USCA Case No. 23-3175

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIN LERETTE, individually and as guardian and next friend of minor child, B.T.B. and TRISTAN T. BURTON
Plaintiffs-Appellants,

vs.

County of Hawai‘i, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I
THE HONORABLE JILL A. OTAKE, JUDGE
CASE NUMBER: 1:20-CV-00202-JAO-RT

DEFENDANTS-APPELLEES COUNTY OF HAWAI‘I, LUKE WATKINS, PAUL T. ISOTANI, AND LANDON TAKENISHI’S ANSWERING BRIEF

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ELIZABETH A. STRANCE 4715
Corporation Counsel

MARK D. DISHER 8987
Deputy Corporation Counsel
LERISA L. HEROLDT 7519
Deputy Corporation Counsel Section Chief
County of Hawaii
101 Aupuni Street, Suite 325
Hilo, Hawai‘i 96720
Telephone: (808) 961-8251
Facsimile: (808) 961-8622
Email: mark.disher@hawaiicounty.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

Statutes:

Hawai‘i Revised Statutes

Rules:

Local Rules

Federal Rules of Appellate Procedures

Federal Rules of Civil Procedures

Federal Rules of Evidence

United States Code

Other

DEFENDANTS-APPELLEES COUNTY OF HAWAI'I, LUKE WATKINS, PAUL T. ISOTANI, AND LANDON TAKENISHI'S ANSWERING BRIEF

I. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 since the Complaint raised claims under 42 U.S.C. § 1983.

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 based on the entry of the final judgment by the District Court on September 21, 2023. 1-ER-002.

C. Timeliness of Appeal

Following the entry of judgment on September 21, 2023, Plaintiffs Erin Lerette, individually and as guardian and next friend of minor child, B.T.B. and Tristan T. Burton (collectively "Plaintiffs" or "Appellants") filed a notice of appeal on October 23, 2023. 3-ER-343-45. The notice was timely pursuant to Rule 4(a) of Fed. R. App. P.

II. STATEMENT OF ISSUES FOR REVIEW

A. Whether the District Court properly exercised its discretion in disregarding radiologist Ming Peng M.D.'s hearsay statements where they did not fall within a hearsay exception.

B. Whether the District Court properly exercised its discretion in disregarding Andrew Tallmer's legal opinions where Plaintiffs/Appellants submitted them under the guise of expert testimony.

C. Whether the District Court properly exercised its discretion to admit Lindsey Harle, M.D.'s August 21, 2023-declaration where the declaration's statements were based on additional materials Dr. Harle reviewed after completing her Autopsy Report on May 25, 2018, which included records from the Hawai‘i Community Correctional Center, radiologist Peter J. Julien, M.D.'s report, and a video of Burton's appearance at a court hearing on May 8, 2018.

D. Whether qualified immunity provides another basis for affirming summary judgment in the Officers' favor because it was not clearly established on May 4, 2018, that an officer who uses a bear hug, trips (either intentionally or not), and then falls on an arrestee who had shoved the officer and is resisting attempts to be subdued violates the Fourth Amendment of the Constitution.

III. RELEVANT STATUTORY PROVISIONS

A. Constitution of the United States of America Fourth Amendment, Unreasonable Searches and Seizures

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. 42 U.S.C. § 1983. Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IV. STATEMENT OF CASE

A. Facts

On May 2, 2020, Plaintiffs filed a Complaint against the County of Hawai‘i ("County"), Officer Luke Watkins ("Officer Watkins"), Officer Paul T. Isotani ("Officer Isotani"), and Officer Landon Takenishi ("Officer Takenishi") (collectively "County Defendants" or "Defendants" or "Appellees").[1] 3-ER-313-40. Plaintiffs allege excessive force was used when Vincent Burton ("Burton") was arrested for various offenses to include DUI and Resisting an Order to Stop.

[1]On September 15, 2023, during the hearing in District Court for *Defendants' Motion for Summary Judgment*, counsel for Plaintiffs conceded there was no case against Officers Isotani and Takenishi and did not object to the granting of Motion for Summary Judgment ("MSJ") in favor of those two Defendants. 2-ER-053-54.

On the night of May 3, 2018, Officer Takenishi was assigned to the North Kohala District on the Island and in the County of Hawai‘i and was conducting checks in the town of Hawi. SER-040-41 at ¶¶3-4. No businesses were open at the time. *Id.* He parked his vehicle and walked near Kawa Café. *Id.*

At 11:13 p.m., as Officer Takenishi was walking back to his vehicle, a brown Ford pickup truck ("Truck") parked behind his police vehicle. SER-041 at ¶5. It appeared the driver had released the clutch while still in gear, causing the engine to stop. *Id.* at ¶6. Officer Takenishi approached the Truck to see whether they needed assistance. *Id.* at ¶7. He saw three occupants, a male driver, a female passenger, and another male. *Id.* at ¶8. The driver, Burton, had red, watery and glassy eyes, and smelled of alcohol. *Id.* at ¶9. His speech was slow and slurred. *Id*. He stated that he thought Officer Takenishi was Jonathan Bartsch and kept repeating himself. *Id.* at ¶¶9-10. Burton was inebriated. *Id.* at ¶10, SER-128.

Officer Takenishi walked to his vehicle to inform dispatch that he was with the Truck. SER-042 at ¶11. While standing at his vehicle, Burton exited the Truck. *Id.* at ¶12. Officer Takenishi instructed Burton at least three times to stay in the vehicle and Burton refused. *Id.* Officer Takenishi was very concerned with Burton's actions. *Id*. at ¶13. He was alone, it was dark, late at night, there were other occupants in the Truck and he could not see what they were doing. *Id.* There was no other vehicle or pedestrian traffic. SER-044 at ¶28. Upon drawing his

firearm, Burton finally complied and returned to his Truck and at that point Officer Takenishi holstered his firearm. SER-042 at ¶13.

Officer Takenishi also returned to the Truck and asked for identification. *Id.* at ¶14. Burton did not have his license and admitted it was expired. *Id*. at ¶15. He also did not have registration or proof of insurance.[2] *Id.* at ¶16.

Officer Takenishi informed Burton that he would be investigating him for DUI[3] and driving without a valid license and asked him for the keys to the Truck. SER-043 at ¶¶17-18. Burton stated "no" and started the Truck with an angry look

---

[2]Despite not having a license, registration, or insurance, the Burtons decided to drive around the island from their home in Mountain View. SER-017-18 (excerpt of deposition of Donna Burton ("Donna")). The distance from Mountain View to Hawi is over 90 miles. SER-015 at ¶30, SER-136. The Burtons drank an unknown number of beers prior to their "trip". SER-022.

[3]Though commonly referred to as "DUI" or "Driving Under the Influence" the offense in Hawai'i is actually "Operating a vehicle under the influence of an intoxicant" or "OVUII" pursuant to Haw. Rev. Stat. § 291E-61 which states:

> (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:
>
> (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;
>
> (2) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;
>
> (3) With .08 or more grams of alcohol per two hundred ten liters of breath; or
>
> (4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

Id.

on his face. *Id.* at ¶19. Officer Takenishi ordered him to turn off the Truck and Burton refused, revving the engine. *Id.* at ¶20. Officer Takenishi reached into the Truck and tried to grab the keys. *Id.* Burton was strong and pushed him away and put the truck into gear. *Id.* at ¶21. Officer Takenishi yelled "Stop! Turn it off! Stop pushing me!" and they struggled. *Id.*

Officer Takenishi was concerned and positioned himself in front of the Truck, drew his firearm and repeatedly ordered him to stop the Truck. *Id.* at ¶22. Burton ignored the commands, made a U-turn, and left the area. *Id.* at ¶23.

Officer Takenishi initiated an "All Points Bulletin" ("APB") which alerted other officers that Burton had resisted an order to stop,[4] was driving without a license or insurance. SER-044 at ¶25, SER-075-76. He asked dispatch to notify neighboring districts that the Truck may be headed towards them. SER-044 at ¶27.

At the same time, Officer Cory Gray ("Officer Gray") was working in the South Kohala District. SER-077-78 at ¶3. Officer Gray heard that the Truck ran from police in the North Kohala District. *Id.*

Officer Gray located the Truck at the Shell gas station in Waimea and there were two passengers, but no driver. SER-078 at ¶¶5-6. Burton exited the gas

[4]Haw. Rev. Stat. § 710-1027 "Resisting an order to stop a motor vehicle" states: "A person commits the offense of resisting an order to stop a motor vehicle in the second degree if the person intentionally fails to obey a direction of a law enforcement officer, acting under color of the law enforcement officer's official authority, to stop the person's vehicle." *Id*.

station and Officer Gray asked him if the Truck was his. *Id.* at ¶7. Burton denied it was and walked away. *Id.*

Donna stated she did not know who the driver of the Truck was. SER-079 at ¶¶12-13. Officer Gray left the gas station momentarily and when he returned, the Truck was observed leaving. SER-079-80 at ¶¶15, 17. Officer Gray hit the driver's side window with his hand and yelled "Stop!" but the truck went over a curb and left.[5, 6] SER-080 at ¶¶19-20. Officer Gray radioed dispatch to inform the officers in the Hamakua District that Burton was headed their way. *Id.* at ¶21.

Officer Gregg Karonis ("Officer Karonis") and Officer Watkins, from the Hamakua District, were provided a description of the Truck, told that Burton had fled from officers on two occasions, and that Burton was highly intoxicated. SER-027 at ¶4, SER-047 at ¶¶3-4. At approximately 12:20 a.m., the officers spotted Burton's Truck heading in the opposite direction. SER-027 at ¶5, SER-047 at ¶5. The officers made U-turns and Officer Watkins activated his blue lights and siren. SER-027 at ¶6, SER-047 at ¶6. The headlights on the Truck went off and the driver turned onto a side street, Wailana Place. SER-027 at ¶6, SER-047 at ¶8.

[5]The male passenger, that was previously in the Truck, remained at the gas station. SER-019, SER-080.

[6]Although the encounters with the police occurred around midnight, Donna claims it was still daylight. SER-020.

Up until this point these facts are largely uncontested, or at minimum uncontroverted without any evidence to the contrary presented by Plaintiffs. *Compare* 2-ER-151-52 *with* SER-005-06. Additionally, Plaintiffs' Opening Brief devotes a mere two sentences regarding the events of that night up to the point Burton was pulled over in the Hamakua District by Officers Karonis and Watkins. *See* Opening Brief at 2-3.

Officers Karonis and Watkins approached the Truck and spoke with Burton. SER-027-28 at ¶¶8-10, SER-048 at ¶¶9, 11. Burton was unable to provide a driver's license and admitted his license was expired. SER-028 at ¶9. Burton's speech was slurred, his eyes were red and watery, he smelled of alcohol, and appeared to be intoxicated.[7] SER-028 at ¶10, SER-048 at ¶¶12-13, SER-128.

Burton stated he bought a six pack, but only drank one beer. SER-028 at ¶13. He could not remember his address or what street he lived on, nor could he provide his social security number. *Id.* at ¶14.

[7]Donna also appeared intoxicated, was slurring her speech, had alcohol blushing and her eyes were watery. SER-028 at ¶11, SER-050 at ¶¶22 and 26. Plaintiffs admit that when Donna drinks she drinks to get drunk, that her personality changes (jokingly referred to as "Dr. Jekyll and Mr. Hyde"), and she tends to not remember events while intoxicated. 2-ER-180 at 30, 2-ER-222 at 18-20, SER-054, SER-057-58.

Burton was instructed to exit the Truck for further testing.[8] SER-029 at ¶15. Officer Watkins and Burton walked to the church parking lot for the field sobriety testing. *Id.* at ¶16. Testing revealed Burton was intoxicated. SER-029-30 at ¶¶17-20.

Burton was arrested for DUI and handcuffed behind his back. SER-030 at ¶¶21-22, SER-049 at ¶17. Burton initially refused to get into the police vehicle and was upset that he was being arrested. SER-030 at ¶22, SER-049 at ¶19. He also kept trying to talk to his wife.[9, 10] SER-030 at ¶22.

After several minutes of Burton arguing about getting into the vehicle, he finally got into the rear passenger seat and the seatbelt was fastened. *Id.* at ¶23. The

[8]Officer Isotani heard Officer Watkins had initiated the traffic stop and went to assist. SER-036 at ¶6.

[9]Plaintiffs claim in the Complaint that, according to Donna, the police used excessive force when Burton was handcuffed after being arrested at a gas station in Honokaa. However, Donna later admits she did not see any force being used, cannot recall any specific words or anything which she heard, and allegedly relies upon what Burton told her which is inadmissible hearsay. 3-ER-319 at ¶26, SER-021, SER-023, SER-049 at ¶21.

[10]Plaintiffs also admit they were not present during the arrest of Burton or witnessed any assault and relied on Donna's account as to what happened which amounts to double hearsay. 2-ER-187 at 57-59, 2-ER-226 at 33-34, SER-059-61.

only "force" used at the scene of Burton's arrest was officers guiding him to the police vehicle and no strikes or weapons were utilized.[11] *Id*., SER-049 at ¶21.

Officer Watkins transported Burton to the police station and upon arrival, Officer Watkins opened the rear passenger door and was alarmed to see that Burton's seatbelt was no longer on and his handcuffed hands were now in front of him. SER-031 at ¶25. Without warning, Burton lunged at Officer Watkins, shoving him in the chest attempting to flee, exclaiming "I'm out of here!" SER-031 at ¶¶26-27, SER-038 at ¶14, SER-134 at ¶10.

Officer Watkins grabbed Burton with two hands which prevented him from falling to the ground. SER-031 at ¶27, SER-038 at ¶14. Officer Watkins then transitioned to a bear-like hold from behind, hugging Burton around his waist. SER-031 at ¶27. Burton tried to escape and was shuffling, trying to create space between him and Officer Watkins, while trying to pry Officer Watkins' hands apart.[12] *Id.* at ¶28, SER-038 at ¶15.

Officer Watkins began to lose his grip and knew that if he didn't get control soon, Burton would get away. SER-031-32 at ¶29. Officer Watkins lowered his

---

[11]The record is silent as to any admissible evidence presented that force was used at the scene of arrest as alleged in the Complaint, however all witness testimony indicates no force was used. 3-ER-314-19 at ¶¶4, 26, SER-021, SER-030 at ¶23, SER-037 at ¶¶11-13, SER-049 at ¶21.

[12]Burton was a brown belt in Kenpo Karate and would teach his son Tristan martial arts and self-defense. 2-ER-182 at 38-39.

body and placed his left foot in front of Burton's feet and was able to break Burton's momentum, causing them both to lose balance. *Id.* They both fell to the ground on their left sides. *Id.*, SER-038 at ¶15. This was the only force used on Burton. SER-031-32 at ¶29. No strikes or weapons were ever used. *Id.* Everything happened quickly, and the entire incident lasted only a few seconds. SER-033 at ¶36. Burton apologized and stated it was stupid of him to try to flee. SER-032 at ¶30.

Officer Watkins sustained injuries to his left elbow and knee. *Id.* at ¶31, SER-038 at ¶16, SER-121-22, SER-134 at ¶9. Burton had an abrasion to his left elbow. SER-032 at ¶31, SER-123-24. Officer Watkins' and Burton's injuries, as depicted in photographs taken that night, are consistent with falling on their left sides, as both were facing the same direction when they fell, consistent with Officer Watkins' explanation of events. *Id*. Burton stated he may have broken arms and a rib, but there was no visible indication of a broken bone. SER-032 at ¶32, SER-134 at ¶¶11-12. Regardless Emergency Medical Services ("EMS") was called[13] and rendered treatment to Burton's elbow. SER-032 at ¶32, SER-038 at ¶¶16-17, SER-132-135. When EMS arrived, Burton was observed to be

[13]EMS arrived within approximately 4 minutes of being called. SER-133 at ¶5.

ambulatory, bleeding from his left elbow, and was handcuffed in front of him.[14] SER-133 at ¶7. Burton refused further treatment. SER-032 at ¶32, SER-034, SER-038 at ¶17, SER-134 at ¶¶12-13.

At the station, Burton consented to an alcohol breath test. SER-032 at ¶33, SER-065. Burton had a blood alcohol content ("BAC") of 0.153 g/210L BrAC, three hours after the first encounter with police. SER-032-33 at ¶34, SER-128.

Officer Watkins charged Burton with the crimes which occurred in the Hamakua District: 1) DUI, 2) driving without a license, 3) no insurance, and 4) assault on an officer.[15] SER-033 at ¶35. Officer Isotani charged Burton with the crimes that took place in North Kohala District, and which were the subject of the APB: 1) resisting an order to stop, 2) driving without a license, and 3) no motor vehicle insurance. SER-038-39 at ¶18; SER-075-76.

While in cell block, in the hours **after** the minimal amount of reasonable force was used to prevent Burton's escape, Burton was observed to make racial statements about some of the officers' Hawaiian heritage and statements about

[14]One of the several photographs taken of Burton that night while he was in cell block clearly shows Burton to still be handcuffed in front of his body and not behind. SER-125.

[15]"Assault against a law enforcement officer in the second degree" pursuant to Haw. Rev. Stat. § 707-712.6 states: "A person commits the offense of assault against a law enforcement officer in the second degree if the person recklessly causes bodily injury to a law enforcement officer who is engaged in the performance of duty."

Officer Watkins' weight. 2-ER-108-09. Plaintiffs allege this is somehow proof of the source of malice on the part of Officer Watkins towards Burton, however as these statements were made in the hours Burton was in cell block **after** the force was used, the only malice this demonstrates is that of Burton's against the officers. *Id*.; *see also* Opening Brief at 3 and 27.

Burton was later transported to the Hilo cell block. SER-033 at ¶37, SER-039 at ¶20. During the transport, he did not complain of any pain. SER-033 at ¶38, SER-039 at ¶21.

On the morning of May 4, 2018, police took Burton to Hilo Medical Center ("HMC"). SER-072-73 at ¶3. X-rays were taken and revealed a left 10th rib that was observed to be healing. SER-063, SER-073 at ¶¶6-8. Burton was told the fracture was pre-existing and Burton admitted he had gotten into a scuffle with his son weeks earlier and fell off his lanai. SER-073 at ¶8. His son, who was bigger, landed on him. *Id.* No other fractures were observed or discussed with Burton by HMC personnel. SER-063, SER-073 at ¶¶6-8.

Burton remained in custody at Hawai‘i Community Correctional Center ("HCCC") until May 8, 2021. 3-ER-320 at ¶¶32-33, SER-082-90. While there, he sought medical treatment on May 5th, 6th, and 7th for daily "wound care" for abrasions. *Id.* Burton did not complain of rib/abdominal pain but did complain of pain in "left, right, upper, lower, foot, hand(s), knee(s)". *Id.*

Burton attended court on May 8, 2018, and did not appear to be suffering from any injury, walked without any difficulty, and did not complain of any injuries or pain. SER-116 at ¶¶3-8.[16]

On May 11, 2018, three days after being released from custody, Burton returned to HMC and CT scans revealed fractures of the left 7th, 8th, and 9th ribs not previously observed.[17, 18] SER-068-71, SER-131 at ¶5. If these fractures were present on May 4th, the date on which Burton encountered the police, they would have been visible on the x-rays taken on May 4th. *Id.* Therefore, the fractures to these ribs occurred sometime after May 4, 2018. *Id.* at ¶6.

Lindsey Harle, M.D. ("Dr. Harle"), while employed with Clinical Laboratories of Hawaii/Pan Pacific Pathologists, LLC, is a forensic pathologist that has performed more than 3500 autopsies, and originally performed the autopsy of Burton in 2018. 2-ER-075-81, 2-ER-231-39. Dr. Harle was provided with a copy

[16]The prosecutor has a clear memory because the FBI contacted her shortly after the hearing. SER-117 at ¶11.

[17]The healing left 10th rib fracture initially observed on the May 4, 2018 x-ray was also observed on the May 11, 2018 CT scans. SER-063, SER-068-71, SER-130 at ¶4.

[18]No fractures to the left 6th or right 8th ribs were observed to be present on the CT scans taken on May 11, 2018. SER-068-71.

of the expert report authored by radiologist Peter J. Julien, M.D. ("Dr. Julien")[19], Burton's medical records from HCCC following his arrest, and video of the court hearing Burton attended on May 8, 2018. 2-ER-080 at ¶5. Based on her independent review of the additional materials not previously provided to her, including observing Burton in court on video, Dr. Harle did not disagree with Dr. Julien's findings and acknowledged that 1) the left 7th, 8th, and 9th rib fractures would have been visible on the May 4, 2018 x-ray and 2) those fractures could have been caused by an altercation or trauma occurring after May 4, 2018. *Id*. at ¶¶6-7.

Dr. Harle's 2018 autopsy report also noted a left 6th and a right 8th rib fractures that were not observed on either the May 4, 2018 x-rays or the CT scans taken after Burton's hospitalization on May 11, 2018. 2-ER-232, SER-063, SER-068-71.

There is no evidence to support the claims that Burton was beaten by police on May 3-4, 2018. Despite Plaintiffs baseless assertions there is no evidence of "witness tampering" regarding Dr. Harle's testimony.

B. Relevant Procedural History

[19]Dr. Julien's expertise in the area of radiology is without question and he currently is the Chief of Thoracic Imaging at Cedars-Sinai Medical Center, Los Angeles California. SER-091-114.

On May 2, 2020, Plaintiffs filed their Complaint. 5-ER-313-40. Since then, two other dispositive motions were previously ruled upon in this case.

On September 24, 2020, the District Court entered its *Order Granting in Part and Denying in Part Defendants County of Hawai'i, Hawai'i County Police Department, Luke Watkins, Paul T. Isotani, and Landon Takenishi's Motion to Dismiss*. SER-180-91. The District Court dismissed claims against the officers in their official capacity, claims against the Hawai'i County Police Department, and a number of state law claims brought by Erin Lerette ("Lerette") and Tristan Burton ("Tristan") against the County. *Id*.

On June 20, 2023, the District Court entered its *Order Granting in Part and Denying in Part Defendants' Motion for Judgment on the Pleadings ECF NO. 87*. SER-137-77. This motion was brought in part based on the argument that Plaintiffs' claims were precluded by the District Court ruling on summary judgment in a related case brought by Donna and Burton's estate. The District Court denied dismissal on the ground of preclusion, however additional claims were dismissed as part of the ruling. *Id*.

Based on the District Court's resolution of the two prior dispositive motions,[20] the remaining claims consisted of: 1) Tristan and B.T.B.'s excessive

[20]Neither of the prior District Court rulings of September 24, 2020 and June 20, 2023 were appealed nor reconsideration sought by Plaintiffs.

force claim under 42 U.S.C. § 1983 against the officer Defendants in their individual capacities (Count I); 2) Lerette, Tristan, and B.T.B.'s state law claims against the officer Defendants in their individual capacities (Count III: "Assault and Battery"; Count IV: "Wrongful Death"; Count V: "Negligence"; Count VI: "Gross Negligence"; Count VII: "Intentional Infliction of Emotional Distress"; Count VIII: "Negligent Infliction of Emotional Distress"); and 3) B.T.B.'s claim against the County for "Respondeat Superior and/or Vicarious Liability" (Count IX) as to his state law claims. SER-175-76.

On July 24, 2023, County Defendants filed *Defendants' Motion for Summary Judgment* ("Defendants' MSJ") (3-ER-270-310) and *Defendants' Concise Statement of Facts in Support of Defendants* ("Defendants' CSOF") (SER-004-09). Plaintiffs filed *Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, Filed July 24, 2023* ("Plaintiffs Opposition") (3-ER-244-69) and *Plaintiffs' Concise Statement of Facts* ("Plaintiffs' CSOF") (2-ER-151-56) on August 14, 2023. *Defendants' Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, Filed August 14, 2023 [ECF 120]* ("Defendants' Reply") (2-ER-114-36) and *Defendants' Further Concise Statement of Facts* ("Defendants' FCSOF") (2-ER-068-72) was filed on August 28, 2023. Oral arguments on Defendants' MSJ were heard on September 15, 2023. 2-ER-042-67. The District Court granted summary judgment on the

remaining claims by way of *Order Granting Defendants' Motion for Summary Judgment*, filed on September 21, 2023. 1-ER-005-38.

V. SUMMARY OF ARGUMENT

The District Court properly dismissed Plaintiffs' case because they failed to set forth sufficient admissible evidence which could impose liability against the Defendants, much less create an issue of material fact. Officer Watkins did nothing wrong when he used a minimal amount of reasonable force to prevent Burton's escape from custody. It was within the governmental interest to prevent Burton's flight while using such minimal force to subdue him. As such Officer Watkins did not violate Burton's constitutional rights and on that basis the 42 U.S.C. § 1983 claims fail.

Even if Plaintiffs could overcome the shortcomings outlined above, their claims still fail because Officer Watkins (as well as Officers Isotani and Takenishi) is (are) entitled to qualified immunity. Plaintiffs cannot, and have not, identified any legal authority which demonstrates Officer Watkins violated clearly established law.

And lastly the allegations related to "witness tampering" made by Plaintiffs; 1) were not raised by Plaintiffs in District Court, 2) are completely without any merit, and 3) wholly lack any factual or legal support. The allegations appear to be

a deliberate misrepresentation to the Court and a symptom of a notable lack of due diligence in the prosecution of this case by Plaintiffs.

VI. STANDARD OF REVIEW

"A grant of summary judgment is reviewed de novo." *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007) (citations omitted). The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). The appellate court must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the District Court correctly applied the relevant substantive law. *See Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004).

Whether officials are entitled to qualified immunity is also reviewed de novo. *Hines v. Youseff,* 914 F.3d 1218, 1227 (9th Cir. 2019).

Evidentiary rulings by the District Court in the context of summary judgment motions are reviewed for an abuse of discretion. *Sandoval v. Cty. Of San Diego*, 985 F.3d 657, 665 (9th Cir. 2021) (*citing Bias v. Moynihan*, 508 F.3d 1212, 1224 (9th Cir. 2007). *See also Clare v. Clare*, 982 F.3d 1199, 1201 (9th Cir. 2020) ("We review evidentiary rulings for abuse of discretion even when the rulings

determine the outcome of a motion for summary judgment." (quotation marks omitted, citing *Domingo v. T.K.*, 289 F.3d 600, 605 (9th Cir. 2002)).

> An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found. The abuse of discretion standard requires that we not reverse a district court's exercise of its discretion unless we have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached.

National Wildlife Federation v. National Marine Fisheries Service, 422 F.3d 782, 798 (9th Cir. 2005) (citations and quotations omitted).

VII. ARGUMENT

42 USC § "1983 provides a cause of action against state actors who violate an individual's rights under federal law." *Filarsky v. Delia*, 566 U.S. 377, 380 (2012). "[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard[.]" *Graham v. Connor*, 490 U.S. 386, 395 (1989) (emphasis omitted).

Plaintiffs provided no admissible evidence disputing County Defendants' showing Officer Watkins used reasonable force. The admissible evidence is clear, Officer Watkins and Burton fell on their left sides after Burton shoved Officer Watkins in an ill-conceived escape attempt. SER-031-32 at ¶¶25-31, SER-038 at ¶¶14-15, SER-121-24, SER-133-34 ¶¶7-10.

A. The District Court Properly Exercised Its Discretion in Disregarding Dr. Ming Peng's Hearsay Statements.

Plaintiffs' alleged dispute on reasonable force ineffectively relies on an *ipso facto* argument based on injuries Burton received sometime later, after his release from custody. Plaintiffs' theory of their case is hinged on a vague and conclusory double hearsay statement attributed to Dr. Ming Peng ("Dr. Peng") in a coroner's report and an over reliance on the 2018 autopsy report's conclusion founded on incomplete facts. None of these matters create a genuine issue of material fact based on the admissible medical evidence before the District Court.

1. Dr. Peng's Hearsay Statements Are Not Admissible.

In a desperate attempt to find justification to use Dr. Peng's hearsay statement, Plaintiffs argued at hearing on Defendants' MSJ multiple reasons to allow the statement in evidence to include "admission against interest", "admission of a party opponent", and as a "government record or report". 2-ER-061. As the record is silent and unclear how Dr. Peng's statement can be an admission against interest (and how to meet the requirement that declarant is "unavailable" for the statement to be admissible) under Fed. R. Evid. 804(b)(3) or an admission against a party opponent under Fed. R. Evid. 801(d)(2) as Dr. Peng is not a party to this action. Obviously, those exceptions do not apply here.[21] As for the remaining

[21]As noted by the District Court, it was during the hearing on Defendants' MSJ that, Plaintiffs argued Dr. Peng's statements were admissible as a statement against

arguments the District Court correctly exercised her discretion in excluding or simply disregarding the hearsay statement of Dr. Peng.

Fed. R. Evid. 803(4) does not apply to the facts before the court. "Rule 803(4) applies **only to statements made by the patient to the doctor**, not the reverse." *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1316 (9th Cir. 1985) (emphasis added). As the statement sought by Plaintiffs is that of Dr. Peng's, then obviously this argument also fails on its face.

Additionally, Dr. Peng's double hearsay comment cannot be considered "trustworthy" for purposes of Fed. R. Evid. 803(8)(A)(iii). "[A] trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof . . . that she determines to be untrustworthy." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988). To determine trustworthiness the relevant factors may include: "(1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation." *Id*. at 167 n. 11.

In the present case the record is silent whether the timeliness of the coroner's report has been established though the dates of actions of the investigator are documented in the report. 2-ER-169-71. The record is also silent regarding the

---

interest or as the statement of a party opponent raised for the first time. 1-ER-017, 2-ER-060-61.

investigator's skill or experience and any potential bias in drafting the coroner's report. As for the hearing, the only hearing in which the issue of Dr. Peng's summarized statements in the coroner's report came up was at the hearing on Defendants' MSJ. 2-ER-060. During the hearing the District Court questioned the reliability of Dr. Peng's statement when she asked Plaintiffs' counsel: "Well, let's talk about Dr. Peng in particular. I mean, the – **he really doesn't say more than there could be fractured ribs**, right?" *Id*. (emphasis added). It is also important to note that the "fact" proposed by Plaintiffs to be admitted was not an opinion or conclusion of the author of the report, but rather the hearsay statement of a witness the author spoke to, Dr. Peng. Thus, based on the untrustworthiness of a vague, non-specific hearsay statement contained secondhand within a report the District Court has the discretion, and the obligation, to exclude it.

2. District Court Correctly Relied on Dr. Harle's Revised Opinion Based on Her Review of Additional Materials.

Dr. Harle confirms information she received after completing Burton's Autopsy Report, dated August 31, 2018 ("Autopsy Report") affects her attribution of Burton's fatal rib injuries to a police altercation. 2-ER-079-81. She admits she based her conclusion on causation on incomplete information. *Id.* When drafting the Autopsy Report, Dr. Harle relied on: 1) Burton's medical records from May 4, 2018 showing only one, older rib fracture to the left 10th rib; 2) medical reports from May 11, 2018, including x-rays and CT scans now showing additional acute

(recent) rib fractures to include displaced fractures on the left 7th, 8th, and 9th ribs not previously present on May 4, 2018; 3) police reports regarding the arrest of Burton to include description of the takedown by Watkins on May 4, 2018; and 4) double hearsay verbal comments from FBI (no written report reviewed) regarding statements made by Donna alleging an assault she never saw. 2-ER-231-2, SER-021. What Dr. Harle did **not** have were any records of what happened to Burton for the week following the incident between May 4-11, 2018.

Dr. Harle has since been able to review documentation covering a portion of that missing week. She was able to review HCCC medical records where Burton did not complain of rib pain nor sought any treatment for such, and a video of Burton's preliminary hearing on May 8, 2018, where he demonstrated no distress or pain. 2-ER-080 at ¶5, SER-082-90, SER-116-17 at ¶¶4-10.

Dr. Harle also reviewed Dr. Julien's expert report. Dr. Harle, an experienced pathologist, agreed with Dr. Julien's findings that: Burton's **displaced** fractures to the left 7th, 8th, and 9th ribs, if they were present, would have been clearly seen on his x-ray taken May 4, 2018, therefore, those additional rib fractures occurred after May 4, 2018. 2-ER-080 at ¶5, SER-131 at ¶¶5-6. Dr. Harle also agrees the left 10th rib fracture was from a prior injury and could not be a result of Defendants' actions. 2-ER-081 at ¶8, SER-130 at ¶4, SER-063, SER-073 at ¶¶6-8. Dr. Harle acknowledges the acute **displaced** left 7th, 8th, and 9th rib fractures could have

been caused by an altercation or trauma **after** May 4, 2018. 2-ER-080 at ¶7. But since she did not have any documentation during the period following Burton's arrest when she wrote the Autopsy Report, she attributed Burton's newer rib fractures to the May 4, 2018 incident. *Id*.

3. Drs. Harle and Peng's Speculative Conclusions in 2018 Must be Disregarded.

As Dr. Harle's original opinion in 2018 was based on incomplete information, her finding as to cause of death is conclusory and/or speculative. It is undisputed the acute, **displaced** fractures of the left 7th, 8th, and 9th ribs would have been obvious and clearly seen, if present, on the x-rays taken on May 4, 2018.[22] 2-ER-080 at ¶¶6-7, SER-063, SER-131 at ¶¶5-6. This alone is evidence the fractures were the result of some other, undocumented incident after Burton was x-rayed on the morning of May 4, 2018. Likely this undocumented incident occurred sometime after his court hearing on May 8, 2018. Additionally, the left 6th and right 8th rib fractures also noted in the Autopsy Report were not present and/or observed in either the May 4, 2018 x-rays or the May 11, 2018 CT scans of Burton. 2-ER-231-35, SER-063, SER-068-71.

[22]Notably absent from Plaintiffs' arguments, including Plaintiffs' Opposition, is any depiction of the May 4, 2018 x-rays that actually shows any other rib fractures were present other than the healing left 10th rib fracture. 2-ER-142-239, 3-ER-244-67.

Similarly, Dr. Peng's statements[23] are conclusory, vague, and lacks specificity; and Plaintiffs have made no attempt to clarify them.[24] 2-ER-170. Additionally, the phrase "there **could** be fractures of the ribs" alone is hardly an unequivocable recantation of Dr. Peng's previous findings, nor do his statements dispute the evidence as to the medical care Burton received while in custody (EMS, at HMC, and at HCCC) as well as the minimal nature of his injuries he actually sustained on May 4, 2018. *Compare* 2-ER-080-81 at ¶¶6-8, SER-034, SER-038 at ¶¶14-17, SER-063, SER-073-74 at ¶¶6-10, SER-082-90, SER-116-17 at ¶¶4-10, SER-123-24, SER-133-34 at ¶¶7-8, 11-13, and SER-130-31 at ¶¶4-6 *with* 2-ER-168-69.

Thus, Drs. Harle's and Peng's speculative conclusions in 2018 must be disregarded. *See Reynolds v. City of San Diego,* 84 F.3d 1162, 1169 (9th Cir. 1996) (finding an expert's conclusions about why the suspect moved were "nothing more than speculation and fail[ed] to raise an issue of fact about the reasonableness of [the defendant's] conduct—a material issue") (overruled on other grounds, *Acri v. Varian Associates, Inc.,* 114 F.3d 999 (9th Cir. 1997) (citing *United States v. Various Slot Machines on Guam,* 658 F.2d 697, 700 (9th Cir. 1981) ("in the

[23]The coroner's report contained a summary of a conversation with Dr. Peng by Detective Jessie Kerr ("Det. Kerr") on November 16, 2018, and no direct quotes, or specific details were attributed or noted in the report. 2-ER-169-71.

[24]Plaintiffs chose not to depose Dr. Peng or Det. Kerr.

context of a motion for summary judgment, an expert must back up his opinion with specific facts"); *Evers v. General Motors Corp.,* 770 F.2d 984, 986 (11th Cir. 1985) (a party may not avoid summary judgment solely on the basis of an expert's opinion that fails to provide specific facts from the record to support his conclusory allegations)); *Guidroz-Brault v. Missouri Pac. R. Co.,* 254 F.3d 825, 831 (9th Cir. 2001) (expert testimony inadmissible where affidavit was unsupported by facts and made estimates of damage based on assumptions).

4. Even if Dr. Peng's "Statements" Were Considered it is Insufficient to Establish a Genuine Issue of Material Fact.

Assuming, arguendo, that the vague, non-specific statements attributed to Dr. Peng in the coroner's report were admissible and considered by the District Court, they are insufficient to raise a triable controversy on whether the obvious, displaced fractures of the left 7th, 8th, and 9th ribs would have been visible in the May 4, 2018 x-rays. *Compare* 2-ER-080 at ¶¶6-7, SER-063, SER-131 at ¶¶5-6 *with* 2-ER-169-70. The non-moving party's burden on summary judgment is not trifling. At this stage, allegations, assertions, speculation, conclusory statements, and characterizations of disputed facts will not save the non-moving party. A possibility the jury would disbelieve Defendants' evidence is not enough, and while circumstantial evidence may be considered, it must lead to more than mere speculation.

Under Fed. R. Civ. P. 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *See also*, Local Rule 56.1.

Plaintiffs have failed to provide any evidence to support their position and, therefore, have failed to provide a basis to deny Defendants' MSJ. Plaintiffs "must produce at least some 'significant probative evidence tending to support the complaint.'" *TW Elec. Serv., Inc. v. Pacific Elec. Contractor's Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

Moreover, "'the mere existence of **some** additional factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no **genuine** issue of **material** fact.'"[25] *Scott v. Harris*, 550 U.S. 372, 380 (2007) (emphasis in the original; citation

[25]"A 'material' fact is one relevant to an element of a claim or defense and whose existence might affect the outcome. The materiality of a fact is determined by the substantive law governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *TW Elec. Serv., Inc.*, 809 F.2d at 630.

omitted). "[W]hen the facts, as alleged by the non-moving party, are unsupported by the record such that no reasonable jury could believe them, [courts] need not rely on those facts for the purposes of ruling on the summary judgment motion." *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010) (citing *Scott*, 550 U.S. at 380). The non-moving party must "go beyond the pleadings" and demonstrate a triable issue exists, especially in cases when they have the burden of proof at trial regarding any dispositive issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

The party moving for summary judgment bears the initial burden of showing the absence of a genuine, material dispute and an entitlement to judgment, however there is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials **negating** the opponent's claim." *Celotex Corp.*, 477 U.S. at 323 (emphasis in original). As such the moving party is not obligated to disprove the opponent's claims or defenses once the initial burden has been met showing the absence of a genuine issue of material fact. *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987).

The Defendants, as the moving party, have met its *prima facie* burden based on Drs. Julien's and Harle's declarations as well as the wealth of other corroborating evidence and witness statements, effectively disproving Plaintiffs' theory of the case. 2-ER-080-81 at ¶¶6-8, SER-034, SER-038 at ¶¶14-17, SER-

063, SER-073-74 at ¶¶6-10, SER-082-90, SER-116-17 at ¶¶4-10, SER-123-24, SER-133-34 at ¶¶7-8, 11-13, SER-130-31 at ¶¶4-6. As such the burden of going forward shifts to the Plaintiffs, as the non-moving party, to show by affidavit or otherwise, that a genuine dispute of material fact remains for the factfinder to resolve. *Beard v. Banks*, 548 U.S. 521, 529 (2006) (*citing Celotex*, 447 U.S. at 323).

However, like here, the Plaintiffs cannot sustain a case and survive summary judgment by simply theorizing a plausible scenario in support of their claims, especially when that proffered scenario conflicts with direct, contrary evidence. *Scott*, 550 U.S. at 380. Plaintiffs' theory that Burton must have been "stomped" or "beaten" or "piledrive[en]" is only sustained, however tenuously, by the assumption that the injuries he had when he entered the hospital on May 11, 2018 were the same injuries he had on May 4, 2018. The accounts of Officers Watkins and Isotani, along with the physical evidence, as well as Drs. Julien's and Harle's opinions, taken together, unequivocally dispute Plaintiffs' theory and thus their entire case collapses like a house of cards. 2-ER-080-81 at ¶¶6-8, SER-034, SER-038 at ¶¶14-17, SER-063, SER-073-74 at ¶¶6-10, SER-082-90, SER-116-17 at ¶¶4-10, SER-123-24, SER-133-34 at ¶¶7-8, 11-13, SER-130-31 at ¶¶4-6.

B. The District Court Properly Exercised Its Discretion in Disregarding Mr. Tallmer's Legal Opinions.

The District Court ruled that Tallmer's report was "insufficient to raise a triable issue both because it relies on Plaintiffs' theory of events that is not borne out by the admissible evidence, and because ultimately it seeks to provide a legal opinion regarding the reasonableness of the force used here." 1-ER-026. Though the District Court did not specifically indicate that Tallmer's report was inadmissible or excluded, she definitely had the discretion to do so as the report is not one that would be admissible under any hearsay exception. *Hunt v. City of Portland*, 599 Fed. Appx. 620, 621 (9th Cir. 2013) ("With respect to the expert's written report, we conclude that the report is hearsay to which no hearsay exception applies.").

The District Court properly found that Tallmer's report does not overcome Defendants' showing that the force used by Officer Watkins was reasonable and minimal based on the admissible evidence. Furthermore, Tallmer's report provided a legal opinion which, in and of itself, does not create a genuine issue of material fact. Tallmer has no law enforcement experience and is not trained in police procedures. 2-ER-087 at 20, 2-ER-092 at 38-39. Tallmer's report is littered with case citations and reads more as a legal memorandum than a report. 2-ER-209-16. Tallmer admits his experience with law enforcement is limited to providing legal instruction, advice, and opinions. 2-ER-087-91 at 20-22, 24, 33-35. Tallmer admitted that his opinion was a legal opinion. 2-ER-091 at 33 l. 24-5.

Tallmer's legal opinion does not "assist the trier of fact to understand the evidence or to determine a fact in issue", thus, it does not support or create a dispute as to any material fact. Fed. R. Evid. 702. "Pure legal conclusions are not admissible as factual findings. In the context of a summary judgment motion, a conclusion of law by a third-party investigator **does not, by itself, create a genuine issue of material fact for the obvious reason that a legal conclusion is not a factual statement**. . ." *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 777 (9th Cir. 2010) (emphasis added); *see also Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) ("Turning to the substance of Mr. Hartmann's opinions, an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law." (internal quotation marks and citations omitted)); *McHugh v. United States Service Auto Ass'n*, 164 F. 3d 451, 454 (9th Cir. 1999) (stating expert testimony cannot be used to provide legal meaning or interpret written policies).

Thus, the District Court was right to disregard the legal opinion of Tallmer's report and could have ruled that the report was inadmissible hearsay regardless.

C. The District Court Properly Exercised Its Discretion in Admitting Dr. Harle's Declaration.

Plaintiffs raise the issue regarding Dr. Harle's Declaration as "witness tampering" for the first time on appeal in their Opening Brief. *See* Opening Brief at 9-10, 15-16, 22-23. Though Plaintiffs had an opportunity to raise an objection at

oral argument for Defendants' MSJ on September 15, 2023, they failed to do so. 2-ER-059-60. As such no objection was made regarding this "issue" for the District Court to rule upon.

The general rule is that an issue will not be considered for the first time on appeal. *See Rothman v. Hosp. Serv. of Southern California,* 510 F.2d 956, 960 (9th Cir. 1975). Before the appellate court will consider such an argument, Plaintiffs must show exceptional circumstances why the issue was not raised below. *Taylor v. Sentry Life Ins. Co.,* 729 F.2d 652, 655–56 (9th Cir. 1984). Plaintiffs here are unable to show exceptional circumstances as the issue related to the lack of new, acute displaced rib fractures being present on May 4, 2018, was not a novel or new one when Defendants' MSJ was filed. Plaintiffs have been on notice of Dr. Julien's findings and opinion since receiving a copy of his report on or about November 26, 2021. SER-178-79. Since that time, with full knowledge of Dr. Julien's findings, Plaintiffs failed to conduct any depositions, including those of Drs. Julien, Harle, Peng, nor for Det. Kerr who drafted the coroner's report. Nor was there any reason on record preventing Plaintiffs from contacting Dr. Harle in preparing their case, who was not and has never been a County employee. 2-ER-075-8.

Furthermore, Plaintiffs lack any facts to support their "witness tampering" allegation and failed to cite to any authority. In fact, Section III of the Opening Brief is completely devoid of any cited authority or citations to the record in

violation of the Fed. R. App. P. Rule 28(a)(8)(A). *See* Opening Brief at 22-23. Pursuant to Rule 28(a)(8)(A) of Fed. R. App. P. "The appellant's brief must contain, under appropriate headings and in the order indicated . . . the argument, which must contain. . .appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which appellant relies. . . ."

In Defendants' attempt to respond here to Plaintiffs' "issue" on appeal regarding the alleged "witness tampering" based on no authority or facts, the Defendants believe Plaintiffs are attempting to have this Court strike Dr. Harle's declaration. However, Plaintiffs do not put forth a legal basis to do so. The sham affidavit doctrine appears likely to be the closest legal analysis to the present situation, however applying such a doctrine would be inappropriate in this case as: 1) the prior opinions regarding cause of death was from the 2018 Autopsy Report, not from a previously sworn statement or testimony, such as from a deposition as none was had, and 2) the contradiction from Harle's Declaration is clearly explained to resolve the reason for the disparity (i.e. she was provided additional information). *See Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806-7 (1999); *see also Van Asdale v. International Game Technology*, 577 F.3d 989, 998 (9th Cir. 2009) (sham affidavit rule is necessary to maintain the principle that summary judgment is an integral part of the federal rules); *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) ("[T]he sham affidavit rule should be applied

with caution because it is in tension with the principle that the courts is not to make credibility determinations when granting or denying summary judgment.") (citations and quotation marks omitted).

As no authority or facts were presented by Plaintiffs, and the sham affidavit doctrine does not apply in this case, Dr. Harle's Declaration remains admissible.

D. The Officers Are Entitled to Qualified Immunity

The District Court correctly found, alternatively, that Officer Watkins (as well as Officers Isotani and Takenishi) is (are) also entitled to qualified immunity in addition to the fact that Officer Watkins' actions were constitutional. In determining whether an Officer is entitled to qualified immunity, courts determine: 1) whether a public official has violated a constitutionally protected right; and 2) whether the right was clearly established at the time of the violation. *Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1115 (9th Cir. 2017). These two prongs need not be considered in any particular order, and both prongs must be satisfied for Plaintiffs to overcome the qualified immunity defense. *Id*.

1. Officer Watkins did not Violate Burton's Constitutionally Protected Rights as the Force Used was Objectively Reasonable.

The Supreme Court has explained that "all claims that law enforcement officers have used excessive force−deadly or not−in the course of an arrest,

investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard...." *Graham*, 490 U.S. at 395.

> The 'reasonableness' of a particular use of force must be judged from the perspective of a **reasonable officer on the scene, rather than with the 20/20 vision of hindsight**…**The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments** – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation (citations omitted, emphasis added).

Id. at 396-397.

Careful attention must be paid to the facts and circumstances of each case, including "the severity of the crime…whether the suspect poses an immediate threat to the safety of the officers…and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396.

As to the severity of crimes, Burton was arrested and charged with assaulting Watkins pursuant to Haw. Rev. Stat. § 707-712.6, resisting an order to stop a motor vehicle under Haw. Rev. Stat. § 710-1027, driving without a license, no-fault insurance, and DUI. Assaulting a law enforcement officer can be considered a serious offense. *See Caldwell v. City of Selma*, No. 1:13–cv–00465–SAB, 2014 WL 4275513, at *8 (C.D. Cal. Aug.19, 2014) (finding that "assault and battery on a police officer" are relatively severe crimes that "weigh[ ] in favor of the use [deadly] of force").

Likewise, resisting an order to stop and DUI can also be considered serious offenses. *See Cooper v. Brown*, 844 F.3d 517, 522 (5th Cir. 2016) (DUI is considered a serious offense); *Hernandez v. Town of Gilbert*, No. CV-17-02155-PHX-SMB, 2019 WL 1557538, *5 (D. Ariz. April 10, 2019) (DUI was serious offense when plaintiff disregarded the officer's flashing lights, continued drive home, attempted to close garage door and refused to exit vehicle despite orders) *aff'd* 989 F.3d 739 (9th Cir. 2021) (seriousness of offense not specifically addressed on appeal). Under these circumstances, the first *Graham* factor weighs in Defendants' favor.

However, taking these various crimes together, along with Burton's aggression towards Officer Takenishi, his reckless driving observed by Officer Gray, the attempts to evade and hide from police multiple times, and forcibly striking of Officer Watkins in an attempt to escape, makes the totality of the circumstances, to include the individual crimes and escalating behavior, quite serious. Therefore, Burton's actions were especially concerning and potentially endangering officer safety as well as safety of the public. At minimum this factor regarding the seriousness of the crimes may be considered neutral based on the analysis of the District Court in the First Burton Case when presented with the same facts. *See Burton v. City and Cty of Hawaii*, 2022 WL 280999, *8-9 (D. Haw. Jan. 31, 2022) (appeal dismissed).

The second, and most important *Graham* factor, is whether the suspect posed an immediate threat to the safety of the officers or others.[26] *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011); *Miller v. Clark County*, 340 F.3d 959, 964 (9th Cir. 2003); *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994).

When Officer Watkins opened the vehicle's door, he was alarmed to see Burton's seatbelt no longer fastened and his handcuffed hands now in front of him after being handcuffed behind his back. SER-030-31 at ¶¶22-23, 25. Burton forcefully shoved Officer Watkins' chest, knocking Officer Watkins off-balance, while lunging out of the vehicle. SER-31 at ¶26. Burton's deliberate assault was a clear threat to Officer Watkins' safety and did ultimately result in injury to Officer Watkins before Burton was placed back under control. *Id*. at ¶31, SER-121-22, SER-134 at ¶9.

[26]A threat imports a communicated intent to inflict physical or other harm and is distinguished from words uttered as mere idle talk, jests or pleas to stop that do not have a reasonable tendency to create apprehension the speaker will act. *See Tolan v. Cotton*, 572 U.S. 650, 658 (2014).

The type of resistance Burton displayed is best described as active aggression, *i.e.*, "physical actions of assault".[27, 28] SER-119 at ¶6; *see Jones v. Kootenai Cty.*, No. CV 09-CV-317-N-EJL, 2011 WL 124292 (D. Idaho Jan. 13, 2011) (characterizing handcuffed and intoxicated plaintiff's yelling, threatening, kicking of deputy and attempted kicking of other officers as active aggression); *McKenney v. Harrison*, 635 F.3d 354, 362 (8th Cir. 2011) (noting police policy named "assault" as an example of active aggression").

Under these dangerous circumstances, Burton posed an immediate threat to Officer Watkins, and the second *Graham* factor weighs in Defendants' favor. *See Gregory v. Cty. of Maui*, 523 F.3d 1103, 1109 (9th Cir. 2008) (officers had reason to believe suspect posed threat because he refused their requests, acted aggressively and assaulted a bystander); *Miller*, 340 F.3d at 965 (suspect posed immediate threat where he recklessly fled from officers in vehicle and then fled on foot); *Billington v. Smith*, 292 F.3d 1177, 1185 (9th Cir. 2002) (concluding suspect

[27]The resistance continuum consists of psychological intimidation, verbal non-compliance/resistive dialogue, passive resistance, defensive resistance, active resistance/aggression, agitated/aggravated active aggression and deadly force. *See, e.g.*, *Deshotels v. Norsworthy*, No. 08-1378, 2012 WL 1566256, *1 (W.D. La. May 2, 2012); *Reed v. City of St. Larkin*, No. 4:04CV00745-ERW, 2007 WL 1656266, *7 (E.D. Mo. June 6, 2007); *Dyer v. Sheldon*, 829 F.Supp. 1134, 1140 n.14 (D. Neb. 1993).

[28]As Burton had a brown belt in Kenpo Karate and had a history of domestic related incidents, facts not known to Officer Watkins, this made Burton a more dangerous individual than an average DUI suspect. 2-ER-182 at 38-39, SER-055-56.

posed imminent threat of injury or death where he kicked and punched officer and reached for his gun), *abrogated in part on other grounds, Cty. of Los Angeles v. Mendez*, 137 S.Ct. 1539, 1546 (2017); *Menuel v. City of Atlanta*, 25 F.3d 990, 995 (11th Cir. 1994) ("a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression, and death").

In addition to posing an immediate threat of harm to Officer Watkins (which resulted in actual injury to Officer Watkins), Burton was actively resisting and attempting to escape. Burton had already fled from police on two separate occasions earlier in the evening, as well as an attempt to evade Officers Watkins and Karonis by turning off the Truck's lights and turning into a side street under cover of darkness. SER-027 at ¶¶5-6, SER-047 at ¶¶5-6. Burton also initially refused to get into the police vehicle when placed under arrest and was argumentative during the contact with police. SER-030 at ¶22, SER-037 at ¶12, SER-049 at ¶20. When Burton assaulted Officer Watkins, he yelled "I'm out of here!" SER-031 at ¶27, SER-134 at ¶10. There can be little doubt that Burton was making every possible effort to escape. Given Burton's assault on Officer Watkins and clear intent to escape, the third *Graham* factor, whether a suspect is actively resisting or trying to escape, weighs heavily in Defendants' favor. Therefore, all

three factors articulated in *Graham* favor Defendants (or at minimum are neutral) and justify the use of the minimal force used in this incident.

As stated, the force Officer Watkins chose to use was minimal, consisting of a body hold around Burton's waist and foot trip. SER-031-32 at ¶¶27-29, SER-038 at ¶¶14-15. This force is considered "empty hand control techniques". SER-119-20 at ¶7. Empty hand control techniques are often used to gain control or subdue noncompliant individuals. *See, e.g.*, *Fischer v. Hoven*, 925 F.3d 986, 989 (8th Cir. 2019) ("The arm-bar takedown is a common technique to restrain individuals."); *Gonzalez v. Coughlin*, No. 92 CIV. 7263 (HB), 1996 WL 496994, *5 (S.D.N.Y. Sept. 3, 1996) ("In an attempt to bring the situation under control, [the corrections officer] used a foot sweep which is a common and accepted practice"). They are weaponless control maneuvers involving low levels of bodily force to gain control of situations; they are not intermediate levels of force requiring the use of "less-lethal technologies" such as batons, projectiles, chemical sprays or conducted energy devices. NAT'L INST. FOR JUSTICE, THE USE-OF-FORCE CONTINUUM, https://nij.ojp.gov/topics/articles/use-force-continuum; *Deshotels*, 2012 WL 1566256, at *1; *Reed*, 2007 WL 1656266, at *7.

Given Burton's assault and attempt to escape, Watkins' minimal use of force was objectively reasonable. *See Garcia v. City of Santa Clara*, 772 F.App'x 470, 472 (9th Cir. 2019) ("relatively mild force" consisting of leg sweep, control holds,

and punch to face on physically aggressive suspect was reasonable); *Horn v. Barron*, 720 F.App'x 557, 565 (11th Cir. 2018) (use of "a soft hands, straight arm bar takedown technique" on suspect who pulled her arm away officer was reasonable "minimal level of force"); *Donovan v. Phillips*, 685 F.App'x 611, 613 (9th Cir. 2017) (gripping suspect's wrist, pulling arm downward causing her to roll onto ground, was reasonable "minimal force"); *Estate of Tapueluelu v. City & Cty. of S.F.*, 268 F.App'x 639, 640 (9th Cir. 2008) (leg sweep of handcuffed suspect actively struggling was objectively justified); *Johnson v. Cty. of L.A.*, 340 F.3d 787, 793 (9th Cir. 2003) (hard pulling and twisting to extract suspect from car was objectively reasonable "minimal" intrusion on his Fourth Amendment interests); *Smith v. Ball State Uni*., 295 F.3d 763 (7th Cir. 2002) (straight arm bar to remove resistant suspect from car was "minimal use of force); *Standifer v. Lacon*, 587 F.App'x 919, 924-25 (6th Cir. 2014) (empty hand maneuver to bring handcuffed, intoxicated, actively twisting, turning and kicking plaintiff to ground, after she kicked his groin); *Willimason v. City of National City*, 23 F.4th 1146 (9th Cir.

2022) (minimal force used where governmental interests are low was not considered excessive force).[29, 30]

2. Officer Watkins' Did not Violate a Clearly Established Right.

Qualified immunity shields government officials from liability for civil damages when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quotations and citations omitted).

While case law does "not require a case directly on point" for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 12. In other words, immunity

[29]Officer Watkins would have been justified in using a higher level of force. *See, e.g.*, *Franklin v. Franklin Cty, Ark.*, 956 F.3d 1060, 1062 (8th Cir. 2020) (using taser on defiant suspect in handcuffs was reasonable); *Zivojinovich v. Barner*, 525 F.3d 1059, 1073 (11th Cir. 2008) (use of taser on handcuffed arrestee who appeared to be intentionally spraying blood at officer was reasonable); *Yarnall v. Mendez*, 509 F.Supp.2d 421, 433 (D. Del. 2007) (use of taser to subdue handcuffed and fleeing arrestee was reasonable).

[30]The facts also clearly establish that Officers Takenishi and Isotani were not responsible for ***any*** use of force as admitted by Plaintiffs' counsel. 2-ER-053-54.

protects "all but the plainly incompetent or those who knowingly violate the law." *Id.*

Courts are not allowed to define clearly established law at a high level of generality; rather "[t]he dispositive question is whether the violative nature of **particular** conduct is clearly established," *Id*. (emphasis in original, quotation marks and citations omitted). Additionally, the "inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* (quotations marks and citations omitted).

Plaintiffs must identify a case where an officer acting under similar circumstances was held to have violated the Constitution. *Sharp v. Cty. of Orange*, 871 F.3d 901, 911 (9th Cir. 2017). They must point to prior case law articulating a constitutional rule specific enough to alert Officer Watkins that his particular conduct was unlawful. *Id.* "To achieve that kind of notice, the prior precedent must be 'controlling'—from the Ninth Circuit or Supreme Court—or otherwise be embraced by a 'consensus' of courts outside the relevant jurisdiction." *Id.*

Plaintiffs cite several cases they claim clearly establish Officer Watkins' use of force was unlawful. Plaintiffs' cases, however, are so factually distinct from the instant case it cannot be said these cases provided Officer Watkins "fair and clear warning", *U.S. v. Lanier*, 520 U.S. 259, 271 (1997), that his acts were unlawful. Neither does *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005), *Harris v.*

Roderick, 126 F.3d 1189, 1201 (9th Cir. 1997), nor *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 748 (S.D. Tex. 2011) render the purported right's "contours" "sufficiently definite" so "any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 572 U.S 765, 778-79 (2014).

Plaintiffs' reliance on *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219 (D. Me. 1996) is also misplaced. Not only is this case not controlling, the facts don't support even a persuasive argument. In *Comfort*, a non-party police officer corroborated plaintiff's excessive force allegations regarding a defendant officer's conduct, which persuaded the court to deny summary judgment due to the genuine issues of material fact on the Fourth Amendment's reasonableness inquiry. *Id.* at 1228-29. Here there is no admissible eyewitness testimony corroborating Plaintiffs' allegations of a beating and creating a factual issue, thus *Comfort* is inapposite.[31]

Bryan v. Macpherson, 630 F.3d 805 (9th Cir. 2010) does not support a determination that Burton's initial crimes or his resistance were minor. In *Bryan*,

[31]The only eyewitness testimony was that of Officer Isotani, and besides one minor inconsistency regarding Burton's overall behavior that night noted by the District Court, Officer Isotani corroborates Officer Watkins' testimony to the events surrounding the fall at the police station. SER-031-33 at ¶¶26-32 and 37-38, and SER-038-39 at ¶¶14-17 and 19-21, SER-133-134 at ¶¶ 7-13. Though Officer Isotani was a named co-Defendant, Plaintiffs' counsel admitted at hearing on Defendants' MSJ that Officer Isotani was no more than a percipient witness. 2-ER-054.

an officer "deployed his X26 taser in dart mode to apprehend Carl Bryan for a seatbelt infraction, where Bryan was obviously and noticeably unarmed, made no threatening statements or gestures, did **not** resist arrest or attempt to flee, but was standing **inert** twenty to twenty-five feet away from the officer." *Bryan*, 630 F.3d at 809 (emphases added). In comparison to the instant case, *Bryan* is plainly distinguishable in many important ways. Immediately before Officer Watkins' use of force, he knew Burton was a safety risk because Burton's seatbelt was unfastened and his handcuffed hands were in front of his body. SER-031 at ¶25. Burton lunged at Officer Watkins, shoved him in the chest and attempted to flee while shouting out "I'm out of here!" SER-031 at ¶¶26-27, SER-038 at ¶14, SER-134 at ¶10. Given these critical factual distinctions, *Bryan* is inapplicable.

The facts in *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001) render its constitutional guidelines "inapplicable" and "too remote" on the question of reasonableness here. *Kisela v. Huhges*, 138 S.Ct. 1148, 1153 (2018). And the Court has already instructed courts not to read *Deorle* too broadly in deciding whether clearly established law governs a new set of facts. *City & Cty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1775-77 (2015). *Deorle* involved a police officer who shot an emotionally disturbed, unarmed man in the face, without warning, even though the officer had a clear line of retreat, there were no bystanders nearby, the man had been "physically compliant and generally followed all the officers' instructions",

he had been under police observation for roughly 40 minutes and had not attempted to flee or escape. 272 F.3d at 1276, 1281-82 (internal quotation marks omitted). As with the present case "[w]hatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page." *Sheehan*, 135 S.Ct. at 1776. Furthermore, although an individual's emotional disturbance factors into the reasonableness calculus, there is nothing in the record indicating Officer Watkins had reason to believe Burton was mentally disturbed at the time the minimal force was used, and "[k]nowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public[.]" *Id*. at 1778 (internal quotation marks omitted). Even Officer Watkins' use of the descriptive "bipolar" in his reports was made later and included Burton's behaviors while in the cell block at the police station in the hours **after** his arrest. 2-ER-108-09.[32]

Nor does *Davis v. City of Las Vegas*, 478 F.3d 1048 (9th Cir. 2007) refute Officer Watkins' reasonable use of force against a combative Burton for "Davis was neither actively resisting arrest nor attempting to flee". *Id*. at 1056.

Vera Cruz v. City of Escondido, 139 F.3d 659 (9th Cir. 1997), involved a suspect evading a police officer who ignored commands to stop and warnings a K-9 would be used if he did not.

[32]There is no admissible evidence Burton suffered from any mental illness.

And although ascertaining the facts in cases where an officer defendant is often the only surviving eyewitness, *see Scott v. Heinrich*, 39 F.3d 912, 915 (9th Cir. 1994), Officer Isotani witnessed the incident here, and both his and Officer Watkins' accounts are consistent with other known facts and evidence.[33] SER-031-33 at ¶¶25-32 and 37-38, SER-038-39 at ¶¶14-17 and 19-21, SER-133-34 at ¶¶7-13.

Importantly, Plaintiffs fail to meet their burden to "identify a case where an officer acting under similar circumstances as [Officer Watkins] was held to have violated the Fourth Amendment." *White v.* Pauly, 137 S.Ct. 548, 552 (2017); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (requiring "existing precedent must have placed the statutory or constitutional question beyond debate"); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000) (stating it is plaintiff who "bears the burden of showing that the rights allegedly violated were 'clearly established'"). Plaintiffs provide no prior controlling precedent from the Ninth Circuit or Supreme Court articulating a constitutional rule specific enough to alert Officer Watkins the use of an empty-hand maneuver to restrain an actively resistant, handcuffed suspect attempt to flee was unlawful. *Sharp*, 871 F.3d at 911

[33]Though initially a named defendant, Plaintiffs' counsel consented to granting MSJ in favor of Officer Isotani, agreeing with the District Court that Officer Isotani was a percipient witness to the force used by Officer Watkins. 2-ER-054.

("Plaintiffs must point to prior case law that articulates a constitutional rule specific enough to alert **these** deputies **in this case** that **their particular conduct** was unlawful") (emphases in original). Furthermore, "to the extent that a robust consensus of cases of persuasive authority could itself clearly establish the federal right Plaintiffs allege, no such consensus exists here." *See, e.g.*, *Womack v. Bradshaw*, 49 F. Supp. 3d 624 (S.D. Mo. 2014) (holding arresting officer who used empty-hand takedown and other maneuvers against an resistant, handcuffed arrestee who was attempting to flee from police vehicle; *see also Van Pelt v. City of Detroit, Michigan*, No. 22-1680, 70 F.4th 338, 2023 WL 3836477 (6th Cir. June 6, 2023) (holding officer who tackled fleeing, handcuffed individual suspected of drug offenses and vehicle violations, did not violate suspect's constitutional rights and was entitled to qualified immunity).

Plaintiffs have failed to satisfy their burden since they failed to identify any authority which put Officer Watkins on notice his actions were unconstitutional. Therefore, Officer Watkins (and for that matter Officers Takenishi and Isotani as well) is (are) entitled to qualified immunity.

VIII. CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's grant of Summary Judgment for Defendants/Appellees.

IX. STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, there are no known cases related to this appeal pending in the United States Court of Appeals for the Ninth Circuit other than those identified in the Appellant's Brief.

Dated: April 15, 2024,
Kailua-Kona, Hawai‘i

Respectfully submitted,

___s/ Mark D. Disher____

MARK D. DISHER
Deputy Corporation Counsel
Office of the Corporation Counsel
County of Hawai‘i
101 Aupuni Street, Suite 325
Hilo, Hawai‘i 96720
(808) 961-8251
Attorneys for DEFENDANTS-APPELLEES COUNTY OF HAWAI‘I, LUKE WATKINS, PAUL T. ISOTANI, AND LANDON TAKENISHI

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-3175

I am the attorney or self-represented party.

This brief contains 11,815 **words,** including _____ words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (●) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties.
  - [ ] a party or parties are filing a single brief in response to multiple briefs.
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated _____.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Mark D. Disher **Date** 04-15-24
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit, using the Appellate Electronic Filing system (ACMS) on April 15, 2024.

Participants in the case who are registered ACMS users will be served by ACMS. Non-registered participants will be served by U.S. Mail, postage prepaid.

Dated: Kailua-Kona, Hawai‘i, April 15, 2024.

/s/ Mark D. Disher
MARK D. DISHER
Deputy Corporation Counsel
Office of the Corporation Counsel
County of Hawai‘i
101 Aupuni Street, Suite 325
Hilo, Hawai‘i 96720
(808) 961-8251
Attorney for Defendants-Appellees
COUNTY OF HAWAI‘I, LUKE WATKINS, PAUL T. ISOTANI, AND LANDON TAKENISHI