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,

v.

COUNTY OF HAWAII, et al.,

Defendants-Appellees,

On Appeal from the United States District Court
For the District of Hawaii

PLAINTIFF-APPELLANTS ERIN LERETTE, individually and as guardian and next friend of minor child, B.T.B. and TRISTAN T. BURTON'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

On May 3, 2020, Erin Lerette on behalf of then minor Brandon Burton, and Tristan Burton ("Plaintiffs") brought suit pursuant to 42 U.S.C. Sec. 1983 against the County of Hawaii ("County") and County police officers, including Luke Watkins (collectively "Defendants") for the death of their father, Vincent Burton ("decedent"), following injuries sustained while in police custody following a DUI arrest. 3-ER-313-35. Defendants moved for summary judgment on July 24, 2023. 3-ER-270. Plaintiffs timely opposed the Motion. 3-ER-244-69. On September 21, 2023, the United States District Court for the District of Hawaii granted the Defendants' Motion for Summary Judgment 1-ER-005-038, and the Clerk of Court entered a Final Judgment in the case. 1-ER-002. On October 23, 2023, Plaintiffs filed a timely Notice of Appeal to this Court. 3-ER-343.

STATUTORY [AND REGULATORY] AUTHORITIES

42 U.S.C. Sec. 1983: 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.

Fourth Amendment- 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.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court grievously erred in granting summary judgment for Defendants on the Plaintiffs' claims for excessive force based on excluding evidence of 5 rib fractures sustained by the decedent when in police custody, creating a genuine issue of material fact.

II. Whether the District Court grievously erred in granting Summary Judgment for Defendants on the Plaintiffs' claims of excessive force even though the Plaintiff's expert witness, Andrew Tallmer, who is qualified to train/teach law enforcement officers in excessive force, rendered detailed opinions that the force employed by the Defendants and inflicted upon the decedent while handcuffed for a D.U.I. was excessive, thereby creating a genuine issue of material fact.

III. Whether the District Court grievously erred in granting Summary Judgment for Defendants on the Plaintiffs' claims of excessive force even though the County of Hawaii attorneys convinced the Pathologist to Sign a Declaration Contradicting her Autopsy Report that the multiple rib fractures identified on autopsy of the decedent may have been sustained after the decedent was released from police custody, creating yet another genuine issue of material fact based on the County's own Contradictory Submissions of the County Pathologist.

IV. Whether the District Court grievously erred in granting Summary Judgment based on qualified immunity where it was clearly established at the time of Mr. Burton's death that police officers could not brutalize, beat, or body slam a hand-cuffed, intoxicated arrestee who poses no threat to the police officers, and where the governmental interest in force, tantamount to lethal force, was small compared to the level of harm or threat posed by a D.U.I. arrestee.

STATEMENT OF THE CASE

Vincent Burton ("Burton"), age 57 and his wife, Donna Burton, on the evening of May 3, 2018 were leisurely driving in Honoka'a on the island of

Hawaii. 3-ER-246. Later that evening, Officer Luke Watkins ("Watkins") pulled Burton over on suspicion of DUI. 3-ER-246. Officer Watkins and other officers, including Paul Isotani, arrived on the scene. Burton was Caucasian; Luke Watkins is of Hawaiian ancestry. 2-ER-207. Burton was compliant throughout the encounter. 2-ER-206.

Watkins weighed approximately 300 pounds at the time he arrested Burton, Burton weighed approximately 160 pounds. 2-ER-203. To Watkins, Burton appeared intoxicated and suffering from a bipolar disorder. 2-ER-206. Burton repeatedly mouthed off and insulted Watkins for being overweight and Hawaiian. 2-ER-207.

The officers at the scene removed Burton from his vehicle and attempted to isolate Burton from his wife "so she would not be able to see" what they did to Burton. 2-ER-155.

After being removed from the vehicle, Watkins at some point handcuffed Burton **behind his back**. 2-ER-155. After handcuffing Burton, the officers struck, hit or stomped Burton's flanks. 2-ER-164. Burton's hospital records confirmed his injuries to his bilateral flanks:

> PT reports was 'beaten' by police last Thursday night at 2130, was seen here Friday. Reports pain 10/10 to bilateral flanks and ribs. Hematoma noted to L. flank and rib cage. Tender to MD palpitation to bilateral flanks. [1]

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[1] Burton's reports of his injuries contained in his medical records about how and when his injuries occurred were admissible pursuant to FRE Rule 803(4) as a

2-ER-164-65.

At some point thereafter, Watkins placed Burton in the back of a patrol car and fully seat-belted the handcuffed Burton. 2-ER-202.

The drive from the place of Burton's arrest for DUI to the police station was a short ride only a few minutes. 2-ER-202. Watkins and Isotani arrived at the police station at approximately the same time. 2-ER-192-93. Watkins removed Burton from the back of the patrol car. 2-ER-203-04. Burton took one step out of the back of the patrol car at which time Officer Watkins, who was behind Burton, reached around him and in a bear hug-like maneuver picked Burton up from the ground, turned and showed Isotani and that he was holding Burton up in the air from behind, and then hurled Burton to the ground slamming him on the concrete with all of his approximate 300 pounds of weight piledriving on top of Burton. 2-ER-154. Burton was not trying to flee at the time. 2-ER-192-96. Burton immediately screamed out in pain that his ribs were hurt. 2-ER-193 ("I immediately heard Mr. Burton complain of pain to his ribs. . . oh ow, my ribs").

Burton was in excruciating pain for the next several days until his death due to internal injuries secondary to being beaten by the police and from complications of rib fractures. 2-ER-231-32. Burton was in so much pain that the police officers

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Statement Made for Medical Diagnosis or Treatment and pursuant to FRE 803(6), record of records of a regularly conducted activity. This was raised below. 3-ER-247.

had Burton taken to the Hilo Hospital on the morning of May 4, 2018. 2-ER-231. The radiologist initially did not report the multiple rib fractures sustained by Burton. 2-ER-169-70. However, during the subsequent Coroner's Inquest into the death of Burton, the radiologist admitted to the County of Hawaii detective that there *were* multiple rib fractures to the left rib cage of Burton which were, in retrospect, visible on the May 4, 2018 x-rays of Burton. 2-ER-169-70. According to the official Coroner's Inquest:

> Upon reviewing the medical reports, I attempted to locate the radiologist who reviewed the X-rays that were taken of the victim at his initial examination and then on his second examination at the hospital, I was able to locate the name of Dr. Ming Peng who was the radiologist who reviewed the X-rays for both visits for the victim . . . I informed him that the reason I was there is I wanted to determine if the X-rays showed any injuries to Vincent Burton at his initial visit which would have been on 05-04-2018, because of the fact that he did not show injuries when he reentered the hospital with the rest of the symptoms on May 11, 2018. Dr. Peng reviewed the X-rays, and he stated that in retrospect, in the initial X-rays, there are what appears to be fractures of the ribs. He stated that it is very difficult to see these types of fractures, unless you are specifically looking for them due to the patient complaining of those particular symptoms; however, in retrospect, looking back at the initial X-rays, it does appear that there could be fractures of the ribs. He indicated that at the time of the initial visit, those injuries were not observed. He stated that also with conducting a CT scan on the second examination, the CT scan is much more accurate and easier to view the fractures.

2-ER-169-70.

Plaintiffs maintained below that pursuant to FRE Rule 803(8)(A)(iii) the

factual findings, including opinions contained in the Coroner's Inquest Report of Burton's death were admissible, pointing out that in Beech Aircraft Corporation v. Rainey, 488 U.S. 153, 169-170, 109 S.Ct. 439, 102 L.Ed.2d 445 (Brennan, J. 1988), the United States Supreme Court held:

> A broad approach to admissibility under Rule 803(8)(C), as we have outlined it, is also consistent with the Federal Rules' general approach of relaxing the traditional barriers to 'opinion' testimony. Rules 702-705 permit experts to testify in the form of an opinion, and without any exclusion of opinions on 'ultimate issues.' And Rule 701 permits even a lay witness to testify in the form of opinions or inferences drawn from her observations when testimony in that form will be helpful to the trier of fact. We see no reason to strain to reach an interpretation of Rule 803(8)(C) that is contrary to the liberal thrust of the Federal Rules. **We hold, therefore, that portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion**. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report. As the trial judge in this action determined that certain of the JAG Report's conclusions were trustworthy, he rightly allowed them to be admitted into evidence. We therefore reverse the judgment of the Court of Appeals in respect of the Rule 803(8)(C) issue.

3-ER-249. (Bold added).

Vincent Burton was released from police custody on May 8, 2018. When Burton went home he was in excruciating pain, vomiting blood, unable to walk, and unable to urinate. 2-ER-154. Vincent Burton became further ill due to his beating by the police and being body-slammed by Luke Watkins and was finally hospitalized on May 11, 2018. 2-ER-164-65. Photographs taken at the hospital of Burton showed massive bruising and contusions to his left flank and buttocks. 2-

ER-229-30.[2] Due to complications from his rib fractures and internal injuries, Burton's condition worsened; He developed sepsis due to his injuries and was pronounced dead on May 18, 2018. 2-ER-231-32. According to the Autopsy Report, the cause of Burton's death was directly related to the multiple internal injuries and rib fractures he sustained from the police. The autopsy report provided:

> Based on these autopsy findings and the investigation and history available, in my opinion, this 57-year-old male died as a result of sepsis and multiorgan failure, secondary to subacute rib fractures sustained during an altercation with police. Because the injuries leading to his infection and ultimate death (rib fractures) occurred due to the intentional act of another, the manner of death is ruled homicide.

2-ER-232.

The surviving sons of Vincent Burton filed suit for their father's death alleging excessive force and other state law causes of action. 3-ER-343. Defendants moved for summary judgment on 7/24/23. 3-ER-270. Essential to the Defendants' Motion for Summary Judgment below was that the decedent's multiple rib fractures, identified by Hilo Medical Center and shown on autopsy at left rib #s 6, 7, 8, and 9, right #8, had to have occurred *after* Burton was released from police custody on May 8, 2018, and did not occur following his arrest on May 3, 2018 and prior to his being taken to Hilo Medical Center *for chest x-rays* due to

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[2] Photographs were also relied upon by the Plaintiffs' expert witness Andrew Tallmer. 2-ER-211.

injuries to his chest while in police custody. 3-ER-289-90. However, according to the County of Hawaii's own Coroner's Inquest Report, Burton's multiple rib fractures (five) were visible and present on the x-rays taken on May 4, 2018 of Burton when he was taken to the hospital by the police; however, the Hilo, Hawaii radiologist had originally misinterpreted his reading of Burton's X-rays on May 4, 2018:

> Dr. Ming Peng who was the radiologist who reviewed the X-rays for both visits for the victim . . . I informed him that the reason I was there is I wanted to determine if the X-rays showed any injuries to Vincent Burton at his initial visit which would have been on 05-04-2018 . . . **Dr. Peng reviewed the X-rays, and he stated that in retrospect, in the initial X-rays, there are what appears to be fractures of the ribs.** He stated . . . **however, in retrospect, looking back at the initial X-rays, it does appear that there could be fractures of the ribs.**

2-ER-169-70. (Bold added). There were genuine issues of material fact below that County police officers, including Officer Luke Watkins, fatally brutalized Vincent Burton, who was unarmed, defenseless and hand-cuffed behind his back when body slammed to the ground by the nearly 300 lb. Luke Watkins resulting in five contiguous rib fractures to the decedent, raising a genuine issue of material fact below. Burton was also located at the Honoka'a police station when assaulted, a threat to no-one and had been arrested for DUI, hardly a dangerous felon. 2-ER-155. Less violent and less severe force alternatives were available to the officers but not employed. 2-ER-155. Plaintiffs maintained below that the governmental

interest in inflicting what was tantamount to lethal force upon Burton was unjustifiable and excessive. 3-ER-254-56.

Plaintiffs' filed a Memorandum of Opposition to the County's Motion for Summary Judgment, 3-ER-244, and a separate Concise Statement of Material Facts (CSOF) denying the County's facts, and also filed a separate CSOF contradicting the County's Statement of Facts. 2-ER-154-55. In the Plaintiffs CSOF, the Plaintiffs asserted that the decedent in fact had sustained the 5 acute rib fractures while in police custody. 2-ER-232, ("subacute rib fractures (left ribs at #6, 7, 8, and 9, right rib #8)"). Raising a genuine issue of material fact, the Plaintiffs CSOF relied on both the County Coroner's Inquest Report's conclusions that Dr. Ming Peng, the radiologist, admitted the x-rays he read on May 4, 2018 showed the multiple rib fractures to Burton, which were also identified when he was subsequently hospitalized at Hilo Medical Center on May 11, 2018. 2-ER-169-71. The Plaintiffs CSOF also relied on the Pathologist's autopsy report dated 8/3/18, and submitted into evidence, that the decedent had sustained five rib fractures while in police custody, and that the cause of his death was "homicide", secondary to rib fractures. 2-ER-232.

However, the County below, not able to countenance the Pathologists autopsy report, sought to have the pathologist alter her opinions, providing the pathologist incomplete additional information (not including the Coroner's inquest

findings) but a report of the County's hired expert witness, and caused the Pathologist to retract her conclusions and opine in a reply memorandum filed by the County that the decedent's rib fractures may not have been present when he was taken to Hilo Medical Center for chest x-rays on May 4, 2018. 2-ER-079-80.

At the summary judgment hearing, Plaintiffs maintained the County's action of having the Pathologist change her opinions, in-and-of-itself created a genuine issue of material fact based on the County's contradictory Pathology submissions. 2-ER-060, (transcript of hearing on County of Hawaii's Motion for Summary Judgment). The actions of the County also raise the issue of witness tampering, since the Pathologist was only asked to change her opinions based on the County's hired expert, not based on information contained in the County's own Coroner's inquest, that Dr. Peng admitted that the May 4, 2018 x-rays showed the rib fractures the decedent had sustained in police custody. 2-ER-69-70. The County deliberately did not show Dr. Harle the radiologist's/Inquest conclusion that the multiple rib fractures were in fact present on May 4, 2018 x-ray, but hard to visualize. This also constituted a suppression of evidence, and misleading of the Court and Pathologist.

In its Reply Memorandum, the County of Hawaii also admitted that Dr. Peng had determined that the May 4, 2018 x-rays of Vincent Burton indicated the presence of rib fractures but argued that part of Dr. Peng's statement that the May

4, x-rays of the decedent that "there could be fractures of the ribs" was "hardly an unequivocable recantation of Dr. Peng's previous findings." 2-ER-128.

In addition to the factual conflict in the record over the presence of rib fractures to the decedent on the May 4, 2018 emergency room visit based on the autopsy report and coroner's inquest reports, both concluding the decedent had multiple rib fractures at the time of his May 4, 2018 emergency room visit when he was taken to the hospital for chest x-rays due to injuries to his chest sustained in custody, Plaintiffs also submitted an expert report of police practice and procedure professor, Andrew Tallmer, which also opined that the County police officers employed excessive force on the Plaintiff. 2-ER-209-16. However, the District Court in its opinion granting summary judgment, although acknowledging the Plaintiffs' expert report, refused to consider the detailed report of Mr. Tallmer as raising an issue of fact. See Opinion of Court at 1-ER-026. Mr. Tallmer, relying on expert information, including the inquest concluded the Plaintiff had in fact sustained rib fractures (based on the evidence reviewed of a type customarily relied upon by experts in the field per FRE 702-703 and that the force here was excessive). 2-ER-213-16. Plaintiffs' submitted the detailed report in opposition to the County's Motion for Summary Judgment, along with Mr. Tallmer's C.V. 2-ER-209-16.

SUMMARY OF ARGUMENT

Essential to the Defendants' Motion for Summary Judgment below was that the decedent's multiple rib fractures, identified by Hilo Medical Center and shown on autopsy at left rib #s 6, 7, 8, and 9, right #8, had to have occurred *after* Burton was released from police custody on May 8, 2018, and did not occur following his arrest on May 3, 2018 and prior to his being taken to Hilo Medical Center *for chest x-rays* due to injuries to his chest while in police custody. 3-ER-289-90, ("Therefore, the fractures to these ribs occurred sometime after May 4, 2018."). However, according to the County of Hawaii's own Coroner's Inquest Report, Burton's multiple rib fractures (five rib fractures) were visible and present on the x-rays taken on May 4, 2018 of Burton when he was taken to the hospital by the police; however, the Hilo, Hawaii radiologist had originally misinterpreted his reading of Burton's X-rays on May 4, 2018.

There were genuine issues of material fact below that County police officer, Luke Watkins, fatally brutalized Vincent Burton, who was unarmed, defenseless and hand-cuffed behind his back when body slammed to the ground by the nearly 300 lb. Luke Watkins resulting in five contiguous rib fractures to the decedent, raising a genuine issue of material fact below of excessive force. 2-ER-154-55. Burton was also located at the Honoka'a police station when assaulted, a threat to no-one and had been arrested for DUI, hardly a dangerous felon. 2-ER-154. Less violent and less severe force alternatives were available to the officers but not

employed. Plaintiffs maintained below that the governmental interest in inflicting what was tantamount to lethal force upon Burton was unjustifiable and excessive.

STANDARD OF REVIEW

A district court's decision to grant, partially grant, or deny summary judgment or a summary adjudication motion is reviewed de novo. *See, e.g.*, *Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir.) (grant), *cert. denied*, 142 S. Ct. 343 (2021); *2-Bar Ranch Ltd. P'ship v. United States Forest Serv.*, 996 F.3d 984, 990 (9th Cir. 2021) (partial summary judgment); *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 606 (9th Cir. 2019) (denial); *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017); *Mull for Mull v. Motion Picture Indus. Health Plan*, 865 F.3d 1207, 1209 (9th Cir. 2017).

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).

On review, the appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Soc. Techs. LLC v. Apple Inc.*, 4 F.4th 811, 816 (9th Cir. 2021); *Frudden v. Pilling*, 877 F.3d 821, 828 (9th Cir. 2017); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004).The court must not weigh the

evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. *See Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999).

Evidentiary rulings made in the context of summary judgment are reviewed for an abuse of discretion. *See Sandoval v. Cty. of San Diego*, 985 F.3d 657, 665 (9th Cir. 2021); *Clare v. Clare*, 982 F.3d 1199, 1201 (9th Cir. 2020) ("We review evidentiary rulings for an abuse of discretion even when the rulings determine the outcome of a motion for summary judgment." (internal quotation marks and citation omitted); *Wong v. Regents of Univ. of California*, 410 F.3d 1052, 1060 (9th Cir. 2005); *Fonseca v. Sysco Food Serv., Inc.*, 374 F.3d 840, 845 (9th Cir. 2004).

OBJECTION RAISED BELOW

Plaintiffs filed their CSOF contesting the County Defendants factual assertion that the decedent sustained his multiple rib fractures after his May 8, 2018 release from custody. 2-ER-151-242.

Plaintiffs filed their Memorandum in Opposition to the County Defendants Motion for Summary Judgment on 8/14/23 at 3-ER-244-69.

Plaintiffs submitted their Expert Report of Andrew Tamer that there was excessive force at 2-ER-209-16, and autopsy report of Pathologist Lindsey Harle, M.D. confirming multiple rib fractures of the decedent/homicide at 2-ER-231-39.

Plaintiffs' timely asserted objections and raised below that the County's own submissions, including potential tampering with Dr. Lindsey Harle's opinions by providing her with incomplete information on which the County attempted to obtain a change of her Autopsy Report opinions regarding Mr. Burton's death at 2-ER-060.

ARGUMENT

I. The District Court Grievously erred in Concluding the Decedent Had Not Sustained Multiple Rib Fractures While in Police Custody, as there Were Multiple Genuine Issues of Material Fact Precluding Summary Judgment.

Fundamental to the County's Motion for Summary Judgment was to convince the District Court that the decedent had not sustained the five acute, and contiguous rib fractures to his left side while in police custody on May 3, 2018 – May 4, 2018. This was an essential thrust of the County's CSOF, to wit: that Vincent Burton's multiple, acute and contiguous rib fractures had to have occurred *after* Mr. Burton was released by the County police on May 8, 2018. 3-ER-289-90. The reason is clear, had Mr. Burton sustained five, contiguous rib fractures, as concluded by the Pathologist, Lindsey Harle, M.D. in her original autopsy report, then there would be irrefutable evidence that Mr. Burton's injuries were the result of excessive force, and/or at a minimum establish a genuine issue of material fact precluding summary judgment as to excessive force. Therefore, a major component of the County's Summary Judgment was devoted to refuting that Mr.

Burton's rib fractures were sustained in custody. To achieve end, the County deliberately did not provide Dr. Harle its own Coroner's inquest findings that the x-rays taken on May 4, 2018 did show the multiple rib fractures as subsequently read by Dr. Peng. 2-ER-169-71. This raises the specter of suppression of evidence and misleading the Court and pathologist, providing incomplete and contradicted x-ray results, of the County's own detective's findings in the Inquest.

The District Court adopted the County's Facts that Burton's rib fractures were sustained post release, to wit: after May 8, 2018, 1-ER-030, and overlooked the original autopsy report concluding otherwise. The Court also overlooked the Coroner's Inquest Report finding that the radiologist on May 4, 2018 had misread the x-rays of Vincent Burton. 1-ER-022. Nor did the Court consider the Coroner's finding as a government record or report pursuant FRE 803(A)(iii) and the decision of Beech Aircraft Corporation v. Rainey, 488 U.S. 153, 169-170 (Brennan, J. 1988) as cited by the Plaintiffs below. 3-ER-249. This evidence was also admissible of a type relied upon by experts in the field (FRE 703), and contained the expert opinion of Dr. Peng, the treating radiologist and should have been admitted under FRE 702.

Both the Autopsy Reports and the County of Hawaii Coroner Inquest reports were admissible as Official Government Records or Reports pursuant to FRE 803(A)(iii) and contained relevant opinion evidence pursuant to FRE Rules 702-

703. Both reports were produced in discovery by the County of Hawaii and bear the County of Hawaii bates numbering. Both reports were referenced and cited in the Plaintiffs' Counter-Statement of Material Facts that Mr. Burton did sustain fatal injuries, including multiple rib fractures at the time of his May 3, 2018 arrest, creating a genuine issue of material fact of excessive force.

Regarding the Coroner's Inquest Report, the statements of Dr. Peng were incorporated into the findings of the County Detective, who stated:

> Upon reviewing the medical reports, I attempted to locate the radiologist who reviewed the X-rays that were taken of the victim at his initial examination and then on his second examination at the hospital, I was able to locate the name of Dr. Ming Peng who was the radiologist who reviewed the X-rays for both visits for the victim . . . **I informed him that the reason I was there is I wanted to determine if the X-rays showed any injuries to Vincent Burton at his initial visit which would have been on 05-04-2018**, **because of the fact that he did not show injuries when he reentered the hospital with the rest of the symptoms on May 11, 2018**. **Dr. Peng reviewed the X-rays, and he stated that in retrospect, in the initial X-rays, there are what appears to be fractures of the ribs. He stated that it is very difficult to see these types of fractures, unless you are specifically looking for them due to the patient complaining of those particular symptoms; however, in retrospect, looking back at the initial X-rays, it does appear that there could be fractures of the ribs. He indicated that at the time of the initial visit, those injuries were not observed.** He stated that also with conducting a CT scan on the second examination, the CT scan is much more accurate and easier to view the fractures.

2-ER-169-70

In its Reply Memorandum to the Plaintiffs' Memorandum in Opposition to the County's Motion for Summary Judgment, the County of Hawaii admitted Dr. Peng's statements that the X-rays taken on May 4, 2018, of Vincent Burton showed rib fractures, however, in their Reply they contested that Dr. Peng's statements that the x-rays showed rib fractures on May 4, 2018 were "equivocal" or constituted speculation. Defendants acknowledge Dr. Peng's statements, but maintained they were "speculative". 2-ER-128, ("Plaintiffs' Reliance . . . on Dr. Peng's Speculation are Misplaced).

Notwithstanding, the County's Reply conceded/admitted Dr. Peng's statements to the County's own detective that in retrospect the X-rays taken on May 4, 2018 showed new rib fractures of the decedent. 2-ER-128. It is undisputed that Dr. Peng is the radiologist who read the X-rays of the decedent on May 4, 2018, and once again interpreted the X-rays for the Coroner's Inquest, at which time the radiologist admitted the multiple rib fractures were in fact present at the time of Mr. Burton's presentation to the Hilo Hospital Emergency Room on May 4, 2018, as brought by the police for chest injuries/contusion. 2-ER-169-70. Dr. Peng, as a radiologist, rendered an expert opinion pursuant to subpoena, that the x-rays of Mr. Burton showed rib fractures on May 4, 2018, this was incorporated into the Coroner's Inquest and admissible under FRE Rule 803(8)(A)(iii), and admissible under FRE Rules 702-703. Dr. Peng's interpretation of the x-rays

incorporated into the Coroner's Inquest also have circumstantial guarantees of trustworthiness pursuant to FRE 807.

There were multiple issues of fact before the Court that Mr. Burton sustained massive internal injuries, including 5 rib fractures at the time of his arrest on May 3-4, 2018.

The x-rays taken on May 4, 2018, are because the County police used physical force on Burton following his arrest for D.U.I. The County admits that when force was employed, Mr. Burton was handcuffed. What the County refuses to accept is the extent of Mr. Burton's injuries resulting in his death, to wit: five-acute-rib-fractures as a result of governmental force intentionally applied.

The County's arguments and contrived factual submissions to the contrary, are implausible and should be rejected that Mr. Burton actually sustained his rib fractures later when the evidence in the record is reviewed as a whole. First, the County officer Luke Watkins, who weighed 300lbs, admits to bear-hugging and taking Burton to the ground with all his weight upon Burton on May 3, 2018. 2-ER-204-05. Burton immediately cried out his ribs were injured or broken. The police then took Burton to the Hilo Emergency for a chest X-ray, due to pain to Burton's chest. 2-ER-197. Following his release from custody on May 8, 2018, Burtons children testified that he was in agony, urinating blood and coughing up blood from injuries he sustained in custody. They helped nurse their father, until

his conditioned worsened that they took him back to the hospital on May 11, 2018.

The pathologist identified the multiple X-rays on her autopsy report:

> 1. Subacute rib fractures (left ribs #6, 7, 8, and 9; right rib #8). . .
>
> CONCLUSION: Based on these findings and the investigative and historical information available to me, in my opinion, this 57-year-old male died as a result of sepsis and multiorgan failure, secondary to subacute rib fractures sustained during an altercation with police. Because the injuries leading to his infection and ultimate death (rib fractures) occurred due to the intentional act of another, the manner of death is ruled homicide.

2-ER-232.

The Pathologist's report, concluding that the rib fractures were due to altercation with the police, was corroborated by Mr. Burton's multiple statements made for purposes of medical diagnosis, before his death, that he was "beaten by the police", as contained in his medical records submitted in opposition to the County's Motion for Summary Judgment.

Moreover, the County proffered no plausible explanation for Mr. Burton's multiple rib-fractures other than his in-custody body slam by the 300lb. Watkins. Thus the totality of the evidence contains circumstantial guarantees of trustworthiness, including the Plaintiffs' expert witness' opinions of excessive force incorporating the Pathology findings of severe/fatal injuries to Vincent Burton arising out of his custody with police and inflicted while handcuffed. Plaintiffs' expert, Mr. Tallmer's report, and the Pathology Report of Dr. Lindsey

Harle, M.D. should have been given deference and/or credence by the District Court, and genuine issues of material fact identified, particularly given FRE Rule 703, which provides:

> Rule 703. Bases of an Expert
> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

II. The District Court Grievously Erred in Granting Summary Judgment for Defendants Where Plaintiff's Expert Police Practices Witness Established Genuine Issues of Material Fact of Excessive Force, Including the Severity of the Decedent's Injuries Sustained while Handcuffed for a D.U.I. Arrest.

The District Court erred in disregarding the Plaintiffs' expert report, which should have been considered, particularly as to his opinion that "Defendant's use of force against Burton while he was handcuffed was objectively unreasonable", as raising a genuine issue of material fact.

Mr. Tallmer, as the owner of Andrew Tallmer Consultants, provides training and consulting to North Carolina law enforcement and agencies. 2-ER-209. Mr. Tallmer teaches courses, including civil liability, search and seizure, and arrest procedures, to patrol officers and supervisors. 2-ER-209. Mr. Tallmer served as police attorney for the New York City Police Department, which included

responsibilities to provide legal instruction to NYCPD personnel in civil liability and use of force, both deadly and non-deadly force. Mr. Tallmer is also a former Assistant District Attorney for Nassau County, New York. 2-ER-209.

Mr. Tallmer reviewed extensive materials relating to the incident in forming his opinions, and relied also on the medical information available, including Dr. Harle's Autopsy Report, FBI investigative reports, County of Hawaii Use of Force Policies and Procedures, AELE Law Journal Article on Use of Handcuffs, etc. Id. Under **Fed. R. Evid. 702**, a witness, qualified as an expert by knowledge, skill, experience, training, or education, may testify if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. **Fed. R. Evid. 702**. The proponent of the evidence bears the burden of proving the expert's testimony satisfies **Fed. R. Evid. 702.** MedImpact Healthcare Sys. v. IQVIA Holdings Inc., 2022 U.S. Dist. LEXIS 184648, *1. Here, Mr. Tallmer is both qualified based on extensive experience and training, as well as based on his education to opine on the issues of excessive force.

III. The District Court grievously erred in Granting Summary Judgment for Defendants on the Plaintiffs' Claims of Excessive Force Where the County of Hawaii Convinced the Pathologist to Sign a

Declaration that Burton's Rib Fractures Could Have Occurred After May 4, 2018, Raising Additional Genuine Issues of Material Fact.

Following Plaintiffs CSOF and Memorandum in Opposition to the County Defendants' Motion for Summary Judgment filed on August 14, 2023, the County Defendants contacted Pathologist Lindsey Harle, M.D., provided her with the County's Expert report that Mr. Burton's acute Rib fractures would have been visible on May 4, 2018, and had her sign a declaration including that "I acknowledge the 7th, 8th, and 9th left rib fractures could have been caused by a new altercation or trauma involving Burton after May 4, 2018 altercation." The County did not provide Dr. Harle with the Coroner's inquest report that Dr. Peng the radiologist concluded upon further review of the x-rays the multiple rib fractures were visible on the May 4, 2018 x-rays. Dr. Harle's supplemental declaration, as argued by Plaintiffs at the summary judgment hearing, also created a genuine issue of material fact, given the factual conflict between Dr. Harle's original autopsy report and her subsequent declaration based on incomplete information.

IV. The District Court Grievously Erred in Granting Summary Judgment to the County Based on Qualified Immunity Where it was Clearly Established that Police Officers Cannot Brutalize, Beat, or Body Slam Defenseless Hand-Cuffed, Arrestees who Pose No Threat to the Police.

Beating a handcuffed prisoner is not objectively reasonable and violates the 4th Amendment prohibition against unreasonable search and seizures. In Comfort

v. Town of Pittsfield, 924 F.Supp. 1219, 1228 (D. Me. 1996) the Court recognized that beating a defenseless and handcuffed prisoner in custody is unreasonable:

> Based on the instant facts, a reasonable jury could find that the Officers' alleged aggression goes beyond the level of force necessary to effectuate Comfort's arrest, and therefore conclude that this force violate Comfort's Fourth Amendment rights. Reasonable officers would have known that "ramming" a subdued and handcuffed suspect's head into a door jam constitutes excessive force and violates the suspect's Fourth Amendment rights. (Comfort Aff., ¶ 9.) See, e.g., Fowles v. Stearns, 886 F.Supp. 894, 901 (D.Me.1995) (alleged conduct of police officers who punched and kicked handcuffed plaintiff, who did not resist arrest, if true, would violate the Fourth Amendment); McLain v. Milligan, 847 F.Supp. 970, 976 (D.Me.1994) (alleged conduct of police officer who, after handcuffing Plaintiff, "kicked his legs out from under him, forced him to his knees, slammed his chest and face onto the concrete, placed his knee down on plaintiff's back, picked his head up by the hair and slammed his face down onto the pavement," if true, would violate the Fourth Amendment). Comfort claims he never resisted arrest or threatened the Officers in any way.

In addition to Watkins, Officer Isotani can also be held liable for standing by as Watkins beat/brutalized Burton:

> To the extent that Comfort's allegations ring true, Officers Tremblay and Dodge may both be liable for the use of excessive force despite the fact that only one of the Officers took part in the beating. See Noel v. Town of Plymouth, Mass., 895 F.Supp. 346, 352 (D.Mass.1995) ("Courts have held that a police officer who fails to prevent the use in his presence of excessive force by another police officer may be held liable under § 1983.") (quoting Hathaway v. Stone, 687 F.Supp. 708, 712 (D.Mass.1988)).

Comfort, 924 F.Supp. at 1228, n.4.

Moreover, given that the police use of force resulted in Burton’s death, the Court is charged with carefully scrutinizing the government’s one-sided arguments. In Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994), the court stated:

> Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. Therefore, the judge must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story--the person shot dead--is unable to testify. The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts. Hopkins, 958 F.2d at 885-88; Ting v. United States, 927 F.2d 1504, 1510-11 (9th Cir.1991). **In other words, the court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational fact finder that the officer acted unreasonably**.

(Bold added).

Here, to desperately try to justify the body slamming of the handcuffed Plaintiff, the government creates an implausible fiction that even though Watkins handcuffed Burton behind his back and fully seat belted him in the back of the police car, that in the short ride to the police station, Burton somehow managed to rotate his shoulders and hands over his head and presto be handcuffed in his front when Watkins opened the patrol car door. This is highly improbable, if not impossible, and the kind of self-serving invention of facts that Scott v. Henrich cautions the Court to reject such implausibility where the deceased Plaintiff is not alive to contradict the surviving government witness' self-serving and made-up story.

Burton posed no danger or threat to the officers or others justifying lethal/massive force. Also, the crime he was arrested for was not a felony.

In Bryan v. Macpherson, 630 F.3d 805, 828-29 (9th Cir. 2010), the Ninth Circuit stated:

> The severity of Bryan's purported offenses "provide [ ] little, if any, basis for [Officer MacPherson's] use of physical force." Smith, 394 F.3d at 702. It is undisputed that Bryan's initial "crime" was a mere traffic infraction—failing to wear a seatbelt—punishable by a fine. …While "the commission of a misdemeanor offense is 'not to be taken lightly,' it militates against finding the force used to effect an arrest reasonable where the suspect was also nonviolent and 'posed no threat to the safety of the officers or others.' " Headwaters, 240 F.3d at 1204 (quoting Hammer v. Gross, 932 F.2d 842, 846 (9th Cir.1991)). None of the offenses for which Bryan was cited or of which he was suspected is inherently dangerous or violent, and as already discussed, Bryan posed little to no safety threat. Cf. Parker v. Gerrish, 547 F.3d 1, 9 (1st Cir.2008) ("Though driving while intoxicated is a serious offense, it does not present a risk of danger to the arresting officer that is presented when an officer confronts a suspect engaged in an offense like robbery or assault."). Therefore, there was no substantial government interest in using significant force to effect Bryan's arrest for these misdemeanor violations that even the State of California has determined are minor. Cf. Miller v. Clark County, 340 F.3d 959, 964 (9th Cir.2003) (finding a felony to be "by definition a crime deemed serious by the state").

Genuine issues of material fact exist that Watkins picking up from behind the handcuffed Burton, whose hands were behind his back and could not break his fall, and pile driving him to the ground with all of his weight on top of him was deadly force. Burton handcuffed behind-his-back could not break his fall. The force fractured five of Burton's ribs- which were the cause of his death according to the pathologist - hence lethal force has been determined.

In Deorle v. Rutherford, 272 F.3d 1272, 1279 (9th Cir. 2001) the Court stated:

> The officer's actions are measured by the standard of objective reasonableness. Graham, 490 U.S. at 397. The reasonableness of the force used to effect a particular seizure, is determined by "careful[ly] balancing . . . `the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the counter-vailing governmental interests at stake." Graham, 490 U.S. at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)). As we have held, "[t]he force which [i]s applied must be balanced against the need for that force." Liston v. County of Riverside, 120 F.3d 965, 976 (1997). See also Alexander v. City and County of San Francisco, 29 F.3d 1355, 1367 (9th Cir. 1994).

The character of the offense is often an important consideration in determining whether the use of force was justified. Deorle, 272 F.3d at 1280. The Court also considers, under the totality of circumstances, the quantum of force used and the availability of less severe alternatives. Davis v. City of Las Vegas, 478 S.3d 1048, 1055 (9th Cir. 2007); Deorle, 272 F.3d at 1282. Here, Watkins did not consider less severe alternatives, besides the lethal force of body slamming the handcuffed Burton. According to Isotani, Watkins had lifted Burton off of the ground and showed him to Isotani before slamming him to the ground. 2-ER-192-93. Instead of body slamming him and inflicting fatal injuries, Watkins should have awaited Isotani while he held the much smaller Burton, to assist in escorting Burton to a cell, rather than brutalizing the defenseless (handcuffed-behind-his-back). Instead, Watkins piledriving Burton indicates Watkins animus at Burton, a Caucasian, calling Watkins a fat Hawaiian.

The 9th Circuit in Derole considered the importance of using less severe force, especially when dealing with an individual who is under a potential mental disability, which is likely temporary and the individual in need of help and should not be harmed if lesser force alternative were available. The Court in Derole stated:

> Nothing in the record before us suggests that Rutherford considered other, less dangerous, methods of stopping Deorle. See Headwaters Forest, 240 F.3d at 1204 (holding that, before deploying pepper spray, police "were required to consider `[w]hat other tactics if any were available' to effect the arrest"); Chew, 27 F.3d at 1443. 20 Rutherford had not seen any bystanders in the immediate area; as far as he was aware, the only neighbors in the vicinity, along with the other police officers, were safely behind the two roadblocks. In sum, the crime being committed, if any, was minor and the danger to Rutherford and others appears to have been minimal, as was the risk of flight. There was no immediate need to subdue Deorle before the negotiators who were part of the response group could arrive and perform their "essential function"; nor had those in charge made a decision to subject Deorle to the use of physical force rather than await their arrival. Considering all the circumstances, at the time Rutherford fired, the governmental interest in using force capable of causing serious injury was clearly not substantial.

Deorle, 272 F.3d at 1282. See also Vera Cruz v. City of Escondido, 139 F.3d 659, 663 (9th Cir. 1997). So to here, there was nowhere for Burton to go, they were already at the Honokaa police station.

As to the care that should be taken before use of force against the mentally ill or impaired, the Court stated:

> The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the

> use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. See Alexander, 29 F.3d at 1366 (holding that the police used excessive force, considering all the circumstances, in "storm[ing] the house of a man whom they knew to be a mentally ill .. . recluse who had threatened to shoot anybody who entered"). **Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a men-tally ill individual.** We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under Graham , the reasonableness of the force employed.

Deorle, 272 at 1282-83.

Here, under the facts and circumstances, including the objective medical evidence of Burton's massive, ultimately fatal internal injuries, there are genuine issues of material fact that Watkins employed excessive and lethal force on Burton, who was unarmed and handcuffed, which was unnecessary. There was nowhere for him to go when he exited the police car at the police station. Watkins had a hold of the handcuffed Burton. According to Isotani's deposition testimony it did not appear Burton was fleeing, he was exiting the police car as he was required to do per Watkins opening the back door for him to exit the vehicle, Burton had taken a single step (not a run) when Watkins grabbed him from behind and pile drove him

into the ground with such force fracturing five of Burton's ribs causing fatal internal injuries that there was excessive force is also supported by the Plaintiffs' expert witness in police practices and procedures, Andrew Tallmer, who has instructed/taught police officers on use of force standards. Summary Judgment should therefore have been denied.

(A) The Officers Are Not Entitled To Qualified Immunity.

In determining whether a given defendant is entitled to the defense of qualified immunity, a court must decide (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) if so, whether that right was "clearly established" at the time of the defendant's alleged misconduct. Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). "[C]ourts … should … exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Pearson v. Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 818 (2009). Qualified immunity applies unless the official's conduct violated such a right. Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523. Here the force used was excessive and not reasonable, particularly as the crime at issue was not severe (Burton released from custody on May 8, 2018), and that Burton was unarmed, handcuffed, mentally unstable and/or intoxicated, and not a threat to anyone at the Honoka'a police

station. There was simply no reason for Watkins to employ force tantamount to lethal force against the hand cuffed Burton.

The right to be free from excessive governmental force, to be free from beatings by police was also clearly established. Graham v. Connor, 490 U.S. 386, 394 (1989). The act of a police officer using deadly force to prevent a suspect from fleeing constitutes a "seizure" for purposes of the Fourth Amendment. See Brower v. County of Inyo, 489 U.S. 593, 596, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989); Tennessee v. Garner, 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) ("[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."). In Garner, the Supreme Court further stated:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect.

471 U.S. at 11, 105 S.Ct. at 1701. Accord Smith v. City of Hemet, 394 F.3d 689, 704 (9th Cir. 2005) (en banc) ("Thus, where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force.").

Law enforcement officers may not use lethal force unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his

escape will result in a serious threat of injury to persons. Harris v. Roderick, 126 F.3d 1189, 1201 (9th Cir. 1997). Whenever practicable, a warning must be given before deadly force is employed. Harris, 126 F.3d at 1201; Garner, 471 U.S. at 11-12, 105 S.Ct. at 1701-02. "Even if a police officer who uses deadly force believed he is at risk of death or serious bodily injury; he is not entitled to qualified immunity if that belief was objectively unreasonable." Hobart v. City of Stafford, 784 F.Supp.2d 732, 748 (S.D.Tex. 2011).

CONCLUSION

Plaintiff requests the District Court's Order Granting Summary Judgment on the Plaintiffs' Excessive Force Claims against the County Defendants be vacated and remanded based on the existence of genuine issues of material fact.

DATED: Honolulu, Hawaii, February 14, 2024.

/s/ Paul V.K. Smith
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FOR THE NINTH CIRCUIT

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