not applicable.

5. Irrelevant. This statement is simply an acknowledgement by the City of Lawton that its jail facility is not the equivalent of a mental health facility.

6. Two of five jailers sued were present during Christina's booking. Plaintiff has not shown any evidence to prove that Defendants Sellers, Fisher, or Carney knew

Christina had defecated on herself. Plaintiff has pointed to no evidence that any jailer other than Hallagin and McMillion were even present during her booking or had any reason to know or believe that a proper medical or mental health screening had not been performed during booking.

7. Admitted.

8. Admitted but irrelevant. Plaintiff provides no proof that this policy was violated.

9. Denied as irrelevant. That a particular employee does not recall training is not sufficient to prove that the training was inadequate.

10. Denied. Defendants would note that there are cases in which detainees are handcuffed to fixed objects and courts did not determine that it was an excessive use of force. See: *Uzochukwu v. Jones*, No. CIV-11-1512-HE, 2012 WL 6853505, at *3 (W.D. Okla. Dec. 13, 2012), report and recommendation adopted, No. CIV-11-1512-HE, 2013 WL 147910 (W.D. Okla. Jan. 14, 2013)(inmate handcuffed to door); *Petersen v. Farnsworth,* 371 F.3d 1219, 1224 (10th Cir.2004)(handcuffed to bar attached to the booking counter).

11. Irrelevant.

12. Admitted.

13. Admitted.

14. Admitted.

15. Denied. Defendants further state that evidence that Christina had labored breathing over 24 hours before she got to the jail does not establish that she had labored or distressed breathing while in the jail. [Doc.95]

16. Denied.

ARGUMENT AND AUTHORITIES

Plaintiff first argues that "all defendants are responsible for an excessive use of force in this case because they either participated, or failed to intervene, in the restraint of Christina Tahhahwah with handcuffs to the cell bars. [Doc. 106, pg. 19] Plaintiff then points to the opinion of their jail expert, W. Ken Katsaris, to support her argument. First, it should be noted that Plaintiff cannot prove that Defendant Hallagin either participated or failed to intervene in any restraint. Second, although Plaintiff's expert opines that "handcuffs to restrain a person to the cell bars is barbaric" - there are cases in which detainees are handcuffed to fixed objects and courts did not determine that it was an excessive use of force. See: *Uzochukwu v. Jones*, No. CIV-11-1512-HE, 2012 WL 6853505, at *3 (W.D. Okla. Dec. 13, 2012), report and recommendation adopted, No. CIV-11-1512-HE, 2013 WL 147910 (W.D. Okla. Jan. 14, 2013)(inmate handcuffed to door); *Petersen v. Farnsworth,* 371 F.3d 1219, 1224 (10th Cir.2004)(handcuffed to bar attached to the booking counter).

Plaintiff then goes to great length to describe how Defendants *Sellers* and *McMillion* are "specifically liable" for their "excessive force" during the last restraint incident. Plaintiff notes that Defendant Carney states (on video) that the handcuffs were "too tight" and thus released her from the handcuffs. [Doc. 106, No. 16, pg. 6] –

however, Plaintiff points to no evidence to suggest that Defendant Carney relayed this information to Defendants Sellers or McMillion (who were not on shift at the time Defendant Carney made this statement). In fact, the booking narrative simply reflects that at 3:55a.m., "[Christina] was released from cuffs with no incident to herself or staff." [Doc. 96, Ex.11]

Plaintiff also states that "Christina was restrained on five occasions, but on none of those occasions was she restrained for more than one hour except the fifth occasion, when she was restrained for approximately 1 hour and 16 minutes." [Doc. 106, pg. 20] Plaintiff then argues that McMillion and Sellers were therefore 'otherwise made aware' that Christina's handcuffs would be too tight after 40-50 minutes. [Doc. 106, pg. 20] However, Plaintiff fails to mention that in that 1 hour and 16 minute timeframe – Defendant McMillion checked on Christina three times – the third time being 20 minutes before Christina was found unresponsive. This fact has not been disputed. Defendants would also note that Plaintiff offers no argument to refute Defendants' Hallagin, Adamson, Quisenberry, Fisher, and Carney's arguments that they are entitled to summary judgment and qualified immunity regarding Plaintiff's excessive force claims.

With respect to Plaintiff's second proposition that "Defendants Hallagin and McMillion violated Christina Tahhahwah's clearly established constitutional right to medical and mental health care" Defendants would first note that Plaintiff offers *no argument* to refute Defendants Quisenberry's and Adamson's Motion for Summary

Judgment on this claim and they are thus entitled to summary judgment.[1] Second, Plaintiff is correct that she must show that Defendants "knew of an excessive risk to the plaintiff's health or safety and disregard that risk" in order to satisfy the subjective prong of the deliberate indifference test. [Doc. 106 at 26 citing *Rife*, 854 F.3d at 647] Plaintiff attempts to support her argument about the "mindset" of Defendants Hallagin and McMillion by pointing to statements made on a video which allegedly reflect the "hostile attitude of the jailers and officers who came in to restrain Christina on November 13, 2014." [Doc. 106 at 27]

Allegations of verbal harassment …without more, simply do not show the invasion of any federally protected right. *Collins v. Haga*, 373 F.Supp. 923 (W.D.Va.1974) cited, with approval by *Coyle v. Hughs*, 436 F. Supp. 591, 593 (W.D. Okla. 1977). More importantly, Plaintiff has failed to identify who made statements about Christina other than a self-serving observation in a footnote that "Hallagin testified that he wasn't sure if he said this or not, but it is clear from listening to the recording that it was Hallagin who did in fact make this response." [Doc. 106, pg. 27, Fn.91] At this late stage of this case, there should be no need for the Court to have to guess who made a statement on a video or to simply take Plaintiff's attorney's word for who said what on a video – particularly when Plaintiff has had ample opportunity to question witnesses who were present on said video and chose not to take the deposition of two jailers nor to ask

[1] In fact, of the eleven individually named Defendants, all of whom have spent two years defending this suit, Plaintiff failed to respond to motions or make argument regarding six of these defendants (Gordon, Jenkins, Carney, Fisher, Adamson and Quisenberry).

other Defendants who may have been present when the statements were made to identify who made the statements on the video during those Defendants' depositions.

With respect to Plaintiff's final argument, that "Defendant's Sellers and McMillion violated Christina Tahhahwah's clearly established constitutional right to medical and mental health care while a pretrial detainee", this argument must also fail. Plaintiff is correct that "the factfinder may conclude that a prison official subjectively knew of the substantial risk of harm by circumstantial evidence or "from the very fact that the risk was obvious." *Martinez v. Beggs*, 563 F.3d 1082, 1089 (10th Cir. 2009) citing *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S.Ct. 1970 (1994). However, the Supreme Court has cautioned that an obvious risk cannot conclusively establish an inference that the official subjectively knew of the substantial risk of harm, because "a prison official may show that the obvious escaped him." *Farmer* at 843 n. 8, 114 S.Ct. 1970.

The subjective component requires the prison official to disregard the risk of harm claimed by the prisoner. *Estate of Hocker v. Walsh*, 22 F. 3d 995 (10th Cir. 1994). In this case, the Plaintiff must therefore establish that Defendants Sellers and McMillion disregarded the risk of death. At best, and viewing the evidence in the light most favorable to Plaintiff, the most that Plaintiff has established is that Defendants Sellers and McMillion were aware that leaving Christina in handcuffs would cause her hands to turn colors. There has been no evidence presented that connects Christina's hands "turning colors" in the handcuffs to her death. Likewise, as the Supreme Court cautioned in *Farmer*, even if McMillion and Sellers were aware of the "obvious risk" of Christina's

hands turning colors from the manner of handcuffing, this does not conclusively establish an inference that they subjectively knew that there was a substantial risk of harm (death) created by the manner of handcuffing.[2]

Plaintiff also asks this Court to consider circumstantial evidence to refute Sellers' and McMillion's assertions that they did not observe Christina breathing heavily while in handcuffs, but to ignore circumstantial evidence that would support their assertions. For example, Plaintiff relies heavily on statements made by Officer Adamson regarding Christina's difficulty breathing about 24 hours before Christina was in the jail, but ignores the fact that Christina was taken to the hospital and seen by medical professionals *after* her encounter with Officer Adamson. Furthermore, the record from that hospital visit does not reflect that Christina presented with any difficulty breathing. [Doc. 96, Exs. 4-5] In fact, the records show her oxygen saturation at 100% upon admittance and an O2% of 96% upon discharge – which supports Defendants Sellers' and McMillion's assertions that they did not observe Christina to have distressed breathing. [Doc. 96, Exs. 4-5] Defendants McMillion and Sellers are thus entitled to summary judgment.

CONCLUSION

WHEREFORE, all premises considered, Defendants Adamson, Quisenberry, Carney and Fisher respectfully requests this Court to note that Plaintiff has offered little to no argument to refute their assertion that they are entitled to summary judgment on all

[2] Defendants deny that the manner of handcuffing caused Christina's death.

claims [Doc. 96] and all Defendants respectfully request that this Court grant their summary judgment motion and for any other such relief as the Court deems appropriate.

Respectfully submitted this 5th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2018, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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s/Clay Hillis
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