IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-01814-WDM-MJW

DEBBIE ULIBARRI;
ESTATE OF SHAWN FRANCISCO VIGIL;
COLORADO CROSS-DISABILITY COALITION, a Colorado Corporation;
COLORADO ASSOCIATION OF THE DEAF, a Colorado Corporation;
ROGER KREBS;
SARAH BURKE;

Plaintiffs,

v.

CITY & COUNTY OF DENVER,

Defendant.

POST-HEARING BRIEF REGARDING RULE 702 MOTION

Defendant, the **CITY AND COUNTY OF DENVER,** (hereinafter "Denver") by the undersigned counsel and pursuant to the Court's Minute Order (#311), submits the following Post-Hearing Brief regarding Denver's Rule 702 Motion to exclude expert opinions of Plaintiffs' expert witnesses Jean Andrews and Marc Pogrebin.[1]

[1] Denver maintains that opinions of Plaintiffs' expert witness Linda Edwards in her Verified Statement (#292-3), which are identified and argued in Denver's Brief (#300) in support of its Rule 702 Motion (#246), should be excluded on the grounds of relevance because the opinions relate only to claims which were never brought in the Second Amended Complaint (#48) (*i.e.*, negligence or Eighth Amendment claims), or were dismissed by the Court on summary judgment (#265).

A. Opinions of Jean Andrews

1. Professor Andrews' methodology of creating a communication/language profile of a deceased person is not sufficiently reliable, and therefore her opinions about Shawn Vigil's alleged lack of effective communication which are based upon this methodology should be excluded.

Professor Andrews offers the following opinions in her Verified Statement (Exh. 83) about Shawn Vigil's ("Vigil") alleged lack of effective communication which should be excluded from evidence because they are based upon an unreliable methodology of creating a communication/language profile of a deceased person:

- "[V]arieties of English such as speech, lipreading, and note-writing would not have provided effective communication for Mr. Vigil." (Exh. 83, ¶ 8)
- "[E]ffective communication with Mr. Vigil would have required an ASL [American Sign Language] interpreter." (Exh. 83 ¶ 10)
- "Mr. Vigil was not provided effective communication at any stage of the jail process—including booking and the medical and psychological intake—so he could not communicate his serious medical and psychological needs." (Exh. 83, ¶ 11)
- "By failing to provide effective communication to Mr. Vigil, Defendants made it impossible for his mental health needs to be addressed." (Exh. 83, ¶ 12)
- "Because effective communication was not provided, [Vigil] had no way of knowing what was happening to him. He was denied supportive contact with prison staff and other prison inmates. He was not able to obtain his rights as a prisoner. And he had no social interaction with other inmates. His isolation was further exacerbated by not being able to watch captioned television of have regular phone contact with family

and friends as hearing inmates had. His unmet communication needs compounded his isolation, anxiety and stress." (Exh. 83, ¶ 13)

- "These factors, when combined, created an experience of severe communication deprivation." (Exh. 83, ¶ 14)

In her Verified Statement, Professor Andrews describes her methodology of creating a communication/language profile of Vigil:

> I developed a communication/language profile of Mr. Vigil in order to determine which mode of communication and language he used. Because Mr. Vigil was deceased at the time of my analysis, I developed this profile based on a thorough review and analysis of his records from the Colorado School of the Deaf and Blind ("CSDB"), which he attended from age 6 to 21, including both educational and audiological records. I also reviewed samples of Mr. Vigil's writing after his arrest, Denver Sheriff Department documents, and deposition testimony of Denver Sheriff Department and other city personnel. (Exh. 83, ¶ 3)

The evidence at the Daubert hearing shows that this methodology of creating a communication/language profile for a deceased person does not meet any of the criteria for reliability set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-4 (1993) and noted in the Fed. R. Evid. 702 advisory committee's note (2000 Amendment). Professor Andrews holds a doctorate degree in Speech and Hearing Science. Therefore the *Daubert* criteria for the reliability of a scientific opinion should apply in this case. According to the advisory committee note, the factors that may be considered in evaluating reliability are:

> (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

At the Daubert hearing, Professor Andrews testified that prior to this lawsuit, she had never created a communication/language profile for a deceased person. Professor Andrews has never taught students at Lamar University how to create a communication/language profile for a deceased person. The only peer review study which Professor Andrews cited for her methodology of creating a communication/language profile for a deceased person is Chapter 5 in the book, *Psychology of Deafness,* which was offered as part of Exhibit 6 at the Daubert hearing. However, Exhibit 6 was never admitted into evidence (#308, #309, and #311). Professor Andrews could not identify any journal articles that she authored or co-authored which address the subject of how to create a communication/language profile for a deceased person. Professor Andrews did not offer any evidence that her methodology has a known or potential rate of error when applied; nor any evidence about the existence and maintenance of standards and controls; nor any evidence that her methodology has been generally accepted in the scientific community of Speech and Hearing Science.

Professor Andrews' Verified Statement claims that her methodology is "based on a thorough review and analysis of [Vigil's] records from the Colorado School of the Deaf and Blind ("CSDB") which he attended from age 6 to 21, including both educational and audiological records." (Exh. 83, ¶ 3). However, at the Daubert hearing, Professor Andrews admitted that she testified at her deposition that the school records that she reviewed were "very brief." Professor Andrews admitted that she did not review any school records for a 12-year period, from 1988 through 2000, when Vigil was enrolled at the school. She also admitted that she never did any classroom observation of Vigil and that she never met him before creating a communication/language profile. The conclusion is inescapable that Professor Andrews'

methodology is a subjective, conclusory approach that cannot reasonably be assessed for reliability, and therefore is inadmissible under the Daubert criteria.

2. Professor Andrews is not qualified to offer opinions about the cause of Vigil's suicide, or about his mental, emotional, or psychological condition while he was incarcerated.

The Court has ruled that Professor Andrews is not qualified to offer an opinion about the cause of Vigil's suicide (#311). Denver also objects that Professor Andrews is not qualified to offer opinions about Vigil's mental, emotional, or psychological condition while he was incarcerated. The Court has ruled that Professor Andrews may testify as an expert about matters concerning communication, language, and literacy skills of deaf people in general (#311). However, these subject matters of expertise do not qualify Professor Andrews to offer opinions about Vigil's mental, emotional, or psychological condition while he was incarcerated, which include the following opinions from her Verified Statement:

- That Vigil was "essentially defenseless" in a hearing prison environment (Exh. 83, ¶ 7)
- That Vigil had "serious medical and psychological needs" (Exh. 83, ¶ 11)
- That Vigil had "no coping skills in the jail" (Exh. 83, ¶ 11)
- That Vigil "suffered acute distress, anxiety and emotional and psychological pain" (Exh. 83, ¶ 11)
- That Vigil was "totally powerless in the jail" (Exh. 83, ¶ 11)
- That he had "anxiety and fear of not knowing what was going on around him" (Exh. 83, ¶11)
- That it was "devastating" to Vigil to be incarcerated (Exh. 83, ¶ 11)
- That it was "impossible for his mental health needs to be addressed" (Exh. 83, ¶ 12)

- That Vigil was "at risk" for mental health issues such as anxiety, depression, stress and feelings of powerlessness (Exh. 83, ¶ 13)
- That Vigil experienced "isolation, anxiety and stress" (Exh. 83, ¶ 13)
- That Vigil experienced "severe communication deprivation" which "was a cause of Mr. Vigil's taking his own life" (Exh. 83, ¶ 14)

3. Professor Andrews' opinions about all matters occurring prior to August 28, 2005, are irrelevant because claims based upon these matters are barred by the two-year statute of limitations

Claims based upon about all matters occurring prior to August 28, 2005, are barred by the statute of limitations, including: Vigil's arrest on August 17, 2005; his entire incarceration at the city jail from August 17-25, 2005, including his initial medical screening at the city jail; and his booking at the county jail on August 25, 2005, which included the medical and mental health screening and the classification process and decision. Therefore, Professor Andrews' opinions about Vigil's alleged lack of communication during these events are not relevant (Exh. 83, ¶ 11). Similarly, Professor Andrews' opinions (Exh. 83, ¶ 9) that Vigil would not have been able to comprehend the Miranda Warning (which was given at the time of Vigil's arrest), the Pre-Arraignment Detention Facility ("PADF" or city jail) Rules and Guidelines, and the Denver County Jail Intake Questionnaire (which was used at the time of Vigil's booking) are irrelevant because claims based upon these matters are barred by the statute of limitations.

Plaintiffs argue that Professor Andrews' opinions concerning matters that occurred prior to the statute of limitations are relevant to the organizational plaintiffs' claims for injunctive relief (#307, p. 3). This argument is without merit. The two organizational plaintiffs, the Colorado Cross-Disability Coalition and the Colorado Association of the Deaf, were added as

parties to this lawsuit when the first Amended Complaint (#16) was filed on October 24, 2007, which is more than two years after Vigil's suicide on September 27, 2005. Therefore, all claims by the two organizational plaintiffs concerning Vigil's arrest and incarceration are barred by the two-year statute of limitations. Adding the two organizational plaintiffs in the first Amended Complaint does not relate back under Fed.R.Civ.P. 15(c) to the date of their original complaint filed on August 25, 2007. *Cf. Garrett v. Fleming,* 362 F.3d 692, 696 (10th Cir. 2004) (adding a new defendant does not relate back under Rule 15(c) to the filing of the original complaint). Furthermore, Vigil's estate lacks standing to assert a claim for injunctive relief because he was deceased at the time the lawsuit was filed. *See Greene v. Branson,* 108 F.3d 1296, 1300 (10th Cir. 1997) (claims for equitable relief of a prisoner who had been released from custody were moot).[2]

B. Opinions of Marc Pogrebin

1. Professor Pogrebin's opinions that Denver was negligent in the operation of a jail are not admissible because his opinions are based on a methodology which misapplies the standards of the American Correctional Association, and his methodology is not sufficiently reliable.

The Court's minute order from April 21, 2011 (#311) permits reference to the standards of the American Correctional Association ("ACA") in establishing alleged negligence in the operation of a jail. Numerous authorities have held that ACA standards are not conclusive in establishing the standard of care, or in establishing constitutional requirements, for the operation

[2] The distinction between mootness and standing is described in *Southern Utah Wilderness Alliance v. Smith,* 110 F.3d 724, 727 (10th Cir. 1997): "Article III mootness is the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness)."

of a jail. The Supreme Court in *Bell v. Wolfish*, 441 U.S. 520, 543, n.27 (1979) has characterized the ACA standards as "goals:"

> [W]hile the recommendations of [the ACA] may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization.

Membership in the ACA, which is a voluntary organization, is not controlling as to the standard of care. *Smith v. Bd. Of County Comm'rs of County of Lyon,* 2003 WL 21293565 *2 (D. Kan. 2003). *See also Spotts v. United States,* 613 F.3d 559, 571-2 (5th Cir. 2010) (violation of non-mandatory ACA standards does not establish liability pursuant to the Federal Tort Claims Act concerning the operation of a federal prison); *Petrick v. Fields,* 1996 WL 699706 *2 (10th Cir. 1996) (unpublished opinion) (ACA standards do not establish the constitutional minima; citing *Bell v. Wolfish, supra*); *Jesusdaughter v. Scoleri,* 2007 WL 2071653 *2 (D. Colo. 2007) (ACA standards may be instructive, though not conclusive, in determining a violation of the Eighth Amendment).

Professor Pogrebin's opinions in his Verified Statement (Exh. 84) concerning the various ways in which the Denver Sheriff Department ("DSD") allegedly breached the standard of care with respect to Vigil are based upon a methodology which misapplies the ACA standards, and therefore his methodology is not sufficiently reliable. First, Professor Pogrebin fails to distinguish between ACA standards which are mandatory to obtain accreditation, and the ACA standards which are non-mandatory. Secondly, Professor Pogrebin cites ACA standards which do not apply to the alleged situations in which he claims that DSD breached its duty of care to Vigil. DSD Director of Corrections Gary Wilson, qualified by the Court as an expert witness concerning the standards and accreditation of the ACA (#311), testified that Professor Pogrebin

cites ACA standards that are non-mandatory and that do not support his opinions that Denver breached the standard of care regarding Vigil.

Professor Pogrebin's opinions in paragraphs 7 and 8 rely upon three ACA standards: 4-ALDF-4C-29 (Exh. 49)[3] which addresses mental health screening of inmates; 3-ALDF-2C-13 (Exh. 50) which is an outdated and non-mandatory standard that addresses housing for handicapped inmates; and 4-ALDF-4C-40 (mis-cited by Professor Pogrebin as "ALDF-4C-40") (Exh. 51) which is a non-mandatory standard that addresses consultation between jail personnel and health care personnel concerning decisions about housing and program assignments for disabled inmates. Although Professor Pogrebin states that "The ACA standards are the generally accepted community standards for operational jail practices" (Exh. 84, ¶ 4), this bald assertion is unsupported by any facts or data, and it is contradicted by the undisputed evidence that accreditation by the ACA is entirely voluntary in the State of Colorado.

Opinions in paragraphs 7a, b, c, and d

Professor Pogrebin's opinions that Denver was negligent in not providing a sign language interpreter for Vigil's mental health screen (Exh. 84, ¶ 7a), and for his classification interview (Exh. 84, ¶ 7b) are based solely upon an alleged lack of compliance with ACA standards as the applicable standard of care. However, ACA standard 4-ALDF-4C-29 (Exh. 49) which Professor Pogrebin cites, does not require a sign language interpreter for either of these activities. Furthermore, Professor Pogrebin cites an outdated standard, 3-ALDF-2C-13 (Exh. 50) which is non-mandatory, and another non-mandatory standard, 4-ALDF-4C-40 (Exh. 51). Neither ACA standard articulates the standard of care for classification of inmates, and neither ACA standard

[3] Exhibits 49, 50, 51, and 52 are attached to this brief for the Court's convenience.

explicitly requires a sign language interpreter for a deaf inmate for a mental health screen or for the classification interview. Also, the mental health screen and classification occurred on August 25, 2005, when Vigil was booked into the county jail, and this Court has ruled that claims based upon matters occurring prior to August 28, 2005, are barred by the statute of limitations.

Professor Pogrebin's opinion that Denver was negligent in failing "to ensure that effective communication occurred during [Vigil's] medical screening" (Exh. 84, ¶ 7c) does not cite any applicable standard of care, and therefore this opinion is not admissible. Professor Pogrebin's opinion that Denver was negligent in "failing to provide proper communication between the classification and medical/mental health staff" concerning Vigil's medical and mental health screening (Exh. 84, ¶ 7d) again cites an outdated standard, 3-ALDF-2C-13 (Exh. 50) which is non-mandatory, and another non-mandatory standard, 4-ALDF-4C-40 (Exh. 51). Furthermore, Professor Pogrebin fails to cite any other basis to establish the standard of care for jails in Colorado as to these alleged duties.

Opinions in paragraphs 8 a, b, c, d, e, and f

Professor Pogrebin offers the opinion in paragraph 8 that Denver's negligence was "a cause of Mr. Vigil's suicide." Denver maintains that Professor Pogrebin is not qualified to offer any opinion about the cause of Vigil's suicide because he has only been qualified as an expert concerning the administration, management and operation of a jail (#311).

Professor Pogrebin also offers opinions that Denver was negligent in classifying Vigil in "administrative segregation" (Exh. 84, ¶ 8a), in not offering Vigil necessary accommodations (Exh. 84, ¶ 8b), in not providing a sign language interpreter at the administrative review board meetings (Exh. 84, ¶ 8c), in not providing "any notice to inmates with disabilities of their rights

under the ADA or about available accommodations" (Exh. 84, ¶ 8d), in his housing assignment (Exh. 84, ¶ 8e), and by "failing to provide policies and procedures…regarding the treatment and care, or accommodations that should be provided to deaf inmates" (Exh. 84, ¶ 8f). All of these opinions are based upon an outdated standard, 3-ALDF-2C-13 (Exh. 50) which is non-mandatory, and/or another non-mandatory standard, 4-ALDF-4C-40 (Exh. 51). Furthermore, Professor Pogrebin fails to cite any other basis to establish the standard of care for jails in Colorado as to these alleged duties.

Opinions in paragraphs 9

Professor Pogrebin offers opinions that Denver was negligent in its pre-service and in-service training of deputy sheriffs because the amount of time devoted to training on the topics of deaf and hearing impaired inmates, inmate supervision and suicide prevention and risks was insufficient. (Exh. 84, ¶ ¶ 9a, b, c, d, e, f, g, h, i, and j). His only basis for these opinions is that Denver was not in compliance with ACA standard "4-A10F-7B-10 (1991-2004)." However, there is no ACA standard with this citation, and no exhibit with this citation was admitted into evidence.

Presumably, Professor Pogrebin is referring to ACA standard "4ALDF-7B-10," a non-mandatory standard, which is Exhibit 52 (attached hereto). This ACA standard recommends 160 hours of pre-service training and 40 hours of in-service training for deputy sheriffs each year, and does not specify the amount of time that should be devoted to specific topics such as inmate supervision and suicide prevention and risks, nor does it include the topic of deaf and hearing impaired inmates. It is undisputed in this lawsuit that Denver provides 520 hours of pre-service training for deputy sheriffs which far exceeds the 160 hours recommended by the ACA standard.

Furthermore, Professor Pogrebin fails to cite any other basis for his opinion that pre-service and in-service training was insufficient, such as the standard of care established by the pre-service and in-service training offered by other jails in the State of Colorado, or any state law that mandates specific training for deputy sheriffs.

In paragraphs 9 e, f, g, h, and i, Professor Pogrebin argues that the conduct described in those paragraphs demonstrates negligent training. Assuming for the purpose of argument that the conduct described in these paragraphs did occur, Professor Pogrebin fails to show that it is more likely that these acts or omissions were the result of negligent training, rather than a failure on the part of individual employees to follow their training.

In paragraph 9 j, Professor Pogrebin's opinion that Denver was negligent in not requiring special training for deputies assigned to the unit in which Vigil was housed (*i.e*, special management) is based upon an alleged lack of compliance with the mis-cited ACA standard. However, the ACA training standard in Exhibit 52 does not require specialized training for deputies who are assigned to the type of unit in which Vigil was housed.

In paragraph 9 k, Professor Pogrebin's opinion that Denver was negligent in not adopting "and/or" implementing jail policies for the care and treatment of deaf inmates is based upon an alleged lack of compliance with the out-dated and non-mandatory ACA standard 3-ALDF-2C-13 (Exh. 50), which addresses housing for handicapped inmates. His opinion is also based upon an alleged lack of compliance with ACA standard "ALDF-4C-40" which is presumably a typographical error meant to refer to the non-mandatory standard in Exhibit 51. This standard recommends consultation between jail personnel and health care personnel concerning decisions about housing and program assignments for disabled inmates, and does not, by its own language,

require facilities to adopt "and/or" implement policies for the care and treatment of deaf inmates. Furthermore, Professor Pogrebin fails to cite to any other basis upon which these two ACA standards establish the duty of care for jails.

2. Professor Pogrebin is not qualified to offer an opinion about Vigil's mental, emotional, or psychological condition while he was incarcerated, or about.the cause of Vigil's suicide.

The Court has ruled that Professor Pogrebin may not offer opinions about Vigil's mental, emotional, or psychological condition while he was incarcerated (#311). The Court has ruled that Professor Pogrebin may testify as an expert about matters concerning the administration, management and operation of a jail (#311). These subject matters of expertise do not qualify Professor Pogrebin to offer an opinion about the cause of Vigil's suicide, as stated in his Verified Statement (Exh. 84, ¶ 8).

3. Professor Pogrebin's opinions about all matters occurring prior to August 28, 2005, are not relevant because claims based upon these matters are barred by the two-year statute of limitations.

Professor Pogrebin's opinions about all matters occurring prior to August 28, 2005 are not relevant because claims based upon these matters are barred by the two-year statute of limitations for negligence claims. C.R.S. § 13-80-102. These matters include Vigil's arrest on August 17, 2005; his entire incarceration at the city jail from August 17-25, 2005, including his initial medical screening at the city jail; and his booking at the county jail on August 25, 2005, which included the medical and mental health screening and the classification process and decision. Therefore, all of Professor Pogrebin's opinions in paragraph 7 (Exh. 84) that involve the booking, intake, classification, medical screening and mental health screening at the county jail are irrelevant, because these matters all occurred prior to August 28, 2005, and are time-

barred. Plaintiffs' argument, that matters occurring prior to the statute of limitations are relevant to the organizational plaintiffs' claims for injunctive relief, is without merit for the reasons argued above with respect to Professor Andrews' opinions.

CONCLUSION

For the foregoing reasons, Denver respectfully requests that the Court exclude from evidence the expert opinions of Jean Andrews and Marc Pogrebin as identified herein. Denver also respectfully requests that the Court exclude the expert opinions of Linda Edwards as identified and argued in Denver's Brief (#300) in support of its Rule 702 Motion (#246), on the grounds of relevance because Ms. Edwards' opinions relate only to claims which were never brought in the Second Amended Complaint (#48) (*i.e.*, negligence or Eighth Amendment claims), or were dismissed by the Court on summary judgment (#265).

Respectfully submitted this 4th day of May, 2011.

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CERTIFICATE OF MAILING (CM/ECF)

I hereby certify that on the 4th day of May, 2011 I electronically filed the foregoing **POST-HEARING BRIEF REGARDING RULE 702 MOTION** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

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