IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

DEBBIE ULIBARRI, *et al.*,

Plaintiffs,

v.

CITY & COUNTY OF DENVER,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S BRIEF REGARDING HEARING ON RULE 702 MOTION

Plaintiffs, by and through counsel, submit this Response to Defendant's Brief Regarding Hearing on Rule 702 Motion (ECF No. 300).

Defendant, the City and County of Denver (the "City"), has moved to preclude certain testimony[1] of three of Plaintiffs' expert witnesses. Defendants' Fed. R. Evid. 702 Motion to Strike Expert Witnesses ("Defs.' 702 Motion," ECF No. 246). Through Plaintiffs' Opposition to Defendants' Fed. R. Evid. 702 Motion to Strike Expert Witnesses ("Pls.' Opp'n to 702 Motion," ECF No. 259) and the verified statements Plaintiffs filed last week (ECF No. 292 and attachments), Plaintiffs demonstrated that Defendant's 702 Motion has no merit. The Court has scheduled a three-day hearing on the 702 Motion starting tomorrow, April 19, 2011.

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[1] Defendant's Hearing Brief, ECF No. 300, states that it "seeks to preclude the testimony of three of Plaintiffs' expert witnesses." *Id.* at 1. This is an overstatement. The City's 702 Motion in fact challenges discrete opinions and does not represent an across-the-board challenge to any of Plaintiffs' experts.

Last week, eight days before the hearing, Defendant filed its Brief Regarding Hearing on Rule 702 Motion ("Defendant's Hearing Brief" or "Def.'s Hearing Br.," ECF No. 300), asserting that this Court's September 30, 2010 Order on Pending Motions, ECF No. 265, rendered certain of Plaintiffs' experts' opinions irrelevant, and that one of the opinions expressed by Jean Andrews in her Verified Statement, ECF No. 292-1, was not disclosed in her expert report. These arguments, too, are without merit.

INTRODUCTION

This is a prison conditions and disability discrimination case involving three deaf pretrial detainees, Shawn Vigil, Roger Krebs, and Sarah Burke. Mr. Vigil, a 22-year-old profoundly deaf man, was arrested on August 17, 2005 and was in the custody of the City and County of Denver until September 27, 2005, when he committed suicide by hanging himself in the Denver County Jail ("DCJ"). While incarcerated, he was placed in administrative segregation solely on the basis of his deafness and was never provided with effective communication. As a result, he was completely isolated. Ms. Burke -- who is deaf and diabetic -- was arrested peacefully on a warrant, not permitted to bring with her necessary medication or an accessible communications device, and taken to Denver's Pre-Arraignment Detention Facility ("PADF") where she was repeatedly denied access to effective communication, including upon her release at approximately 2:00 a.m. Mr. Krebs, also deaf, was arrested at Denver's Greyhound Bus Station and was denied effective communication by Defendants, including, crucially, at his arraignment.

Plaintiffs have designated four expert witnesses pursuant to Rule 26(a)(2), three of whom Defendant challenges under Rule 702. Jean Andrews, Ph.D., an expert in communications and psycho-social issues relating to people who are deaf, will opine on Mr. Vigil's language abilities

and the impact of ineffective communication and isolation on his mental health. Mark Pogrebin, Ph.D., a national expert on jail and prison conditions, will opine on the inadequacy of the City's practices and procedures relating to deaf inmates and suicide prevention. Linda Edwards, RN, MHS, CDE, an expert in the treatment, education, and management of diabetes, and in working with organization systems and diabetics in a prison setting, will opine on the inadequacy of the City's practices and procedures relating to inmates with diabetes.

ARGUMENT

I. All of Plaintiffs' Experts' Opinions Are Relevant.

In their Hearing Brief, Defendant argues that certain of Plaintiffs' experts' opinions are not relevant because they related to claims that have been dismissed. Specifically, it argues that opinions of Dr. Andrews and Dr. Pogrebin concerning events that occurred outside the statute of limitations are irrelevant, as are opinions of Ms. Edwards concerning specific events as to which this Court has dismissed the claims of Plaintiff Sarah Burke.

To the contrary, all of the challenged evidence remains relevant to the organizational plaintiffs' claims for injunctive relief, and as background evidence providing an understanding of individual plaintiffs' claims that remain at issue. As this Court noted in the Order on Motion for Certification of Rule 54(b) Judgment, "there is significant factual overlap between the dismissed claims and the pending claims" in this case. ECF No. 293 at 4.

Relevant expert testimony must "logically advance[ ] a material aspect of the case," *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 884 n. 2 (10th Cir., 2005) and be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute," *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579, 591 (1993) (quotation omitted). In assessing whether

testimony will assist the trier of fact, district courts consider several factors, including whether the testimony "is within the juror's common knowledge and experience," and "whether it will usurp the juror's role of evaluating a witness's credibility." *United States v. Rodriguez-Felix,* 450 F.3d 1117, 1123 (10th Cir. 2006) (footnotes omitted). Pursuant to Rule 702, courts must conduct a "common-sense inquiry" into whether a juror would be able to understand certain evidence without specialized knowledge. *United States v. Becker,* 230 F.3d 1224, 1231 (10th Cir. 2000); *see also United States v. Garcia*, 2011 WL 1125777, at *3 (10th Cir. Mar. 28, 2011).

A. All of the Challenged Opinions Are Relevant to the Claims of the Organizational Plaintiffs for Injunctive Relief.

Plaintiffs Colorado Cross-Disability Coalition ("CCDC") and Colorado Association of the Deaf ("CAD") bring claims for injunctive relief to remedy the City's deficient policies and practices toward deaf and/or diabetic inmates. The organizations' claims are based on the time and resources they have to expend investigating claims and assisting their members and others to obtain redress when the City "fail[s] to provide adequate accommodation for deaf and other disabled arrestees, detainees, and inmates." Order on Pending Motions at 40. In denying the City's motion for summary judgment on these claims, this Court held that "it is reasonable to infer that other deaf persons detained will have some of the same difficulties as the detained Plaintiffs here." *Id.* at 42. Any testimony concerning deficient City practices in working with deaf or diabetic inmates is relevant to show the injunctive relief necessary to remedy those deficiencies.

For example, Dr. Andrews's opinion that Mr. Vigil was not provided effective communication at his pre-August 28, 2005 booking, Verified Statement of Jean Andrews, Ph.D.

("Andrews Statement," ECF No. 292-1) ¶ 11, is relevant to ensure that injunctive relief in this case reforms the booking process to provide effective communication. Dr. Pogrebin's opinions concerning Mr. Vigil's treatment at the Pre-Arraignment Detention Facility -- also prior to August 28, *see, e.g.,* Verified Statement of Mark Pogrebin, Ph.D. ("Pogrebin Statement," ECF No. 292-2) ¶ 7(b) -- are all relevant to the need for injunctive relief ensuring proper procedures and effective communications in the future. Similarly, Ms. Edwards's opinions about the blood glucose meter, its care and handling, *see* Verified Statement of Linda Edwards, RN, MHS, CDE ("Edwards Statement," ECF No. 292-3) ¶ 17, are relevant to explain why Defendant's policies and procedures for individuals with diabetes are inadequate, and provide support for policy changes with respect to blood glucose testing. The same is true of the remainder of these experts' challenged statements -- all of which will be relevant to the contours of the injunctive relief sought by the organizational plaintiffs.

B. Dr. Andrews's and Dr. Pogrebin's Opinions Concerning Lack of Effective Communication and Improper Procedures Throughout Mr. Vigil's Incarceration are Relevant.

Shawn Vigil was arrested on August 17, 2005; the initial complaint in this matter was filed on August 28, 2007. This Court has held that "any claim based solely on Vigil's arrest is time-barred." Order on Pending Motions, ECF No. 265, at 32. Evidence relating to events occurring outside the statute of limitations is admissible as "relevant background evidence." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 112 (2002) (quoting *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977)). Plaintiffs' expert opinions -- even those that discuss events outside the statute of limitations or events as to which this Court has dismissed Plaintiffs' claims

-- remain relevant as background evidence to understand the entirety of Plaintiffs' interaction with Defendant and its representatives.

Dr. Andrews offers opinions concerning Defendant's lack of effective communication with Mr. Vigil throughout the time he was in their custody, including his arrest, booking, medical and psychological intakes, and incarceration -- both before and after August 28, 2005. *See, e.g.,* Andrews Statement ¶ 11. All of this evidence, whether or not barred by the statute of limitations, is relevant to Mr. Vigil's comprehension of his surroundings, feelings of isolation, and other factors that contributed to his emotional state and eventual suicide after August 28, 2005. For example, it is relevant to understanding the isolation to which Mr. Vigil was subjected while in administrative segregation after August 28 that no effective communication was provided during his earlier intake, classification, or medical screening, ensuring both that his communicative isolation was complete and that City personnel did not have sufficient information to protect him. As such, Dr. Andrews's opinions concerning the City's communication -- or lack thereof -- with Mr. Vigil prior to August 28, 2005 is "relevant background evidence," admissible under the standard set forth in *Morgan*, 536 U.S. at 112.

Similarly, Dr. Pogrebin's opinions concerning improper procedures that predate the statute of limitations are relevant to understanding the entire course of events within the limitations period. For example, Dr. Pogrebin opines that one of the ways Defendant initially breached its duty of care was its failure to accurately and fully complete Mr. Vigil's intake questionnaire and its failure to obtain the necessary mental health screening. Pogrebin Statement ¶ 7(b). While this event occurred outside the statute of limitations -- and therefore cannot be an independent basis for a damages claim -- it is essential that the trier of fact understand what

happened at the genesis of his confinement to fully understand what happened thereafter. Dr. Pogrebin will testify that classification is a continuing process, throughout the period of confinement. He will opine that the fact that the initial booking and classification process was inadequate impacted every future step taken, or not taken, with respect to Mr. Vigil, during his stay at DCJ. Thus, it is critical for a jury to understand what happened at those initial stages of his confinement in order to comprehend the full context of the events that occurred, and how the subsequent, and actionable conduct by the Defendants impacted the terms and conditions of Mr. Vigil's confinement.

C. Ms. Edwards's Opinions Concerning Improper Diabetes Procedures Throughout Ms. Burke's Detention are Relevant Because They Will Assist The Trier of Fact in Understanding Disputed Issues.

Linda Edwards is a nurse specializing in diabetes care. She offered opinions concerning Defendant's conduct toward Plaintiff Sarah Burke, who is both deaf and diabetic. While some of Ms. Burke's claims have been dismissed, most remain, particularly claims surrounding her arrest and subsequent release from the PADF. The events that occurred after her arrest, and before her release, while perhaps not actionable, are relevant to determine whether or not discrimination occurred at her release. As such, Ms. Edwards's opinions are relevant to aid the jury in understanding Ms. Burke's physical condition at the time of her release and will aid the jury in resolving factual disputes.

Defendant seeks to exclude Ms. Edwards's opinion that the arresting officers exhibited a deliberate and willful disregard, or deliberate indifference to Ms. Burke's medical needs at the time of her arrest. Edwards Statement ¶¶ 8, 11. This Court has ruled that "the question of whether Burke was discriminated against in the course of her arrest and detention should be

determined by a jury." Order on Pending Motions at 38. Ms. Edwards explained in her deposition that the use of the words "deliberate and willful disregard" is not a legal opinion, but rather a term used in the context of medical care. Edwards Dep. p. 88, l. 24 - p. 89, l. 21.

Ms. Edwards's opinions about Ms. Burke's medical treatment during the intake process are relevant to provide the context of Ms. Burke's medical condition at the time of her release from custody. Defendant challenges Ms. Edwards's opinions in paragraphs 12 through 17. *See* Def.'s Hearing Br. at 5-8. While some of the facts are not actionable as independent claims, the context of what happened, or did not happen, to Ms. Burke during the medical screening is essential to understanding Ms. Burke's condition as a Type I diabetic during the remainder of her detention, and her condition upon release. Furthermore, Ms. Edwards's opinions in paragraph 16 specifically concern Ms. Burke's condition at the time of her release.

II. Dr. Andrews's Report Included The Opinion That a Cause of Mr. Vigil's Suicide was Lack of Effective Communication.

Dr. Andrews, in her Verified Statement, summarizes the lack of effective communication provided to Shawn Vigil during the time he was in Defendant's custody, and concludes, "[t]hese factors, when combined, created an experience of severe communication deprivation. It is my opinion that this was a cause of Mr. Vigil's taking his own life." Andrews Statement ¶ 14. Defendant asserts that this opinion was not disclosed in Dr. Andrews's report. Defs.' Hearing Br. at 9. This is incorrect.

Dr. Andrews's report includes this paragraph:

> By not providing a qualified sign language interpreter, effective communication was not available. Mr. Vigil had no way to express his feelings to the police officers and jail officials, nor was he able to fully comprehend what their

> questioning was. Neither was he provided with the TTY or the videophone. Consequently, he took his life.

"Report for Shawn Vigil," Robertson Decl. (ECF No. 259-2) Ex. 1 at 12. This paragraph makes very clear that it is Dr. Andrews's opinion that Defendant's lack of effective communication was a cause of Mr. Vigil's suicide. "The purpose of Rule 26(a)(2)'s expert disclosure requirements is to eliminate surprise and provide the opposing party with enough information regarding the expert's opinions and methodology to prepare efficiently for deposition, any pretrial motions and trial." *Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1122 (D. Colo. 2006); *see also Palmer v. Asarco, Inc.*, 510 F. Supp. 2d 519, 528 (N.D. Okla. 2007) (refusing to exclude expert opinion on causation because moving party was on notice concerning the expert's testimony, even if she did not use the precise language in question).

The paragraph from Dr. Andrews's report quoted above -- and specifically her use of the word "consequently" -- put Defendant on notice that she would opine that the lack of effective communication with Mr. Vigil was a cause of his suicide. Defendant had sufficient information regarding that opinion to prepare for deposition, motions, and trial.

CONCLUSION

For the reasons set forth above and in Plaintiffs' Opposition to Defendants' 702 Motion, Plaintiffs respectfully request that this Court deny Defendant's 702 Motion in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2011 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email address:

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