IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

TABATHA BARNES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. CIV-16-184-HE
	)	
THE CITY OF OKLAHOMA CITY, a municipal corporation, et al.,	)	
	)	
Defendants.	)	

REPLY OF DEFENDANT THE CITY OF OKLAHOMA CITY TO PLAINTIFFS' RESPONSE TO DEFENDANT CITY'S MOTION FOR SUMMARY JUDGMENT

COMES NOW a Defendant, The City of Oklahoma City, and for its Reply to Plaintiffs' Response to Defendant City's Motion for Summary Judgment, states as follows:

In responding to Defendant City's Statement of Material Facts not in Dispute, as well as Subsection A: Facts of the Investigation into the Sexual Assaults, Plaintiffs admit the vast majority[1]: 3, 7-14, 16-18, 20-29. In response to Subsection B – Facts of City's Hiring and Training of Police Officers, Plaintiffs admit all facts, although some admissions allude to the fact being immaterial, raise an objection to materials as hearsay, and insert improper comments. Those facts should be deemed admitted. See LCVR 56.1 (d) and (e). Plaintiffs improperly deny Fact 4, arguing that this fact is immaterial and that it is an argument, not a statement of undisputed material fact. The statements contained within Fact 4 should be deemed admitted, as Plaintiffs offer no proof in opposition. Plaintiffs

[1] Albeit, some with improper comments.

dispute Fact 6, yet contradict themselves on Page 15, ¶38. Fact 6 should be deemed admitted.

Response To Plaintiffs' Additional Facts Precluding Summary Judgment

Defendant City submits that none of the additional facts proposed by Plaintiffs are material or relevant. Further, these additional facts are in violation of LCvR 56.1(c) which states that the nonmovant shall not present facts that are not material to an issue raised by the movant. All of the "additional facts" raised by Plaintiffs are addressed in Defendant City's Motion for Summary Judgment, and none of these facts preclude judgment for Defendant City. However, Defendant City responds as follows:

1. Undisputed but immaterial.

2-10. Disputed and immaterial. This Court has already addressed the Plaintiffs' theories of the culpability of Lt. Bennett (former Defendant) in its Order dated April 30, 2019 [Doc. 190], and granted Bennett summary judgment. In the Order, the Court addressed the claimed assertions by Ms. Campbell that Holtzclaw was "perverted" and that Oklahoma City should get him "off the force because I'm afraid of what he may do to the next black person". See Order page 9. The Court concluded that "even viewing the evidence in the light most favorable to plaintiffs, Ms. Campbell's testimony as to her statements to Bennett suggests her focus was racial bias, not sexual misconduct." Order page 9. The Court thus granted Bennett summary judgment, stating that having "carefully considered plaintiffs' evidence offered in connection with the motion, the court concludes plaintiffs' theory is essentially speculation, and their evidence falls short of creating a

dispute of material fact the resolution of which might result in judgment for plaintiffs against Bennett."

11-12. Disputed and immaterial. Again, these facts asserted by plaintiffs are speculation and does nothing to create a dispute of material fact precluding City's summary judgment.

13. Undisputed. It should be noted that Plaintiffs now concede that on May 24, 2014, Ms. Morris reported to OCPD that she had been sexually assaulted by an OCPD officer. This fact supports City's position in its request for summary judgment.

14-28. Disputed and immaterial. Plaintiffs make several assertions and argument as "facts", none of which preclude summary judgment for City. For example, Plaintiffs concede that Ms. Morris made sexual assault allegations on May 24, 2014, but Plaintiffs conveniently leave out the fact that Ms. Morris initially stated that the assault occurred 3-4 days earlier, and that it occurred near the City Rescue Mission (see Doc. 368, Exhibits 30-31). It was later determined that the alleged sexual assault of Ms. Morris by Holtzclaw occurred on May 8, 2014. (See Doc. 368, Exhibit 9).

29. Disputed and immaterial. First line supervisors, which are Lieutenants, go to the scene of arrests, assist with calls, sign Probable Cause affidavits, and a myriad of other things related to their duties as patrol supervisors.

30-31. Disputed, irrelevant and immaterial. This is not a Constitutional violation.

32-33. Undisputed but immaterial.

34. Disputed.

35-37. Undisputed. Plaintiffs admit that OCPD has a thorough early intervention program to identify issues.

38. Disputed. This "fact" conflicts with Plaintiffs Paragraph 37.

39. There is no fact No. 39.

40-41. Undisputed but immaterial.

42-59. Disputed and immaterial. The only relevant consideration is whether the City had an unconstitutional policy. Anything else is immaterial. Plaintiffs include numerous additional alleged "facts precluding summary judgment" which are all immaterial. They are prohibited from doing so pursuant to LCvR 56.1(c).

60-63. Any "opinion" by Mr. Clark as a "nationally renowned expert on police practices" should be disregarded. Further, in *Carr v. Castle*, 37 F.3d 1282, the court has stated that "the fact that someone with the opportunity to prepare an expert report at leisure opines that well-trained officers would have performed differently under pressure does not rise to the legal standard of deliberate indifference on the part of the City…" *Carr* at 1230. Additionally, as *Medina and City and County of San Francisco v. Sheehan*, 135 S.Ct. 1765 (2015) recognize, Plaintiff cannot manufacture a dispute of fact where none otherwise exists by relying on the testimony of any expert.

Proposition I: Defendant City's Policies, Procedures, and Customs are Constitutional and It Did Not Unconstitutionally Fail to Adequately Supervise.

In this Proposition, Plaintiffs merely state that Plaintiffs' constitutional injuries were caused by a municipal policy maintained by the City in the form of a custom of failing to adequately supervise its officers and respond to citizen complaints. It appears that

Plaintiffs have admitted that the City's Policies, Procedures and Customs are Constitutional, and have therefore waived any allegation based on hiring, training or ratification. Although somewhat difficult to following the reasoning in Plaintiffs' Response, it appears that Plaintiffs have not addressed, and therefore have conceded that the City is entitled to judgment on several counts of Plaintiffs' First Amended Complaint: Count 4 (Conspiracy); Count 6 (Ratification); Count 7 (Failure to Train); Count 9 (GTCA Assault and Battery); and Count 11 (False Arrest/Imprisonment under GTCA).

As stated in Defendant City's Brief, the Court shall enter summary judgment when the movant has established that plaintiffs cannot establish an essential element of their claim. Failure of the plaintiff to rebut this proposition and show an essential element renders all other facts immaterial. *Taken v. Ok Corp. Commission*, 934 F. Supp. 1294 (WDOK 1996), citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). All the facts precluding summary judgment asserted by Plaintiffs fail to demonstrate the existence of an unconstitutional policy. Plaintiffs allude to alleged uses of force by Holtzclaw that were investigated and are not relevant to allegations of sexual misconduct. Many of these "facts" are not even clearly about Holtzclaw. It is only by surmise and speculation that they have any remote relevancy.

District courts are obligated to view evidence in the light most favorable to the non-movant. However, factual disputes that are irrelevant or unnecessary will not be counted. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986) at 248 ("….. mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment"). None of the statements made by Plaintiffs regarding any alleged failure to

supervise are relevant or material and they should be disregarded by the Court.

Proposition II: Defendant City is not Liable to Plaintiffs Ligons and Lyles under §1983

In their Proposition II, Plaintiffs argue that Defendant City is liable only to Plaintiffs Ligons and Lyles under §1983. Because this Proposition is asserted only on behalf of Plaintiffs Ligons and Lyles, as a preliminary matter, judgment should be entered for the City on behalf of Plaintiffs Hill, Barnes, Morris, and Johnson.

Plaintiffs allege that the City, and Bill Citty were on notice that Holtzclaw was a sexual predator and that they failed to stop him from the time Demetria Campbell initially complained of a use of force by Holtzclaw. Plaintiffs further contend that this "deliberate indifference" amounts to a policy which caused a violation of each of the Plaintiff's constitutional rights. Notwithstanding the fact that it was a use of force complaint in Campbell and it is denied by the City that Ms. Campbell ever complained of any inappropriate sexual behavior, any "notice" issue is simply nothing more than mere negligence and cannot amount to a constitutional violation.

It is remarkably well settled that negligence cannot be the basis for a constitutional violation. As early as 1986, the United States Supreme Court held that mere acts of negligence cannot be the basis for a constitutional violation. In *Davidson v. Cannon*, 474 U.S. 344, (1986), and *Daniels v. Williams*, 474 U.S. 327, (1986) decided essentially back to back, the Court clearly provided that "…protections of the Due Process Clause of the Fourteenth Amendment, whether procedural or substantive, are not triggered by lack of due care…" *Davidson* at 347. The Court further explained that "…lack of care simply

does not approach the sort of abusive government conduct that the that the Due Process Clause was designed to prevent…" *Davidson* at 348.

While both *Davidson* and *Daniels* arose from prison settings and prisoner safety, it is notable for purposes of the present case that *Davidson* dealt with the failure of prison officials to identify a threat and prevent an assault on a prisoner after receiving a note that he was in danger. The Court considered such to be only negligence.

Much of the Plaintiffs cases against the City, and Bill Citty, rest on the alleged 'notice' to each that should have prevented Holtzclaw from continuing his assaults. For example: Plaintiffs admit that Holtzclaw was investigated at the direction of Citty eventually; that he was terminated from his employment and that he was successfully prosecuted by the District Attorney with the assistance of City police officers.

Furthermore, the failure of negligence to rise to a constitutional violation has expanded well beyond prison cases. In *County of Sacramento, v. Lewis*, 118 S.Ct. 1708 (1998), in a police officer pursuit case, the Supreme Court held that "…the Constitution does not guarantee due care on the part of state officials; *liability for negligently inflicted harm is categorically beneath the threshold* of constitutional due process…" (emphasis added) at 1713. (See also: *Radecki v. Barela*, 146 F.3d 1227 (10th Cir. 1998), where the Circuit Court noted that *Lewis* "…rejects again any tendency to equate constitutional liability with tort liability…" at 1230, applying that concept in an officer use of force case in a qualified immunity context) (See also: *Woodward v. City of Worland*, 977 F.2d 1392, (10th Cir. 1992), "the Supreme Court has made it clear that liability under §1983 must be predicated upon a deliberate deprivation of constitutional rights…it cannot be predicated

upon negligence…" at 1399.

Plaintiffs fail to note that "hiring, training, supervision, monitoring, and retention are actions that implicate a political entity's policy and planning functions and therefore fall under the discretionary function exemption of 51 OS §155(5)." *Johnson v. Indep. Sch. Dist. No. 89 of Okla. Cnty.*, No. CIV–15–680–D, 2016 WL 1270266, at *8 (W.D. Okla.Mar. 31, 2016) (negligent supervision); *Burris v. Okla. ex rel. Okla. Dep't of Corrections,* No. CIV–13–867–D, 2014 WL 442154, at*9 (W.D. Okla. Feb. 4, 2014) (negligent hiring, training, supervision, and retention). This was followed as recently as June 24, 2020, by the Eastern District of Oklahoma in *Easter v. Okla. Dept. of Wildlife Conservation,* 2020 U.S. Dist. LEXIS 110659, *No. CIV-16-168-KEW (E.D. Okla. June 24, 2020).* As a matter of law, Plaintiffs are barred from pursuing a claim against the City based on the negligent hiring, training, supervision, or retention of Officer Holtzclaw.

Arguably, the only viable cause of action that the Plaintiffs may conceivably have left is a negligence claim pursuant to state of Oklahoma law for which the City is exempt for the manner and method of providing police protection at 51 OS §155(6). Further, Plaintiffs Hill, Barnes, Morris and Johnson did not file the requisite Notice of Tort Claim, as required by the Oklahoma Governmental Tort Claims Act. The only state law negligence causes of action asserted in Plaintiffs' First Amended Complaint are Counts 9, 10 and 11, and these counts were only asserted on behalf of Ligons and Lyles. Therefore, any Negligence cause of action should be dismissed and judgment entered on behalf of the City.

Proposition III: Defendant City is not Liable to Plaintiff Ligons Under State Law

It appears by Plaintiffs' Response that the only state law allegation still being asserted is on behalf of Plaintiff Ligons, and that is only for the proposition that Holtzclaw was acting within the scope of his employment when he searched her. Therefore, any state law cause of action asserted by Hill, Barnes, Morris, Johnson or Lyles should be dismissed and judgment should be granted for the City.

In *Morales v. City of Oklahoma City,* 2010 OK 9, 230 P.3d 869, the Court first held that the City could be exempt from liability if its employee would be exempt. The Court stated at 877 "if the employee has immunity from suit under a statute other than the GTCA or under the common law. . .the terms of § 155(16) should ordinarily extend those laws' benefits to the governmental employer." The City employees working within the scope of their employment are Citty, Gregory and Bennett. This Court has previously granted Bennett summary judgment. Plaintiffs have not filed a Response to Gregory's Motion for Summary Judgment [Doc. 371], therefore he is entitled to judgment. Plaintiffs did not address qualified immunity asserted in Citty's Motion for Summary Judgment [Doc. 362], therefore he is entitled to qualified immunity and judgment. Because all City employees (other than former City employee Defendant Holtzclaw, whom the City has steadfastly maintained was outside the scope of employment) are entitled to judgment, then judgment should be entered for the City as well.

Additionally, Plaintiff Ligons did not assert any cause of action against the City for any alleged illegal search. Pursuant to the GTCA, Plaintiff Ligons only asserted Assault

and Battery (Count 9), Negligent Supervision (Count 10) and False Arrest/Imprisonment. As it appears that Plaintiff Ligons is for the first time alleging any illegal search, this Court should grant judgment to Defendant City on Counts 9, 10 and 11.

CONCLUSION

Plaintiffs fail to address several propositions asserted in City's Motion for Summary Judgment. As previously argued, Holtzclaw's use of force in the Armstrong and Campbell incidents is not relevant to this case. Even if Campbell told Bennett Holtzclaw was perverted (which is denied), perversion is not a crime. The OCPD does attempt to investigate a person's complaint that an officer sexually abuses them.

Plaintiffs appear to abandon any allegations based on unlawful use of force, failure to discipline, negligent hiring, ratification, and conspiracy. The actions of Holtzclaw in sexually assaulting these women was not committed in good faith and therefore outside the scope of his employment (51 O.S. §§ 152(12) and 153), and the City cannot be liable on Plaintiffs' state law claims. (Only Plaintiffs Hill and Ligons' timely filed the required Notice of Tort Claims. The City cannot be liable on any state law claims of the other Plaintiffs.) Therefore, Defendant City is entitled to Judgment herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of October, 2021, I electronically transmitted the attached Defendant City's Reply to Plaintiffs' Response to Defendant City's Motion for Summary Judgment to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants on file herein.

/s/ Sherri R. Katz