IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

DEMETRIA M. CAMPBELL, individually,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CJ-2015-4217
	)	
CITY OF OKLAHOMA CITY, a municipality; and DANIEL HOLTZCLAW, individually,	)	
	)	
Defendants.[1]	)	

DEFENDANT CITY OF OKLAHOMA CITY'S RESPONSE TO PLAINTIFF'S MOTION TO VACATE IN PART ORDER GRANTING DEFENDANT'S CITY OF OKLAHOMA CITY'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

COMES NOW, a defendant, the City of Oklahoma City (City) and respectfully requests this Court to deny the Plaintiff's Motion to Vacate, in part, this Court's October 4, 2018 Order granting Defendant City's Motion for Summary Judgment in part. In support of this Response, Defendant City shows as follows:

ARGUMENT AND AUTHORITIES

I. Background.

On November 5, 2013, while investigating a 9-1-1 call about a stolen vehicle, Defendant Holtzclaw made contact with Plaintiff Campbell, who matched the description of the lady driving the stolen vehicle, near the intersection the vehicle was located, placed her in investigative detention,

[1] Defendant Daniel Holtzclaw, in his official capacity as Police Officer of the Oklahoma City Police Department, was removed from the style of the case by Order of this Court on October 30, 2015.

handcuffed her, placed her in his patrol car, and later returned her to her location and released her. After this encounter, the Plaintiff picked up a to-go order at a nearby restaurant and returned to the hospital where she was visiting her daughter. When she arrived at the hospital, she decided to be examined in the E.R. for possible injuries she may have sustained during her encounter with Defendant Holtzclaw.

OCPD Lieutenant Brian Bennett responded to a call at OU Presbyterian Hospital in which a female was in the E.R. and wanted to speak with a police supervisor. The nurse who placed the 9-1-1 call simply reported that Plaintiff Campbell felt she had been assaulted by a police officer, but **never** mentioned the possibility of a sexual assault. Plaintiff Campbell informed Lieutenant Bennett that she was upset with Defendant Holtzclaw because she believed he had used unnecessary force by placing her against the wall while handcuffing her.

Plaintiff Campbell explained that Defendant Holtzclaw apologized to her when it was all over and that she told him she forgave him. At **no time** during Plaintiff Campbell's examination by the medical staff at the hospital, nor during her interview with Lieutenant Bennett, did she complain or allege that Defendant Holtzclaw had an erection during the encounter and intentionally pressed the alleged erection against her while he was handcuffing her.[2]

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[2] Plaintiff now alleges that she told Lieutenant Bennett that Holtzclaw was "perverted" during their encounter, a claim Lieutenant Bennett denies. More importantly, Plaintiff has never claimed she informed Lieutenant Bennett of any alleged "sexual misconduct" by Holtzclaw.

Plaintiff Campbell twice followed up on her E.R. visit with her personal doctor on November 11, and 29, 2013. Plaintiff Campbell claimed in her deposition that she told her doctor about Defendant Holtzclaw's erection, but such a fact is not annotated in any of her medical records.

On August 29, 2014, the Oklahoma County District Attorney filed a thirty-six count information against Defendant Holtzclaw in Oklahoma County Case No. CF-2014-5869 alleging, *inter alia*, multiple charges of Rape, Sexual Battery, and Forcible Oral Sodomy arising out of the OCPD's investigation of allegations of sexual battery and rape against Defendant Holtzclaw.[3] On November 3, 2014, Plaintiff Campbell, via her attorney, filed a Notice of Tort Claim with the Defendant City. The claim alleged damages from physical assault and battery, false arrest, and excessive force, but omitted any claim based on sexual battery. When Plaintiff Campbell was deposed on 02/15/18, she refused to state why a claim of sexual battery was omitted, relying upon the attorney-client privilege. On July 31, 2015, Plaintiff Campbell filed this instant Petition, alleging for the first time that Defendant Holtzclaw had an erection during the altercation and intentionally pressed it against her while he was handcuffing her.

Defendant City filed a Motion Dismiss Portions of Plaintiff's Petition on August 26, 2015. Pursuant to this Court's October 30, 2015, Order, Plaintiff's remaining claims were Negligent Supervision (Claim #2) and Negligent

[3] Plaintiff Campbell was not one of the alleged victims of sexual assault by Defendant Holtzclaw in his criminal case.

Infliction of Emotional Distress (Claim #4). Defendant City filed a Motion for Summary Judgment on June 25, 2018. Defendant City argued that any claim the Plaintiff may have regarding Defendant's Holtzclaw's alleged sexual assault would be outside of the scope of his employment with the OCPD. Plaintiff Campbell responded on July 26, 2018, and vehemently objected to Defendant City's characterization of Defendant Holtzclaw's actions as a sexual assault. Plaintiff Campbell restated multiple times in her response, just as she did in her deposition, that she never claimed Defendant Holtzclaw sexually assaulted her, rather, that he was "perverted." (*See* Plaintiff's July 26, 2018 Response to City's Motion for Summary Judgment: *See also* Plaintiff's 02/15/18 deposition pp. 133-135, 169, 176, 178, relevant pages attached as Exhibit 1).

This Court agreed with Defendant City, and on October 4, 2018, ordered that "no mention shall be made of Defendant Holtzclaw's claimed erection or sexual assault of Plaintiff during the trial of this case . . . ." This Court further sustained Defendant City's Motion for Summary Judgement on Plaintiff Campbell's second claim, "negligent supervision." Thus, Plaintiff Campbell's sole remaining claim against Defendant City is Claim #4, negligent infliction of emotional distress.

On November 5, 2018, Plaintiff Campbell filed a Motion to Vacate in Part that portion of this Court's Order that prohibited any mention of Defendant Holtzclaw's alleged erection. Curiously, but not cleverly, Plaintiff does not challenge the part of this Court's Order that eliminated Plaintiff's

cause of action for negligent supervision, rather, Plaintiff argues that Defendant Holtzclaw's alleged erection constitutes "sexual misconduct," and the Plaintiff should be able to argue such in front of a jury. Further, Plaintiff now claims Holtzclaw's alleged placing of an erection against the Plaintiff constituted a sexual assault. Further, Plaintiff claims that because other jurisdictions have recently allowed a municipality to be held liable for a police officer's sexual assault, this Court should too. However, as shown below, Plaintiff's claims are without merit and must be denied by this Court.

II. Plaintiff's motion is not proper pursuant to 12 O.S.Supp.2013, § 1031.1.

Plaintiff first mistakenly claims that her motion is proper pursuant to 12 O.S.Supp.2013, § 1031.1. Indeed, a partial summary adjudication order is an intermediate order that this Court may modify or alter at any time prior to final judgment. *See LCR, Inc. v. Linwood Properties*, 1996 OK 73, ¶ 11, 918 P.2d 1388, 1393. However, because this Court's October 4, 2018 Order is only a partial summary adjudication, Plaintiff's Motion is not a § 1031.1 motion.

> [A motion] challenging a partial summary adjudication was not a . . . 12 O.S. § 1031.1 motion. A partial summary adjudication which is lacking finality and appealability as a non-appealable interlocutory order is but an intermediate order in the case, remains within the trial judge's complete control to modify or alter at any time before judgment, and a motion to reconsider challenging that intermediate order is to be treated as a request for reconsideration of an intermediate ruling in the case.

Andrew v. Depani-Sparkes, 2017 OK 42, ¶ 14, 396 P.3d 210, 217 (internal citation and quotations omitted).

Defendant City submits that this determination is important because "A journal entry disposing of a § 1031.1 motion is an appealable event." *Kordis v. Kordis*, 2001 OK 99, ¶ 6, 37 P.3d 866, 869. This Court's ruling on the Plaintiff's instant motion would not be appealable as it would not be a final order or judgment in the case. "The trial court's response to that request may not hence be treated as an appealable ruling made upon a § 1031.1 motion. To qualify under the cited section, the motion must be directed to a final order or judgment." *Linwood Properties*, 1996 OK 73, ¶ 11, 918 P.2d at 1393.

Again, Defendant City agrees a partial summary adjudication order is an intermediate order that this Court may modify or alter at any time prior to final judgment. However, modification of the partial summary adjudication is not properly brought under § 1031.1. Accordingly, this Court should specifically state in its order denying Plaintiff's motion that the Plaintiff's motion should be treated as a simple request for reconsideration of an intermediate ruling, and was not a motion properly brought under § 1031.1.

III. Plaintiff should not be allowed to change her theory of the case and should be estopped from referring to Defendant's Holtzclaw's alleged actions as "sexual misconduct."

Plaintiff has testified and argued that Defendant Holtzclaw did not sexually assault her, but rather, that he was "perverted," or "perverted her" (Exhibit 1). Defendant City has argued that Plaintiff's claim that Holtzclaw was "perverted" was nothing more than an opportunistic attempt to piggyback

on the claims from the victims in Holtzclaw's criminal trial. Plaintiff Campbell's motion to reconsider is further evidence of Defendant City's contention.

Footnote 1 in the Plaintiff's motion alleges a "hotly contested discovery dispute" in Defendant Holtzclaw's civil lawsuits in federal court. Footnote 1 is telling in that Plaintiff's counsel in the current case is not involved in any of Holtzclaw's federal civil suits. Plaintiff's counsel not only fails to explain the relevance of this note to the present motion, but also fails to advise the Court that, in the "dispute," Defendant City contends that its counsel simply asked his client for information to defend a lawsuit. This begs the question, where is Plaintiff's counsel getting her information from? Conversely, why would the plaintiffs' attorneys in the federal cases care so much about the instant case? Simply put, the plaintiffs in the federal cases need Plaintiff Campbell to establish notice of Defendant Holtzclaw's alleged proclivity towards sexual assaults (not perversion). Defendant City can think of no clearer example of a plaintiff attempting to piggyback on the claims of others than the instant case.

Plaintiff Campbell never told anyone that she believed that Defendant Holtzclaw had an erection, nor had "perverted" her until she filed her Petition in this case a year after Holtzclaw was criminally charged, and nearly two years after her encounter with Holtzclaw. Plaintiff Campbell admitted during her deposition that she never told anyone that she believed Holtzclaw had sexually assaulted her, merely that she believed he was perverted (Exhibit 1).

Plaintiff Campbell even objected to Defendant City's characterization of the Plaintiff's claims as a sexual assault in her response to Defendant City's Motion for Summary Judgment.

Now, Plaintiff seeks to characterize Holtzclaw's alleged erection as "sexual misconduct." This characterization is contrary to her claim up until this point, and only serves a purpose outside of the instant case. "Sexual misconduct" describes an **intentional act**, like an assault. Moreover, Plaintiff's argument that the sexual misconduct should be considered within the scope of employment because other jurisdictions have allowed sexual assaults to be so considered, is evidence that Plaintiff is attempting to change the nature of her original claim and should be judicially estopped from doing so.

> Oklahoma jurisprudence recognizes the doctrine of judicial estoppel, which provides that a party **who has knowingly assumed a particular position dealing with matters of fact is estopped from assuming an inconsistent position** to the detriment of the adverse party. The doctrine applies to inconsistent positions assumed in the course of the same judicial proceeding or in subsequent proceedings where the parties and questions are identical. **The doctrine's purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment**. The doctrine applies only to prevent a party from advancing a position inconsistent with a court's determination of a matter of fact made by the court on the basis of that party's assertions.

Bank of Wichitas v. Ledford, 2006 OK 73, ¶ 23, 151 P.3d 103, 112 (quotations and footnotes omitted, emphasis added).

In the present case, in her Response to Defendant City's Motion for Summary Judgment, Plaintiff twice argued "Campbell did not testify that she was sexually assaulted by Holtzclaw, she testified his actions made her believe that he was perverted." (Plaintiff's Response to Defendant City's Motion for Summary Judgment, pp. 7, 8). Later, Plaintiff argued, that the "City may not have given Holtzclaw permission to . . . subject her to perversion (whether voluntary or involuntary). . . ." (Plaintiff's Response to Defendant City's Motion for Summary Judgment, pp. 11).

Clearly, Plaintiff's theory was not one of an intentional sexual assault or intentional sexual misconduct, but that of Plaintiff Campbell's belief that Holtzclaw was perverted, whether voluntary, or involuntary. The Plaintiff should be estopped from making such a drastic fundamentally inconsistent change in her theory of the case. Accordingly, Plaintiff's motion to reconsider should be denied.

IV. Plaintiff's reliance on cases outside of this jurisdiction is misplaced.

The Plaintiff has changed her theory from believing Holtzclaw was perverted to believing he committed sexual misconduct because the Supreme Court of Indiana recently held that a police officer's sexual assault may be considered within the scope of employment, and thus, a municipality may be liable for the intentional tort. *See Jennifer Cox et al., v. Evansville Police Department et al.*, 107 N.E.3d 453 (Ind. 2018). However, as shown below,

Indiana law relied on in *Cox* is different than the law in Oklahoma, and thus, any reliance on the Indiana Supreme Court is misplaced.

Under the Oklahoma Government Tort Claims Act (OGTCA), 51 O.S.2011, § 151 *et seq.*, scope of employment is statutorily defined as "performance by an employee acting in **good faith** within the duties of the employee's office or employment or of tasks lawfully assigned by a competent authority. . . ." 51 O.S.Supp.2018, § 152(12) (emphasis added). "Scope of employment means performance by an employee acting in good faith within the duties of his office or employment or of tasks lawfully assigned by a competent authority." *Speight v. Presley*, 2008 OK 99, ¶ 12, 203 P.3d 173, 176. Further, "employees are not acting within the scope of their employment if they are acting in bad faith." *Bd. of Cty. Comm'rs of Delaware Cty. v. Ass'n of Cty. Comm'rs of Oklahoma Self-Ins. Grp.*, 2014 OK 87, ¶ 15, 339 P.3d 866, 870.

The Indiana Government Tort Claims Act, Ind. Code, Title 34, Art. 13, Ch. 3 (IC 34-13-3-0.1 to IC 34-13-3-25), contains no similar definition of scope of employment requiring the employee's actions to have been performed in good faith. Indeed, a search of the Indiana Supreme Court's opinions on their Government Tort Claims Act reveals a lack of a good faith requirement except in specific instances not at issue in this case. In fact, the case the Plaintiff relies on specifically evaluated the issue "under Indiana common law" as opposed to a reference to any statutory requirements. *Cox*, 107 N.E.3d at 460. The Indiana Supreme Court never once mentioned "good faith" in the

opinion. *Cox*, 107 N.E.3d at 453-468. Ultimately, the Indiana Supreme Court found that when a police officer misuses authority to commit a sexual assault, the city may be liable if the assault arose naturally from the officer's employment activities. *Cox*, 107 N.E.3d at 460-465.

Further, contrary to Oklahoma law, the Indiana Supreme Court held:

> This means that the scope of employment—which determines whether the employer is liable—may include acts that the employer expressly forbids; that violate the employer's rules, orders, or instructions; that the employee commits for self-gratification or self-benefit; that breach a sacred professional duty; or that are egregious, malicious, or criminal.

Cox, 107 N.E.3d at 461. The Oklahoma Supreme Court has long held that a municipality is not liable for malicious acts committed in bad faith by police officers. *See Parker v. City of Midwest City*, 1993 OK 29, 850 P.2d 1065, 1067-1068.

The Indiana Supreme Court's holding was based on Indiana's common law theory of liability under its interpretation of *respondeat superior*. *Cox*, 107 N.E.3d at 460-465. While Oklahoma has not abandoned all common law theories in tort, the Legislature has codified the means for a plaintiff to recover against a government entity in tort.

> [T]he OGTCA, [is] the exclusive remedy for an injured plaintiff to recover against a governmental entity in tort. Subject to specific limitations and exceptions, governmental immunity was waived under the OGTCA and governmental accountability was extended to torts for which a private person would

> be liable, **unless they were committed in bad faith or in a malicious manner**.

Bosh v. Cherokee Cty. Bldg. Auth., 2013 OK 9, ¶ 15, 305 P.3d 994, 1000, as corrected (June 28, 2013) (emphasis added). Unlike Indiana, an employee is only acting within the scope of employment if the employee is acting in "good faith." 51 O.S.Supp.2018, § 152(12). It cannot be said that a sexual assault is ever committed in a "good faith" furtherance of an employee's duties. "As a general rule, it is not within the scope of an employee's employment to commit an assault on a third person." *Bosh*, 2013 OK 9, ¶ 12, 305 P.3d at 999 (citation omitted). Accordingly, this Court should not be persuaded by the Indiana Supreme Court's opinion in *Cox* as the law in Oklahoma does not allow a municipality to be liable for acts committed in bad faith.

Similarly, the Plaintiff cites, without even minimal analysis, several cases from other jurisdictions. Specifically, the Plaintiff cites *Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148 (Del. 2018); *Doe v. City of San Diego*, 35 F.Supp.3d 1195 (S.D. Cal. 2014); *Mary M. v. City of L.A.*, 814 P.2d 1341 (Cal. 1991); and *Applewhite v. Baton Rouge*, 380 So.2d 119 (La. Ct. App. 1979)[4] for her contention that multiple jurisdictions may allow a municipality to be held liable for a sexual assault by a police officer. However, an actual

[4] Plaintiff also cites *White v. County of Orange*, 166 Cal.App.3d 566 (Cal. Ct. App. 1985). However, Plaintiff then attributes a quote to that case that is actually quoted from *Mary M.*, a case not cited or even mentioned in *White*. Regardless, *White* is just as inapplicable as *Mary M.*

reading of each of those cases reveals that none of them rely on or even mention a good faith requirement.

Moreover, the law in Delaware on scope of employment is based solely on the Restatement (Second) of Agency, and not on "its statutes" as the Plaintiff attempts to mislead (Plaintiff's Motion, p. 9) *See Sherman*, 190 A.3d at 154-155. Plaintiff also cites the Delaware case for her contention that once an arrestee is in the custody of a police officer, she may not resist without committing a crime. This contention ignores the fact that in Oklahoma:

> As a general rule, one may reasonably resist an unlawful arrest. The right to resist an illegal arrest is a common law right providing that if the officer had no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest.

State v. Nelson, 2015 OK CR 10, ¶ 28, 356 P.3d 1113, 1121 (internal citations and quotations omitted). Thus, if a police officer uses his arrest powers to effectuate a sexual assault, the arrestee may rightfully resist without fear of committing a crime contrary to what the Plaintiff inexplicably argues.

Also, similar to Indiana, the State of California's Government Tort Claims Act, Cal. Gov't Code § 810 *et seq.* (Supp.2013) does not define scope of employment to require the act to be performed in good faith. The federal case from the Southern District of California is an opinion on a partial summary judgement in which the plaintiff sought to have that court determine that the sexual assault had actually occurred, and not whether the city was liable. Finally, just like Indiana and California, Louisiana's

Government Tort Claim Act, La. Stat. Ann. § 13:5101 *et seq.* (2010) does not define scope of employment to require the act to be performed in good faith. As such, because the law in the jurisdictions of the cases relied on by the Plaintiff is different than the law in Oklahoma, this Court should not be persuaded by those cases and deny Plaintiff's motion to reconsider.

Plaintiff also alleges that Defendant City's authorities cited in its Motion for Summary Judgment do not provide a legal or rational basis for granting summary judgment. Inexplicably, Plaintiff argues that because two of the cases cited do not involve police officers they are "distinguishable on that basis alone" (Plaintiff's Motion, p. 5), and Defendant City's reliance is "misplaced for reasons other than not involving police officer sexual misconduct – which Plaintiff submits is a distinguishing material fact." (Plaintiff's Motion, p. 6). Defendant City is perplexed as to why the Plaintiff argues that principles of law do not apply from case to case if the defendant in one case holds a different occupation than the defendant in another. Plaintiff cites no authority for this absurd contention, and indeed, there is none.

Defendant City relied on *Garst v. University of Oklahoma*, 2001 OK CIV APP 144, 38 P.3d 927 for the legal principal that "one who intentionally tries to deceive another does not act in good faith." *Garst*, 2001 OK CIV APP 144, ¶ 11, 38 P.3d at 931. This was in response to Plaintiff's claim during her deposition that Holtzclaw and Lieutenant Bennett intentionally

misrepresented the truth. *Garst* is sound law on this subject regardless of the occupation of the one who is intentionally trying to deceive.

Defendant City also relied on *N.H. v. Presbyterian Church*, 1999 OK 88, 998 P.2d 592 for its contention that it is inconceivable that a sexual assault is ever within the scope of employment. *N.H.*, 1999 OK 88, ¶ 18, 998 P.2d at 599-600. This was in response to Plaintiff's claim that Holtzclaw placed his erection on the Plaintiff for two minutes and "perverted her." *N.H.* is sound law on this subject regardless of the occupation of the one who is committing the sexual assault. Plaintiff also mischaracterizes the assailant in *N.H.* as a "church employee." However, the assailant was actually a minister, who, like a police officer, is held in a certain regard of power and authority. A minister may not be able to place the same physical hold on a victim as a police officer, but most assuredly may place a similar emotional hold on his victims.

Finally, Defendant City relied on *Shaw v. City of Oklahoma City*, 2016 OK CIV APP 55, 380 P.3d 894 for the contention that summary judgment is proper when plaintiff believes an officer's illegal acts were intentional. *Shaw*, 2016 OK CIV APP 55, ¶ 20, 380 P.3d at 899. Plaintiff acknowledges this case involves a police officer, but claims it is inapplicable because it does not involve a sexual assault. Again, Plaintiff fails to support this incorrect legal reasoning with any authority. *Shaw* is sound law regardless of the intentional illegal act committed by the police officer.

Plaintiff argues that this Court has little guidance on the issue of scope of employment in matters involving sexual assault by a police officer. While

there is no Oklahoma Supreme Court case analyzing the exact fact pattern of sexual assault by a police officer, guidance may be found in the Oklahoma Court of Civil Appeals. In the unpublished opinion of *Sanders v. The City of Oklahoma City, et al.*, Case No. SD-99,964 (OK CIV APP, DIV 4, May 4, 2004) (unpublished)[5] (Attached as Exhibit 2) the plaintiff, a private security guard, alleged that she had been sexually assaulted by a police officer after they both responded to a call. The City of Oklahoma City filed a motion to dismiss arguing that any unlawful or illegal act committed by the police officer was outside the scope of his employment. *Sanders*, Case No. SD-99,964, slip op. at 4. The trial court agreed and granted the City's motion to dismiss. *Id.* The Plaintiff appealed, and although the Oklahoma Court of Civil Appeals ultimately ruled in favor of the City on a different legal theory, the Court of Civil Appeals did recognize that, "In its argument before the trial court, City correctly contended that it was not liable under the GTCA for the criminal acts of its employee." *Sanders*, Case No. SD-99,964, slip op. at 6. Thus, contrary to the Plaintiff's contention in the present case, guidance on this issue may be found within this jurisdiction.

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[5] Defendant City recognizes Okla. Sup. Ct. R. 1.200(c)(5), Title 12, Ch. 15, App. 1 (Supp.2014), disfavors the citation of unpublished opinions. However, Defendant City feels duty bound to cite this case pursuant to Local Court Rule 22, *Rules for the Seventh and Twenty-Sixth Judicial Districts*, which requires counsel to inform the Court if the issue had been previously submitted and ruled on by a different judge. This issue was previously raised and ruled on before the Honorable Norma D. Gurich, then District Judge, in Oklahoma County Case No. CJ-2002-7838, *Sanders v. The City of Oklahoma City, et al.*

Similarly, in Oklahoma County Case *Huff v. The City of Oklahoma City et al.*, Case No. CJ-2003-8330,[6] the trial court again granted the City's motion to dismiss holding that a police officer's rape of an individual "could not be within the scope of employment of an employee of a municipality as defined by 51 O.S. § 152[12] and case law." (Order of Dismissal attached as Exhibit 3). Accordingly, this Court should hold, as it has in the past, that the sexual assault by a police officer is outside the scope of his employment and deny Plaintiff's motion to reconsider.

CONCLUSION

For the reasons set out above, this Court should explicitly hold that Plaintiff's motion is not a § 1031.1 motion, but rather a simple motion to reconsider, and deny the motion to reconsider finding it is completely without merit.

Respectfully Submitted,

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[6] Submitted pursuant to Local Court Rule 22, *Rules for the Seventh and Twenty-Sixth Judicial Districts.*

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CERTIFICATE OF SERVICE

This is to certify that on the 26th day of November 2018, a true and correct copy of the above Response to Plaintiff's Motion to Vacate was mailed via U.S. Mail to:

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ATTORNEYS FOR DEFENDANT HOLTZCLAW

ASSISTANT MUNICIPAL COUNSELOR

daughter." I said, "I did not need this. I'm going to my car" -- I said, "from my car to the building, he runs up on me, snatches me up, has me up against the wall, handcuffs me." I said, "And it all could have been avoided had he listened."

Q Okay.

A I said, "He wouldn't listen to me."

He said, "What do you mean 'he wouldn't listen?'" He said, "What are you -- were you trying to tell him something?"

And I said, "Yes, I was asking him if he would just tell me who he thought I was. I told him that I could have proven to him that I was not the individual." I said, "But he wouldn't hear that. He wouldn't let me explain to him anything. He wouldn't let me" -- I said, "He wouldn't explain to me, he wouldn't listen, he just" -- I said, "He was hateful." I said, "And I don't deserve that. He was hateful, he was" -- I said, "He's prejudiced against" -- I said, "He made me feel like trash." I said, "He was perverted."

I said, "And I didn't need this." I said, "My life has been hectic, I don't need him and this type of behavior." I said, "If he had said from the beginning -- I had my license, I had proof of insurance." I said, "In my purse, I even have the title to the car." I said, "But

he wouldn't explain and he wouldn't allow me to explain."

He said, "I need more detail, from you, what happened." I told him in detail what happened. I said, "He was perverted while I was against the wall." I said, "He slammed my head against the wall as hard as he could." I said, "He was angry." I said, "And the one mistake that Oklahoma City has made is hiring him as an officer. He does not deserve to be called one of Oklahoma City's finest." I said, "He is hateful."

He said, "How do you know?" I said, "You could see it in his eyes." I said, "He was almost like a ravaged animal." I said, "He -- he wouldn't listen at all." I said, "I don't know" -- I said, "I really didn't believe he was an officer because of his behavior." I said, "It's -- it's unacceptable behavior." I said, "And if Oklahoma City knows, like I know, they would get him off of the force because I'm afraid of what he may do to the next black person."

He said, "Ms. Campbell, how do you know that he was prejudiced?" I said, "His eyes." I said, "He looked at me as though I were trash," I said, "as though I were a nobody." And I said, "I'm sure what he thought was that he had grabbed an uneducated black woman, someone that he could bully and push around and do whatever," I said, "and I honestly believe he had other intentions for me." I

said, "But I peed my pants so that he wouldn't take me somewhere and do something to me."

He said, "Ms. Campbell, I'm sorry." He said, "I'm sorry." He said, "I need to tell you what my officer has said." He said, "And, again, I don't want you to think that I am taking up for him or saying that he's right and you were wrong." He said, "My officer has told me that there was a call with a lady matching your description, from a stolen vehicle." He said, "He says that he took you into custody for questioning."

I told him, "Then he lied to you because he never asked me a question and he never allowed me to answer anything, because there was never a question asked."

Q Okay. As you sit here today, have you described for me, to the best of your recollection, your conversation with Sergeant Bennett on this occasion?

A Yes.

Q Okay. Was Bennett in uniform?

A Yes.

Q Okay. Do you recall -- did his uniform look any different than what you recalled Holtzclaw's uniform?

A No.

Q Okay. I think I asked you this. If -- I'm going to ask again, though, just in case. Prior to this

MS. D'ANTONIO: Thank you.

MR. SOLOMON-SIMMONS: Thank you, sir.

MR. SMITH: You're welcome. Don't try the stare down.

MR. SOLOMON-SIMMONS: You are funny.

MR. SMITH: What?

MR. SOLOMON-SIMMONS: I said you are funny, sir.

MR. SMITH: Okay. Glad you think so.

Q **(By Mr. Smith)** Have you ever seen those, ma'am?

A Yes.

Q Okay. And for the record, what are they?

A Medical records.

Q Okay. Did you ever tell anybody, on the night of this incident, at the hospital, that Daniel Holtzclaw perverted you?

A Yes.

Q Who did you tell at the hospital?

A Lieutenant Brian Bennett.

Q Okay. When I meant from the hospital -- and that was a poorly-worded question.

Did you tell anybody employed by the hospital that Daniel Holtzclaw perverted himself?

A No.

Q Okay. So is that why it's not in these medical records?

MS. D'ANTONIO: You can tell him when you're done.

A I'm -- I'm done.

Q **(By Mr. Smith)** Okay. First of all, it's five pages, not four. I apologize.

A Uh-huh.

Q Okay. The first two purport to be what you told Lieutenant Bennett. And I understand you've never seen that document before today, until I just gave it to you. Do you agree with what -- that that's what you told Lieutenant Bennett, what's reported in there on the first two pages?

A Not all of that. Not all of that.

Q Okay. So some of it is what you told him?

A Yes.

Q Okay. Can you tell me what it is that you did tell him, or is it easier to go and say what you didn't tell him?

A I did tell him that Holtzclaw had me against the wall.

Q Okay.

A That he was perverted while he had me against the wall.

Q Okay.

A I told him that he would not explain why he had

Q Okay.

A Second sentence. I did not tell him that I thought he used unnecessary force by placing me against the wall. I told him that he placed me against the wall and that he was aggressive.

Q Okay.

A I told him that he was perverted, that -- there's so much in here that I didn't say, but...

Q Okay. Well, let's talk about -- you keep saying the word "perverted." Is that the word you used?

A "Perverted."

Q That was the word you told him?

A Yes --

Q Okay.

A -- "perverted."

Q All right. And I understand that he summarized some of the things that you said in the second paragraph, at least that's my take on it. Is that a correct assumption, that he's summarizing some of the things that you have told him about?

MS. D'ANTONIO: I'm going to object to speculation.

Q **(By Mr. Smith)** Ma'am, you can answer it.

A Oh, I'm sorry. Repeat that, please.

Q Well, we can do it the hard way and I can go

ORIGINAL

EXHIBIT 2

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
MAY 04 2004
MICHAEL S. RICHIE
CLERK

V. CAROL SANDERS,)
)
Plaintiff/Appellant,)
)
vs.) Case No. 99,964
)
THE CITY OF OKLAHOMA CITY,)
a municipal corporation, and)
THE OKLAHOMA CITY POLICE)
DEPARTMENT,)
)
Defendants/Appellees.)

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE NOMA D. GURICH, TRIAL JUDGE

AFFIRMED

J. Matthew DeVilliers
Oklahoma City, Oklahoma — For Plaintiff/Appellant

William R. Burkett
MUNICIPAL COUNSELOR
Richard C. Smith
ASSISTANT MUNICIPAL COUNSELOR
Oklahoma City, Oklahoma — For Defendants/Appellees

Rec'd (date) 5-4-04
Posted
Mailed
Distrib
Publish ___yes ✓ no

OPINION FROM JERRY L. GOODMAN, JUDGE:

Plaintiff V. Carol Sanders appeals the trial court's September 29, 2003, order granting the City of Oklahoma City and the Oklahoma City Police Department's (collectively City) motion to dismiss. The appeal was assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(a)(2), 12 O.S.2001, ch. 15, app. 1. Based upon our review of the appellate record and applicable law, we affirm.

FACTS

Plaintiff was a private security guard assigned to Bricktown in Oklahoma City. On the night of September 5, 1999, she and another security guard, along with two Oklahoma City police officers, responded to a call. Shortly thereafter, City's employee, a captain with the Oklahoma City Police Department, arrived. It is not clear from this record if he was driving a police vehicle. The captain ordered the two other officers on the scene to leave, and ordered Plaintiff to remain with him in his vehicle. According to Plaintiff's affidavit, she believed the captain was intoxicated, but felt she had no choice but to obey his orders, as she believed he was acting in his official capacity when he ordered the other on-duty officers to leave. While in the captain's vehicle, Plaintiff alleged he verbally abused her for

several hours and then he committed a sexual assault upon Plaintiff by inappropriately touching her.

Following the assault, Plaintiff filed a complaint with City. The matter was investigated and the captain was charged with sexual battery. He later pled guilty to a reduced charge of outraging public decency.

Plaintiff filed suit[1] against City March 31, 2003. Plaintiff's petition alleged City knew or should have known that the captain had an alcohol and/or drug addiction problem and that City failed to protect the general public, and specifically the Plaintiff, from certain off-duty acts of that officer. Plaintiff alleged City had a duty to protect Plaintiff; that City breached that duty by failing to monitor the behavior of the police captain; and that on September 5, 1999, the captain "committed acts of mental abuse and degradation against the Plaintiff." Plaintiff alleged the captain, now deceased, was a "rogue" officer who was chemically dependent and who sexually assaulted and harassed Plaintiff. The captain was off-duty at the time he assaulted Plaintiff, although Plaintiff alleges that the captain was "acting in his apparent official capacity."

[1] This is the second time suit was filed in this case. The first suit was filed and dismissed.

City filed a motion to dismiss and argued first that the Oklahoma City Police Department was not a separate legal entity and that any claim against it should be dismissed. City next contended that any unlawful or illegal act done by the police captain while on duty would clearly be outside the scope of his employment with City. Therefore, Plaintiff's claims against City, governed by the Oklahoma Governmental Tort Claims Act, 51 O.S.2001, §§ 151-172 (GTCA), would be subject to dismissal. Likewise, City could not be liable for the captain's off-duty actions.

In an order filed September 29, 2003, the trial court found that Plaintiff's petition did not state a cause of action and further found that Plaintiff would not be able to state a cause of action under these facts. Therefore, permitting Plaintiff to amend her petition would be futile. (*See* 12 O.S.2001, § 2012(G)). The trial court then granted City's motion to dismiss. Plaintiff appeals.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim will not be granted, nor will a petition be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Frazier v. Bryan Mem'l Hosp. Auth.*, 1989 OK 73, 775 P.2d 281;

Bettis v. Brown, 1991 OK CIV APP 93, 819 P.2d 1381. The review of a motion to dismiss involves a de novo consideration of the petition to determine the legal sufficiency of the claim. We are permitted to construe the petition in connection with any exhibits attached to it. *Indiana Nat'l Bank v. State Dept. of Human Servs*, 1994 OK 98, 880 P.2d 371. Further, we will take as "true all of the challenged pleading's allegations together with all reasonable inferences which may be drawn from them." *Id.* at ¶ 3, 880 P.2d at 375.

ANALYSIS

Plaintiff's petition alleges that City failed to monitor the on-duty conduct of its employee and to recognize his alcohol dependence; failed to provide appropriate counseling and treatment; and failed to re-assign the captain to duties that did not put him in contact with the public. City's breach of these duties, according to Plaintiff, could forseeably cause harm to members of the general public, and thus to Plaintiff.

We initially note that defendant Oklahoma City Police Department (OCPD) remained a named defendant in the trial court's September 29, 2003, order granting City's motion to dismiss. This was so despite the fact Plaintiff dismissed the

OCPD as a defendant on May 9, 2003. For purposes of clarity, we affirm the dismissal of the OCPD as a defendant in this matter.

We next note that Plaintiff is not alleging the captain was acting within the scope of his employment as a police officer when he assaulted her. Nor does Plaintiff allege that City had a duty to monitor or control the captain's off-duty behavior. Plaintiff does allege that City should have monitored the captain's on-duty behavior to the point that it could have deduced he was chemically dependent and a possible threat to the public. Then, armed with that knowledge, City should have acted to prevent the captain from being in contact with the general public when he was on duty. Further, because City should have known its officer was chemically dependent, City breached a duty to Plaintiff when, while off duty but acting in his apparent official capacity, the captain assaulted Plaintiff.

In its argument before the trial court, City correctly contended that it was not liable under the GTCA for the criminal acts of its employee, assuming the employee was on duty at the time. Further, City also correctly contended that because its employee was off duty, City was immune from suit. On that basis alone, City prevails.

While we agree City would be entitled to prevail on this basis, Plaintiff's claim is not that City is liable for the criminal acts of its employee, but rather that

City was in the best position to observe the actions of its employee and determine that his chemical dependancy constituted a potential hazard to the public, but yet failed to act to protect Plaintiff. Therefore, the cases relied upon by City and, by extension, the trial court, do not directly address the issue raised by Plaintiff.

To sustain a negligence action, Plaintiff must prove: (1) a duty owed by the defendants to the plaintiff to use ordinary care; (2) a breach of that duty; and (3) injury proximately caused by the defendants' breach of duty. *Thompson v. Presbyterian Hosp.*, 1982 OK 87, 652 P.2d 260; *Rose v. Sapulpa Rural Water Co.*, 1981 OK 85, 631 P.2d 752. The circumstances proved "must warrant the conclusion that a preponderance of the evidence discloses facts and circumstances establishing a reasonable probability that defendant's negligence was the proximate cause of the injury . . . . [I]f a plaintiff fails to meet his burden of sufficiency of proof of evidence to establish a prima facie issue of causation where the probabilities are evenly balanced or less, a defendant may be entitled to [judgment] . . . ." *Grayson v. State By and Through Children's Hosp. of Okla.*, 1992 OK CIV APP 116, 838 P.2d 546.

The existence of a duty under these facts is a question of law for the trial court. Under these facts, we conclude as a matter of law that Plaintiff failed to establish the existence of a duty owed to her by City. Further, assuming arguendo

such a duty existed, we find no causal connection between the police captain's state of chemical dependence and the sexual battery he committed on Plaintiff.

As to the existence of a duty, we again note that Plaintiff is not alleging City had a duty to protect her from its employer's off-duty acts. Thus, this is not the typical "failure to provide police protection" case as City argues.[2] Plaintiff argues that City should have known that a chemically dependent police officer constituted a general hazard to the public, and to Plaintiff in particular. In essence, Plaintiff contends this is more akin to a negligent supervision and control case. *See Cooper v. Millwood Indep. School Dist. No. 37*, 1994 OK CIV APP 114, 887 P.2d 1370. However, Plaintiff cites no other statutory or authoritative case law to support the existence of such a duty and we find none.

Finally, we conclude, as did the trial court, that there is no causal connection between the captain's intoxication and his assault on Plaintiff. Again, even had City determined its employee to be chemically dependent, it was not reasonably forseeable that the employee, while off duty, would commit a sexual assault.

The trial court's dismissal of Plaintiff's case is affirmed.

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[2] *See, generally*, 51 O.S. Supp. 2003 § 155(6).

AFFIRMED .

TAYLOR, P.J., and STUBBLEFIELD, J., concur.

May 4, 2004

IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY

STATE OF OKLAHOMA

KRISTIE LYNN HUFF, Plaintiff, v. THE CITY OF OKLAHOMA CITY A governmental municipality, and JOHN BOHAN, individually and in his official Capacity as a police officer for the City of Oklahoma City, Oklahoma, an individual, Defendants.	)	Case No. CJ-2003-8330

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

DEC 30 2003

PATRICIA PRESLEY, COURT CLERK
by _____ Deputy

ORDER OF DISMISSAL

NOW on this 19th day of December, 2003, there comes on for hearing in front of me the undersigned Judge of the District Court, upon the Motion to Dismiss of the Defendant City of Oklahoma City. The Plaintiff appears by her counsel, O. Clifton Gooding, the Defendant City appears by its counsel, Richard C. Smith, Assistant Municipal Counselor, and Defendant Bohan appears not. The Court, after reviewing the Court file, including the Petition, the Motion to Dismiss of the Defendant City, the Plaintiff's Response and Amended Response to the Defendant City's Motion to Dismiss, the Defendant City's Reply and the Plaintiff's Surreply, and after hearing the oral argument of counsel, finds that the Plaintiff's allegations that Defendant Bohan raped the Plaintiff on two separate occasions, could not be within the scope of employment of an employee of a municipality as defined by 51 O.S. § 152(9) and case law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Defendant City's Motion to dismiss filed herein should be, and the same hereby is, SUSTAINED. Defendant City is therefore, dismissed from this action.

NANCY L. COATS
David Harbor
Judge of the District Court

APPROVED:

O. Clifton Gooding, OBA #10310
3535 NW 58th, Suite 600
Oklahoma City, OK 73112
Attorney for Plaintiff

I, PATRICIA PRESLEY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 30 day of DEC, 20 03
PATRICIA PRESLEY, Court Clerk
By _____ Deputy

WILLIAM R. BURKETT
Municipal Counselor

By: _____
Richard C. Smith, OBA #8397
Assistant Municipal Counselor
200 N. Walker, Suite 400
Oklahoma City, OK 73102
(405) 297-2451 FAX (405) 297-3851
Attorney for Defendant City of Oklahoma City

CERTIFICATE OF MAILING

This is to certify that on the 30th day of December, 2003 a true and correct file-stamped copy of the above and foregoing Order of Dismissal was mailed to: O. Clifton Gooding, 3535 NW 58th, Suite 600, Oklahoma City, OK 73112, Attorney for Plaintiff; and John Coyle, III, 119 N. Robinson, Suite 320, Oklahoma City, OK 73102, Attorney for Defendant Bohan.

_____
Assistant Municipal Counselor

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