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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

CALVIN DONALD OSTLER, as personal representative of the Estate of Lisa Marie Ostler, Plaintiff, v. HOLLY PATRICE HARRIS, ZACHARY PAUL FREDERICKSON, TODD ALLAN BOOTH, RONALD PAUL SEEWER, JR., BRENT LEE TUCKER, and SALT LAKE COUNTY, a political subdivision of the State of Utah, Defendants.	**PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISQUALIFY THOMAS D. FOWLKES AS EXPERT WITNESS** Case No. 2:18-cv-00254-001 Judge Bruce S. Jenkins

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INTRODUCTION

For at least seven months, in violation of Rule 26(e), Defendants' counsel withheld from Plaintiff, but provided to Dr. Thomas D. Fowlkes ("Fowlkes"), Lisa's medical records subpoenaed by Defendants. Defendants' counsel only provided the documents to Plaintiff *after* the discovery period expired and expert reports had been exchanged.

In response to Plaintiff demonstrating that Fowlkes wholly failed to provide any information establishing any qualification he has to testify as an expert about (1) perforated gastrointestinal ulcers ("PGUs") or peritonitis, or (2) nursing standards or care, Defendants conceded that Fowlkes would *not offer an opinion* about PGUs or peritonitis (although Fowlkes's Rule 26(a)(2)(B) report ("Fowlkes Report") [ECF 193-1] is replete with such opinions) and misrepresented that Fowlkes's CV describes experience with nursing that is *nowhere* found in that CV or anywhere in the Fowlkes Report.

Nowhere have Defendants demonstrated that Fowlkes has applied any appropriate methodology, connecting undisputed facts and data to his conclusions, that would serve any usefulness to a jury in determining questions of fact or law. Also, they have not refuted the utter neglect or misleading minimization by Fowlkes of uncontroverted material evidence, which demonstrates his failure to utilize any acceptable methodology.

Fowlkes failed to disclose any source for any standard of care referenced by him. Finally, any opinion by Fowlkes regarding the thoughts, intentions, or attempts of Defendants or the ultimate legal issue of "deliberate indifference" is inadmissible.

ARGUMENT

I. FOR SEVEN MONTHS, DEFENDANTS' COUNSEL WITHHELD LISA'S SUBPOENAED MEDICAL RECORDS, WHICH FOWLKES RELIED UPON; HENCE, SEVERE SANCTIONS SHOULD BE IMPOSED UPON DEFENDANTS.

After filing the motion to disqualify Fowlkes as an expert witness ("Motion to Disqualify") [ECF 193], Plaintiff's counsel learned for the first time—long after the discovery cut-off and after expert reports had been exchanged—that in May or June of 2019, Defendants' counsel obtained numerous medical records from several of Lisa's medical providers. In blatant violation of Fed. R. Civ. P. 26(e), Defendants' counsel had not provided those documents to Plaintiff, even though they *had* provided the documents to Fowlkes, whose report relied on them. *See* Fowlkes Report, 17–18, 22–23.

In February 2019, Plaintiff consented to Defendants subpoenaing medical records on the condition that they provide "written assurance that copies of all such documents will be forwarded to [Plaintiff] immediately upon [Defendants'] receipt of them."[1] On February 14, 2019, Defendants' counsel, Ms. Ramos, stated as follows regarding the provision to Plaintiff of documents subpoenaed by Defendants: "The rule provides that you get a copy of those records. I don't have an issue with that." Anderson Decl., ¶ 3. Ten months later, in a letter from Defendants' counsel responding to Plaintiff's subpoena duces tecum served on Fowlkes, Defendants' counsel described documents from Lisa's medical providers as

[1] Letter from Walter Mason, February 4, 2019, Exhibit "A" to Declaration of Ross C. Anderson ("Anderson Decl."), attached hereto as Exhibit "1."

"Subpoenaed, not produced in discovery."[2] The next day, in a teleconference, Ms. Ramos represented (with Ms. Romano present) that the documents referenced as "Subpoenaed, not produced in discovery" were subpoenaed by Defendants but were not received by them. (Anderson Decl. ¶ 5.) Later, Ms. Ramos corrected that misrepresentation, saying documents from three of Lisa's medical providers *had* been obtained by Defendants through subpoenas and provided to Dr. Fowlkes, but *not* been provided to Plaintiff.[3] Ms. Ramos thereafter represented the records were received by her office in May or the first part of June 2019.[4] Defendants' counsel purported not to have known about receiving the documents, *even though Defendants' counsel had provided them to Fowlkes*.[5]

In short, Defendants' counsel obtained Lisa's medical records and provided them to Fowlkes, who relied upon them in rendering his opinion, but the documents were withheld from Plaintiff for at least 7 months (and, hence, withheld from Plaintiff's expert witnesses), until after expert reports had been completed and after the discovery cut-off. For that reason alone, the Court is urged to fashion an appropriate sanction, including the preclusion of Fowlkes's testimony, entering default judgment as to liability against Salt Lake County ("County") (considering the pattern throughout this matter of the County and Defendants' counsel withholding, failing to preserve, and destroying access to evidence), and awarding Plaintiff a reasonable attorney's fee, pursuant to Fed. R. Civ. P. 26(e) and 37(c)(1).

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[2] Letter from Jacque Ramos, December 16, 2019, Exhibit "B" to Anderson Decl.
[3] Letter from Jacque Ramos, December 20, 2019, Exhibit "C" to Anderson Decl.
[4] Email from Jacque Ramos, December 23, 2019, Exhibit "D" to Anderson Decl.
[5] Letter from Jacque Ramos, December 20, 2019, Exhibit "C" to Anderson Decl.

II. DEFENDANTS DO NOT CONTEND FOWLKES HAS DESCRIBED ANY EXPERTISE REGARDING PERFORATED GASTRO-INTESTINAL ULCERS OR PERITONITIS; THEREFORE, HE SHOULD BE PRECLUDED FROM TESTIFYING ABOUT ANYTHING RELATED THERETO.

In his Motion to Disqualify, Plaintiff demonstrated that Fowlkes did not present *any* information in the Fowlkes Report relating to any qualification to opine as an expert about PGUs or peritonitis, which caused Lisa Ostler's death. Motion to Disqualify, at 1, 3–5. In their opposition memorandum ("Mem. Opp.") [ECF 201], Defendants do not contend Fowlkes has demonstrated any expertise about PGUs or peritonitis. In fact, they maintain that "Fowlkes *does not offer an opinion* concerning the medical examiner's finding that Ms. Ostler died from peritonitis" and "*offers no opinion* as to the onset of the gastrointestinal perforation, resulting sepsis or Ms. Ostler's potential recoverability therefrom."[6] Mem. Opp., at 6 (emphasis added). Defendants are wrong about the purported opinions in the Fowlkes Report,[7] but their concession about the lack of information

[6] Directly contradicting that statement, Defendants' DUCivR 26-1(b)(1)(A) Expert Disclosures [ECF 184], state that "Dr. Fowlkes is expected to testify that Ms. Ostler's death was neither reasonably foreseeable *nor preventable* . . . ." (Emphasis added.)

[7] Without establishing any expertise whatsoever regarding PGUs and peritonitis, Fowlkes opined at length in his report about PGUs and peritonitis and about the signs and symptoms Lisa would have had as she was dying of peritonitis, contrary to Defendants' contention that he offers *no opinion* about Lisa's PGU and peritonitis. Following are examples of Fowlkes's "opinions" offered in his report about PGUs and peritonitis:

- ". . . Ms. Ostler did not present with signs or symptoms which should have alerted the nurses that Ms. Ostler was developing a perforated ulcer or peritonitis." Fowlkes Report, 14.
- "[T]here is no recorded fever or other objective finding which was indicative of an acute abdomen." *Id.* at 14.

regarding any qualification to testify about PGUs or peritonitis is compelled by the fact that the Fowlkes Report does not contain one word about any experience, training, or knowledge by Fowlkes about PGUs or peritonitis. Further, Defendants' concession is compelled by the law. *See* Siegel v. Blue Giant Equip. Corp., __ F. App'x __, 2019 WL

- Fowlkes discusses signs and symptoms of opiate withdrawal, intimating they were demonstrated by Lisa, then states: "The presence of those symptoms should not lead a reasonable nurse or provider to suspect any other condition besides opiate withdrawal in the absence of new or worsening symptoms." *Id*. at 15. Fowlkes has no demonstrated expertise about what signs and symptoms Lisa would have had as she was dying of PGU and peritonitis, or the diagnosis and treatment of those conditions.
- Fowlkes states that "[a]fter five scores with no significant withdrawal it was reasonable to move Ms. Ostler to less restrictive housing." *Id*. at 15. Without any knowledge about life-threatening PGU and peritonitis, Fowlkes simply has no qualification to state his opinion about what was "reasonable" for Lisa's care and custody.
- Fowlkes states that "it was likewise reasonable of the night shift officers to rely upon the assessment of the nurse that Ms. Ostler's course was progressing as expected." *Id.* at 16. That is equivalent to saying that Lisa's peritonitis was not causing obvious signs or symptoms, a matter about which Fowlkes has no expertise.
- "It cannot be known what the nursing assessment scheduled for Ms. Ostler on the morning of 4/2/2016 would have shown since she suffered a sudden medical emergency prior to the assessment." *Id.* at 17. Fowlkes has no qualification whatsoever for opining that Lisa's peritonitis was "a sudden medical emergency." It does not happen that way. *See* https://www.hopkinsmedicine.org/health/conditions-and-diseases/peritonitis.
- ". . . [H]er presentation would not have alerted SLCJ medical, nursing, or security staff that she was suffering from a serious medical condition that was so obvious that even a lay person would easily recognize the necessity for medical attention." Fowlkes Report *Id.* at 17. That statement constitutes Fowlkes's opinion about the presentation of a person who has suffered a PGU and peritonitis, about which Fowlkes is not qualified.
- "[Ms. Ostler's state at the time she was incarcerated] made it more likely that if a complication occurred, such as a perforation at the site of her remote gastric bypass, the presentation would be atypical and would be more likely to be fatal before significant symptoms developed than in a person without those underlying risk factors." *Id*. at 19.
- ". . . Ms. Ostler developed an unforeseen condition which was rapidly fatal." *Id.*
- "Ms. Ostler's death was neither reasonably foreseeable nor preventable and was not a result of a breach of the standard of care." *Id.* at 20.

5549331, at * 4 (10th Cir. Oct. 28, 2019) (unpublished) (expert testimony must fall within the "reasonable confines" of the witness's expertise). It is not enough that a witness is a physician; the witness must have expertise in the specific matter at hand. *See Basanti v. United States*, 666 Fed. App'x 730, 733 (10th Cir. 2016) (unpublished); *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001); *Christison v. Biogen Idec Inc.*, No. 2:11–cv–01140–DN–DBP, 2016 WL 6902706, at ** 3–4 (D. Utah August 5, 2016) (unpublished). Because Fowlkes has demonstrated no expertise regarding PGUs, peritonitis, or—as demonstrated below and in the Motion to Disqualify, at 5–6—nursing care, he should be disqualified as an expert witness.

III. INSTEAD OF CONCEDING FOWLKES PROVIDED NO INFORMATION TO REMOTELY QUALIFY HIM TO OPINE ABOUT NURSING STANDARDS OR CARE, DEFENDANTS' COUNSEL MATERIALLY MISREPRESENTED FOWLKES'S CV.

Expert witness reports filed pursuant to Fed. R. Civ. P. 26(a)(2)(B) "are intended not only to identify the expert witness, but also 'to set forth the substance of the direct examination.'" *Jacobsen v. Deseret Book Company*, 287 F.3d 936, 953 (10th Cir. 2002) (quoting Fed. R. Civ. P. advisory committee note (1993)). An expert witness report, as in the case of direct examination, must reflect information about the expertise of the witness regarding the subject of the witness's testimony. *See supra* at 5–6. *See also Jager v. Andrade-Barraza*, No. 18-743 GBW/CG, 2019 WL 6896643 at ** 5–6 (D. N.M. December 18, 2019) (unpublished) (emergency room experience insufficient to support physician's "opinions regarding treatment beyond the immediate aftermath" of an injury).

Defendants seek to present the "expert" testimony of Fowlkes regarding *nursing* care, without having presented the slightest information in the Fowlkes Report that would support a finding, in the Court's "gatekeeper" role,[8] that he has *any* experience, training, or other source of expertise concerning nursing care. As he does in other parts of his report, Fowlkes makes simplistic, ungrounded claims about the standard of care having been exceeded (while Lisa was dying from peritonitis, without diagnosis or treatment), but he fails to specify any standard about which he refers.

Plaintiff noted that Fowlkes offers nothing in his report (including the exhibits thereto) that would indicate he is qualified to opine as an expert about nursing care. Fowlkes "offers no evidence he has ever provided nursing services, supervised nurses, trained nurses, read nursing books, taken nursing courses, or otherwise developed any expertise regarding nursing functions." Motion to Disqualify at 5–6.

In response, Defendants' counsel, at first, honestly described Fowlkes's CV as stating that as medical director of a correctional facility, Fowlkes "is responsible for *provision* of medical, nursing, medication, and lab services to incarcerated persons at the correctional facility." Mem. Opp., at 7 (emphasis added). But Defendants' counsel no doubt realized that being responsible for the *provision* of services is not equivalent to having expertise about the services being provided.[9]

[8] *See Dodge v. Cotter Corp.*, 328 F.3d 1212, 1221 (10th Cir. 2003).

[9] For instance, being responsible for providing "lab services" does not render one an expert laboratory scientist. Likewise, to say that the author of this memorandum "is responsible for provision of" computer technology services for his law firm obviously does not mean

Then Defendants' counsel fabricated, misrepresenting Fowlkes's CV as follows:

> As the medical director he is responsible for providing, *supervising, and training* on medical, nursing, medication, and lab services to incarcerated persons . . . .

Mem. Opp., at 9–10 (emphasis added). Defendants' counsel then manufactures the following out of whole cloth: "As a practicing physician and medical director in a correctional setting, with *extensive and long-standing experience in implementing and supervising nursing services* provided therein, Dr. Fowlkes is eminently qualified to testify as to the appropriateness of care by nurses in a correctional setting." Mem. Opp., at 10.

The inconvenient fact for Defendants' counsel is that *nowhere* in Fowlkes's CV or Report is there *any* reference to "supervising" or "training" "on [sic] medical, nursing, medication, and lab services" or mention of *any* nursing experience, training, supervision, or expertise. The only reference to "nursing" in Fowlkes's CV is as follows:

> From 1998-2015, as an independent contractor responsible for *provision* of all medical, nursing, medication and lab services at the facility. Responsible for all these health services as an employee of Lafayette County, MS since 2015 (Emphasis added.)

The only reference to "supervising," "training," or "implementing" *nursing* services is what was created by Defendants' counsel in the opposition memorandum.

IV. FOWLKES'S OPINIONS ARE UNRELIABLE AND, INSTEAD OF BEING HELPFUL TO A JURY, WILL MISLEAD THEM BECAUSE OF HIS APPARENT DISREGARD OF UNCONTROVERTED MATERIAL FACTS THAT DO NOT FIT HIS NARRATIVE.

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he has *any* expertise that would permit him to testify as an expert about computer technology (to which he would stipulate). Or that someone "responsible for provision of" meals for a film crew has any expertise in actually preparing and serving the food.

Fowlkes entirely ignored undisputed facts, many of them provided by Defendants themselves, in treating this matter as a Procrustean bed into which he will squeeze or stretch the facts to fit his purposes. That is the very definition of "unreliable" under Rule 702.

For any expert witness to "help the trier of fact to understand the evidence or to determine a fact in issue," within the meaning of Rule 702(a), to base testimony "on sufficient facts or data," within the meaning of Rule 702(b), and to base testimony on the "product of reliable principles and methods," within the meaning of Rule 702(c), the witness *must* consider the entire case, including all uncontroverted material facts, not just pick out morsels that will support a pre-ordained conclusion that everyone at the Jail was wonderful—"exemplary" and "well above the standard of care"—as they did *nothing* to help Lisa while other inmates were calling for jail staff to help her and as she was screaming, moaning in pain, begging for medical help, hitting her emergency button repeatedly, and, ultimately, dying as a result of the deprivation of medical care. *See* Motion to Disqualify, 8–12. For Fowlkes to say "the standard of care was exceeded in this case" (without even bothering to describe what the source of that standard is[10]), that Lisa's "death was neither reasonably foreseeable nor preventable," and that he would be prepared to tell a jury that jail staff "were attempting to deliver the highest level of care"[11] (as if he can

[10] The failure to "identify any standards in the correctional setting which inform his view" is contrary to the requirement that Fowlkes's testimony be "the product of reliable principles and methods" or that he "has reliably applied the principles and methods to the facts of the case." *Cox v. Glanz*, No. 11–CV–457–JED–FHM, 2014 WL 916644, at * 3 (N.D. Okla. March 10, 2014) (unpublished).

[11] Fowlkes Report, at 20–21.

somehow divine what the jail staff were "attempting" to do[12]) would be testimony based on a selective parsing of the facts that can be only *un*helpful to a jury.

Rule 702 requires a conscientious analysis of whether expert testimony is actually going to *help* fact-finders to understand what they may not be able to understand without the witness's expert assistance. Fowlkes's disregard of the uncontroverted, material facts will help no one other than those who seek to avoid accountability. Certainly, ignoring and self-servingly minimizing undisputed material facts is "an impermissible analytical gap in an expert's methodology" which is "a sufficient basis to exclude expert testimony" under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *See Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1233–34 (10th Cir. 2005); *Cox* at * 1.

V. THE "SUBJECT AREA" OF FOWLKES'S CONTEMPLATED TESTIMONY, AS DEFINED BY DEFENDANTS' COUNSEL, IS AN INAPPROPRIATE SUBJECT FOR EXPERT TESTIMONY.

Defendants' counsel states an expert is to stay "within the reasonable confines of his subject area," Mem. Opp., at 8, then defines Fowlkes's "subject area" as follows:

> The "subject area" relevant here is whether County Defendants violated Ms. Ostler's constitutional rights by being deliberately indifferent to a known, serious medical need. . . . As his report reveals, Dr. Fowlkes has offered expert opinion testimony on the issues of deliberative [sic] indifference in 1983 actions.

[12] Fowlkes cannot be permitted to testify about what anyone was thinking, intending, or attempting. *See, e.g., M.H. v. County of Alameda*, 2015 WL 54400 (N.D. Cal. January 2, 2015) ("Plaintiffs' experts cannot testify as to Defendants' actual, subjective states of mind."); *Cotton ex rel. McClure v. City of Eureka*, No. C 08–04386 SBA, 2011 WL 4047490, at * 2 (N.D. Cal. Sep. 8, 2011) (precluding witness from testifying about Defendants' subjective knowledge in relation to a claim of deliberate indifference).

Mem. Opp., at 8. Similarly, Defendants stated in their DUCivR 26-1(b)(1)(A) Expert Disclosures [ECF 184], *inter alia*, that "Dr. Fowlkes is expected to testify . . . that Defendants . . . did not at any time act with deliberate indifference." That "subject area" of Fowlkes's testimony would be wholly inappropriate and not at all helpful to the jury.

> [W]hether a prison official acted with deliberate indifference depends on that official's state of mind. Thus, by expressing the opinion that [the warden] was deliberately indifferent, [the expert] gives the false impression that he knows the answer to this inquiry, which depends on [the warden's] mental state. . . . [T]he district court did not abuse its discretion by excluding [the expert's] testimony . . .

Woods v. Lecureux, 110 F.3d 1215, 1221 (6th Cir. 1997). *See also Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994); *M.H. v. County of Alameda*, No. 11–cv–02868–JST, 2015 WL 54400 (N.D. Cal. January 2, 2015) (excluding expert testimony using terms "deliberate indifference" and "objective reasonableness"); *Cox*, at * 5; *Al-Turki v. Robinson*, No. 10–cv–02404–WJM–CBS, 2013 WL 603109, * 5 (D. Colo. Feb. 15, 2013) (unpublished) (expert physician prohibited from testifying that defendant was "deliberately indifferent").

CONCLUSION

Fowlkes should be excluded as an expert witness, default judgment as to liability should be entered against the County; Plaintiff should be awarded a reasonable attorney's fee; and the Court should fashion other appropriate sanctions.

Respectfully submitted this 24th day of January 2020:

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/s/ Ross C. Anderson
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