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,	)	
-vs-	)	Case No. CIV-16-0869-F
THE CITY OF LAWTON, OKLAHOMA, et al.,	)	
Defendants.	)	

ORDER

Four motions for summary judgment are before the court in this action, which is brought by Margie M. Robinson as the personal representative of the estate of Christina Dawn Tahhahwah, deceased (Christina).

Briefly stated, the complaint alleges that Christina was arrested by officers of the Lawton Police Department and transported to the Lawton City Jail, where she was booked into the jail on a trespassing charge despite the fact that the booking officer at the jail knew that Christina, who suffered from bipolar disorder, was in the midst of a psychotic episode. *See*, *e.g.*, doc. no. 1, ¶¶ 41-44. The complaint alleges constitutional violations under 42 U.S.C. § 1983 on the part of various sets of police officers and jailers, each of whom is sued in his or her individual capacity (only), as well as a § 1983 claim against the City of Lawton (the City). The complaint also alleges negligence claims against the City.

I. The Defendants

In the sequence that they are listed in the caption of the complaint, the defendants who are police officers are:

-- Chelsea Gordon (dispatched to the home)

-- Timothy Jenkins (recalls no contact with Christina)

-- Lindsey Adamson (dispatched to the home, and called to the jail on one occasion)

-- Kurt Short (present during events which led to Christina's arrest)

-- Lawrence Turner (present during events which led to Christina's arrest, and took Christina into custody following a citizen's arrest)

-- Terry Quisenberry (former police officer, called to the jail on one occasion).

The defendants who are jail officers (jailers) are:

-- Terry Sellers

-- Stacey McMillion

-- Daniel Halligan (worked booking desk at the jail when Christina was brought in by Turner; booked Christina into jail),

-- Troy Carney[1]

-- Tika Fisher

The City of Lawton is also a defendant.

II. Background Facts

While some of the events of November 13 and 14, 2014, are in dispute, many are not. The following background facts are undisputed on this record. The only exceptions are described, below, as contentions or allegations.

[1] Defendant Kay Carney was dismissed by plaintiff, without prejudice, on November 10, 2016. Doc. no. 27.

Christina was bipolar. She was also morbidly obese, weighing close to 400 pounds.

Plaintiff contends that during the relevant events, Christina was in the midst of a bipolar episode. (There is evidence to support this contention, which is taken as established.)

On November 13, 2014, various police officers were dispatched, at different times, to the residence of Christina's grandfather, Edward Jerome Tahhahwah (Jerome), and his wife Ann Chalepah (Anna, since deceased), where Christina had been staying. These events culminated in a citizen's arrest for trespass which was executed by Anna on the afternoon of November 13, after two police officers, Short and Turner, were dispatched to the residence following a call from Anna. Turner took Christina into custody and Christina was taken to the jail where she was booked into jail by Halligan without the completion of a medical or mental health care evaluation. Halligan was later disciplined for failing to complete the proper booking procedures, which required screening for medical and mental health issues. Christina remained at the jail until she was taken to the hospital by emergency responders the next afternoon, on November 14, 2014.

Five times during this period of detention, Christina was handcuffed, in her jail cell, to the jail cell bars, after she was observed banging on the metal bunk. During these handcuffing events, Christina was handcuffed, in a seated position, with her back to the bars, and with her hands over her shoulders where they were cuffed to the jail cell bars. The record is not completely clear with regard to exactly how Christina's hands were positioned during the first, second and third handcuffing events. During the fourth and fifth handcuffing events, it is clear that Christina's hands were cuffed to the bars at approximately head-level or ear-level.

During the fourth handcuffing event, which lasted forty to fifty minutes, Christina's hands turned colors, at which point she was released from the cuffs and her hands were rubbed to increase circulation.

During the fifth handcuffing event -- the longest of the handcuffing events, lasting one hour and sixteen minutes -- Christina was checked on several times by McMillion. Eventually, Christina became non-responsive and stopped talking. As had happened during the fourth handcuffing event, Christina's hands turned blue or purple during the fifth handcuffing event. At the time Christina became unresponsive, no jailers were in the cell block area and Christina was being monitored by an inmate trustee. Per video evidence, the trustee repeatedly knocked on a door in the cell block area in an obvious effort to get a jailer's attention. After several minutes, Sellers responded. Emergency health care providers were summoned and Christina was taken to the hospital by ambulance.

The complaint alleges that the hospital determined, through an EEG, that Christina had suffered a severe anoxic brain injury. (There is evidence to support this allegation, which is taken as established.)

Life support was withdrawn and Christina died on November 17, 2014, three days after she had become non-responsive during the fifth handcuffing event at the jail.

Additional facts are described in other parts of this order, where material.

III. The Motions

Four motions for summary judgment are before the court.

Doc. no. 93. This motion is brought by police officers Gordon and Jenkins. Plaintiff did not respond to this motion and these defendants' arguments have been confessed. *See*, LCvR7.1(g) (any motion not opposed within 21 days may, in the

discretion of the court, be deemed confessed).[2] Gordon and Jenkins will be granted summary judgment in their favor on all claims alleged against them.

Doc. no. 92. This motion is brought by police officers Short and Turner. *See*, plaintiff's response brief, doc. no. 105, with appendix at doc. no. 107; movants' reply brief, doc. no. 115.

Doc. no. 96. This motion is brought by a combination of police officers and jailers: Adamson, Quisenberry, Carney, Sellers, McMillion, Halligan and Fisher. *See*, plaintiff's response brief, doc. no. 106, with appendix at doc. no. 107; movants' reply brief, doc. no. 114.

Doc. no. 95. This motion is brought by the City. *See*, plaintiff's response brief, doc. no. 108, with appendix at doc. no. 107; movants' reply brief, doc. no. 113.

All of the individual defendants' motions assert qualified immunity as a basis for summary judgment in their favor. It is not completely clear from their briefs whether the individual defendants also assert, as a separate and alternative ground for summary judgment, that the evidence is insufficient to support the claims alleged against them. The court presumes the individual defendants intend to make this alternative argument. This order takes each motion up separately; within its discussion of each motion, it addresses qualified immunity arguments first, after which it addresses the alternative argument that the evidence, as a general proposition, is insufficient to support the claims. (As will be seen, the results are the same with or without the alternative argument.)

The City's motion argues that the evidence is insufficient to support any of the claims alleged against it. The City also asserts governmental immunity as a basis for judgment on some of the negligence claims.

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[2] Plaintiff's counsel informed chambers' staff that plaintiff intends to concede this motion.

IV. Summary of the Claims

The first claim is brought under 42 U.S.C. § 1983 against Short and Turner. This claim alleges a deprivation of Christina's fourth amendment rights premised upon a false arrest (arrest for trespass without probable cause).

The second claim is brought under § 1983 against Adamson, Short, Turner, Halligan, Sellers, Carney, Fisher, Quisenberry and McMillion.[3] This claim alleges deliberate indifference to Christina's need for medical and mental health care, in violation of eighth amendment standards made applicable through the Fourteenth Amendment.

The third claim is brought under § 1983 against Adamson, Halligan, Sellers, Carney, Fisher, Quisenberry and McMillion. This claim alleges use of excessive force during handcuffing events involving Christina at the jail, in violation of the Fourth Amendment.

The fourth claim is brought under §1983 and is alleged against the City. This claim alleges inadequate training of the City's officers (both police officers and jailers), resulting in violations of Christina's constitutional rights.

The fifth claim is also brought against the City but involves only state law. This claim alleges that the City's conduct, through its officers (both police officers and jailers), constitutes negligence.

A sixth claim, alleging a violation of the Americans with Disabilities Act claim, was previously dismissed. Doc. no. 40.

[3] Defendants Gordon and Jenkins, whose motion has been conceded, were also named in this claim.

V. Standards

A. Rule 56, Fed. R. Civ. P.

Under Rule 56, Fed. R. Civ. P., summary judgment shall be granted if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The moving party has the burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In determining whether a genuine issue of a material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

All reasonable inferences to be drawn from the undisputed facts are to be determined in a light most favorable to the non-movant. United States v. Agri Services, Inc., 81 F.3d 1002, 1005 (10th Cir. 1996). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials, demonstrating that there is a genuine issue for trial. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983). The existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to avoid a properly supported summary judgment motion; there must be evidence on which the jury could reasonably find for the plaintiff. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

B. Qualified Immunity at the Summary Judgment Stage

Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Perry v. Durborow, 892 F.3d 1116, 1120 (10th Cir. 2008), citations and quotations omitted.

When a defendant asserts a qualified immunity defense at the summary judgment stage, plaintiff is required to shoulder a heavy two-part burden to avoid judgment. *Id.* Plaintiff bears the burden to show: 1) that the defendant's actions violated a constitutional right, and 2) that the allegedly violated right was clearly established at the time of the conduct at issue. Mick v. Brewer, 76 F.3d 1127, 1134 (10th Cir. 1996). Thus, if, on the facts, no constitutional right was violated, then no further inquiry is required and the defendant is entitled to summary judgment. Saucier v. Katz, 533 U.S. 194, 200-01 (2001).

At the first step of the qualified immunity analysis (actions that violated a constitutional right), a plaintiff must establish that the defendant acted under color of state law and caused or contributed to the alleged violation. Jenkins v. Wood, 81 F.3d 988, 994 (10th Cir. 1996). Plaintiff must show that the defendant personally participated in the alleged violation. *Id*. There must be a deliberate, intentional act by a defendant, and liability cannot be predicated upon mere negligence. Murrell v. Sch. Dist. No.1, Denver, Colo., 186 F. 3d 1238, 1250 (10th Cir. 1999), citing Woodward v. City of Worland, 977 F. 2d 1392, 1399 (10th Cir. 1992).

If a constitutional right can be made out, then the court moves on to the second step of the analysis (clearly established law). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [officer in the defendant's position] that his conduct was unlawful in the situation." Cortez v. McCauley, 478 F.3d 1108, 1114 (10th Cir. 2007), quoting Saucier at 202. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition...." Cortez at 1114, quoting Saucier at 201. For a right to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." Cortez at 1114-15, quoting Medina v. City of Denver, 960 F.2d 1493,

1498 (10th Cir. 1992). Furthermore, the contours of the constitutional right at issue must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. Perry, 892 F.3d at 1122-23, citations and quotations omitted. In applying the test, courts must not define the relevant constitutional right at a high level of generality; rather, the clearly established law must be particularized to the facts of the case. *Id.* at 1123, citations and quotations omitted. This means that the plaintiff must identify a case where an official acting under similar circumstances was held to have violated the Constitution. *Id.*, citations and quotations omitted. Summary judgment based on qualified immunity is appropriate if the law did not put the officer on notice that his conduct would be clearly unlawful. Cortez at 1114, citing Saucier at 202.

Although, as is customary, this order refers to these two steps as the first and second steps of the qualified immunity analysis, the law permits the court to exercise discretion with respect to which step it addresses first. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

VI. Short and Turner's Motion for Summary Judgment (Doc. no. 92)

A. Section 1983 Claim Against Short and Turner Premised Upon False Arrest

Short and Turner are the only defendants named in the first claim, which alleges a violation of § 1983 premised upon these officers' false arrest of Christina.

Based on the court's review of the law and the evidence as set out below, the court finds that plaintiff has not carried her burden at the first step of the qualified immunity analysis with respect to the § 1983 claim premised upon false arrest.

The Tenth Circuit looks to the common law of torts as a starting point for the contours of claims of constitutional violations under § 1983. Pierce v. Gilchrist, 359 F.3d 1279, 1287-89 (10th Cir. 2004). In this context, the term "common law" refers to "general principles of common law among the several states." *Id.* at 1288. In its consideration of § 1983 claims, the Tenth Circuit has considered the state law

formulation for false arrest. McCormick v. Farrar, 147 Fed. Appx. 716, 721 (10th Cir. 2005) (unpublished) (citations omitted). In Oklahoma, the common law tort of false arrest has a single element: that the defendant-officer arrested the plaintiff without probable cause. *See*, Overall v. State ex rel. Dep't of Pub. Safety, 910 P.2d 1087, 1091 (Okla.Ct.App.1995) ("An arrest, with or without a warrant, cannot be valid unless the officer has reason to believe a crime has been or is being committed, which is the probable cause required to effect a valid arrest.").

Likewise, under the Fourth Amendment, a warrantless arrest is permissible if the officer has probable cause to believe a person committed a crime. Romero v. Fay, 45 F.3d 1472, 1476 (10th Cir. 1995). "Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." *Id.* at 1476, quoting Jones v. City and County of Denver, 854 F.2d 1206, 1210 (10th Cir. 1988). This is an objective standard, and thus, the subjective belief of an individual officer as to whether there was probable cause for making an arrest is not dispositive. Koch v. City of Del City, 660 F.3d 1228, 1239 (10th Cir. 2011), citing United States v. Valenzuela, 365 F.3d 892, 896 (10th Cir. 2004). Whether a reasonable officer would believe that there was probable cause to arrest in a given situation is based on the totality of the circumstances. *Id.*, citing Valenzuela at 897.

The following facts are material to the false arrest claim.[4]

Police officers Turner and Short arrived at Jerome and Anna's residence, located at 1006 S.W. 42nd Street, in Lawton, Oklahoma, on the afternoon of

[4] Most of these facts are undisputed. To the extent that they are in dispute, the court credits plaintiff's version of events.

November 13, 2014.[5] Short and Turner arrived at 1:30 p.m. in response to Anna's call to dispatch at 1:20 p.m. Doc. no. 92, p. 16,[6] ¶¶ 21, 23. Dispatch had informed Short and Turner that there was a "domestic" at the residence, and the officers were told to make contact with Anna. Based on what Anna had told dispatch, dispatch also informed Short and Turner that Christina was there, was throwing cups of milk at Anna, and was making threats to kill people although there were no weapons.[7] Doc. no. 92, p. 16, ¶ 21.

Upon arrival at the residence, Short and Turner made contact with Jerome and Anna. Anna told the officers that she and Jerome wanted Christina "gone" from the residence but that Christina would not leave. *Id.* at ¶ 23. Christina was a guest in the house at the time and had recently been living there. Christina confirmed to the officers that she had been asked to leave the residence and stated that she had nowhere else to go. *Id.* Christina did not agree to leave the residence. *Id*. Anna and Jerome told Short that Christina "was causing a problem, was not taking her medication and needed to go to Taliaferro." *Id.* at p. 17, ¶ 24. "Taliaferro" is Taliaferro Community Mental Health Center, located in Lawton.

While there is a dispute regarding how and why the citizen's arrest form came to be executed, there is no dispute about the fact that while Short and Turner were present at the residence, Anna filled out a "Citizens Arrest Form." The form states that Anna Chalepah has arrested Christina Tahhahwah for a public offense

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[5] Christina had made a number of calls to police earlier that day and other officers had been dispatched to the residence in response. Doc. no. 92, pp. 7-15, ¶¶ 1-19. There is no evidence that Short or Turner were aware of these other calls.

[6] This order uses ecf page numbers except when citing deposition pages.

[7] Throughout this order, statements that are arguably inadmissible hearsay have not been considered for the truth of the matter asserted.

committed against her, and that Anna delivers Christina to the custody of the Lawton Police Department for the purpose of having her brought before a magistrate. *Id.* at p. 19, ¶ 27. The form identifies the public offense in question as trespassing. Doc. no. 92-13, p. 2.[8] A statement on the form indicates that Jerome and Anna had invited Christina to come and stay with them while their house was being worked on but that after Christina threw a cup of milk on Anna they asked her to leave and she refused. *Id.* at p. 2 of 2. The form says nothing about Taliaferro Community Mental Health Center (Taliaferro), or about any type of medical or mental health care, or about Christina's medical or mental condition.

Plaintiff contends that Jerome and Anna did not actually intend to arrest Christina and that they asked the officers to take Christina to Taliaferro for treatment; accordingly, plaintiff contends that Short and Turner were aware of Jerome and Anna's true intentions. Doc. no. 105, p. 12, ¶ 27. Plaintiff has presented evidence to support these contentions, which are considered established. For example, plaintiff cites Jerome's testimony that he told the officers Christina "was going into a bipolar state," that he asked the officers if they could take her to Taliaferro, and that he told the officers that Taliaferro knew all about her and would take her in. Doc. no. 107-7, pp. 76-77. According to Jerome's testimony, the officers said they could not take Christina "in," and indicated that the only way they could take her "in" was for Jerome to file charges against her. *Id.* When Jerome asked what kind of charges he could file against Christina, an officer said Jerome could file trespassing charges. Jerome said, "we'll sign the trespassing charges for you to get

[8] The Lawton City Code includes the following language within the definition of trespassing: "Each and every actual entry or remaining upon the premises of another owner or person in possession of real property, whether the property is public or private, without the owner's or occupant's consent, express or implied;…." Section 16-3-1-316(B)(3), cited at doc. no. 92-14.

her out…. And I told them, would you -- would you please take her to Taliaferro." *Id.*

The court presumes Jerome's testimony to be true and grants plaintiff the benefit of an inference that Short and Turner incorrectly advised Anna about the necessity for a citizen's arrest as the only means by which to take Christina off the property. That said, a reasonable officer faced with plaintiff's version of the facts about what happened at the residence would have concluded that probable cause existed to arrest Christina for trespass, or to continue a citizen's arrest[9] of Christina for trespass, given two undisputed facts: Jerome and Anna wanted Christina removed from their property, and Christina refused to leave.

Furthermore, contrary to plaintiff's argument, Short's answer to a question at his deposition does not change the court's conclusion regarding probable cause for the arrest. Short was asked, "As you were assessing the situation, did you believe that Christina had committed any crime?" Doc. no. 107-9, p. 49. Short answered, "No, sir." *Id.* Counsel then asked Short, "Why was Christina then taken into custody?" Short answered, "Her grandfather signed a citizen's complaint for trespassing because she wouldn't leave." *Id*. Read in context, Short's "no" answer clearly was *not* intended to indicate that Short did not believe Christina could be arrested for trespass. Furthermore, no matter what Short believed, the question is whether a reasonable officer, presented with the information that Short had in his

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[9] The probable cause analysis is no different when a police officer effectuates a seizure after a citizen's arrest because, ultimately, assessment of probable cause is a nondelegable duty of law enforcement. *See*, Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1432 (10th Cir. 1984), vacated on other grounds by City of Lawton, Oklahoma v. Lusby, 474 U.S. 805 (1985). In Lusby, the City's policy permitted officers to take shoplifting suspects into custody without independent investigation if the suspect was the subject of a citizen's arrest by a merchant. The court referred to the City's policy as "an impermissible city policy that delegates a nondelegable duty…." 749 F.2d at 1432.

possession, would have had probable cause to arrest (or to continue a citizen's arrest) of Christina for trespass. Short's "no" answer constitutes, at most, a scintilla of evidence in support of plaintiff's false arrest claim.[10] Considered with the rest of the record, Short's "no" answer does not create a triable claim under § 1983 for false arrest.

The court concludes that no violation of Christina's constitutional rights has been shown so that plaintiff has not carried her burden at the first step of the qualified immunity analysis. This conclusion entitles Short and Turner to summary judgment on the § 1983 claim premised upon false arrest.

Alternatively and additionally, plaintiff has not carried her burden to identify clearly established law that would have put Short or Turner on notice that their conduct (determined by the version of events most favorable to the plaintiff) violated the Constitution. Plaintiff argues that decisions addressing an arrest warrant issued on false information in an affidavit constitute clearly established law in this area. But that law is not sufficiently on point to put Short or Turner on notice that officers who acted as plaintiff contends these officers did would be acting unconstitutionally. Plaintiff also argues that Short and Turner's conduct was so outrageous that it was obvious they were on notice of relevant constitutional limits even without a specific case on point. Although the court recognizes that a plaintiff can sometimes meet her burden with respect to clearly established law without identifying a specific, controlling case on point, that argument is inapplicable here. None of the conduct in issue is so outrageous as to be obviously unconstitutional.

[10] The court also notes that, as discussed later, it was not Short, but Turner, who took Christina into custody on the trespass charge.

Short and Turner are entitled to qualified immunity with respect to the § 1983 claim premised upon false arrest.[11]

Apart from the qualified immunity analysis, the court agrees with Short and Turner's alternative argument that there is insufficient evidence to support the false arrest claim. The court's findings at the first step of the qualified immunity analysis (no constitutional violation) are sufficient to explain this conclusion.

For the reasons stated, Short and Turner are entitled to summary judgment on the § 1983 claim premised upon false arrest (the first claim).

B. Section 1983 Claim Against Short and Turner for Deliberate Indifference To Christina's Need for Medical And Mental Health Care

Short and Turner are among the defendants who are named in plaintiff's second claim, which alleges a § 1983 claim for deliberate indifference to Christina's need for medical and mental health care. Short and Turner's motion for summary judgment on this claim is addressed below. The other defendants who are named in this claim move separately and their motion is addressed later. The law which governs all of these defendants' motions for summary judgment on the deliberate indifference claim is set out here.

Plaintiff's § 1983 claim for deliberate indifference to Christina's need for medical and mental health care rests on an alleged violation of eighth amendment standards made applicable through the Fourteenth Amendment. Estate of Booker v.

[11] Olsen v. Layton Hills Mall, 312 F.3d 1304 (10th Cir. 2002), which involved the arrest of a person with mental health issues, arrives at a different conclusion but applies the same principles. Qualified immunity was denied on the § 1983 claim of false arrest due to disputed facts. *Id.* at 1313. The court noted that the arresting officer relied on what he had been told without conducting an investigation of his own, and that the charges included an interference with arrest charge which the officer had tacked on "*immediately before* he effectuated the arrest." *Id.* at 1310 (emphasis in original). In contrast, Short and Turner were on the scene from the outset and were in a position to personally assess probable cause.

Gomez, 745 F.3d 405, 429 (10th Cir. 2014) (Eighth Amendment's proscription against deliberate indifference to the serious medical needs of a prisoner applies to pretrial detainees under the Fourteenth Amendment); Estrada v. Cook, 166 F.Supp.3d 1230, 1244 (D. N.Mex. 2015) (claims of delayed medical treatment by pretrial detainees, and even by arrestees, are covered under the Fourteenth Amendment which makes applicable the Eighth Amendment's standard of deliberate indifference).[12]

Under eighth amendment standards, deliberate indifference has both an objective and a subjective component. Callahan v. Poppell, 471 F.3d 1155, 1159 (10th Cir. 2006).

The objective component is met if the harm suffered is sufficiently serious to implicate constitutional protection. *Id.* The Tenth Circuit has stated that a medical need is sufficiently serious to warrant constitutional protection if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. Mata v Saiz, 427 F.3d 743, 753 (10th Cir. 2005). Here, undisputed evidence establishes: Christina's bipolar condition; that Christina had been seen at medical facilities for this condition; and that Christina had been prescribed medication for this condition

[12] For purposes of this claim, the parties agree that Christina's protections arise under the Fourteenth Amendment's Due Process Clause and that eighth amendment standards apply.

including on the day of her arrest.[13] The objective component of the test for deliberate indifference to mental health care needs is satisfied.[14]

The subjective component of the deliberate indifference test is satisfied only if the defendant knew of an excessive risk to the plaintiff's health or safety and disregarded that risk. Rife v. Oklahoma Dep't of Public Safety, 854 F.3d 637, 647 (10th Cir. 2017). In deciding whether this component is satisfied, the factfinder may consider circumstantial evidence. *Id.* For example, the existence of an obvious risk to health or safety may indicate awareness of the risk, although the obviousness of a risk is not conclusive and [an official] may show that an obvious risk escaped him. *Id.* Furthermore, the subjective component requires the official to disregard the specific risk claimed by the plaintiff. Crocker v. Glanz, ___ Fed. Appx. ___, 2018 WL 4566260, *3 (10th Cir. September 24, 2018).

Keeping these standards in mind, the court addresses Short and Turner's qualified immunity defense to the claim that they were deliberately indifferent to Christina's need for medical and mental health care. Before doing so, however, it is important to define the parameters of this claim. At this stage, plaintiff's briefing describes her deliberate indifference claim against Short and Turner as follows: "Defendant[s] Turner and Short violated Christina's constitutional rights by denying her medical care and instead taking her to a jail facility that was not equipped, designed, or staffed to house the mentally ill." Doc. no. 105, pp. 22-23.

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[13] Earlier on November 13, 2014, Christina was seen at the Comanche County Memorial Hospital after an ambulance was called for her by another officer who was dispatched to the residence prior to the time that Short and Turner were dispatched. Medical records show Christina was prescribed medicine for a urinary tract infection and for bipolar disease. Doc. no. 92, p. 13, ¶ 15 and medical records at doc. no. 92-6.

[14] The finding that the objective component is satisfied applies to all of plaintiff's claims based on deliberate indifference to Christina's need for mental health care, whether those claims are alleged against Short, Turner or any other defendant.

Two things are clear about this claim as pressed in plaintiff's briefing papers. First, plaintiff does not assert (nor would the record support) a claim that Short and Turner were deliberately indifferent to any of Christina's medical needs other than her need for mental health care. Second, the specific conduct plaintiff argues was unconstitutional is that Short and Turner took Christina to jail rather than obtaining mental health care for her. Accordingly, going forward, the court considers the deliberate indifference claim against Short and Turner as limited to the claim that Short and Turner were deliberately indifferent to Christina's need for mental health care when they took Christina to jail rather than obtaining mental health care for her.[15]

The first step of the qualified immunity analysis with respect to this claim requires plaintiff to show unconstitutional conduct by either Short or Turner.

Referring back to the legal principles (already stated) that govern officers' conduct with respect to the rights of the people with whom they come into contact, the first question is whether the objective component of the deliberate indifference analysis has been satisfied. The court has answered that question in the affirmative.

The next question (albeit a question still within the first step of the qualified immunity analysis) is whether there is evidence to satisfy the subjective component of deliberate indifference. To carry her burden in this regard, plaintiff must identify evidence that Short or Turner knew of an excessive risk to Christina's health or safety and disregarded that risk.

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[15] Throughout this order, the court holds plaintiff to her description of her claims, as briefed. This case is far too complex to require evaluation by the court (or ultimately by a jury) of any aspects of any claims that have not been defended in a developed and non-conclusory way in response to the defendants' comprehensive and supported motions. Moreover, it is the court's clear impression that the plaintiff has not overlooked any arguments but that she has, instead, made a strategic decision (as is appropriate and helpful at this stage) to press only those aspects of her claims that she considers most viable.

In determining what Short or Turner knew, plaintiff is entitled to an inference that both officers knew what either officer knew, unless otherwise stated below. This inference is reasonable because these officers were working together when the call came in from dispatch as well as when they were at the residence. With that understanding, the court addresses the evidence most relevant to what Short and Turner did or did not know about Christina's condition and circumstances on the afternoon of November 13, 2014.

As previously stated, there is no evidence that Short or Turner knew about any dispatch calls other than the dispatch call they answered. Nor is there any evidence that Short or Turner knew that Christina had, that morning, been treated and discharged from Comanche County Memorial Hospital. It is undisputed that Turner, at times while he was in the residence, saw Christina sitting at a table, eating. Doc. no. 92, p. 16, ¶ 23. At one point he observed her sitting calmly outside on the sidewalk. *Id.* at p. 17, ¶ 26. There is no evidence that Christina, in the presence of either of these officers, took any violent actions or behaved in any way that could be considered dangerous to her physical safety or to the safety of others. There is no evidence that Christina resisted arrest or transport to the jail. The gist of the evidence is that while these officers were at the home, Christina was calm and cooperative.

It is undisputed that before entering the jail, Christina stopped, in Turner's presence, and spoke to another person for five to ten minutes. *Id*. at p. 20, ¶ 33. (Knowledge of this conversation is not imputed to Short, who was not present at the time.)

On the other side of the subjective component "scale," there is undisputed evidence that Short and Turner were told by dispatch that Anna reported Christina had been throwing cups of milk on her and had made threats to kill people. *Id.* at p. 16, ¶ 21. Taking plaintiff's version of the facts as true at this stage, Short and Turner were also made aware, during their time at the residence, that, according to Jerome,

"Christina was going into a bipolar state," that he (Jerome) requested that Christina be taken to Taliaferro for treatment, that Taliaferro had information about Christina, and that Taliaferro would take Christina in. Doc. no. 107-7, pp. 76-77. There is evidence that when Short tried to ask Christina questions, Christina was, at least for some period, unresponsive. Doc. no. 107-9, p. 45. It is undisputed that at some point Short became aware that Christina had defecated on herself. *Id.* Plaintiff is entitled to an inference that Short and Turner were aware, while still at the residence, that Christina did not have control of her bodily functions.

As for what happened after these officers left the home, it is undisputed that Short had no contact with Christina after he left the residence or during the booking process at the jail. Doc. no. 92, p. 20, ¶ 34. Short's affidavit says nothing about Christina ever being in his custody. Doc. no. 92-9. This is in contrast to Turner's affidavit, which states that, "After Chalepah [Anna] placed Christina under arrest for Trespassing, I assumed custody for Christina." Doc. no. 92-8. (Another police officer drove Christina to jail, and Turner followed in his police car. Turner did not drive Christina to jail because he did not believe she would fit in his car.) Thus, the record is clear that Turner is the only police officer who took Christina into custody on the day in question.

It is undisputed that by the time Christina was booked, she had urinated on herself. As Short had no contact with Christina after she left the residence, this knowledge is not imputed to Short but is imputed to Turner. (Video evidence shows that Turner was present, with Christina, in the booking area of the jail.) Of course, by this time, Christina was being handed-off to the jail, and plaintiff does not argue that Turner's conduct during booking procedures deprived Christina of mental health care. Rather, as previously discussed, plaintiff's deliberate indifference claim against Short and Turner is based on the contention that police officers should not have taken Christina to the jail in the first place but should have, instead, taken her

for treatment. Relevant to this contention, plaintiff places considerable weight on the undisputed fact that neither Turner nor Short believed the jail was equipped to treat people who suffer from mental illness. Doc. no. 92, p. 20, ¶ 32.

Considering the evidence as a whole, a reasonable inference arises that Turner and Short knew that on the afternoon in question, Christina was in the middle of a bipolar episode during the time they were in contact with her. That said, it is an undisputed fact -- and a critical one in the view of the court -- that Short and Turner were aware the jail could send detainees to a local hospital or to Taliaferro or to any other mental health treatment facility, if the jail determined that a detainee required treatment by a medical or mental health professional. *Id.* The court also finds that when Short and Turner turned Christina over to the jail, these officers were indisputably entitled to presume that they were placing Christina in a controlled setting (which they were), where her mental health needs would be triaged, meaning that mental health care would be obtained for Christina if deemed necessary by jail officials. That is not the same thing as taking her to a mental health care facility, which plaintiff alleges they should have done. But it is a fact which, along with other undisputed evidence (such as the lack of any violent behavior by Christina in the presence of these officers), helps defeat plaintiff's claim that Short or Turner were deliberately indifferent to Christina's need for mental health care.

Plaintiff has not carried her burden to show evidence of unconstitutional conduct by Short or Turner with respect to the deliberate indifference claim alleged against these officers.[16]

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[16] Olsen, 312 F.3d 1304, which denied qualified immunity to the arresting officer on a deliberate indifference claim, is distinguishable. The Court of Appeals mentions no evidence to show that the arresting officer knew the jail could send detainees to a mental health treatment facility if mental health treatment were required. Furthermore, denial of qualified immunity turned on the

This conclusion makes it unnecessary to consider whether clearly established law put Short and Turner on notice that their conduct (their conduct, giving plaintiff the benefit of disputed facts and inferences) violated the Constitution. Nevertheless, the court concludes, Olsen notwithstanding,[17] that plaintiff has not identified clearly established law that would require an arresting officer to take an arrestee or detainee who is in the midst of a mental health episode to a treatment facility rather than to jail on charges for which there is probable cause, when the officer knows the jail has procedures to determine whether transfer to a mental health facility is needed.[18] Plaintiff also has not identified clearly established law holding that a police officer who is in the presence of a person in need of mental health care but who never takes that person into custody (like Short), is required by the Constitution to take that person to a mental health care facility or into protective custody, where that person has not exhibited, in the presence of the officer, any violent behavior or any behavior that puts safety at risk.

observation that there were "[s]trongly contradictory factual assertions as to the nature of OCD and [the officer's] response to [plaintiff's] pleas." *Id.* at 1317.

[17] On the topic of clearly established law, Olsen found that "[t]he right to custodial medical care is clearly established." *Id*. at 1315. But nothing in Olsen indicates that the plaintiff framed the issue in terms of whether the arresting officer was required to take plaintiff straight to a mental health care facility.

[18] *In accord*, Arrington-Bey, 858 F.3d 988, 992-93 (6th Cir. 2017) (pretrial detainee's right to medical treatment for a serious medical ailment (psychiatric) is clearly established but this principle, standing alone, does not suffice because clearly established law may not be defined at such a high level of generality; plaintiff, who had serious mental problems, "has not pointed to, and we have not found, any case like this one -- a case showing that the officers at the scene immediately needed to seek medical treatment"; "In delivering [the arrestee] to the jail, [the officers] had no reason to doubt that reasonable procedures would be used at that point, whether with respect to medical screening or separation [from other arrestees]"; "[N]o clearly established law, here or anywhere else from what we've seen, required the arresting officers to drive [the arrestee] to a hospital rather than the jail under these circumstances.").

Short and Turner are entitled to qualified immunity with respect to plaintiff's claim that they were deliberately indifferent to Christina's need for mental health care when they took her to jail rather than obtaining mental health care for her.

Apart from the qualified immunity analysis, the court agrees with Short and Turner's alternative argument that there is insufficient evidence to support a § 1983 claim premised upon Short and Turner's alleged deliberate indifference to Christina's need for mental health care. The court's findings at the first step of the qualified immunity analysis (no constitutional violation) are sufficient to explain this conclusion.

For the reasons stated, Short and Turner are entitled to summary judgment on the claim that they were deliberately indifferent to Christina's need for mental health care when they took her to jail rather than obtaining mental health care for her.

VII. Adamson, Quisenberry, Carney, Sellers, McMillion, Halligan and Fisher's Motion for Summary Judgment (Doc. no. 96)

This motion is brought by defendants who are jailers, as well as by two police officers (one, a former police officer) who stood by and observed, at the jail's request, when Christina was put into handcuffs at the beginning of the fifth handcuffing event. This motion challenges plaintiff's claim that this set of defendants was deliberately indifferent to Christina's need for medical and mental health care (the second claim), and challenges plaintiff's claim that this set of defendants used excessive force against Christina while she was being held in jail (the third claim).

A. Section 1983 Claim Against Adamson, Quisenberry, Carney, Sellers, McMillion, Halligan and Fisher For Deliberate Indifference To Christina's Need for Medical And Mental Health Care

In response to these defendants' motion, plaintiff expressly concedes her deliberate indifference claim in favor of all movants *except* Halligan, Sellers and

McMillion. Doc. no. 106, p. 38, n.107. This means that Adamson, Quisenberry, Carney and Fisher are entitled to summary judgment in their favor on the second claim.

The movants whose arguments remain for consideration -- Halligan, Sellers and McMillion -- are all jailers. Plaintiff's response brief presses her deliberate indifference claim against these remaining defendants in two parts.

1. Plaintiff claims Halligan and McMillion were deliberately indifferent to the risk that Christina would be deprived of mental health care from the time she was admitted to the jail through the date of her death. Plaintiff relies, for example, on Halligan's failure to do a mental health screening, and on Halligan and McMillion's failure to ensure that Christina had her bipolar medication. *See generally*, doc. no. 106, proposition II, pp. 27-32 (referring, for example, at p. 28, to "the suffering that [Christina] endured between the date of her incarceration and her death").

2. Plaintiff claims Sellers and McMillion were deliberately indifferent to Christina's medical health care needs, specifically a risk of death as a result of the fifth handcuffing event. *See generally*, doc. no. 106, proposition III, pp. 33-39. During the fifth handcuffing event, Christina was positioned in a certain manner for an hour and sixteen minutes. It was during the fifth handcuffing event that Christina was found non-responsive, after which she was taken to the hospital where she died three days later. (This claim, which is based on deliberate indifference to Christina's medical health care needs, should not be confused with plaintiff's third claim for relief, which alleges that excessive force was used by defendants during the fifth handcuffing event. That claim is addressed in Part VII.B. of this order.)

1. Claim That Halligan and McMillion Were Deliberately Indifferent to the Risk that Christina Would be Deprived of Mental Health Care From the Time She Was Admitted to the Jail Through the Date of Her Death

Before addressing the facts material to defendants' qualified immunity defense to this claim, it is helpful to do some "pruning" of this claim because only part of it merits detailed consideration. Although plaintiff purports to hold Halligan and McMillion liable through the date of plaintiff's death, plaintiff died three days after she was taken from the jail. There is no evidence that Halligan or McMillion were deliberately indifferent to the specific risk that Christina would be deprived of mental health care "through the date of her death," in other words, past the time that she was at the jail. In addition, plaintiff has not identified any clearly established law that would have put defendants on notice they were liable for the risk that their actions might deprive Christina of mental health care beyond the time she was in jail. Thus, the only part of the deliberate indifference claim against Halligan and McMillion that requires further consideration is the claim that Halligan and McMillion were deliberately indifferent to the risk that Christina would be deprived of mental health care during the time that she was actually held at the jail.

With respect to this claim, narrowed as just stated, the first step of the qualified immunity analysis requires the court to determine whether there is evidence that Halligan or McMillion's actions violated the constitutional right in question. The court has already found that Christina's mental health condition sufficiently serious to satisfy the objective requirement. See, n. 14, *supra*. The remaining question is whether there is evidence to satisfy the subjective component.

The following undisputed facts are material to this issue. Halligan was working the booking desk when Christina was presented to the jail at 2:13 p.m. on November 13, 2014. Doc. no. 96, p. 11, ¶ 11. By the time Christina arrived at the jail, she had urinated and defecated on herself. Doc. no. 106, p. 9. Plaintiff is entitled to an inference that Halligan, as the booking officer, as well as McMillion (who

came and went during that time), would have been aware of these facts.[19] When Christina was in the booking area she kept repeating "chlamydia, chlamydia, chlamydia." *Id.* It is presumed that these jailers heard Christina making these or other nonsensical statements during the booking period. *See*, *e.g.*, video, doc. no. 107-12. Halligan's knowledge in this regard is also established by his contention that Christina's nonsensical state was the reason he did not complete her medical evaluation at the time of booking. Furthermore, Halligan was told, by McMillion, that Christina was crying and asking about her medications. Doc. no. 107-5, p. 117. This conversation presumably occurred before Halligan went off duty at 3:00 p.m. McMillion also told Halligan that Christina said the police officers had kept Christina's medications. *Id*.

These facts create an inference that Halligan and McMillion knew: that at the time of her admission to the jail, Christina was suffering from a serious mental health condition for which she had been prescribed medication; that Christina needed medication at that time; and that Christina's medications were unavailable to her.

It is at this point in the analysis that the impact of the evidence on the claim against Halligan and the claim against McMillion begins to diverge.

Taking McMillion first, it is clear that McMillion informed Halligan about aspects of Christina's mental health condition -- Christina's crying, for example, and the fact that she was requesting her medication. McMillion also informed Halligan about what McMillion had been told, by Christina, regarding the location of Christina's medication. Given the context in which these conversations between McMillion and Halligan occurred, and given that Halligan was the booking officer who had the responsibility to screen Christina's medical and mental health condition,

[19] Video evidence shows McMillion in the booking area at times when Christina was present, and indicates McMillion helped Christina (off-camera) into clean clothes.

McMillion was entitled to rely on Halligan to perform his screening and triage duties with respect to Christina's mental health condition and her need for medication. There is no evidence that McMillion, during the time that Christina was being booked into the jail, was deliberately indifferent to Christina's need for mental health care.

McMillion's contact with Christina did not end at the time of booking. McMillion also had contact with Christina the next day, November 14, during handcuffing events which are discussed later, in relation to the excessive force claim. Regardless, there is no evidence that Christina, when she had contact with McMillion the next day, was speaking nonsense, or lacked control over any bodily functions, or was crying, or was asking for her medication. It is undisputed that Christina was yelling and banging on the metal bunk on November 14 and that McMillion was aware of this, but the record indicates that other inmates also did this at times. Christina appears to have cooperated when she was put into handcuffs on November 14. There is no evidence that Christina's episode of the prior day was continuing on November 14. Plaintiff has singled out no specific evidence to show that on November 14, McMillion knew that Christina still needed, but remained without, her bipolar medicine.

In sum, there is no evidence of deliberate indifference on McMillion's part to the risk that Christina would be deprived of mental health care during the time that Christina was held at the jail. Plaintiff has not carried her burden at the first step of the qualified immunity analysis with respect to this claim, and McMillion is entitled to summary judgment on this claim.

Turning to Halligan, it is undisputed that Halligan never completed a medical or mental screening of Christina, prior to Christina being housed in the jail.[20] There is also no evidence that Halligan took any steps to ensure that someone else at the jail would complete Christina's mental health screening. There is no evidence that Halligan, being unable to complete Christina's screening, noted in the screening records that the records were incomplete because Christina was not in her right mind or was speaking nonsense while he was on duty. There is no evidence of any follow-up on Halligan's part after he was told by McMillion that police officers had Christina's medications (true statement or not). For example, there is no evidence that Halligan talked to Turner or to any other police officer, or that he called Christina's family, to determine the location of Christina's medication. There is no evidence that Halligan made any effort to contact a supervisor or another jail officer to try to make sure Christina's needs for mental health care or for medication were met. *See*, doc. no. 107-5, pp. 117, 121. Halligan states that he chose not to make further inquiries about Christina's medications because "he thought it would get taken care of when they brought her back up." Doc. no. 107-5, pp. 121. Even if that is so, there is no evidence to explain why Halligan would have confidence that Christina would be "brought back up" anytime soon, or that her screening would be completed anytime soon, given Halligan's apparent failure to communicate her condition to anyone at the jail.

Giving plaintiff the benefit of all disputed facts and inferences, there is evidence to support a claim that Halligan was deliberately indifferent to an excessive risk posed to Christina's health or safety by her mental health condition at the time she was presented to the jail for admission, specifically, a risk that Christina would

[20] Halligan was disciplined by the City for his failure to complete Christina's booking process. Doc. no. 96, p. 11, ¶ 12.

be deprived of necessary mental health care while she was held at the jail. Plaintiff has carried her burden to show unconstitutional conduct by Halligan, at the first step of the qualified immunity analysis.

The second step is to determine whether clearly established law put Halligan on notice that his conduct (as determined by the version of events most favorable to the plaintiff) was unconstitutional. Plaintiff cites Olsen, which found, in the context of an arrestee who suffered from a mental disorder (OCD), that the "right to custodial medical care is clearly established," a finding which constituted a sufficient statement of clearly established law for purposes of that case. Olsen, 312 F.3d at 1315. Plaintiff also cites Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980). Ramos held that the Eighth Amendment requires the state to make available to inmates a level of medical care which is reasonably designed to meet their routine and emergency health care needs, including medical treatment for inmates' psychological needs or psychiatric care. *Id.* at 574-75. It is well established that the Eighth Amendment's standard of deliberate indifference to a prisoner's medical needs applies to pretrial detainees and even to arrestees under the Fourteenth Amendment's due process protections. *See*, Estrada v, Cook, 166 F. Supp. 3d 1230, 1244 (D. N. Mex. 2015), citing Wilson v. Meeks, 52 F.3d 1547, 1555–56 (10th Cir.1995), Howard v. Dickerson, 34 F.3d 978, 980–81 (10th Cir.1994), and City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983) (addressing municipalities' obligations to persons injured while being apprehended by police).

Plaintiff has identified clearly established law putting Halligan on notice that deliberate indifference to Christina's need for mental health care, as evidenced by Halligan's conduct during the time that Christina was being booked into the jail, would violate Christina's constitutional right to mental health care while she was held at the jail. Plaintiff has carried her burden at the second step of the qualified immunity analysis, with respect to the deliberate indifference claim against Halligan.

The result is that McMillion is entitled to qualified immunity on this claim but Halligan is not.

Apart from the qualified immunity analysis, Halligan and McMillion argue there is insufficient evidence to support the deliberate indifference claim alleged against them. As shown by the court's findings at the first step of the qualified immunity analysis, there is insufficient evidence to support plaintiff's deliberate indifference claim against McMillion, but the evidence is sufficient to support this claim against Halligan. Accordingly, Halligan and McMillion's alternative argument for summary judgment works for McMillion and provides another basis for summary judgment in McMillion's favor, but it does not work for Halligan, whose motion will be denied.

For the reasons stated, McMillion's motion for summary judgment on plaintiff's § 1983 claim of deliberate indifference to Christina's need for mental health care will be granted. Halligan's motion for summary judgment on this claim will be denied.

2. Claim that Sellers and McMillion Were Deliberately Indifferent to Christina's Medical Needs, Specifically a Risk of Death As a Result of the Fifth Handcuffing Event

The court now turns to plaintiff's claim that Sellers and McMillion were deliberately indifferent to Christina's medical needs, specifically a risk of death as a result of the fifth handcuffing event during which Christina was handcuffed in a certain position for an hour and sixteen minutes. The law governing claims of deliberate indifference to medical or mental health care needs has already been set out, so the court begins its first-step analysis with a review of relevant facts.

It is undisputed that Christina was 5' 3'' and weighed 374 pounds; that she had a body mass index of 66; and that she would be considered morbidly obese.

Doc. no. 106, p. 15. Christina's obesity would have been obvious to Sellers and McMillion.

Undisputed facts regarding the *fourth* handcuffing event are relevant to the *fifth* handcuffing event.

Relative to the fourth handcuffing event, at approximately 7:25 a.m. on the morning of November 14, Sellers was in the booking area when he heard Christina kicking and banging the bunk in her cell. Doc. no. 96, p. 14, ¶ 19. Sellers went to the cell area and observed Christina facing the metal bunks and hitting the bunks with her hands, and yelling. *Id.* Sellers handcuffed Christina with Christina seated on the floor of her cell, with her back to the bars, and with her hands over her shoulders at head level, using two pairs of handcuffs for each hand due to her size. Doc. no. 96, p. 14, ¶ 19.

Video evidence regarding the fourth handcuffing event (doc. no. 107-14) shows that shortly after 8:00 a.m. that morning, McMillion states as follows, in the booking area of the jail: "Christina. She keeps shaking 'em and moving 'em where they're turning red."[21] Doc. no. 106, p. 12, ¶ 20. McMillion then returns to the cell and observes Christina again, comes back into the booking area where Sellers was located, and states as follows. "Hey LT [Lieutenant Sellers], we'll have to loosen Christina's a little bit…because [her hands are] turning colors." Doc. no. 106, p. 12, ¶ 20. Sellers says to let Christina out but to tell her that if she does it again, she would be cuffed again. *Id.* McMillion and another jailer (Stewart, not a defendant) then released Christina from her cuffs. *Id.*; *and see*, video, doc. no. 107-14. Thus, evidence shows that during the fourth handcuffing event, Christina developed circulation problems and injuries which were apparent because her hands were

[21] The video does not show to whom McMillion was speaking but circumstances suggest it was another jailer, probably Sellers.

turning colors; due to those injuries, Christina was released from the cuffs after approximately forty to fifty minutes. Doc. no. 96, p. 14, ¶ 20.

It is undisputed that the fifth handcuffing event occurred later that same morning, on November 14, 2014, between approximately 11:48 a.m. and 1:04 p.m. The fifth event was triggered when McMillion observed Christina hitting the metal bunk so hard that the upper bunk broke. McMillion tried to calm Christina down. *Id*. at p. 15, ¶ 22. From the booking area, Sellers heard the banging and yelling and he called to request additional officers to stand by while the jail again restrained Christina. *Id*. Those other officers (Adamson and Quisenberry) followed Sellers into the cell block area, where McMillion stood, talking to Christina. *Id.* at pp. 15-16, ¶ 23. Christina again sat down, with her back to the cell bars, and put her arms over her shoulders with her hands at head level. McMillion placed two sets of handcuffs on Christina's hands and connected the handcuffs to the bars. *Id.*

A jail trustee (Tosta, not a defendant) was assigned to monitor the area, which plaintiff contends violates Oklahoma jail regulations.[22] *Id*. at p. 17, ¶ 25. It is undisputed that McMillion went back into the cell block area three times while Christina was handcuffed during the fifth handcuffing event. *Id.* at p. 17, ¶ 26. Christina was still sitting with her back to the bars during this time. *Id.* The video shows the trustee massaged Christina's hands, and that McMillion and the trustee had what plaintiff characterizes as an "animated conversation." Doc. no. 106, p. 13; *and see*, video, doc. no. 107-16.

The trustee's affidavit states that while Christina was cuffed that morning, Christina would move and kick and slide forward, making the cuffs tighter. Doc.

[22] According to plaintiff, the regulation states: "A prisoner shall be prohibited from supervising, controlling, exerting or assuming any authority over another prisoner." Doc. no. 108, p. 16.

no. 96-17.[23] The trustee states that at one point Christina told her that her hands were numb and asked her to notify the jailers, which she did. *Id.* The trustee states that she continued to watch Christina and continued to have conversations with her, and massaged her hands for her. *Id.* The trustee states that, "When I noticed that she stopped talking and her hands were blue, or dark purple, I went over to her, touched her arm and she was not moving. I immediately notified the guards and the guards immediately responded." *Id.* Plaintiff argues that the guards did not "immediately" respond because the video shows (as it does) that it took several minutes for anyone (Sellers) to respond to the trustee's repeated knocks on the door. *Id.* Doc. no. 107-17 (video at approximately 3:10 to 6:51).

It is undisputed that after Sellers went to the cell block and found Christina unresponsive, others responded. Attempts were made to find a pulse, an automated external defibrillator was used and chest compressions were started. Doc. no. 96, p. 18, ¶ 28. Christina was transported by ambulance to Comanche County Memorial Hospital where, on November 17, 2017, she died. *Id.*

Plaintiff argues that Christina exhibited factors which predisposed her to sudden-in-custody-death syndrome, such as: bizarre behavior, aggressive behavior, shouting, obesity, a big belly, and antipsychotic drug use. Doc. no. 106, p. 25. It is undisputed that Sellers and McMillion both have been trained about positional asphyxiation. Doc. no. 106, p. 20.[24]

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[23] Plaintiff challenges defendant's ability to rely on the trustee's affidavit, arguing the trustee is not listed on defendant's witness list. Defendant responds by arguing that the trustee is listed on plaintiff's final witness list, and that defendants' list therefore incorporates the trustee by reference. In these circumstances, the court is permitted to consider the trustee's affidavit.

[24] Although not dispositive, an official's training may undermine his or her claim that she was unaware of a risk to an inmate. Estate of Booker v. Gomez, 745 F.3d 405, 430 (10th Cir. 2014).

Keeping this record in mind, the first step of the qualified immunity analysis requires the court to determine whether the evidence shows unconstitutional conduct by Sellers or McMillion. To the extent material here, the deliberate indifference claim rests on the allegation that Sellers and McMillion's conduct, in response to Christina's medical and mental health conditions (obesity and mental illness[25]) constituted deliberate indifference to the risk that Christina might die, due to the manner in which she was handcuffed during the fifth handcuffing event. (When the court refers to the "manner" of handcuffing, it refers to both the position in which Christina was handcuffed and the duration of the handcuffing.)

There is evidence that these defendants were aware of risks such as a loss of circulation to Christina's hands based on the manner in which she was handcuffed during the fourth and fifth events. There is no evidence, however, that Sellers or McMillion were deliberately indifferent to the specific risk that Christina *might die* as a result of the manner of Christina's fifth handcuffing. *See generally*, Crocker, ___ Fed. Appx. ___, 2018 WL 4566260 at *3 (10th Cir. September 24, 2018) (where complaint did not allege sheriff was deliberately indifferent to the specific risk of an attack by other inmates on the plaintiff, who had serious mental health issues, the sheriff was entitled to qualified immunity because the subjective component of the deliberate indifference test was not supported by the allegations).

Accordingly, Sellers and McMillion are entitled to qualified immunity with respect to plaintiff's claim that they were deliberately indifferent to Christina's medical needs, specifically to a risk of death as a result of the fifth handcuffing event. This conclusion makes it unnecessary to determine whether plaintiff has carried her

[25] The record shows that McMillion knew about Christina's mental state as it existed on November 13. The record does not indicate whether Sellers had this knowledge.

burden to identify clearly established law in this area, and the court does not address that step of the analysis.

Apart from the qualified immunity issue, the court agrees with Sellers and McMillion's alternative argument for summary judgment on this claim. There is insufficient evidence to support this claim against Sellers and McMillion. The court's findings at the first step of the qualified immunity analysis (no unconstitutional conduct) are sufficient to explain this conclusion.

For the reasons stated, Sellers and McMillion are entitled to summary judgment on the claim that they were deliberately indifferent to Christina's medical health care needs, specifically to a risk of death as a result of the fifth handcuffing event.

3. Summary of All Rulings on § 1983 Claim of Deliberate Indifference to Christina's Need for Medical and Mental Health Care (the Second Claim)

The court has now covered all of the individual defendants' challenges to plaintiff's § 1983 claim of deliberate indifference to Christina's need for medical and mental health care (the second claim), in all of that claim's iterations, and as applicable to all defendants named in that claim. Because defendants' challenges to this claim are spread across two motions for summary judgment, it is helpful to review here which part of the second claim survives this order.

Based on the court's findings in Parts VI and VII of this order, the part of the second claim that survives for trial is plaintiff's claim that Halligan (who failed to complete Christina's screening when she was booked into the jail) was deliberately indifferent to the risk that Christina would be deprived of mental health care while at the jail. Otherwise, defendants are entitled to summary judgment in their favor on the second claim.

B. Section 1983 Claim Against Adamson, Quisenberry, Carney, Sellers, McMillion, Halligan and Fisher For Excessive Force.

Defendants Adamson, Quisenberry, Carney, Sellers, McMillion, Halligan and Fisher challenge the third claim alleged in this action -- the claim that excessive force was used by jailers Halligan, Sellers, Carney, Fisher and McMillion, and also by police officers Adamson and Quisenberry.[26] Adamson and Quisenberry stood by and observed, at the request of the jail, while Christina was handcuffed, at the jail, for the fifth time. Thus, although two police officers are named as defendants to the excessive force claim, all of the conduct relevant to this claim occurred at the jail and involved handcuffing.

For this claim, plaintiff relies on the Fourth Amendment, which, rather than the Fourteenth Amendment, governs excessive force claims arising from treatment of an arrestee detained without a warrant and prior to a probable cause hearing. Estate of Booker v. Gomez, 745 F.3d 405, 419 (10th Cir. 2014).[27] As noted in Frohmader v. Wayne, 958 F.2d 1024, 1026 (10th Cir. 1992), the Tenth Circuit, in Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991), held that claims of post-arrest excessive force brought by arrestees detained without a warrant, are governed by the objective reasonableness standard of the Fourth Amendment as that standard is set forth in Graham v. Connor, 490 U.S. 386, 397 (1989), until the detained arrestee is brought before a judicial officer for a determination of probable cause to arrest. Under the Fourth Amendment, the question is whether defendants' actions were objectively reasonable in light of the facts and circumstances confronting them,

[26] Quisenberry is now a former police officer.

[27] For purposes of this claim, the parties agree that Christina's rights arise under the Fourth Amendment.

without regard to their underlying intent or motivation. Frohmader at 1026, citing Graham at 397. Reasonableness must be viewed from the perspective of the defendants on the scene rather than with the 20/20 vision of hindsight. Frohmader at 1026, citing Graham at 396.[28]

In arrest cases involving handcuffing, the Tenth Circuit has held that an examination of the resulting injury supplements the inquiry. *See*, Fisher v. City of Las Cruces, 584 F.3d 888, 897 (10th Cir. 2009) (including Judge (now Justice) Gorsuch's concurring opinion at 902, which notes that the court examines the resulting injury in tight-handcuffing cases in order "to fill a small analytical void that Graham left open."). In order to succeed on a manner-of-handcuffing claim, "a plaintiff must show some actual injury that is not *de minimis*, be it physical or emotional." Koch at 1247, citing Cortez, 478 F.3d at 1129 and Fisher, 584 F.3d at 899, for the conclusion that this standard applies "when the excessive force claim involves the officers' actions in applying handcuffs -- a manner of handcuffing claim."

Keeping these standards in mind, this order addresses plaintiff's excessive force claim which, as briefed, is pressed in two parts.

1. Plaintiff makes an undifferentiated claim that all of the defendants who are sued for excessive force are liable for various handcuffing events based on their direct or indirect involvement in those events.

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[28] Kingsley v. Hendrickson, ___ U.S. ___, 135 S. Ct. 2466 (2015), which addresses excessive force under the Fourteenth Amendment's Due Process Clause in a case brought by a pretrial detainee awaiting trial in a county jail, is consistent. The Court held that where officers act purposefully or knowingly with respect to the force used, an objective standard applies. *Id.* at 2472. "[A] pretrial detainee must show only that the force purposely or knowingly used against him was objectively reasonable." *Id*. at 2473. While this standard is not applied mechanically and turns on the facts and circumstances of the particular case, a court makes this determination "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with 20/20 vision of hindsight." *Id*.

2. Plaintiff claims Sellers and McMillion used excessive force during the fifth handcuffing event.

1. Undifferentiated Claims of Excessive Force

Plaintiff argues that all of the moving defendants are liable for the manner in which Christina was handcuffed, while at the jail, at various times. Plaintiff bases this claim on these defendants' direct or indirect participation in Christina's handcuffing. With respect to indirect participation, plaintiff argues that these defendants failed to intervene in any of the handcuffing events involving Christina.

Holding aside for the moment plaintiff's claims based on Sellers and McMillion's involvement in the fifth handcuffing event, plaintiff presents no developed advocacy to identify, on a defendant-by-defendant basis, each defendant's involvement in, or relationship to, the five handcuffing events. Plaintiff does not identify which defendants directly participated in which events. Plaintiff does not identify which defendants she claims indirectly participated in (*i.e.* failed to intervene in) particular handcuffing events. With respect to her failure to intervene argument, plaintiff presents no arguments about a particular defendant's physical location at the time of handcuffing events or about that defendant's contemporaneous knowledge of the fact that a handcuffing event was underway. Instead, in this portion of her brief, plaintiff relies on undifferentiated arguments.

As support for her claim that all of the named defendants are liable, basically as a group, for excess forced used during any or all of the handcuffing events, plaintiff argues that it was patently unreasonable to handcuff Christina in the manner that she was handcuffed, citing the expert report of W. Ken Katsaris. Mr. Katsaris states his conclusions that the manner in which Christina was handcuffed is barbaric; that it is not a recognized, trained, or accepted corrections practice; that he is not aware of this practice being used anywhere else in the country; that the manner in which Christina was handcuffed is very dangerous; and that the only safe way to

restrain Christina, given all of the circumstances, would have been through use of a restraint chair. Doc. no. 106, p. 23, citing Katsaris report, doc. no. 107-1.

Taking these opinions as correct, they are not a substitute for individuated arguments explaining how each defendant named in the excessive force claim was supposedly involved, directly or indirectly, in handcuffing events. Stated in terms of the first step of the qualified immunity analysis, plaintiff has not carried her burden to show unconstitutional conduct in support of her contention that all of the defendants named in the excessive force claim are liable for the manner in which Christina was handcuffed at various times. With respect to the clearly established law step of the analysis, plaintiff has not carried her burden to identify law which holds that defendants can have liability under § 1983 based on their indirect involvement in the events in question. To the contrary, it is fundamental that liability under § 1983 requires direct participation in the deprivation of a person's rights.

The result is that Adamson, Quisenberry, Carney, Halligan and Fisher are entitled to qualified immunity on the excessive force claim as a whole, and that Sellers and McMillion are entitled to qualified immunity with respect to all claims of excessive force that are premised upon anything *other than* their involvement in the fifth handcuffing event, discussed next.

2. Claim that Sellers and McMillion Used Excessive Force During the Fifth Handcuffing Event

This leaves for consideration the excessive force claim alleged against Sellers and McMillion based on their involvement in the fifth handcuffing event.

The evidence relevant to Sellers and McMillion's involvement in the fifth handcuffing event has already been described in this order. *See*, Part VII.A.2. Accordingly, relevant to the fifth handcuffing event, the court only needs to add one

more finding. That finding is that there is evidence to show the fifth handcuffing event led to an injury which was far from *de minimis.*[29]

Defendants contend it was necessary to handcuff Christina for her own safety. McMillion's affidavit, for example, states that Christina, who had been banging on the metal bunk, was handcuffed to the jail cell bars during the fifth handcuffing event to prevent her from harming herself. Doc. no. 95-21. As a rationale for the handcuffing events, defendants also rely on the jail's interest in preserving order, discipline and security. None of these arguments, however, explain why concerns about Christina's safety or jail management required jailers to handcuff Christina, in the position in which she was handcuffed (which plaintiff contends was a physically compromising position), for an hour and sixteen minutes.

There is evidence to support plaintiff's claim that based on what Sellers and McMillion knew and did at the time, these jailers acted unconstitutionally with respect to the amount of force used against Christina during the fifth handcuffing event. In other words, plaintiff has carried her burden at the first step of the qualified immunity analysis with respect to the excessive force claim against Sellers and McMillion.

The next question is whether plaintiff has shown that the right at issue was clearly established at the time of the fifth handcuffing event. For this purpose plaintiff cites Fisher, 584 F.3d 888 (10th Cir. 2009). Fisher differs on its facts for several reasons, including because it involved handcuffing in connection with an

[29] Of course, plaintiff need not actually "show" or "prove" facts at this stage. Plaintiff must merely demonstrate the existence of a genuine issue of material fact. Although this order sometimes uses the quoted terms because they are used in the case law, the court has consistently judged plaintiff's evidence by the lesser standard which is appropriate at this stage.

arrest. Nevertheless, the plaintiff in Fisher relied on fourth amendment protections, as does the plaintiff here.

Furthermore, the Court of Appeals stated as follows in Fisher: "It is long established law of this and other circuits that a triable claim of excessive force exists where a jury could reasonably conclude that the officer handled a cooperating arrestee in a manner that the officer knew posed a serious risk of exacerbating the arrestee's injuries, which were themselves known to the officer." *Id.* at 901. The pre-existing injuries in Fisher were self-inflicted bullet wounds to the abdomen, which the plaintiff, at the time of the handcuffing, complained were being exacerbated by a behind-the-back handcuffing. *Id*. at 896. In the instant case, Sellers and McMillion were aware of a pre-existing injury to Christina, specifically, injuries which occurred during the fourth handcuffing event as evidenced by the fact that Christina's hands turned colors during that event. Sellers and McMillion were also aware of Christina's obesity, a pre-existing physical condition which may have contributed to the tightness of Christina's handcuffs or to Christina's injuries. Despite their awareness of Christina's vulnerability to circulation injuries based on the fourth handcuffing event, these jailers participated in handcuffing Christina during the fifth handcuffing event -- handcuffing her in the same position that had been used during the fourth event but for a much longer period of time.

Thus, both Fisher and this case involve claims that an arrestee's pre-existing injuries or compromised physical condition, of which officers were aware, were exacerbated when the arrestee was handcuffed in a particular manner.

Furthermore, as a more general proposition of clearly established law, a post-arrest detainee who is detained without a warrant, as Christina was, has long-established constitutional protections against use of excessive force which are measured by the objective reasonableness standard. Frohmader, 958 F.2d 1024, 1026 (10th Cir. 1992).

Clearly established law put Sellers and McMillion on notice that they were subject to an excessive force claim based on their involvement in the fifth handcuffing event.

Sellers and McMillion are not entitled to qualified immunity with respect to plaintiff's claim that they used excessive force against Christina during the fifth handcuffing event.

Apart from the qualified immunity analysis, the court rejects these defendants' alternative argument for summary judgment, which is that there is insufficient evidence to support an excessive force claim against them. The Fourth Amendment's reasonableness inquiry "notoriously eludes easy formula or bright line rules." Fisher, 584 F.3d at 894. Sellers and McMillion's potential liability for use of excess force during the fifth handcuffing event should be determined by a jury.

For the reasons stated, Sellers and McMillion's motion for summary judgment on the claim that they used excessive force against Christina during the fifth handcuffing event will be denied. Otherwise, defendants are entitled to summary judgment on the excessive force claims (the third claim).

VIII. The City's Motion for Summary Judgment (Doc. no. 95)

A. Section 1983 Claim For Failure to Train

The fourth claim is a § 1983 failure to train claim alleged against the City.[30] As briefed, plaintiff presses this claim in two parts.

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[30] As alleged, the fourth claim included a claim of inadequate supervision and discipline. The briefing papers, however, show that these aspects of this claim are no longer pressed by the plaintiff. (The City's brief, and the plaintiff's response brief, describe the § 1983 claim against the City as a failure to train claim. In addition, the City argues that the failure to supervise claim is merely conclusory. Doc. no. 95, pp. 45-46. Plaintiff's response brief does not take issue with that characterization. Nor has plaintiff identified any defendant as a supervisor.)

1. Plaintiff claims the City failed to adequately train police officers and jailers regarding the rights of persons with whom officers come into contact to medical and mental health care.

2. Plaintiff claims the City failed to adequately train jailers regarding use of force.[31]

The law governing these failures to train claims is as follows.[32]

A local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Monell v. Dep't of Social Services of City of New York, 436 U.S. 658, 694 (1978). Instead, it is when execution of a government's policy or custom inflicts the injury, whether that policy is made by lawmakers or by those whose edicts or acts may fairly be said to represent official policy, that the government as an entity is responsible under § 1983. *Id.*

A municipality's culpability for a deprivation of rights is at its most tenuous when a claim turns on a failure to train. Connick v. Thompson, 563 U.S. 51, 61 (2011). To satisfy the statute, a municipality's failure to train its employees in a relevant respect must be so egregious as to amount to deliberate indifference to the rights of persons with whom the untrained employees come into contact. *Id*. Only then can such a shortcoming be properly thought of as a city policy or custom actionable under § 1983. *Id.* If a training program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Board of County Com'rs of Bryan County, Okla. v Brown, 520 U.S. 397, 410 (1997). Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish

[31]The fourth claim does not reference false arrest as a predicate for a failure to train claim. Moreover, this order has found insufficient evidence for a § 1983 claim premised upon false arrest.

[32] The parties agree on these legal requirements for a failure to train claim.

the conscious disregard for the consequences of their action -- the deliberate indifference -- necessary to trigger municipal liability. *Id.*

To prevail on a claim against a municipality for failure to train its officers (police officers or jailers), plaintiff must prove that the training was, in fact, inadequate. Carr v. Castle, 337 F.3d 1221, 1228 (10th Cir. 2003).

In addition to this initial requirement, plaintiff must show that:

> (1) The 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 City's inadequate training of its officers demonstrates deliberate indifference on the part of the City toward persons with whom the officers come into contact; and that
>
> (4) There is a direct causal link between the constitutional deprivations and the inadequate training.

337 F.3d at 1228.

The initial, unnumbered requirement for a failure to train claim (evidence that the training was, in fact, inadequate) will be addressed later, to the extent necessary.

Turning to the first of the numbered requirements -- evidence that an officer of the City violated the constitutional right in question -- it is apparent that a good portion of the failure to train claim necessarily fails under this requirement, given rulings already made in this order. The only violations of constitutional rights which are supported on this record are a violation (by jailer Halligan) of Christina's right to mental health care while held at the jail, and a violation (by jailers Sellers and McMillion) of Christina's right to be free of excessive force during the fifth handcuffing event. This means that to the extent plaintiff's failure to train claim is

premised upon any training inadequacies *other* than inadequacies relating to how jailers were trained to deal with the mental health care needs of persons being held at the jail, or relating to how jailers were trained to deal with handcuffing persons who are detained at the jail, the failure to train claim fails under the first-numbered requirement.

Accordingly, it is only necessary to give further consideration to a narrowed version of the two parts of plaintiff's failure to train claim. Based on the discussion above, the surviving parts of the failure to train claim, are:

1. A claim that the City failed to train jailers regarding mental health care for persons held at the jail; and

2. A claim that the City failed to train jailers regarding use of force at the jail, specifically, handcuffing.

Next, the court tests these surviving portions of the failure to train claim against the other requirements.

1. Claim that the City Failed to Train Jailers Regarding Mental Health Care for Persons Held at the Jail

To satisfy the third-numbered requirement with respect to this claim,[33] plaintiff must identify evidence that the City's inadequate training demonstrates deliberate indifference on the part of the City toward persons with mental health care needs who are being held at the jail.

To prove deliberate indifference, plaintiff, at this stage of the litigation, does not rely on a pattern of conduct; rather, she argues that the evidence brings this case within an exception noted in Allen v. Muskogee, Okla., 119 F.3d 837, 842 (10th Cir. 1997). Allen held that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring

[33]The court skips the second-numbered requirement because the third requirement is dispositive.

situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability under the deliberate indifference standard. *Id*.

Allen involved the city's alleged failure to train officers on how to deal with mentally ill or emotionally upset persons who were armed with firearms. Allen concluded the record supported an inference sufficient to satisfy the third requirement for a failure to train claim, quoting City of Canton v. Harris, 489 U.S. 378, 390 (1989), as follows.

> [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 at 842 (emphasis added).

Plaintiff also relies on Olsen. There, the Court of Appeals found that given the prevalence of obsessive compulsive disorder in the general population, and given the county's "scant" procedures for dealing with mental illness, along with the pre-booking officers' apparent ignorance of plaintiff's requests for medication, "a violation of federal rights is quite possibly a plainly obvious consequence of the [county's] failure to train its prebooking officers to address the symptoms [of OCD]." Olsen, 312 F. 3d at 1320. Accordingly, plaintiff had "raised a genuine issue of material fact as to whether the county had notice of and was deliberately indifferent in its failure to train prebooking officers on OCD." *Id.*

With these authorities in mind, the court reviews the evidence most relevant to the deliberate indifference requirement. The evidence described below is

undisputed (although plaintiff argues it is immaterial, an argument the court rejects).[34]

There are regulations or policies in the jail training manual related to classifying and appropriately segregating mentally ill detainees, as well as to providing medical care and screening to detainees. Doc. no. 95, p. 29, ¶ 49. Jailers are trained to comply with Oklahoma State Department of Health (OSDH) Jail Standards. *Id*. at p. 27, ¶45. None of the jailers named as defendants in this action have failed to meet any training requirements. *Id*. OSDH Jail Standards cover topics such as providing basic standards of care, and adequate medical and health services for detainees. *Id*. at p. 29, ¶ 49. During training sessions, jailers have been trained to recognize the symptoms of bipolar disorder and other specific mental health issues. *Id*.

Policies or regulations included in documents submitted by the City as "Jail Training Records," (doc. no. 95-31), include a provision entitled "Medical Care and Health Services." Doc. no. 95-31, p. 23. This provision requires a medical screening be performed on all inmates by the jailer immediately upon admission and before being placed in the jail. It provides that, at screening, information received from the inmate and from visual observations shall be recorded in the inmate's medical history. It provides that, at a minimum, that information must be included regarding current illnesses and health problems including medications taken. And it provides for behavioral observation of person's state of consciousness and mental status. Doc. no. 95-31, p. 23, ¶ 9.01.

Policies or regulations included in documents submitted by the City as "Jail Training Records" also include a provision which addresses "Mentally Ill" inmates,

[34] When this order characterizes evidence or facts as undisputed, it means that the court has determined there is no genuine, evidence-based dispute. Thus, some evidence is characterized as undisputed despite the fact that plaintiff purports to dispute it.

specifically. Doc. no. 95-31, pp. 21-22, ¶ 6.03. This provision recognizes: that the jail is not designed or staffed to house the mentally ill; that inmates who are, or who appear to be, mentally ill, will be separated from other prisoners; that mental patients will be housed by themselves in separate cells; that the jailer will notify the front desk officer of any prisoner who displays symptoms of mental illness; that the front desk officer will contact the watch commander or the jail administrator who will decide if Taliaferro Community Health Center is to be contacted; and that if the decision is made to contact Taliaferro, the front desk officer will make the necessary contacts to carry out that directive. *Id*. at p. 22 (¶ 6.03)

Documents submitted by the City show that various jailers, including at least two of the jailers named as defendants in this case (Sellers and Carney) attended training courses which included topics related to the mental health of people being held in the jail. Examples of topics covered are: "preventing jail suicide," "dealing with the mentally ill," "stress trauma," and "ways to defuse anger and calm people down." *Id*. at pp. 1-11.

Affidavits submitted by jailers named as defendants state that certain jailers have received training specific to the mental health care of inmates. Doc. no. 95-22 (Sellers), doc. no. 95-16 (Carney, including a statement that he has been trained to recognize bipolar disorder); doc. no. 95-17 (Fisher, including a statement that she has been trained to recognize bipolar disorder); and doc. no. 95-21 (McMillion, including a statement that she has been trained to recognize bipolar disorder). Halligan's affidavit, for example, states that he has been trained to handle mental health issues, trained to recognize symptoms of specific mental illnesses, trained regarding use of force in connection with mentally ill individuals, and trained regarding proper arrest procedures of mentally ill individuals. Doc. no. 95-12, p. 1. Halligan's affidavit states that he has been trained to follow policies on mental health offenders, and that he has been trained to comply with OSDH jail standards which

include topics such as providing basic standards of care and adequate medical care and health services for detainees. *Id*. at p. 2.

Per the language of Allen, this court finds no evidence that there was an obvious need "for more or different training" on the topic of jailers' handling of detainees with mental health issues. Per the language of Olsen, this court finds that the City's training and policies regarding jailers' interactions with detainees who have mental health issues, is not "scant." In addition, the undisputed fact that Halligan was disciplined for his failure to complete the medical and mental health screening of Christina, (*id*. at p.1), lends strong support to the City's position that there is no evidence to show deliberate indifference, on the part of the City, with respect to training jailers about the needs and rights of persons with mental health issues.

There is insufficient evidence to satisfy the third-numbered requirement with respect to the claim that the City failed to adequately train jailers regarding mental health care for persons held at the jail.

For the reasons stated, the City is entitled to summary judgment on this failure to train claim.

2. Claim that the City Failed to Train Jailers Regarding Use of Force at the Jail, Specifically Handcuffing

With respect to the claim that the City failed to train jailers regarding use of force at the jail, specifically handcuffing, the first-numbered requirement of a failure to train claim (a constitutional violation) is satisfied. That finding was made earlier in this order and was based on the sufficiency of the evidence to show a constitutional violation by Sellers and McMillion during the fifth handcuffing event.

The second-numbered requirement for a failure to train claim -- evidence that violations arose under circumstances which were usual and recurring -- is also satisfied with respect to this claim. On this record, plaintiff is entitled to a

presumption that the jail commonly encounters a need to use force, specifically restraints, on persons held in jail, either to keep detainees from harming themselves, or to maintain order, discipline and security at the jail, as the City argues was necessary in this case. To the extent that Christina's obesity or mental illness could be relevant to the claim that the City failed to adequately train jailers about use of force, specifically handcuffing, plaintiff is entitled to a presumption that the jail regularly deals with individuals who are obese or who suffer from mental illness.

To satisfy the third-numbered requirement for a failure to train claim, plaintiff must identify evidence that the City's inadequate training of its jailers regarding use of force, specially handcuffing, demonstrates deliberate indifference on the part of the City toward persons held at the jail.

Within the documents identified by the City as "Jail Training Records," (doc. no. 95-31), the court has found one reference to training specific to "handcuffing" at the jail.[35] That is a reference to a two-hour class, given in 2010, covering "Prisoner Searches, Handcuffing inmates, and the Use of Force policy." Doc. no. 95-31, p. 1. Sellers and Carney are shown as having attended.

Although the affidavits submitted by jailers refer to the general topic of "use of force," the court has found nothing in those affidavits that mentions training specific to handcuffing *per se*. *See*, *e.g.*, affidavits of jailers at doc. nos. 95-12 (Halligan) 95-22 (Sellers), 95-16 (Carney), 95-17 (Fisher), 95-21 (McMillion). Although the jailers' affidavits state that they have been trained to follow policies regarding use of force, the policy that arguably addresses use of force at the jail with the most specificity gives only general guidance. Doc. no. 95-31, p. 19. It says nothing about handcuffing as such, or about handcuffing persons with medical or

[35] The court recognizes that given the size of the record, it may have overlooked something of note. Nevertheless, the court is familiar enough with the record as whole to state, with confidence, that anything it has overlooked would be minor and would not change the results of this order.

mental health vulnerabilities. That policy also provides that the use of restraint equipment shall not be a means of punishment or discipline. *Id*. And it provides that when such devices are used, the inmate will be properly supervised. *Id*. However, there is a genuine fact issue with respect to whether these conditions on use of force were followed in Christina's case.

Sellers, McMillion and Halligan's deposition testimony is also relevant to the deliberate indifference requirement.

Sellers, when asked why he had left Christina in restraints for the amount of time that he did, answered as follows. "Due to training, on-the-job training, back when I first started. I was trained that that was a method that we used, and the time range could range anywhere from one to two hours." Doc. no. 107-3, p. 62 (emphasis added). This testimony mentioned no conditions or exceptions to such an approach. Sellers could not recall whether he had any training specific to an inmate's size as it might bear on the length of time appropriate for a person to remain in restraints. *Id*. at pp. 62-63. Sellers testified that he made the decision that it was okay to handcuff Christina in the position that she was handcuffed in, "since she felt that that was the best position." Doc. no. 107-3, p. 109. The questioner then asked Sellers, "So you relied on Christina to tell you what was the least restrictive means to cuff her?" Sellers answered, "I relied on her telling me that that was the least restrictive, least painful." *Id.*

McMillion was asked at her deposition, "Have you been trained on a concept of positional asphyxiation?" Doc. no. 107-4, p. 122. She answered, "I have heard of it and we – it has been discussed, yes." *Id.* She was then asked, "What training have you received on positional asphyxiation?" She answered, "I would say, as far as training-wise, it's more of – you know, I wouldn't say there's videos on it. It's more of, you know, a discussion or a talking where you're trained." *Id.*

Halligan testified that at the time Christina was in the jail, the jail had a restraint chair available but that the jail did not have a policy on its use, so the chair was "still sitting back there collecting dust." Doc. no. 107-5, p. 112. The accuracy of this testimony is disputed, but it is credited because it favors the plaintiff.[36]

Based on the evidence described above, the court finds that here, as in Olsen, the City has "scant" training or policies regarding use of handcuffing at the jail.

Finally, on the topic of deliberate indifference by the City to training jailers regarding handcuffing, plaintiff has identified evidence that use of handcuffs, in the manner that they were used on Christina, is not an accepted corrections practice. Katsaris states that the practice of cuffing inmates to bars in the manner that Christina was handcuffed has not been used anywhere in the country that he is aware of and is a dangerous practice. Doc. no. 107-1, p. 9. Katsaris' report states, "This technique is barbaric and not a recognized, trained or accepted corrections practice." *Id.* The report states that the restraint chair would have been the only safe and recognized tool for restraining a prisoner in Christina's circumstances, but that it was not even considered. *Id.* Thus, there is evidence that to the limited extent jailers were trained about use of restraints, the practices about which they were trained were out of sync with accepted practices.

The evidence is sufficient to show deliberate indifference on the part of the City with respect to training jailers regarding use of restraints, specifically handcuffing, on persons held at the jail. The third-numbered requirement for this claim is satisfied.

The fourth-numbered requirement is evidence showing a direct causal link between the alleged constitutional deprivation and the inadequate training. The

[36] Sellers testified that the jail ordered the restraint chair after Christina's death. Doc. no. 107-3, p. 113.

court has denied defendant's Daubert challenge to Dr. Buck Hill. Hill's report indicates that handcuffing Christina to the bars of her cell, in a compromising position, more probably than not led to the respiratory acidosis and cardiac irritability that led to her sudden cardiac arrest and subsequent death. Doc. no. 107-2, p. 3. Furthermore, with or without Hill's report, the causation requirement would be satisfied given the nature of the claims and the evidence as a whole. There is evidence of a causal link between the alleged failure to train jail employees about use of restraints, specifically handcuffing, and the injuries Christina allegedly suffered as a result of the fifth handcuffing event.

Lastly, the court comes back to the initial, unnumbered requirement for a failure to train claim, which requires evidence that the training in question was, in fact, inadequate. Evidence and findings relevant to this issue include the following.

> Sellers testified that he was trained an individual could be handcuffed, in the manner that Christina was handcuffed, for up to two hours. He mentioned no conditions or limitations, including no limitations based on a detainees' weight or mental illness.
>
> The City provides scant training, and has scant procedures, regarding the use of handcuffing at the jail.
>
> There is evidence the jail owned (or owns) a restraint chair but that no policies were developed about its use.
>
> Christina, who was bipolar and morbidly obese, was found in a non-responsive state after one hour and sixteen minutes of being handcuffed to jail cell bars during the fifth handcuffing event. She was handcuffed in a seated position, with her back to the bars, and with her hands over her shoulders. Her hands were handcuffed to the cell bars at approximately head-level. She was handcuffed in this manner and for this duration despite the fact that circulation problems and injuries had become apparent during the fourth handcuffing event, during which she was handcuffed in the same position but for a significantly shorter time.

Plaintiff has identified evidence to satisfy the initial, unnumbered requirement for a failure to train claim, as there is evidence that the City's training of jailers regarding use of force, specifically handcuffing, was inadequate.

Plaintiff has carried her burden on her claim that the City failed to adequately train jailers regarding use of force, specifically handcuffing. For the reasons stated, the City's motion for summary judgment will be denied on this claim.

B. Negligence

The fifth claim alleges negligence against the City, including one claim of negligence *per se*. These claims are based on the actions of the City's police officers and jailers as described throughout the complaint. The negligence *per se* claim relates only to the conduct of Halligan, the booking officer on duty when Christina was brought to the jail. Plaintiff alleges Halligan violated jail regulations set forth in the Oklahoma Administrative Code (OAC) which required completion of a medical screening or medical triage at the time of intake, and required sending Christina to a medical facility prior to being housed at the jail. Doc. no. 1, ¶ 88.

Plaintiff has explicitly abandoned any negligence claims premised upon false arrest. Doc. no. 108, p. 30, n.89. This means that that the negligence claims remaining for consideration necessarily relate to either denial of medical or mental health care to Christina during her contact with police officers or jailers, or to jailers' use of force against Christina during handcuffing events. For purposes of this order, the court reorganizes these negligence claims into two categories:

1. Negligence claims based on conduct that occurred at the jail; and
2. Negligence claims based on conduct of police officers in the field.

1. Negligence Claims Based on Conduct that Occurred at the Jail

To the extent that negligence is alleged based on any conduct that occurred at the jail, such conduct would include acts by any of the jailers named as defendants

in this action, as well as the conduct of two police officers, Adamson and Quisenberry, who were called to the jail to "stand by" and "observe" Christina being handcuffed during the fifth handcuffing event. Doc. no. 95-5, ¶ 5 (Adamson); 95-19, ¶ 3 (Quisenberry).

Relevant to negligence claims arising from conduct that occurred at the jail, the City relies on two exemptions to the waiver of sovereign immunity contained in the Oklahoma Governmental Tort Claims Act (OGTCA).

Exemption four to the waiver of governmental immunity provides that a political subdivision of a state:

> [S]hall not be liable if a loss or claim results from…
>
> 4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation, or written policy.

51 O.S. Supp. 2011 § 155(4), emphasis added. The City argues this provision exempts it from the negligence *per se* claim, as that claim is based on Halligan's failure to comply with a written policy which required him to complete medical screening of Christina.

The City also relies on exemption twenty-five to the waiver of governmental immunity. This exemption applies to a political subdivision of the state if the tort claim in question results from:

> Provision, equipping, operation or maintenance of any prison, jail or correctional facility….

Id. at 155(25), emphasis added.

The court begins with the latter exemption, exemption twenty-five. This exemption, in its effect, renders a governmental entity immune to suit for any torts committed in the operation of a jail. Hutto v. Davis, 972 F. Supp. 1372, 1378 (W.D. Okla. 1997). *And see*, Redding v. State, 882 P.2d 61, 63 (Okla. 1994) (state is

immune from tort liability for loss allegedly occurring to a prisoner based on provision of medical care)]; Medina v. State, 871 P.2d 1379, 1384 (Okla. 1993) ("the purpose and intent of [the exemption] is to preserve sovereign immunity against claims of loss resulting from operational level actions by state officers or employees at a penal institution.").

Here, all of the acts which occurred at the jail and which could potentially support a claim of negligence or negligence *per se* are acts performed as a part of jail operations. Those acts relate to operational matters such as: booking persons into the jail; evaluating persons with mental health care needs at the time of booking; and using restraints, specifically handcuffs, to restrain persons when the jail considers handcuffs necessary for protection, or to ensure order, discipline or security.

Accordingly, pursuant to exemption 25, the City's immunity has not been waived with respect to any negligence claims based on conduct that occurred at the jail. In light of this governmental immunity, the City is entitled to summary judgment on such negligence claims.

The above ruling makes it unnecessary to consider the impact of exemption four. Nevertheless, the court notes that plaintiff did not respond to the City's argument that exemption four defeats the negligence *per se* claim. That argument has been confessed, meaning that exemption four provides an alternative basis for summary judgment on the negligence *per se* claim.

2. Negligence Claims Based on Conduct of Police Officers in the Field

Any other negligence claims are necessarily based on the conduct of police officers in the field. This type of conduct would include, for example, the conduct of any officers who responded to any calls and went to the residence. This conduct would also include the actions of police officers Short and Turner, who responded to Anna's call on the afternoon of November 13, 2014, the outcome of which was

that Christina was taken into custody on a citizen's arrest for trespass. Thus, the complaint encompasses negligence claims arising from conduct of police officers in the field.

Given those allegations, the City's moving brief clearly challenges all such negligence claims. For example, the City argues that police officers who came into contact with Christina were not required to take her into protective custody, and that she was never in their custody and control, so that there was no negligence in this regard. Doc. no. 95, p. 49. The City argues that no negligence has been shown because one police officer did, in fact, send Christina, by ambulance, to the hospital, after she requested to go to the hospital and said she had e.coli. *Id*. The City also argues that Short and Turner were not negligent because Christina did not exhibit any behaviors that would have required them to take her involuntarily into protective custody, and because Christina's family, if they thought medical attention was needed, could have taken her to a facility. *Id*.

Plaintiff's response brief makes no developed argument in response to these arguments. Instead, in the part of plaintiff's response brief that argues her negligence claims should survive, plaintiff discusses only negligent conduct that occurred at the jail. *See*, doc. no. 108, p. 31 (first full paragraph). By failing to respond to the City's arguments, the court finds that plaintiff has implicitly conceded those arguments and that the City is entitled to summary judgment on all negligence claims that depend upon conduct by police officers in the field.

Alternatively, the court finds that if it were required to reach the merits of the City's motion for summary judgment on these types of negligence claims, the City would still be entitled to summary judgment. There is no triable issue regarding negligence on the part of any police officer who had contact with Christina in the field. Even under plaintiff's version of the facts, no duty owed by any police officer required that officer to take action he or she did not take. There is no evidence that

while Short and Turner were in Christina's presence, Christina was acting in a way that threatened her physical safety or the safety of others. Furthermore, when Turner took Christina into custody on the trespass charge, he took her to the jail, a controlled environment, where he was entitled to presume that jail officers would (pursuant to their responsibilities, of which Turner was aware) conduct a medical and mental health screening to evaluate Christina's needs.

3. Summary of Rulings on Negligence Claims

These rulings, taken together, entitle the City to summary judgment in its favor on all of the negligence claims alleged in this action.[37]

IX. Conclusion

A. Rulings, Motion by Motion

After careful consideration, defendants' motions for summary judgment are granted or denied, in part or in full, for the reasons stated in this order. On a motion by motion basis, the court rules as follows.

Doc. no. 93. The motion for summary judgment of Chelsey Gordon and Timothy Jenkins is **GRANTED** as confessed.

Doc. no. 92. The motion for summary judgment of Kurt Short and Lawrence Turner is **GRANTED**.

Doc. no. 96. The motion for summary judgment of Adamson, Halligan, Sellers, Carney, Fisher, Quisenberry and McMillion is **GRANTED IN PART** and **DENIED IN PART**, as follows.

[37] The court notes plaintiff's mention of a possible claim against the City pursuant to Bosh v. Cherokee County Building Authority, 305 P.3d 994 (Okla. 2013). (Bosh made the county liable under the doctrine of *respondeat superior* for claims arising under Article 2, Sec. 30 of the Oklahoma Constitution, where liability was based on the acts of officers or employees that constitute excessive force, notwithstanding the rights and limitations of the OGTCA. 305 P.3d at 1001.) No Bosh claim has been alleged and the deadline for amendments passed long ago.

The motion is **GRANTED** with respect to all claims alleged against Adamson, Halligan, Sellers, Carney, Fisher, Quisenberry and McMillion except the following claims, as to which the motion is **DENIED**.

The motion is **DENIED** with respect to the part of the second claim that alleges a § 1983 claim against Halligan for deliberate indifference to Christina's mental health care while held at the jail.

The motion is **DENIED** with respect to the part of the third claim that alleges a § 1983 claim against Sellers and McMillion for excessive force used against Christina during the fifth handcuffing event.

Doc. no. 95. The motion of the City of Lawton is **GRANTED IN PART** and **DENIED IN PART**, as follows.

The motion is **GRANTED** with respect to all claims alleged against the City except the following claims, as to which the motion is **DENIED**.

The motion is **DENIED** with respect to the part of the fourth claim that alleges a failure to train claim against the City, under § 1983, for inadequate training of jailers regarding use of force, specifically handcuffing of persons held at the jail.

B. The Surviving Claims

The **CLAIMS WHICH SURVIVE** this order are as follows.

The second claim: A § 1983 claim against Halligan for deliberate indifference to Christina's mental health care while held at the jail.

The third claim: A § 1983 claim against Sellers and McMillion for excessive force used against Christina during the fifth handcuffing event.

The fourth claim: A § 1983 claim against the City for inadequate training of jailers regarding use of force, specifically handcuffing of persons held at the jail.

C. Defendants Who Are Granted Summary Judgment And Defendants Who Remain in This Action

Below, the court lists the status of each of the defendants following entry of this order.

No claims remain against the following defendants, each of whom is **GRANTED** summary judgment in his or her favor with respect to all claims alleged against him or her in this action.

-- Chelsea Gordon

-- Timothy Jenkins

-- Lindsey Adamson

-- Kurt Short

-- Lawrence Turner

-- Terry Quisenberry

-- Troy Carney

-- Tika Fisher

The following defendants' motions for summary judgment have been **DENIED**, in part, by this order. Accordingly, claims remain against the following defendants.

-- Terry Sellers

-- Stacey McMillion

-- Daniel Halligan

-- The City of Lawton

D. Directives, Going Forward

The purpose of this order is not only to rule on defendants' motions but also to give clear guidance to the parties regarding the contours of the claims that remain for trial. Given the complexity of this action, it is critical that the parties tailor their pre-trial filings (including but not limited to the final pretrial report and proposed

jury instructions and verdict forms) to the remaining claims and defendants, and the parties are hereby **DIRECTED** to do so.

In addition, each proposed jury instruction **SHALL** cite the legal authority upon which the submitting party relies. Proposed verdict forms are **REQUIRED**.

The parties **SHALL** give *immediate* notice of this order to the mediator and ensure that he or she has prompt access to it.

Failure to comply with any of these requirements may result in sanctions including entry of judgment against a non-compliant party on claims or parts of claims.

IT IS SO ORDERED this 23rd day of October, 2018.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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