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 REPLY BRIEF

REVERE & ASSOCIATES, LLLC
TERRANCE M. REVERE
PAUL V.K. SMITH
970 N. Kalaheo Ave., Suite A301
Kailua, Hawaii 96734
Telephone No.: (808) 723-9040

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

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INTRODUCTION

Central to the County Defendants-Appellees ("County Defendants" or "County") Motion for Summary Judgment below was that the force used against Mr. Burton's was "minimal". *See* Answering Brief at 40-41. The word "minimal" appears 16 times in the County Defendants' Answering Brief. An inconvenient fact for the County is Vincent Burton's ("Burton" or "decedent") five rib fractures identified on autopsy a few weeks after his May 3, 2018, arrest, which runs counter to the County Defendants' narrative of only minimal force applied to Burton following his being hand-cuffed and taken to the police station on May 3, 2018. Essential to the County's 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 on May 4, 2018 *for chest X-rays* due to 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 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.

There were genuine issues of material fact below that County police officer, Luke Watkins ("Watkins"), fatally brutalized Vincent Burton, who was unarmed, defenseless and handcuffed behind his back when body slammed or hurled to the ground by the nearly 300 lb. Luke Watkins resulting in five contiguous rib fractures to the decedent, raising genuine issues of material fact below of excessive force. 2-ER-154-55. Burton was also located at the virtually deserted area of 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 according to the Plaintiff's expert witness, which was disregarded by the District Court. Plaintiffs maintained below that the governmental interest in inflicting what was tantamount to lethal force upon Burton was unjustifiable and excessive. The Court below failed to consider the detailed expert report of Andrew Tallmer, with extensive law enforcement experience, knowledge and education that the County Officers failed to follow correct police procedures and employed excessive force on the handcuffed decedent. The lower court also erred in failing to admit or consider the County of Hawaii Defendants own Coroner Inquest Report wherein the decedent's radiologist, who interpreted the May 4, 2018, X-rays, opined that he had misread the original X-rays which in retrospect did appear to show multiple rib fractures of the decedent on May 4, 2018, sustained following the decedent's arrest.

A. The District Court Erred in Disregarding Plaintiffs' Expert's Opinions Regarding Excessive Force, the Availability of Lesser Force Alternatives, and Multiple Inconsistencies in the Police Reports of the Use of Force at the Station Following Mr. Burton's Arrest.

Plaintiffs-Appellants timely submitted a detailed expert report in opposition to the County's Motion for Summary Judgment prepared by Andrew Tallmer, along with Mr. Tallmer's extensive *curriculum vitae* of experience, work, and teaching law enforcement. 2-ER-209-16. Mr. Tallmer's report refuted the central thrust of the County Defendants' Motion for Summary Judgment below that the "force" used against Mr. Burton, while handcuffed at the Honokaa Police Station was "minimal". *See* Answering Brief at 40-41 ("Watkins' minimal use of force was objectively reasonable").

The County argues the District Court properly excluded Mr. Tallmer's Expert Opinions and Report on grounds they contained "legal opinions". *See* Answering Brief at 31. The County admits however that the District Court never excluded Dr. Tallmer's report nor determined the report was inadmissible. Id. As such Mr. Tallmer's report should have been considered as it created multiple genuine issues of material fact that the force applied here was excessive, that less severe/lethal force options existed that Officer Watkins failed to employ, and that the County failed to follow its own practices and procedures regarding use of force with respect to handcuffed arrestees. *See* 2-ER-213-16.

Although Mr. Tallmer referenced the legal standard of excessive force in his report, the core of Mr. Tallmer's opinions about the force applied here did not constitute legal opinions but factual opinions relating to the conduct of Officer Watkins' use of excessive force under the circumstances, and failure to employ less severe force measures which were readily available.

For example, Mr. Tallmer opined:

8. The autopsy report dated May 25, 2021, reflects that Burton had five rib fractures: on the left side, ribs 6.7.8. and 9; on the right side, rib number 8. The autopsy also indicates that Burton had a large healing cutaneous contusion on the left lateral torso.

. . .

14. In my view the reports prepared by the Hawaii Police Department do not sufficiently detail the incident to explain Burton's broken ribs and bruised torso. Assuming the injuries were caused by police action, that level of force would not be justified. **There is no indication in the reports that Burton presented an imminent threat to Watkins or the other officers**.

15. The Hawaii Police Department Arrest Policy, Section 5.5.3 requires that when force is used, information regarding the use of force shall be included in the arrest report (October 27, 2014 version). This means that all use of force should be documented.

16. Assuming Burton had been back cuffed when placed under arrest, it would be reasonable for officers to be concerned that Burton was able to move his hands to the front of his body. **The records do not reflect, however, that Burton was reaching for a weapon or was in some other way causing an imminent threat. It is my opinion that the officers could have re-handcuffed Burton without resorting to a bear hug, leg sweep, or lying on top of Burton**.

17. The Hawaii Police Department's Annual Arrest Control Techniques Refresher (COH 002104) includes instructions on Arm Bar Take Down, Wrist Out Turn Take Down, and High-Risk Kneeling/Handcuffing. The Refresher does not indicate whether "bear hold" takedowns. If such holds are authorized, the Department should instruct officers on the situations in which this use of force is justified.

. . .
19. In the Burton matter, **the police used unnecessary force on Burton after he had been handcuffed.** Since Burton had already been handcuffed, any necessary search for weapons could have been conducted.
. . .
21. The reports reflect that Burton's blood alcohol content was above the legal limit. While a suspect's impairment is a factor the officers may consider in determining the proper amount of force to be used, **the suspect's intoxication does not in and of itself indicate that he is a present threat. The reports do not show that Burton said anything threatening to the police.**

22. While it is unacceptable for anyone to shove a police officer, the amount of force used in response to that contact shove must be proportionate to the possible harm. **The tactics used to subdue Burton after the shove were above those reasonably necessary to protect the officers from further unwelcome contact. I note that Watkins had other use of force options available to him such as pepper spray. Authorization to use pepper spray is set forth in the Hawaii Police Department use of force guidelines dates August 26, 2016.**

23. **The Hawaii Police Department Arrest Policy, section 5.5.2 indicates that no person shall be subjected to more restraint than is necessary and proper for the arrest and detention. It is my opinion that the policy requirements were not followed in the Burton incident.**
. . .
It is my opinion that the force used to effect the arrest of Burton was objectively unreasonable, **excessive, and inconsistent with department policy. The amount and type of force used against Burton while he was handcuffed was unreasonable.**

2-ER-213-16. (Emphasis added).

The District Court should have carefully considered the expert report of Mr. Tallmer, particularly since Officer Watkins' use of force here resulted in Burton's death. *See* 2-ER-232. Given Mr. Burton's death, the Court below was 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). As provided in Scott, Mr. Tallmer's report/opinions unequivocally points out the multiple factual inconsistencies contained in the police reports of the supposed "minimal" use of force vs. the factual evidence, including Mr. Burton's severe injuries, opined by Mr. Tallmer based on the autopsy report and coroner's findings.

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.

The District Court should have but failed to consider Mr. Tallmer's expert opinions/report. "It is well-established ... that expert testimony concerning an ultimate issue is not per se improper." Mukhtar v. Cal. State Univ., Hayward, 299 F.3d 1053, 1066 n. 10 (9th Cir.2002). Indeed, Fed.R.Evid. 704(a) provides that expert testimony that is "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." That said, "an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law." Mukhtar, 299 F.3d at 1066 n. 10. Hangarter v. Provident Life and Acc. Ins. Co., 373 F.3d 998, 1016 (9th Cir. 2004).

Rule 702 requires that a testifying expert be "qualified as an expert by **knowledge**, skill, **experience, training, or education**." Fed.R.Evid. 702. (Bold added). Rule 702 "contemplates a broad conception of expert qualifications." Thomas v. Newton Int'l Enters., 42 F.3d 1266, 1269 (9th Cir.1994). Moreover, "the advisory committee notes emphasize that Rule 702 is broadly phrased and intended to embrace more than a narrow definition of qualified expert." Id.; see also

Fed.R.Evid. 702 advisory committee's note ("In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.").

In Thomas v. Newton Intern. Enterprises, 42 F.3d 1266, 1269 (9th Cir. 1994), this Court stated: "Moreover, if the district court desired more detail about Kuvakas' expert qualifications, it should have given Thomas an opportunity to provide it. Cf. Bulthuis v. Rexall Corp., 789 F.2d 1315, 1317 (9th Cir.1985) (stating in Rule 705 context that if the court desires more information, it should not grant summary judgment against plaintiff without affording plaintiff an opportunity to supply the information)."

The District Court erred and/or abused its discretion in not considering Mr. Tallmer's report, which in-and-of-itself raised multiple genuine issues of material fact that the force employed by Officer Watkins on the handcuffed/defenseless Burton at the police station was excessive and/or unnecessary as Mr. Burton did not pose a danger to the officers such that a leg sweep/body slam maneuver employed at the station was necessary, and that various lesser force options existed but were not utilized. 2-ER-214-16.

The County is wrong that Mr. Tallmer's opinions were "legal opinions" with regard to the force employed on Burton at the station, and the failure of Watkins to use less severe force options, such as pepper spray, re-handcuff the prisoner, etc.

The 9th Circuit in Deorle v. Rutherford, 272 F.3d 1272, 1279 (9th Cir. 2001) 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 Deorle 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. 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 1279. Plaintiffs-Appellants request the District Court's Order Granting Summary Judgment in favor of the County be vacated.

B. The District Court Erred in Disregarding Dr. Ming Peng's Opinion that he Misread Burton's May 4, 2018, X-Rays Showing Multiple Rib Fractures.

Central to the County Defendants Motion for Summary Judgment below was that the force used against Mr. Burton's was "minimal". *See* Answering Brief at 40-41. The word "minimal" appears 16 times in the County Defendants' Answering Brief. An inconvenient fact for the county is Burton's five rib fractures

identified on autopsy a few weeks after his May 3, 2018, arrest, which runs counter to the County Defendants' narrative of only minimal force applied to Burton following his being hand-cuffed and taken to the police station.

To address the inconvenient fact of Burton's five rib fractures, the County maintains that Burton's five rib fractures identified on autopsy had to have occurred post his May 8, 2018, release from police custody, and prior to his return to the Hilo Hospital Emergency Room on May 11, 2018. *See* Answering Brief at 13-14. Burton remained in police custody until May 8, 2018. Id. at 13.[1] How Burton supposedly sustained these fractures primarily on his left side between May 8-11, 2018, other than Watkins (who weighs nearly 300 lb.) body slamming the hand-cuffed Burton on his left side is not provided by the County. The County's position is implausible, particularly as the remaining evidence submitted by the Plaintiffs below all pointed to Burton sustaining the rib injury on May 3-4, 2018 when the nearly 300 lb. Watkins leg-swept the 160 lb. and handcuffed Burton and crushed Burton beneath him into the ground. Following which, Burton immediately cried out that his ribs were injured. 2-ER-197.[2]

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[1] Yet another reason the County's version of "minimal force" and no rib fractures sustained while in police custody is implausible and contradicted by genuine issues of material fact below, is that as soon as Burton was released from police custody and returned home on May 8, 2018, his family observed him in immense pain, could barely walk, coughing blood. 2-ER-154. At the hospital- Burton also immediately complained he had been beaten by the police. 2-ER-164-68.

[2] See also SER 83 Burton's handwritten Note on May 4, 2018, re: "cracked rib."

Given the multiple rib fractures shown on autopsy, Dr. Linsey Harle, the pathologist, requested a review of Burton's X-rays taken on May 4, 2018. 2-ER-169. The County Detective, Jesse Kerr, as part of a coroner's inquest, requested to interview Dr. Ming Peng, the radiologist who read Mr. Burton's May 4, 2018, chest X-rays. Id. Dr. Peng refused to be interviewed and required a subpoena before he would answer any questions. Id. The County Detective obtained a subpoena and interviewed Dr. Peng in the presence of Dr. Peng's counsel. Id.

1. Dr. Peng's Opinion Evidence in the Coroner's Report is Admissible.

The County argues the interview of Dr. Peng as part of the coroner's report is not trustworthy. Answering Brief at 22. However, the record shows that the interview occurred on November 16, 2018, a mere six-months after the X-rays were taken. Dr. Peng was under subpoena and in the presence of counsel. 2-ER-169. Dr. Peng actually "reviewed the X-rays" during the interview, and opined "that in retrospect, in the initial X-rays, there are what appears to be fractures of the ribs." 2-ER-170. Dr. Peng is a radiologist who read the original X-rays, his opinion is admissible under FRE Rules 702-705, however the District Court refused to consider it, nor identified the genuine issue of fact it presented.

The coroner's inquest report is also admissible as a government record or report. 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.**

(Bold added).

Dr. Peng's professional opinion/expert evidence of a treating physician of the decedent, set-forth in the coroner inquest report, is admissible and corroborates that the force here was not "minimal". If the force was so "minimal", then why did Burton end up with five rib fractures primarily on his left side, the same side Watkins claims he leg swept and fell onto Burton, who immediately cried out in pain that his ribs were hurt. *See* 2-ER-213. There is multiple corroborating evidence, that Mr. Burton's rib fractures shown on autopsy, occurred during his post arrest/post-handcuffed police encounter when he was defenseless, including Mr. Burton's statements to his physicians/nurses on May 11, 2018, when he was by that time coughing and urinating blood, that he was "beaten" and "assaulted" by the police the prior "Thursday." 2-ER-164-68. Mr. Burton's statements at the hospital about how his fractures, bruising and other internal injuries occurred, to wit: that he was beaten by the police, is admissible as a statement made for medical diagnosis and treatment. See FRE 803(4).

Dr. Peng's statement that "in retrospect, in the initial X-rays, there are what appears to be fractures of ribs" is also an admissible statement against interest. FRE 804(3)(A). Dr. Peng's statement is an admission that he misread the X-rays originally on May 4, 2018, hence Dr. Peng's attempt at explanation: "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." 2-ER-170. This is a statement against interest for a radiologist to opine he misread/misinterpreted an X-Ray report, particularly where the individual subsequently died.

Dr. Peng was also unavailable to testify per FRE 804(a)(5)(B) at the summary judgment hearing as beyond the 100-mile subpoena power per Fed.R.Civ.P. Rule 45 for the Federal District Court in Honolulu, Hawaii, as Dr. Peng was located in Hilo, Hawaii over 200 miles from Honolulu, Hawaii. See Dr. Peng address at 2-ER-169.[3]

Plaintiffs below could not subpoena Dr. Peng as beyond the 100-mile subpoena limitation of Fed.R.Civ.P. Rule 45(c)(A) for a deposition. Wultz v. Bank

[3] The Court may take judicial notice of the distance between Honolulu, Hawaii on the island of Oahu, and Hilo, Hawaii on the Big Island of Hawaii. The County Defendants, *pari-passu*, submitted a google map of the Big Island of Hawaii in its Supplemental Record Excerpts. SER 135. The court may take judicial notice of the distance between Honolulu and Hilo, Hawaii.

of China Ltd., 32 F.Supp.3d 486, 498, n.103 (S.D.N.Y. 2014). Dr. Peng would not voluntarily give a statement. *See* 2-ER-169. He had to be subpoenaed to give a statement to the County Detective. Id. The County admits the Plaintiffs-Appellants timely argued below/raised that Dr. Peng's statement was also admissible as a statement against interest. *See* Answering Brief at 21.

Plaintiffs also argued below that Dr. Peng's statement, to the extent it was incorporated into the County of Hawaii coroner's inquest report, conducted and prepared by a County of Hawaii detective, would be an admission of a party opponent. 2-ER-61. This was because the County of Hawaii remained a Defendant at the time of the summary judgment hearing. *See* Answering Brief at 17. The coroner's inquest was conducted and prepared by a County Defendant detective, to wit: Jesse Kerr, authorized to make the statement on behalf of the County, manifested to be true, and/or made by a party's agent or employee. 2-ER-169-71. See also FRE 801(d)(2)(A)-(E).

Thus, the County's argument that the statement contained in the coroner's report is not trustworthy under Fed. R. Evid. 803(8)(A)(iii) should be rejected. The Statement is of the decedent's treating radiologist made per a subpoena with counsel present, and while reading the actual X-rays. 2-ER-169-70. The government report was prepared by the County of Hawaii's own detective as part of a coroner's inquest based on the specific request for specific information

requested by the pathologist Linsey Harle, M.D. who requested to determine whether the fractures seen on autopsy she performed were visible also on May 4, 2018, which it turned out they were. 2-ER-169-70.

As such the District Court erred by not considering the opinion evidence of the decedent's treating radiologist contained in the coroner's inquest conducted by the Defendant County below. This information, corroborated by the autopsy report, created a genuine issue of material fact that the force employed by officer Watkins on the hand-cuffed and defenseless Burton was not "minimal" as maintained by the County, but as opined by the Plaintiffs' expert, Andrew Tallman, excessive and that Officer Watkins had lesser, non-lethal force alternatives available that he failed to employ.

C. Dr. Harle's Revised Opinions Based on Review of Selective and Incomplete Information Creates Yet Another Genuine Issue of Material Fact Precluding Summary Judgment.

Following the Plaintiffs submitting their 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 treating radiologist of the decedent on May 4, 2018, concluded upon further review of the X-rays that the multiple rib fractures sustained by Burton did appear to be visible on the May 4, 2018 X-rays of the decedent. 2-ER-169-70. Dr. Harle's supplemental declaration, as argued by Plaintiffs at the summary judgment hearing, also created a genuine issue of material fact itself, given the factual conflict or contradiction between Dr. Harle's original autopsy report and her subsequent declaration based on incomplete information.

It was improper for the County Defendants to request the pathologist to modify her opinions based on their hired expert witness report, without giving her the coroner's inquest report of what the treating radiologist stated that he essentially misread Burton's May 4, 2018, X-rays. This creates yet an additional issue of fact whether the subsequent declaration of Dr. Harle is reliable or based on incomplete/insufficient information and should be disregarded.

In Albright v. Oliver, 510 U.S. 266, 299, 114 S.Ct. 807, 826 (1994), Justice Stevens and Blackmun dissenting, Stated: "Our cases make clear that procedural regularity notwithstanding, the Due Process Clause is violated by the knowing use of perjured testimony or the deliberate suppression of evidence[.]"[citations omitted]). (Bold Italics added). Due Process also prohibits the "deliberate

deception of court and jury" by use of perjured testimony. Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 341, 79 L.Ed. 791 (1935). (Emphasis added). Dr. Harle's original findings in the official autopsy report should not have been disregarded in favor of her questionable subsequent declaration based on incomplete information, and in conflict (issue of material fact) with: (1) her original autopsy report; and (2) Dr. Peng's opinions of the presence of rib fractures visible in the May 4, 2018 X-rays as found/determined by Dr. Peng in the coroner's inquest report.

D. It Was Clearly Established that an Officer Cannot Body Slam or Mistreat a Hand-Cuffed Prisoner.

The County Defendants strain credulity by arguing it was not "clearly established" that the nearly 300 lb. Officer Watkins could not swipe out the legs of a 160 lb. handcuffed prisoner and body slam him into the ground. In Sandoval v. Las Vegas Metro. Police Dep't, 756 F.3d 1154, 1161 (9th Cir. 2014) this Court stated:

> For qualified immunity purposes, in determining whether a constitutional right was clearly established, it is not enough that there is a generally established proposition that excessive use of force is unlawful. See Saucier, 533 U.S. at 202, 121 S.Ct. 2151. Rather, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. (internal quotation marks omitted). It is, however, "not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness [of defendant's actions] was apparent in light of pre-existing law." San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 977 (9th Cir. 2005) (alterations in original) (internal quotation marks omitted).

Similarly in Rodriguez v. Cnty. of L.A., 891 F.3d 776, 795 (9th Cir. 2018) the Court stated:

Though we do "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." Kisela v. Hughes, 138 S.Ct. 1148, 1148 1152, 200 L.Ed.2d 449 (2018) (per curiam) (quoting White v. Pauly, 137 S.Ct. 548, 551, 196 L.Ed.2d 463 (2017) (per curiam)). "[T]he focus is on whether the officer had fair notice that [the officer's] conduct was unlawful." Id. (quoting Brosseau v. Haugen, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam)).

Beating or mistreating a handcuffed prisoner is not objectively reasonable, was clearly established in 2018, 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), a case on point, 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.

(Bold emphasis added). See also Hogan v. Fischer, 738 F.3d 509, 517 (2nd Cir. 2013):

> We therefore hold that the district court erred in concluding that the prison officials' alleged use of force was de minimis and not of the sort repugnant to the conscience of mankind. See Griffin v. Crippen, 193 F.3d 89, 91–92 (2d Cir.1999) (holding that district court erred by concluding as a matter of law that prison guards' alleged **assault upon a handcuffed prisoner** was de minimis).

(Bold added). Comfort, Fowels, McLain, Hogan, and Graham all stand for the proposition that mistreating, beating or slamming/throwing to the ground a handcuffed individual is excessive force, particularly here where Plaintiffs maintain the decedent was utterly defenseless and handcuffed behind his back, making the action (including the nearly 300 lb. officer on top of the 160 lb. decedent) all the more cruel, dangerous, callous and indefensible. These cases were all decided years before 2018, there was ample notice to the County Defendants that it was clearly established they should not injure, harm or mistreat handcuffed and defenseless arrestees.

The Court below errantly found qualified immunity only after determining that Burton did not sustain multiple rib fractures during his May 3, 2018, arrest. This finding should be vacated as there are multiple genuine issues of material fact ignored by the Court below of excessive force, including Plaintiff's expert witness report, the autopsy report, and the decedent's own statements to his doctors and nurses that he was "beaten by the police". His own radiologist also opined that

Burton had sustained what appeared to be multiple rib fractures following his arrest on May 4, 2018. These multiple rib fractures would have occurred after the decedent was arrested, handcuffed, and defenseless. The Court below should have interpreted the facts and inferences to be drawn from them in the light most favorable to the party opposing the motion, the Court did the exact opposite.

In Sandoval the Court further stated:

> The district court found that the boys and Sandoval stated claims for excessive use of force, but that governmental interests in officer safety, investigating a possible crime scene, and controlling an interaction with possible burglars outweighed the intrusions upon the Sandovals' rights.
> In reaching this conclusion, the court improperly "weigh[ed] conflicting evidence with respect to ... disputed material fact[s]." T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.1987); see also Saucier, 533 U.S. at 201, 121 S.Ct. 2151. For instance, the court justified the use of force against the boys on the grounds that they were "potentially noncompliant," and against Sandoval and Henry on the grounds that they were "acting irrationally" and "not complying with the officers' commands," and that the police were continuing to investigate a "potential" or "possible crime scene."
>
> Each of these conclusions was based on conflicting testimony and drew upon the officers' version of events rather than the Sandovals' testimony, as Saucier requires. 533 U.S. at 201, 121 S.Ct. 2151. The District Court found that the boys and Sandoval stated claims for excessive use of force, but that governmental interests in officer safety, investigating a possible crime scene, and controlling an interaction with possible burglars outweighed the intrusions upon the Sandovals' rights.

756 F.3d at 1166. Likewise, in the present case, the District Court only found qualified immunity after adopting the surviving officer's version of the events, not the decedents' who maintains he was beaten. The District Court also made its finding after concluding that the decedent did not sustain multiple rib fractures, as

to which there were genuine issues of material fact, including the Plaintiff's expert report.

Rather, the Court should have followed Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994) which admonishes:

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).

E. Officer Watkins is Not Entitled to Qualified Immunity.

Here, to desperately try to justify the body slamming of the handcuffed Plaintiff, the County Defendants create 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 ended up 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. This also is contradicted by the physical evidence of five-rib fractures which supports that when Watkins slammed Burton into the ground, he was handcuffed behind his back- hence the multiple rib fractures and Burton crying out in pain. 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.[4]

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

[4] The County takes pains to set-forth how Burton allegedly did not comply with the officers' instructions prior to his arrest. Although not ideal action by Burton, what the County fails to inform the Court is that disobeying the instructions of a police officer is a petty misdemeanor under Hawaii law. HRS Sec. 291C-23.

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 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.

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, June 5, 2024.

/s/ Paul V.K. Smith
TERRANCE M. REVERE
PAUL V.K. SMITH
Attorneys for Plaintiffs-Appellants
ERIN LERETTE, individually and as guardian and next friend of minor child, B.T.B. and TRISTAN T. BURTON

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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