IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

DEBBIE ULIBARRI, *et al.*,

Plaintiffs,

v.

CITY & COUNTY OF DENVER,

Defendant.

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**PLAINTIFFS' TRIAL BRIEF**

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Plaintiffs, by and through counsel, respectfully submit their Trial Brief.

## I. Introduction

Congress enacted the Rehabilitation Act ("RA") in 1973 to protect people with disabilities from discrimination by recipients of federal funding. Defendant the City and County of Denver ("the City") concedes it receives federal funding. In 1990, Congress passed the Americans with Disabilities Act ("ADA"), this country's most important civil rights law for people with disabilities; Title II of the ADA prohibits disability discrimination by public entities such as the City. Despite these federal laws, law enforcement for the City has a longstanding pattern and practice of discrimination against deaf inmates by failing to provide effective communication.

The City's repeated failures have produced tragic results as demonstrated by Shawn Vigil's suicide. Mr. Vigil died in 2005. Yet, in 2007, the City's law enforcement still refused to provide effective communications to at least two more deaf people, Plaintiffs Roger Krebs and Sarah Burke. These failures are the responsibility of the City and the result of its failure to adequately train its officers and sheriffs in what is required to comply with the ADA and the Rehabilitation Act for deaf and hard of hearing inmates.

## II. Substantive Issues

### A. The Americans with Disabilities Act and Rehabilitation Act

#### 1. General Requirements

All three Plaintiffs assert claims under the ADA and RA. Title II of the ADA prohibits discrimination on the basis of disability by public entities. 42 U.S.C. § 12132. The RA prohibits such discrimination by recipients of federal financial assistance. 29 U.S.C. § 794. The parties agree that the City is a public entity and receives federal funding. *See* Attachments 1 and 2

hereto. The ADA and RA are analyzed identically. *Cohon ex rel. Bass v. N.M. Dep't of Health*, 646 F.3d 717, 726 (10th Cir. 2011). The elements of a claim under either statute require Plaintiffs to prove (1) that they were disabled; (2) that they were otherwise qualified for the program in question; and (3) that the program discriminated against them. *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009); *Robertson v. Las Animas County Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007).

**2. Disability**

An individual is disabled under these statutes if he or she has a physical impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2)(A); 29 U.S.C. § 705(9). The parties agree that all three Plaintiffs meet the statutory definition of an individual with a disability. *See* Objections to Plaintiffs' Proposed Jury Instructions, ECF 442, at 8. Plaintiff Burke also alleges that she was disabled based on her diabetes. "Major life activities" include eating as well as the ability to regulate one's blood sugar and metabolize food, *Lawson v. CSX Transportation, Inc.*, 245 F.3d 916, 923 (7th Cir. 2001), so Ms. Burke will be able to satisfy this standard for diabetes as well.

**3. Qualified for the Program**

The services, programs, and activities covered by the ADA and RA include everything the Denver Police Department ("DPD") and Denver Sheriff Department ("DSD") do with respect to the general public. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210-11 (1998) (holding that the phrase "benefits of the services, programs, or activities of a public entity" covers programs and activities of prisons); *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 859 (10th Cir. 2003) ("[Title II] essentially simply extends the anti-discrimination prohibition embodied in [the RA] to all

actions of state and local governments." (Quoting H.R.Rep. No. 101-485, pt. 2, at 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367.)); *Robertson*, 500 F.3d at 1193 & n.6 (holding that ADA applies to "inmate detained in a county jail," and "both use of the telephone and participation in a probable cause hearing are 'services' under the ADA"). Judge Miller has specifically held that covered programs include Plaintiff Burke's arrest. *Ulibarri v. City and County of Denver*, 742 F. Supp 2d 1192, 1213 (D. Colo. 2010) (citing *Gohier v. Enright*, 186 F.3d 1216, 1220-21 (10th Cir. 1999)). Plaintiffs make no claim as to the other two arrests (Mr. Vigil's and Mr. Krebs's).

Since the ADA and RA cover all of the programs, services, and activities of the DPD and DSD, Plaintiffs are thus "qualified" individuals with disabilities. *See Yeskey*, 524 U.S. at 210 (holding that prisoners are "qualified" under the ADA for the programs and activities of the prison). Mr. Vigil was, for example, qualified to participate in the programs of communication with his jailers and the jail's medical staff, mental health assessments, communication by telephone, and the Administrative Review Board; Ms. Burke was, for example, qualified to participate in the activity of communications with police officers and sheriff's deputies; Mr. Krebs was, for example, qualified to participate in his own arraignment. There should be no dispute that all three individuals were qualified individuals with disabilities. The only question at issue with respect to each one is thus whether the City discriminated against him or her on the basis of disability.

**4. Prohibited Discrimination**

The ADA's and RA's implementing regulations define the actions that constitute prohibited discrimination under the statutes. "[B]ecause Congress explicitly authorized the

Attorney General to promulgate regulations under the ADA, 42 U.S.C. § 12134(a), the regulations 'must [be given] legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute.'" *Chaffin*, 348 F.3d at 860 n.2 (quoting *United States v. Morton*, 467 U.S. 822, 834 (1984)); *see also Robertson*, 500 F.3d at 1195 n.7 ("The DOJ's regulations interpreting Title II are entitled to substantial deference."). Plaintiffs have a private right of action to enforce their rights under the ADA and RA regulations as well as the statutory language. *Chaffin*, 348 F.3d at 858.

The implementing regulations prohibit the City from denying Plaintiffs an equal opportunity to participate in or benefit from a service or benefit of the DSD or DPD or otherwise limiting Plaintiffs with respect to any right, privilege, advantage, or opportunity of either department that was enjoyed by nondisabled people. 28 C.F.R §§ 35.130(b)(1)(i)-(iii), (vii)(ADA regulations); 28 C.F.R. §§ 41.51(b)(1)(i)-(iii), (vii) (RA regulations). The City was required not just to make its programs available in name only, it was required to provide the Plaintiffs "meaningful access" to its programs and activities, a standard that -- with respect to a deaf person -- may require a sign language interpreter. *Robertson*, 500 F.3d at 1195; *see also Alexander v. Choate*, 469 U.S. 287, 301 (1985) (requiring meaningful access under the RA); *Chaffin*, 348 F.3d at 857 (same).

**a. Effective Communication**

One specific form of prohibited discrimination is failing to provide effective communication. That is, the City is required to ensure that deaf people can communicate with the employees and agents of the DSD and DPD in a manner that is as effective as the communications

they have with others who are not deaf. 28 C.F.R. § 35.160(a)(1); 28 C.F.R. § 41.51(e); *Robertson*, 500 F.3d at 1195; *Ulibarri*, 742 F. Supp 2d at 1214.

Furthermore, the City is required to furnish appropriate auxiliary aids and services where necessary to ensure that deaf people have effective communication. 28 C.F.R. § 35.160(b)(1); *Robertson*, 500 F.3d at 1195-96. The type of auxiliary aids or services that the City was required to provide Plaintiffs to ensure effective communication will vary according to the method of communication used by the deaf person; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. 28 C.F.R. § 35.160(b)(2). In determining what types of auxiliary aids and services are necessary, the City was required to provide an opportunity for Plaintiffs to request the mode of communication they prefer and to give primary consideration to those preferences, unless the City can demonstrate that another effective means of communication existed or that use of the preferred means of communication would have constituted an undue burden. *Id.*; Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services Originally Published July 26, 1991 ("Guidance"), 28 C.F.R. pt. 35, app. B (2011), at 205; *Ulibarri*, 742 F. Supp. 2d at 1214.

While exchange of notes is one type of auxiliary aid and service, sign language interpreters may be required when a deaf person's primary language is sign language, and the information being communicated with the deaf person is complex, or is exchanged for a lengthy period of time. There are many situations where effective communication between law enforcement and individuals who are deaf is critical, including interviewing deaf people, engaging in any complex conversation, or assessing their classification or suicide risk. *Cf. Chisolm v. McManimon*, 275

F.3d 315, 319, 328-29 (3th Cir. 2001) (noting importance of interpreter during intake and classification; prisoner was a suicide risk). In these situations, appropriate qualified interpreters must be provided when necessary to ensure effective communication. ADA Technical Assistance Manual (1994 Supplement), II-7.1000 Equally Effective communication, ILLUSTRATION 3, http://www.ada.gov/taman2up.html. Similarly, when a law enforcement or correctional officer is interviewing or engaging in any complex conversation with a person whose primary language is sign language, a qualified interpreter is usually needed to ensure effective communication. U.S. Department of Justice, Communicating with People Who are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers. http://www.ada.gov/lawenfcomm.pdf.

In Ms. Burke's case, the City was not permitted to rely on her minor child to interpret or facilitate communication, as the situation was not an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available. 28 C.F.R. § 35.160(c)(3). This imminent threat exception is not intended to apply to typical or foreseeable interactions with law enforcement personnel, but rather where a delay in providing interpretation could have life-altering or life-ending consequences. *Id.*

**b. Reasonable Modifications/Accommodations**

The ADA requires that the City make "reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7); *see also Choate*, 469 U.S. at 301 (holding that the RA may require reasonable accommodations); *Ulibarri*, 742 F. Supp 2d at 1214.[1] Plaintiffs' requests for reasonable

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[1] The ADA regulations use the term "reasonable modifications," 28 C.F.R.
(continued...)

modifications include Plaintiff Burke's unsuccessful request to be able to take her diabetes supplies with her -- in the possession of the police -- when she was arrested, so that she could ensure that, if necessary, she could test and maintain her blood sugar level, at the very least when she was released.

**c. Knowledge of the Need for Services or Accommodations**

The Tenth Circuit has held that the duty to provide effective communication or reasonable modifications only arises when the public entity knew that such was necessary; but that such knowledge can arise either through a request for services or because the need for communication or accommodation was obvious. That is, this knowledge may come from the City's knowledge of Plaintiffs' disabilities and their need for, or attempt to participate in or receive the benefits of, a certain service. *Robertson*, 500 F.3d at 1196-97; *Ulibarri*, 742 F. Supp 2d at 1214.

**d. Notice of Rights and Accessible Services**

The City was required to make available to Plaintiffs information regarding the requirements of the ADA. 28 C.F.R. § 35.106. It was also required to ensure that Plaintiffs were able to obtain information as to the existence and location of accessible auxiliary aids, services and activities while they were in the custody, or being taken into the custody, of the City. 28 C.F.R. § 35.163(a). In providing such information, the City was required to comply with the requirements for effective communication. 28 C.F.R. § 35.106.

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[1](...continued)
§ 35.130(b)(7), while *Choate* used the term "reasonable accommodations" under the RA. The Tenth Circuit has held that these terms "create identical standards" and may be "used . . . interchangeably." *Robertson*, 500 F.3d at 1195 n.8.

**5. Damages under the ADA and RA**

**a. Compensatory Damages for Intentional Conduct**

Both the ADA and RA have compensatory damages remedies. *Barnes v. Gorman*, 536 U.S. 181, 187 (2002). To recover such damages, Plaintiffs must show that the City's conduct was intentional. *Barber*, 562 F.3d at 1228-29. Intentional discrimination does not require a showing of personal ill will or animosity toward the disabled person; rather, intentional discrimination can be inferred from the City's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights. *Id.* (quoting, among others, *Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001)).

The test for deliberate indifference in this context requires two elements: (1) knowledge that a harm to a federally protected right is substantially likely, and (2) a failure to act upon that likelihood. *Barber*, 562 F.3d at 1229 (citation omitted). The City, through its officers and employees, knew that harm to a Plaintiff's federally protected right was likely either when the Plaintiff requested an accommodation or when the Plaintiff's need for an accommodation was obvious. *Duvall*, 260 F.3d at 1139. Under the second element, a public entity does not 'act' by proffering just any accommodation: it must consider the particular individual's need when conducting its investigation into what accommodations are reasonable to provide effective communication. *See Barber*, 562 F.3d at 1229 (quoting *Lovell v. Chandler*, 303 F.3d 1039, 1056 (9th Cir. 2002) (internal citations omitted)). In other words, each Plaintiff is entitled to compensatory damages if he or she proves that the City was aware of the need for the accommodation -- either by request or because it was obvious -- and the City denied or failed to act on the request or need.

**b. Survival of Damages Claims under the ADA and RA**

Shawn Vigil's claims for damages -- including non-economic damages -- under the ADA and RA survived his passing and may be brought by his Estate.

Neither the ADA nor the RA contains a provision addressing the question whether or what type of damages claims survive the passing of the injured party. The question is thus governed by either federal common law or the Colorado survival statute, C.R.S. § 13-20-101(1). Under either theory, Mr. Vigil's claims for full compensatory damages under the ADA and RA survive.

**(1) Federal Common Law**

The Tenth Circuit has never directly addressed the question of survival of claims under the ADA. In *Berry v. City of Muskogee, OK*, 900 F.2d 1489 (10th Cir. 1990), it held that federal common law governed the survival of claims under 42 U.S.C. § 1983, using an analysis that is applicable here. The court held that 42 U.S.C. § 1988(a) authorizes federal courts to borrow state law to aid in the enforcement of civil rights statutes. *Berry*, 900 F.2d at 1505. The court conducted an extensive analysis of the three-factor test in § 1988(a), concluding that allowing state law to govern survival of claims under § 1983 would "permit[ ] the state to define the scope and extent of recovery," and ultimately that state survival and wrongful death statutes were "not suitable to carry out the full effects intended for § 1983 cases ending in the death of the victim." *Berry*, 900 F.2d at 1506. Federal courts would have to fashion a federal remedy, one that "must make available to plaintiffs sufficient damages to serve the deterrent function central to the purpose of § 1983," including pain and suffering before death. *Id*.

The ADA and RA, like § 1983, serve a deterrent function. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (The ADA provides a "broad mandate" to "eliminate discrimination against disabled individuals," citing 42 U.S.C. § 12101(b)). The result in *Berry* suggests that the Tenth Circuit would hold that state law was not suitable to carry out the full effects intended for the ADA and RA, and would hold that a federally-created remedy -- survival of compensatory damages including pain and suffering -- would be available. *See also Meyers v. County of Los Angeles*, 2011 WL 7164461, at *2 (C.D. Cal. Dec. 19, 2011) ("Under federal common law, Rehabilitation Act and ADA claims for monetary relief also survive a plaintiff's death," citing *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984)); *cf Kahn v. Grotnes Metalforming Systems, Inc.*, 679 F. Supp. 751, 756 (N.D. Ill. 1988) ("whether or not an action survives the death of a party is determined as a matter of federal, not state, law.").

**(2) Colorado's Survival Statute.**

The alternative to a federally-created remedy would be borrowing Colorado's survival statute, Colo. Rev. Stat. § 13-20-101. This was the path taken by one district court in Colorado, *see Rosenblum v. State Department of Health*, 878 F.Supp. 1404, 1408-09 (D. Colo. 1994), and advocated by the City. *See* Defendant's Proposed Jury Instructions, ECF 431 at 51 (citing § 13-20-101). The City errs, however, in interpreting § 13-20-101 to exclude damages for pain and suffering under the ADA and RA. That statute provides that all damages but those for slander and libel survive, but that "in tort actions based upon personal injury" damages for pain and suffering may not be recovered after the injured party dies. § 13-20-101(1). This latter exception would not apply to Title II of the ADA or to the RA, because the Supreme Court has held that remedies under those statutes are analogous to those for breach of contract. *Barnes*,

536 U.S. at 187; *see also Walker v. Bd. of Trustees*, 69 Fed. Appx. 953, 961-962 (10th Cir. 2003) (holding that estate may recover emotional distress damages for willful and wanton breach of contract, as § 13-20-101(1) only applied to tort actions).

The *Walker* court also considered and rejected the defense's argument that § 13-20-101(1) should bar emotional distress damages in all cases because they are "tort-based." *Id*. at 961. The Eleventh Circuit directly addressed the question whether non-economic damages are available under the RA following the Supreme Court's holding in *Barnes* that RA damages were contract-based. In *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007), that court held that non-economic damages were recoverable under the RA, as contract damages were those that were forseeable, and "[a]s a matter of both common sense and case law, emotional distress is a predictable, and thus foreseeable, consequence of discrimination." *Id*. at 1199.

The cases cited by the City are not to the contrary. Three of the City's cases -- *Rosenblum*, 878 F. Supp. at 1408-1409, *Allred v. Solaray, Inc.*, 971 F. Supp. 1394, 1396-1398 (D. Utah 1997), and *Carmona v. Medical Solutions, USA, Inc.*, 2012 WL 2835536, at *4, 5 (D. P.R. July 9, 2012) -- all arose under Title I of the ADA -- governing employment discrimination -- which is not covered by the holding in *Barnes* that remedies under Title II and the RA are analogous to contract remedies. The fourth case cited by the City, *Green v. City of Welch*, 467 F. Supp. 2d 656 (S.D. W.Va. 2006), arose under Title II, but simply stands for the proposition that state law rather than federal common law should govern. As it is a West Virginia case, it does not address the scope of Colo. Rev. Stat. § 13-20-101.

In sum, whether considered under federal common law or under Colorado's survival statute, Mr. Vigil's estate will be entitled to recover compensatory damages -- including emotional distress and pain and suffering -- based on Mr. Vigil's claims under the ADA and RA.

**B. Negligence Claims**

The Estate of Shawn Vigil has claims for negligent treatment and negligent failure to train and supervise. Mr. Vigil's mother, Debbie Ulibarri, brings a claim for wrongful death based on these same theories. The Estate and Ms. Ulibarri will collectively be referred to as the "Vigil Plaintiffs."

To establish negligent treatment, the Vigil Plaintiffs must show that the DSD or its agents were negligent in their treatment of Shawn Vigil; and that that negligence caused harm to Shawn Vigil. *See* CJI 9:1, Elements of Liability—No Negligence of the Plaintiff. Negligence is defined as the failure to use the due care, or reasonable care, that is required under the circumstances.

The Plaintiffs also claim that the City negligently failed to train and supervise its employees and agents. To establish this claim, the Vigil Plaintiffs must show that the City negligently failed to train and supervise its employees and agents to protect Shawn Vigil from committing suicide and that that negligence caused harm to Mr. Vigil.

The due care that was required of the City, through the DSD and its agents, was that they perform their duties and train and supervise City employees and agents in accordance with the knowledge and skill ordinarily possessed by other jailers in housing deaf persons in their care and custody. *Ulibarri*, 742 F. Supp. 2d at 1225; *Perreira v. State*, 768 P.2d 1198, 1220 (Colo. 1989).

**C. The City Has a Nondelegable Duty to Ensure the Safety of Inmates in its Care and Custody.**

Whether under the ADA and RA or under the common law of negligence, the City was responsible for ensuring a safe and nondiscriminatory environment at its detention facilities. Certain medical services at these facilities are provided by employees of the Denver Health and Hospital Authority ("DHHA"). The City argues -- in its Trial Brief and through its jury instructions -- that it was not responsible for the conduct of DHHA employees at its detention facilities. This is incorrect under both federal and state law.

Under the ADA and RA, the City is prohibited from discriminating on the basis of disability "directly or through contractual, licensing, or other arrangements." 28 C.F.R. § 35.130(b)(1) (Title II regulations); 28 C.F.R. § 41.51(b)(1) (RA regulations). For example, the Ninth Circuit has held, based on this regulation, that the state department of corrections is responsible for discrimination by county jails when state prisoners are held there pursuant to a contract with the state. *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1066-68 (9th Cir. 2010). "That a public entity has contracted for the provision or occurrence of such services, programs and activities seems sufficient to make them 'the services, programs, or activities' of that entity." *Id*. at 1066 (quoting 42 U.S.C. § 12132); *see also Kerr v. Heather Gardens Ass'n*, 2010 WL 3791484, at *7-11 (D. Colo. Sept. 22, 2010) (holding that governing metropolitan district was responsible for disability discrimination by homeowner's association in the provision of services under contract to the district).

Under the common law of negligence, the City has a nondelegable duty to protect the safety of, and provide healthcare to, the prisoners in its care and custody. *See, e.g., Medley v.*

*North Carolina Dep't of Corr.*, 412 S.E. 2d 654, 657 (N.C. 1992) (holding the state may not delegate the duty to provide adequate medical care to inmates and thereby absolve itself of responsibility); *Shea v. City of Spokane*, 562 P.2d 264, 268 (Wash. App. 1977) ("the City's duty must go beyond the mere exercise of ordinary care in the selection of a jail physician as contended by defendant. Rather, the City's liability includes the negligence of the jail physician because the duty to keep the prisoner in health is nondelegable.").

Although Colorado courts have not spoken directly to this question, the *Medley* case relies on section 424 of the Restatement (2d) of Torts, which provides,

> One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

Colorado statute places the Sheriff Department "under a duty to provide specified safeguards [and] precautions for the safety" of the inmates in its care and custody. The Sheriff Department is required, by statute, to "see that [the DCJ] is kept clean, safe, and wholesome." Colo. Rev. Stat. § 17-26-102, *cited in Ulibarri*, 742 F. Supp. 2d 1192, 1225 (D. Colo. 2010); *see also* Colo. Rev. Stat. § 17-26-103 (Sheriff's duty to "receive and safely keep" the inmates committed to its care.; § 17-26-101 (county jail is for "detention, safekeeping, and confinement" of inmates). Based on these statutes and Restatement § 424, the City's duty to safeguard the inmates at the DCJ was nondelegable. As such, it is responsible for the acts and omissions of the DHHA.

### D. The City failed to designate the Denver Health and Hospital Authority as a Non-Party Under C.R.S. § 13-21-111.5.

The City argues that the Denver Heath and Hospital Authority ("DHHA") is an independent contractor and has proposed jury instructions that it is not liable for any negligence

by DHHA. ECF 401 at 6-7; ECF 431 at 58, 59. As Plaintiffs demonstrated above, the City's duties were nondelegable. In any event, the City has failed designate DHHA as a non-party as required by C.R.S. § 13-21-111.5(3)(b). In Colorado, where a party asserts that a non-party to the litigation was "wholly or partially at fault," the party must formally give notice of its assertions within 90 days of the filing of the case. C.R.S. § 13-21-111.5(3)(b):

> Negligence or fault of a nonparty may be considered if the claimant entered into a settlement agreement with the nonparty or if the defending party gives notice that a nonparty was wholly or partially at fault within ninety days following commencement of the action unless the court determines that a longer period is necessary. The notice shall be given by filing a pleading in the action designating such nonparty and setting forth such nonparty's name and last-known address, or the best identification of such nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault.

Plaintiffs filed this lawsuit on August 28, 2007. Therefore, Defendant should have filed its designation of a non-party no later than November 26, 2007. It is now August 27, 2012, nearly five (5) years after Plaintiffs filed this litigation, and trial begins on September 4, 2012, a mere eight (8) days from the date of filing Plaintiffs' trial brief. "Courts should construe designation requirements strictly to avoid a defendant attributing liability to a non-party from whom the plaintiff cannot recover." *Redden v. SCI Colo. Funeral Servs.*, 38 P.3d 75, 80 (Colo. 2001).

While a defendant may ask the court for a longer time period for designating a nonparty at fault, it is that defendant's burden to show the necessity for doing so. *Burgess v. Delta Airlines, Inc.*, 2011 WL 1597961, at *3 (D. Colo. Apr. 28, 2011). There are three factors that a court must consider in deciding whether to allow a defendant to file a nonparty designation out of time:

> (1) whether the neglect was excusable; (2) whether the party making the late designation has alleged a meritorious defense or claim; and (3) whether relief from the deadline would be inconsistent with equitable considerations.

*Hubbell v. Carney Bros. Constr.*, 2010 WL 3629828, at *2 (D. Colo. Sept. 8, 2010) (internal citations omitted).

First, there can be no legitimate argument that this five (5) year delay is excusable. The City, after five years of litigation, has yet to designate DHHA's employees as being either wholly or partially at fault. Under these facts, the City cannot credibly argue that it did not know that DHHA employees worked at the DCJ and were, therefore, unable to timely designate nonparties. The second factor, whether the defense is meritorious cannot be answered in the affirmative, because the City has made no designation and has not identified any basis for its belief that DHHA was negligent with regard to Shawn Vigil. "[W]e now hold that to satisfy the third element of section 13-21-111.5(3)(b), a party must allege the basis for believing the non-party legally liable to the extent the non-party's acts or omissions would satisfy all the elements of a negligence claim." With regard to the third factor, the equities weight heavily against allowing the City to designate any non-party with only eight (8) days until trial. If the City is allowed to proceed with its newly constructed defense, it will shift the direction of the trial away from the City's substantial misconduct in its treatment of Shawn Vigil and toward nurses who spent little time with him.

The failure to timely designate a non-party precludes a defendant from pointing to a nonparty at trial as a potential tortfeasor. "When a court does not believe a defendant has established legal culpability against an alleged non-party, the designation is properly disallowed." *Redden*, 38 P.3d at 81. Consequently, Plaintiffs ask that this Court issue an order barring the City at trial from pointing to DHHA as a nonparty that is wholly or partially at fault.

**E. The City also failed to comply with the certificate of review requirement when suing licensed medical professionals as required by C.R.S. § 13-20-602(3)(c).**

The City's problems in shifting the blame to DHHA do not end with its failure to comply with the designation of a non-party statute. Because DHHA provided medical services at the DCJ and did so through licensed medical professionals, it was also required to satisfy the certificate of review statute, C.R.S. § 13-20-602(3)(c). "If the designated nonparty is a licensed health care professional and the defendant designating such nonparty alleges professional negligence by such nonparty, the requirements and procedures of section 13-20-602 shall apply." C.R.S. § 13-21-111.5(3)(b).

The certificate of review statute includes a number of requirements that must be satisfied before moving forward on any allegations of professional negligence. Colo. Rev. Stat. § 13-20-602. "The failure to file a certificate of review in accordance with this section shall result in the dismissal of the complaint, counterclaim, or cross claim." *Id.* § 13-20-602(4). The certificate of review statute must be satisfied where the licensed professionals are employed by governmental entities such as the DHHA. *See State v. Nieto*, 993 P.2d 493, 500-505 (Colo. 2000).

When a party "levels a negligence or fault claim against a professional, that professional is judged according to the tenets of the field to which he or she belongs." *Redden*, 38 P.3d at 81 (citing *United Blood Servs. v. Quintana*, 827 P.2d 509, 520 (Colo. 1992)). In order for the certificate of review to satisfy the statutory requirements, the party submitting the certificate must "demonstrate that the professional's conduct fell below the standard of care appropriate to the profession. Expert testimony is generally necessary to assist the trier of fact in determining the applicable standards because in most cases such standards are not within the purview of ordinary

persons." *Redden*, 38 P.3d at 81. The City has done nothing to satisfy the certificate of review requirements and should not be allowed an opportunity to do so when the trial will begin in just eight (8) days.

## III. Procedural Issues

### A. Interpreters and Additional Time for Witness Testimony

American Sign Language ("ASL") interpreters will be working in the courtroom throughout the trial. "Proceedings interpreters" will be interpreting all testimony and proceedings for Ms. Burke and Mr. Krebs. "Table interpreters" will sit at counsel table to assist there.

ASL interpretation of trial testimony proceeds differently from other language interpretation. During the testimony of Ms. Burke and witness Jennifer Pfau, the interpreter will listen to the entire question before beginning to interpret the question for the witness. Then the interpreters will listen to the entire answer before interpreting the answer into English.

During Mr. Krebs's testimony, the proceedings interpreters will be assisted by certified deaf interpreters ("CDI"). The proceedings interpreters will listen to the entire question and interpret that question to the CDI. The CDI will then in turn interpret the question for Mr. Krebs. Then Mr. Krebs will provide his answer and the CDI will interpret the answer for the proceedings interpreters, who will then interpret the answer into English.

Plaintiffs' counsel will be assisted during interpreted testimony by a legally certified table interpreter who will monitor for errors in interpretation. This interpreter will also be present at counsel table to facilitate communication amongst counsel, Mr. Krebs, and Ms. Burke.

Last, Plaintiffs' counsel Carrie Ann Lucas, who is deaf, will be using real-time -- similar to the real-time transcript that Plaintiffs believe will appear on the Court's monitor -- as an

accommodation. At times the real-time feed lags behind the proceedings, and Ms. Lucas will have to pause during witness examination to allow the feed to catch-up. Additionally Ms. Lucas is a wheelchair-user and is ventilator-dependent. At times during the proceedings, her home health aide may have to attend to the ventilator and related equipment.

Consequently, because of the interpreter process, additional time may be needed for testimony. For example, although Ms. Pfau is no longer a party representative, additional time may be necessary for her testimony due to the constraints of using a sign language interpreter. At this time, Plaintiffs anticipate completing her testimony in the hour allotted, but if the interpretation process is slow, additional time may be needed.

**B. Time Allotted for Testimony by the City's 30(b)(6) Witnesses.**

Plaintiffs propose that witnesses designated by the City as 30(b)(6) witnesses be treated as party witnesses in allotting time for direct testimony in accordance with this Court's Rules of Trial, ECF 341. Plaintiffs make this proposal because the 30(b)(6) witnesses designated by the City testified on its behalf, Fed. R. Civ. P. 30(b)(6), and the City can only speak through its witnesses. Moreover, these witnesses are in the best position to explain to the jury the operation and administration of the City's Pre-Arraignment Detention Facility and the Denver County Jail and provide other testimony related to Plaintiffs' claims. The 30(b)(6) witnesses are: Lorrie Kosinski; Captain Michael Than; Sgt. John Romero, who is also the City's advisory witness; and former Major Phillip A. Deeds.

## IV. Evidentiary Issues

### A. Witnesses Whitman and Wilson Should Not Be Permitted To Testify Concerning Undue Burden

The City has never disclosed that Denver Police Captain Gerald Whitman and Undersheriff Gary Wilson had information concerning undue burden or any related topic. Plaintiffs respectfully request that these two witnesses be precluded from testifying about that topic.

Defendant disclosed over 100 witnesses in this case. The scheduling order permitted Plaintiffs to take ten depositions. ECF 26 at 12. Plaintiffs moved to amend, requesting 50 additional depositions. ECF 91. This motion was denied. ECF 104. Plaintiffs objected, ECF 113, and their objection was overruled, ECF 265 at 25-26. As such, as the parties head into trial, all that Plaintiffs can rely on to prepare to cross-examine the City's witnesses are the City's mandatory disclosures pursuant to Rule 26(a)(1). That Rule required the City to disclose, among other things,

> the name and, if known, the address and telephone number of each individual likely to have discoverable information -- along with the subjects of that information -- that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment

Fed. R. Civ. P. 26(a)(1)(A)(i). Where the City "fails to provide information or identify a witness as required by Rule 26(a) or (e), [it] is not allowed to use that information or witness to supply evidence . . . at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c).

The City listed both Capt. Whitman and Undersheriff Wilson in its Schedule of Witnesses, and stated that both individuals would address the question whether "accommodations requested

by the Plaintiffs would be an undue burden on the City." ECF 438 at 7-8. Undue burden is an affirmative defense on which the City will have the burden of proof. 28 C.F.R. § 35.164; *see also, e.g., Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999). As such, in order to use the evidence at trial "to support its . . . defense[ ]," the City would have to have disclosed it under Rule 26(a)(1)(A)(i).

Neither individual, however, was disclosed as having information on the subject of undue burden or any related topic. Undersheriff Wilson's disclosure stated only that he "presumably has knowledge and information regarding the incident of September 27, 2005, which is the subject matter of this action." Defendant's Mandatory Initial Disclosures Pursuant to Fed.R.Civ.P. 26(a)(1). Capt. Whitman's disclosure stated only that he "may have knowledge and information regarding the subject matter of this action." Defendant's Fourth Supplemental Disclosures Pursuant to Fed.R.Civ.P. 26(a)(1). See Attachments 3 and 4 hereto.

The City has the burden to show that it was substantially justified in failing to comply with Rule 26. *Gallegos v. Swift & Co.*, 2007 WL 214416, at *2-3 (D. Colo. Jan. 25, 2007). There is no justification for the failure to disclose that Capt. Whitman and Undersheriff Wilson had information relating to the City's undue burden defense. The City asserted this defense in its first answer, ECF 24 at 10, and in the Scheduling Order entered on December 21, 2007, ECF 26 at 6. It disclosed Undersheriff Wilson and Capt. Whitman on January 4, 2008 and October 17, 2008, respectively. Defendant's Initial Disclosures at 26; Defendant's Fourth Disclosures at 8. It has thus had four years to amend its disclosures to identify those individuals as having information relating to the question of undue burden.

Plaintiffs do not seek the complete exclusion of either Undersheriff Wilson or Capt. Whitman; rather, they seek to preclude either man from testifying about undue burden. The standard for complete exclusion of a witness is guided by these factors: "(1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness." *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999). Even though Plaintiffs do not seek the drastic remedy of complete exclusion of a witness, they review these factors.

Here the surprise is great -- Plaintiffs learned less than two weeks before trial that witnesses who had been disclosed for four years had information on a significant topic -- the City's only affirmative defense to the ADA and RA -- that had not previously been disclosed. The prejudice is equally great. Given that Plaintiffs were only permitted ten depositions of over 100 witnesses, they could only choose based on disclosures and documents. The disclosures of Undersheriff Wilson and Capt. Whitman were abbreviated in the extreme, giving no reason to believe they would have knowledge relating to undue burden, and Plaintiffs have been unable to identify any documents suggesting that either man would have this information.

Plaintiffs cannot cure this prejudice. There are four working days until trial, not enough time to take discovery on a topic as significant as the City's sole defense to the ADA and RA. Permitting this testimony would, Plaintiffs respectfully submit, disrupt the trial because Plaintiffs would need a continuance to take the necessary discovery. Finally, while Plaintiffs cannot speak to the City's intent, it is hard to believe that withholding this information for four years until the eve of trial is in good faith.

For these reasons, Plaintiffs object to Undersheriff Wilson or Capt. Whitman testifying to the defense of undue burden.

**B. Sequestration**

While Plaintiffs believe that this was addressed at the February 9, 2012 telephonic pretrial conference, Plaintiffs respectfully request the Court issue a formal order that lay witnesses, save party representatives, be excluded from the courtroom pursuant to Fed. R. Evid. 615. Plaintiffs further request that their expert witnesses be exempted from the sequestration order as advisory witnesses who are essential to Plaintiffs' case. *See* Fed. R. Evid. 615(c); *see also* Advisory Committee Notes (1972) (the third category of witnesses exempted from sequestration includes "expert[s] needed to advise counsel in the management of the litigation"); *Malek v. Fed. Ins. Co.*, 994 F.2d 49, 54 (2d Cir. 1993) (holding that it was error to exclude expert witness); *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 630 (6th Cir. 1978) (holding that, while exemption of experts from sequestration is within the discretion of the trial court judge, "trial court is bound to accept any reasonable, substantiated representation . . . by counsel" that the expert is essential. "We perceive little, if any, reason for sequestering a witness who is to testify in an expert capacity only and not to the facts of the case." *Id*. at 629.)

Plaintiffs' experts will be offering opinions on the facts to be presented through both Plaintiffs' and Defendant's witnesses. While Plaintiffs do not anticipate that their experts will be in the courtroom for much of the trial, Plaintiffs seek to ensure that they may freely discuss other witnesses' testimony with their experts, something a blanket sequestration order would prohibit. For example, Dr. Mark Pogrebin will testify concerning the adequacy of the City's correctional policies and procedures, and will thus need to learn how those procedures and their effects are

described by Plaintiffs' and City witnesses. Dr. Jean Andrews and Dr. Brenda Schick will testify on topics relating to individual plaintiffs' language skills and the effectiveness of the City's attempts (or lack thereof) to communicate, and will thus need to learn how Plaintiffs' and City witnesses testify concerning those attempts. Finally, Nurse Linda Edwards will testify concerning diabetes, and specifically the significance of the information and devices that the Burkes were attempting unsuccessfully to convey to the arresting officers. She will thus need to learn how Plaintiffs' and City witnesses testify concerning those facts.

## V. Responses to the City's Trial Brief (ECF 401, February 2, 2012)

### A. The Colorado Governmental Immunity Act ("CGIA").

In response to the City's trial brief, ECF 401, this Court has ruled that it "would continue to adhere to Judge Miller's legal conclusions" regarding the CGIA and that the negligence claims would be decided by the jury:

> The Court has reviewed the Trial Brief Defendants filed on February 27, 2012. The Trial Brief, inter alia, challenges Judge Miller's prior conclusions that the Colorado Governmental Immunity Act does not bar certain of Plaintiffs' state law claims. In substance, however, the Trial Brief does not attack Judge Miller's legal conclusions as much as it presents factual arguments. The Court adheres to Judge Miller's legal conclusions and holds the factual arguments must be presented to the jury.

ECF 408 at 1.

Second, the City has never provided an explanation as to why properly classifying, supervising and providing medical care to inmates, as it is required to do by statute, C.R.S. § 17-26-101 and C.R.S. § 17-26-104.5, is not within the purview of the "operation of a jail." Through extensive briefing and Judge Miller's ruling on summary judgment, Plaintiffs have

already satisfied their burden as to the waiver of governmental immunity for the negligence claims.

**B. The City wrongly seeks to impose a federal civil rights standard on the Plaintiffs' state law negligence claims.**

**1. Colorado's General Assembly intended that the scope of the duty to prevent an inmate suicide in negligence is broader than the deliberate indifference standard applied to constitutional claims.**

In his order on summary judgment, Judge Walker Miller identified the scope of the duty to prevent an inmate suicide as taking "reasonable care to prevent an inmate from committing suicide by providing proper classification, supervision, and communication, and to adequately train staff in these areas." *Ulibarri*, 742 F. Supp. 2d at 1226. In that same Order, the Court declined to adopt the City's argument that in negligence that a jailer's duty would arise only where those persons supervising Mr. Vigil knew of a specific risk that Mr. Vigil would commit suicide and then disregarded that risk by failing to take reasonable measures to prevent him from doing so. *Id* at 1225-1226. In reaching its decision, the Court noted that the test proposed by the City was identical to the deliberate indifference standard used for constitutional claims. *Id*. The Court described that standard as "affirmatively not a negligence standard." *Id*. at 1226.

Although the City pays lip service to the distinction between a deliberate indifference standard and a negligence standard[2], it nonetheless continues to urge this Court to adopt the heightened standard of deliberate indifference standard for an inmate suicide – that a Denver

[2] In its brief, the City states that "Judge Miller ruled that a showing of deliberate indifference is not required to show a breach of duty to prevent suicide (ECF No. 265, p. 57). Defendant agrees with this conclusion because deliberate indifference is defined as acting recklessly in conscious disregard of a known risk and requires more than a showing of negligence." ECF 401 at 4.

Sheriff had specific knowledge that Mr. Vigil was suicidal but took no steps to prevent the suicide:

> [The Court's] definition of the Defendant's duty to prevent suicide fails to take into consideration the issue of foreseeability of a specific inmate's suicide ... .The duty to prevent suicide must involve negligence by a deputy sheriff who either knew, or should have known, that an inmate would commit suicide, and failed to take reasonable measures to prevent the suicide.

ECF 401 at 4.

What the City further fails to consider in its argument is that the statutory language in the CGIA prohibits using a constitutional standard. Under C.R.S. § 24-10-107, where governmental immunity is waived, the "liability of the public entity shall be determined in the same manner as if the public entity were a private person." Constitutional standards are never applicable in civil actions against private parties. *See Reg'l Transp. Dist. v. Voss*, 890 P.2d 663, 666 (Colo. 1995) (holding that waiver of immunity for the Regional Transportation District ("RTD") required that RTD be treated as any private person, resulting in RTD's being regulated by Colorado's No-Fault automobile insurance statutes).

Had the Colorado General Assembly intended the negligence standard of care to be identical to the constitutional standard of care in operating a jail, there would have been no need to carve out a waiver under C.R.S. § 24-10-106(1)(b). Moreover, the waiver of immunity extends only to pretrial detainees such as Mr. Vigil, not those who are incarcerated after being convicted. *See* C.R.S. § 24-10-106 (1.5)(a) ("The waiver of sovereign immunity created in paragraph[] (b) . . .of subsection (1) of this section does not apply to claimants who have been convicted of a crime and incarcerated in a correctional facility or jail pursuant to such conviction."). The import of § 1.5 is that those incarcerated after being convicted can find relief

only through constitutional claims, not negligence. This is additional evidence that the General Assembly intended that the scope of the duty in negligence claims arising out of the "operation of the jail" should be a lesser standard than the deliberate indifference standard applied to constitutional claims.

The Court has already determined the nature and scope of the duty owed to Mr. Vigil. In doing so, the Court has firmly rejected the City's position on this issue. The City has not provided any new argument as to the proper negligence standard of care and this Court should continue to refuse to adopt the City's argument.

### C. Causation must Be Decided by the Jury

#### 1. Judge Walker Miller has already ruled that the question of causation must be decided by the jury.

The City argues, presumably as a matter of law, that Plaintiffs cannot establish proximate cause on their negligence claims. ECF 401 p. 4-6. In making this argument, the City ignores Judge Miller's September 30, 2010 ruling to the contrary:

> *There are significant issues of fact regarding whether these duties were breached and whether these failures proximately caused Vigil's death*. Accordingly, summary judgment on the negligence claims is not appropriate.

*Ulibarri*, 742 F. Supp. 2d at 1226 (emphasis added).

Nonetheless, the City argues that "[t]o establish proximate cause concerning Vigil's suicide, plaintiffs must show that Vigil's suicide was reasonably foreseeable by a reasonably careful person under the same or similar circumstances." ECF 401 at 5. Thus, and as discussed above, the City's proximate cause argument is premised on a heightened standard of care that is applied in constitutional claim cases, not a Colorado state law negligence claim regarding an

inmate suicide. Therefore, the City's argument that Plaintiffs have no treating health care provider or expert opinion "concerning the proximate cause of Vigil's suicide," ECF 401 at 5, is immaterial.

Because Defendant has offered no reason to disturb Judge Miller's decision on causation, it should stand.

**2. Because inmate suicide is foreseeable, Mr. Vigil's suicide cannot be an intervening superseding cause.**

In its proximate cause argument, the City also takes the position that Mr. Vigil's suicide was an intervening cause breaking the chain of legal causation thereby shielding it from liability. ECF 401 at 4-5. Under Colorado law, an intervening cause "is a cause that would not have been reasonably foreseen by a reasonably careful person under the same or similar circumstances." CJI-Civ.4th 9:20; *Ekberg v. Greene*, 588 P.2d 375, 376 (Colo. 1978) (even criminal acts of a third party are not an intervening cause if reasonably foreseeable). But here, the Court has already determined that inmates are at high risk of committing suicide such that inmate suicide is foreseeable and, in addition, that incarceration can increase the risk of inmate suicide. "The harm is foreseeable; inmate suicides are a documented hazard and, again, the evidence presented shows that numerous factors present in a detention facility, including isolation, demoralization, and an authoritarian environment, could contribute to despair." *Ulibarri*, 724 F. Supp. 2d at 1226.

The shortcomings of the City's intervening superseding cause argument on foreseeability become even more obvious when compared to a few cases where such foreseeability is lacking: *Walcott v. Total Petroleum, Inc.*, 964 P.2d 609, 612 (Colo. App. 1998) ("We therefore conclude that, whether analyzed under the rubric of duty or proximate cause, the risk that a purchaser

would intentionally throw gasoline on a victim and set the victim on fire was not reasonably foreseeable."); *Snyder v. Colorado Springs & C. C. D. Ry. Co.*, 85 P. 686, 687 (Colo. 1906) ("[I]t is not in accordance with the usual and ordinary course of events to anticipate that a seated passenger would so far lose control of himself on account of having a standing passenger crowded against him that he would eject the standing passenger from the car with such force as to throw him over the head of one who was standing upon the step below the party so ejected.").

The three out-of-state cases that the City relies upon offer no support for its proximate cause arguments or its superseding cause arguments. In the first, *Perez v. Oakland County*, 2007 WL 914669 (Mich. App. 2007), an unpublished decision from the Michigan Court of Appeals bases its decision on Michigan's proximate cause rule in its governmental immunity statute. "'The phrase "the proximate cause" . . . "is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury."'" *Id*. at *2 (citing *Cooper v. Washtenaw County*, 715 N.W.2d 908, 909 (Mich. App. 2007)). *Cooper*, in turn, simply used a last-in-time rule proximate cause rule, not an intervening cause rule, as the City states in its brief. "The decisions of this Court and our Supreme Court that address the issue of 'the proximate cause' under MCL 691.1407(2) in circumstances in which there were multiple causes of the harm do not discuss the concepts of intervening and superceding [sic] causation and do not indicate that foreseeability of an intervening cause is relevant to whether it may be deemed 'the proximate cause' under the [governmental immunity] statute." *Id*. at 910. Therefore, *Perez* and *Cooper* provide no support for the City's position that Mr. Vigil's suicide was a superseding cause or even a proximate cause as Colorado applies a different rule.

In another case relied upon by the City, *City of Crossville v. Haynes*, 925 So.2d 944 (Ala. 2005), the Alabama Supreme Court was not writing on a blank slate; instead, longstanding Alabama precedent created a rule that the "'foreseeability of a decedent's suicide is legally sufficient only if the deceased had a history of suicidal proclivities, or manifested suicidal proclivities in the presence of the defendant, or was admitted to the facility of the defendant because of a suicide attempt.'" *Id*. at 951 (quoting *Popham v. City of Talladega*, 582 So.2d 541, 543 (Ala. 1991)). *Haynes* is distinguishable because there is an extant ruling in this case that inmate suicide is foreseeable-and because it is foreseeable, the City has a duty to prevent inmate suicides. *Ulibarri*, 742 F. Supp. 2d at 1125-26. *Haynes*, then, is inapposite.

The City's final case on proximate cause is *Hooper v. County of Cook*, 851 N.E.2d 663 (Ill. App. 2006). This case is distinguishable factually and legally. First, the deceased, Louise Hooper, was not a custodial inmate; instead, she was a medical patient in an Intensive Care Unit ("ICU") for health care issues unrelated to her death. While in the ICU, she became delirious, and suffered from ICU psychosis. *Id*. at 666. She was promptly treated with antipsychotic medication and moved to a quieter hospital floor. Unfortunately, within a very short time period after becoming psychotic, barely 26 hours, Ms. Hooper hanged herself. Given the pace at which Ms. Hooper move from being mentally healthy to so psychotic that she suicided, her death was not foreseeable. The facts surrounding Ms. Hooper's death are so very different from what happened to Shawn Vigil. Mr. Vigil was never even evaluated, let alone treated. Moreover here, it has already been determined that the fact of inmate suicide is foreseeable, therefore, the fundamental question in *Hooper* has already been answered.

**D. Defendant's Exhibit 1 (now renumbered Defendant's Exhibit 60).**

This Court has previously ruled that, with respect to evidence relating to the crimes with which Mr. Vigil was charged, "the minimal relevance is outweighed by the potential prejudicial effect on the jury." Order Granting in Part and Denying in Part Parties' Motions in Limine, ECF 386 ("First In Limine Order") at 1. The Court agreed with Plaintiffs' proposal that the jury be told only certain things about the charges, *id.*, and accordingly Plaintiffs' Proposed Jury Instruction No. 13, ECF 433 at 20, asked the Court to instruct the jury, using language taken from the Court's order. The Court's order would preclude introduction of Defendant's Exhibit 1, the Denver County Court record of the crimes with which Mr. Vigil was charged.

In its Trial Brief, the City argues that a redacted version of Exhibit 1 is essential for three reasons, none of which is relevant and none of which support the requested exception to the Court's ruling. The City asserts that the court file is relevant to show that Mr. Vigil had a public defender and a sign language interpreter in court. This is not relevant to the question whether the City discriminated against him by failing to provide effective communication while he was incarcerated at the Denver County Jail; however, Plaintiffs do not object if the City wants to elicit these facts from Lorrie Kosinski, who testified to them in her most recent declaration. *See* ECF 415-3, ¶¶ 6-7. The City also asserts that the court file is relevant to show that Mr. Vigil "had a $100,000 bond which was a factor in his classification by the Denver Sheriff Department." While Plaintiffs do not believe that this is an accurate recitation of the facts, they do not object if classification officers testify -- subject, of course, to cross-examination and impeachment -- that Mr. Vigil's bond was a factor in his classification. The jury does not need to know the size of the bond, which is simply a back-door way of underscoring the seriousness of Mr. Vigil's crimes.

The City thus provides no relevant reason to carve out an exception to the Court's ruling in its First In Limine Order, and Exhibit 1 -- even as redacted in the City's Attachment 2, ECF 401-2 -- should still be excluded.

**E. Defendant's Exhibit 27 (now renumbered Defendant's Exhibit 61).**

When Ms. Burke was arrested during the events at issue in this case, it was on a warrant for failure to appear in Arapahoe County. In response to Plaintiffs' Motion in Limine pursuant to Rule 403, 404(b), and 609(a), ECF 354 at 7-8, this Court ruled that "[t]he jury does not need to know about [Sarah Burke's] 2004 conviction or the reason the warrant was issued, and this information carries a risk of unfair prejudice," First Order In Limine, ECF 386, at 3. Again, the Court stated that the jury should be provided certain information, *id.*, which Plaintiffs have accordingly proposed, *see* ECF 433 at 20. The Court's order would preclude introduction of Defendant's Exhibit 27, the Arapahoe County Court record relating to Ms. Burke's 2004 misdemeanor conviction.

In its Trial Brief, the City argues that eight[3] of the 66 pages of its original Exhibit 27 are essential for different reasons. Trial Brief, Attachment 4, ECF 401-4. Plaintiffs agree that three of those pages -- Bates Nos. 001632, 001657, and 001658 -- are not objectionable under Rule 403, 404 or 609. Defendant has not established either relevance or foundation for these three documents, however, so Plaintiffs will not stipulate to authenticity or admissibility. To address the evidentiary value Defendant believes these three pages have, Plaintiffs would agree to stipulate as follows:

---

[3] The City's Attachment 4, which contains the pages for its proposed redacted Exhibit 27, is nine pages long, but the last two pages appear to be duplicates.

- That a surety bond was posted for Ms. Burke at 10:36 p.m.
- That the DSD communicated with the Arapahoe County Sheriff Department at 11:47 p.m. that Ms. Burke had bonded on the Arapahoe County warrant.

The parties have already stipulated that Ms. Burke was released from the PADF at 2:00 a.m. Plaintiffs' Proposed Instruction No. 12, ECF 433 at 19; Defendant's Proposed Jury Instructions, ECF No. 431 at 13. With these stipulations, there should be no further need for Bates Nos. 001632, 001657, and 001658.

The remaining documents in Attachment 4 to the City's Trial Brief fall squarely under the Court's original ruling and should be excluded under Rules 403, 404(b), and 609(a). The City's attempt to introduce them is an attempt to do precisely what these rules prohibit: to use Ms. Burke's prior misdemeanor conviction for child neglect to cast aspersions on her character and prejudice the jury against her.

<u>Bates No. 001656 - the active arrest warrant</u>: Plaintiffs do not dispute the existence of an active warrant. Indeed, the upshot of the Court's ruling in its First In Limine Order is that the jury would be informed of this by stipulation. There is no need for Bates No. 001656.

<u>Bates No. 001659 - the computer data provided to the arresting officer</u>: Because this document contains the words "contempt of court," which were, in turn, the only words that the police officers were willing to write to Ms. Burke during the time they were in her home, the City argues that this document "shows that the communication to Burke was effective and accurate regarding the reason for her arrest." Trial Brief at 8. Plaintiffs do not dispute, however, that the warrant was for contempt of court and that one of the police officers wrote the words "contempt of court" to Ms. Burke, so Bates No. 001659 is not necessary to establish this. It does not, of

course, show that communication was effective, as Ms. Burke was unable to learn anything else about the reasons for her arrest -- beyond those three words -- including the remainder of the information in Bates No. 001659.

Bates Nos. 1669-70 - letter concerning parenting class: This document is perhaps the most prejudicial in Attachment 4 -- a letter describing in detail Ms. Burke's response to mandated parenting classes -- but the City provides no foundation and virtually no relevance. It argues that the letter is an example of Ms. Burke's written communication. Trial Brief at 8. While Plaintiffs do not contest that this letter was written by Ms. Burke, it is irrelevant to the present case. Ms. Burke did not write it under circumstances comparable to those at issue, that is, when three policemen showed up unexpectedly her house for unknown reasons and -- after three hours without even written communications -- arrested her. Indeed, Ms. Burke was under no time pressure to write the letter and was not using it as a substitute for a contemporaneous conversation. Nor was she hypoglycemic when she wrote it, as she became during her interaction with the DPD and DSD. Finally, Ms. Burke's testimony will be that she attempted to write notes with the police officers in her home but that they refused to communicate with her in writing. While the extreme and stressful circumstances in her home on the evening of her arrest required a sign language interpreter for effective communication, the police refused even the rudimentary communication that could have been achieved in writing. The fact that Ms. Burke -- in other, unpressured, less stressful circumstances -- could write is completely irrelevant. And, again, any modicum of relevance is vastly outweighed by the extremely prejudicial content of the writing.

Respectfully submitted,

FOX & ROBERTSON, P.C.

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Attorneys for Plaintiffs

Dated: August 27, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on August 27, 2012, I served the foregoing via the CM/ECF system on:

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# Attachment 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-1814-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;

Plaintiffs,

v.

CITY & COUNTY OF DENVER, INCLUDING ITS SHERIFF'S DEPARTMENT;
ALVIN LACABE, in his official capacity as Manager of Public Safety for the City & County of Denver, and in his individual capacity;
WILLIAM LOVINGIER, in his official capacity as the Director of Corrections and Undersheriff for the City & County of Denver, and in his individual capacity;
RON D. FOOS, in his official capacity as Division Chief for the County Jail Division for the City & County of Denver, and in his individual capacity;
GARY WILSON, in his official capacity as Division Chief for the Pre-Arraignment Detention Facility Division, and in his individual capacity.

Defendants.

---

**PLAINTIFF'S FIRST SET REQUESTS FOR ADMISSION PROPOUNDED TO DEFENDANT CITY & COUNTY OF DENVER**

---

Plaintiffs, Debbie Ulibarri, Estate of Shawn Francisco Vigil, Colorado Cross-Disability Coalition, Colorado Association of the Deaf, and Roger Krebs, by and through their attorneys, Carrie Ann Lucas and Kevin W. Williams of the Colorado Cross-Disability Coalition, Fox & Robertson, P.C., and King & Greisen, LLC propound their First Set of Requests for Admissions to Defendant City & County of Denver pursuant to Federal Rules of Civil Procedure 36. The

responses to these Requests for Admission are due thirty (30) days from the date of service.

**Definitions and Instructions**

A. Unless otherwise noted, Plaintiffs incorporate by reference the Definitions and Instructions of the Interrogatories and Requests for Production of Documents that they have previously served on Defendant.

**Requests for Admission**

1. Admit that the City & County of Denver is a recipient of federal financial assistance as that term is used in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et. seq.*, and its implementing regulations.

Respectfully submitted,

COLORADO CROSS DISABILITY COALITION

s/ Carrie Ann Lucas

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Dated: January 4, 2008

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that on January 4, 2008, I served the foregoing via First Class Mail Postage Prepaid to:

Suzanne Fasing
City & County of Denver City Attorney's Office
201 W Colfax Ave Dept 1108
Denver, CO 80202

s/ Carrie Ann Lucas

Carrie Ann Lucas
Attorney for Plaintiffs
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# Attachment 2

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, INCLUDING ITS SHERIFF'S DEPARTMENT;**
**ALVIN LACABE**, in his official capacity as Manager of Public Safety for the City & County of Denver, and in his individual capacity;
**WILLIAM LOVINGIER**, in his official capacity as the Director of Corrections and Undersheriff for the City & County of Denver, and in his individual capacity;
**RON D. FOOS**, in his official capacity as Division Chief for the County Jail Division for the City & County of Denver, and in his individual capacity;
**GARY WILSON**, in his official capacity as Division Chief for the Pre-Arraignment Detention Facility Division, and in his individual capacity.
**GERALD R. WHITMAN,** in his official capacity as Chief of Police, and in his individual capacity.

Defendants.

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**SECOND AMENDED RESPONSE TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS PROPOUNDED TO DEFENDANT CITY AND COUNTY OF DENVER**

---

Defendant, the City and County of Denver, by and through its attorney of record submits its Second Amended Response to Plaintiffs' First Set of Requests for Admissions Propounded to Defendant City and County of Denver as follows:

**REQUESTS FOR ADMISSION**

**Response to Request for Admission No. 1:**

Admitted.

Dated this 8th day of July, 2009.

SUZANNE A. FASING
Assistant City Attorney

By: s/Suzanne A. Fasing
Suzanne A. Fasing
*Attorney for Defendants*

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **SECOND AMENDED RESPONSE TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS PROPOUNDED TO DEFENDANT CITY AND COUNTY OF DENVER** was e-mailed this 8th day of July, 2009, to the following:

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Amy Farr Robertson
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104 Broadway, Suite 400
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arob@foxrob.com

s/Suzanne A. Fasing
Office of the Denver City Attorney

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# Attachment 3

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;**

Plaintiffs,

v.

**CITY & COUNTY OF DENVER, INCLUDING ITS SHERIFF'S DEPARTMENT;**
**ALVIN LACABE**, in his official capacity as Manager of Public Safety for the City & County of Denver, and in his individual capacity;
**WILLIAM LOVINGIER**, in his official capacity as the Director of Corrections and Undersheriff for the City & County of Denver, and in his individual capacity;
**RON D. FOOS**, in his official capacity as Division Chief for the County Jail Division for the City & County of Denver, and in his individual capacity;
**GARY WILSON**, in his official capacity as Division Chief for the Pre-Arraignment Detention Facility Division, and in his individual capacity.

Defendants.

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**DEFENDANTS MANDATORY INITIAL DISCLOSURES**
**PURSUANT TO FED.R.CIV.P. 26(a)(1)**

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Defendants, City and County of Denver, Sheriff Department, Alvin LaCabe, William Lovingier, Ron D. Foos and Gary Wilson (hereinafter referred to as "Denver"), by and through its undersigned attorney, submit its Mandatory Initial Disclosures pursuant to Fed.R.Civ.P. 26(a)(1).

**A. <u>PERSONS LIKELY TO HAVE DISCOVERABLE INFORMATION THAT DEFENDANTS MAY USE TO SUPPORT THEIR DEFENSES</u>**

1. Debbie Ulibarri
   11968 E. 1st Avenue

5. Ron D. Foos, # S760002
Division Chief
Denver Sheriff Department
c/o Internal Affairs Bureau
P.O. Box 1108
Denver, CO 80201
720 865-3993

Division Chief Foos, Defendant in this case, presumably has knowledge and information regarding the incident of September 27, 2005, which is the subject matter of this action.

6. Major Gary L. Wilson, # S92027
Denver Sheriff Department
c/o Internal Affairs Bureau
P.O. Box 1108
Denver, CO 80201
720 865-3993

Major Wilson, Defendant in this case, presumably has knowledge and information regarding the incident of September 27, 2005, which is the subject matter of this action.

7. Captain Craig W. Meyer, # S84015
Denver Sheriff Department
c/o Internal Affairs Bureau
P.O. Box 1108
Denver, CO 80201
720 865-3993

Capt. Meyer received and sent inter-office correspondence on September 27, 2005, regarding the scene, and presumably has knowledge and information regarding the incident which is the subject matter of this action.

8. Captain Jodi L. Blair, # S91026
Denver Sheriff Department
c/o Internal Affairs Bureau
P.O. Box 1108
Denver, CO 80201
720 865-3993

93. Denver Sheriff Department Personal Property Inventory for Roger Krebs, 3/30/07. [Bates Nos. 000243]

94. Denver County Jail Resident Transaction Receipt for Roger Krebs, 3/30/07. [Bates No. 000244]

95 Denver incorporates by reference any evidentiary documents, data compilations and tangible things submitted by Plaintiff Debbie Ulibarri in her initial disclosures pursuant to Fed.R.Civ.P. 26(a)(1) arising from the incident on or about September 27, 2005, which is the subject matter of this action.

**C. DAMAGES**

Denver does not seek damages but reserve the right to seek any attorney's fees or costs pursuant to 42 U.S.C. § 1988, and the Colorado Governmental Immunity Act, § 24-10-101 through § 24-10-120, C.R.S. (2005).

**D. LIABILITY INSURANCE AGREEMENT**

The City and County of Denver is a self-insured governmental entity. Denver's potential liability is limited by the Colorado Governmental Immunity Act § 24-10-101 through § 24-10-120 C.R.S. (2007).

Dated this 4h day of January 2008.

SUZANNE A. FASING
Assistant City Attorney

By: Suzanne A Fasing
Suzanne A. Fasing
*Attorney for Defendants, City and County of Denver, Sheriff Department, Alvin LaCabe, William Lovingier, Ron D. Foos and Gary Wilson*

Denver City Attorney's Office
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## CERTIFICATE OF SERVICE

I certify that on the 4th day of January 2008, a copy of the **DEFENDANTS' INITIAL DISCLOSURES PURSUANT TO FED.R.CIV.P. 26(a)(1)** was sent by U.S. mail, postage prepaid, to:

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King & Griesen, LLP
1670 York Street
Denver, CO 80206

Kevin Williams
Carrie A. Lucas
Colorado Cross Disability Coalition
655 Broadway, Suite 775
Denver, CO 80203

Amy Farr Robertson
Fox & Robertson, P.C.
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Denver, CO 80202

Office of the Denver City Attorney

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# Attachment 4

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, INCLUDING ITS SHERIFF'S DEPARTMENT;**
**ALVIN LACABE**, in his official capacity as Manager of Public Safety for the City & County of Denver, and in his individual capacity;
**WILLIAM LOVINGIER**, in his official capacity as the Director of Corrections and Undersheriff for the City & County of Denver, and in his individual capacity;
**RON D. FOOS**, in his official capacity as Division Chief for the County Jail Division for the City & County of Denver, and in his individual capacity;
**GARY WILSON**, in his official capacity as Division Chief for the Pre-Arraignment Detention Facility Division, and in his individual capacity;
**GERALD R. WHITMAN,** in his official capacity as Chief of Police, and in his individual capacity.

Defendants.

---

**DEFENDANTS' FOURTH SUPPLEMENTAL DISCLOSURES
PURSUANT TO FED.R.CIV.P. 26(a)(1)**

---

Defendants (hereinafter referred to as "Denver"), by and through their undersigned attorney, submit their Fourth Supplemental Disclosures pursuant to Fed.R.Civ.P. 26(a)(1).

## A. PERSONS LIKELY TO HAVE DISCOVERABLE INFORMATION THAT DEFENDANTS MAY USE TO SUPPORT THEIR DEFENSES

1. Chief Gerald R. Whitman, # 80251
c/o Civil Liability Bureau, Room 500
Denver Police Department

1331 Cherokee Street
Denver, CO 80204
720 865-6013

Chief Gerald R. Whitman may have knowledge and information regarding the subject matter of this action.

2. Marie Kielar, # S85022
Denver Sheriff Department
c/o Internal Affairs Bureau
P.O. Box 1108
Denver, CO 80201
720 865-3993

Major Kielar may have knowledge and information regarding the subject matter of this action.

3. Elias Diggins, # S94085
Denver Sheriff Department
c/o Internal Affairs Bureau
P.O. Box 1108
Denver, CO 80201
720 865-3993

Major Diggins may have knowledge and information regarding the subject matter of this action.

4. Saundra K. Fowler, # S91016
Denver Sheriff Department
c/o Internal Affairs Bureau
P.O. Box 1108
Denver, CO 80201
720 865-3993

Sgt. Fowler may have knowledge and information regarding the subject matter of this action.

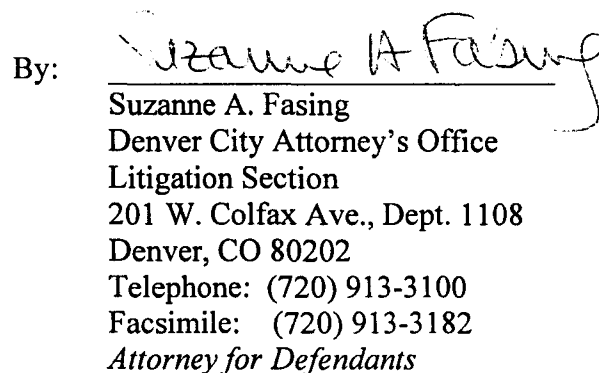
5. Michael T. Than, Sr., # S92102
Denver Sheriff Department
c/o Internal Affairs Bureau
P.O. Box 1108

17. Suicidal Behavior Denver Sheriff Department In-Service Training. [Bates Nos. 000905– 000921]

18. Basic CPR and First Aid for Adults Student Guide. [Bates Nos. 000922– 000980]

Dated this 17th day of October 2008.

SUZANNE A. FASING
THOMAS G. BIGLER
Assistant City Attorneys

By: 

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*Attorney for Defendants*

**CERTIFICATE OF SERVICE**

I certify that on the 17th day of October 2008, a copy of the **DEFENDANTS' FOURTH SUPPLEMENTAL DISCLOSURES PURSUANT TO FED.R.CIV.P. 26(a)(1) (With CD Labeled Bates 863-980)** was sent by U.S. Mail to the following:

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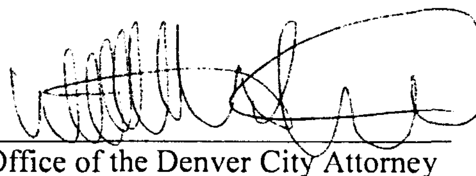

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