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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

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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.

**MOTION TO DISQUALIFY  
THOMAS D. FOWLKES AS  
EXPERT WITNESS AND  
SUPPORTING MEMORANDUM**

Case No. 2:18-cv-00254-001

Judge Bruce S. Jenkins

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

MOTION AND MEMORANDUM IN SUPPORT..... 1

INTRODUCTION ..... 1

ARGUMENT ..... 2

I. Fowlkes’s Report and Opinions Should Be Excluded in Their Entirety Because He Provided No Information Qualifying Him to Opine Regarding Peritonitis, Perforated Gastrointestinal Ulcers, or Nursing Care..... 3

    A. His Status as a Physician Is Not Sufficient to Qualify Fowlkes to Opine Regarding the Manifestation, Diagnosis, or Prognosis of Peritonitis and Perforated Gastrointestinal Ulcers..... 3

    B. Fowlkes Has Offered No Information to Qualify Him to Opine Regarding Nursing Care. .... 5

    C. The Failure to Include the Necessary Qualifications in His Report Is Not Curable. .... 6

II. Fowlkes’s Report and Opinion Are Unreliable Because They Do Not Fit the Facts of This Case; Therefore, They Should Be Excluded..... 8

III. Fowlkes Impermissibly Opines Regarding Ultimate Legal Questions. .... 12

CONCLUSION..... 12

CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT..... 14

**TABLE OF AUTHORITIES**

	Page(s)
<b>Cases</b>	
<i>Arneson v. Michigan Tissue Bank</i> , No. CV 05-189-M-JCL, 2007 WL 4698986 (D. Mont. Mar. 26, 2007) .....	7
<i>Campbell v. United States</i> , 470 F. App'x 153 (4th Cir. 2012).....	7
<i>Cox v. Glanz</i> , No. 11-CV-457-JED-FHM, 2014 WL 916644 (N.D. Okla. Mar. 10, 2014).....	12
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993).....	2, 3
<i>Dodge v. Cotter Corp.</i> , 328 F.3d 1212 (10th Cir. 2003) .....	8
<i>General Elec. Co. v. Joiner</i> , 522 U.S. 136 (1997).....	8
<i>Goebel v. Denver &amp; Rio Grande W. R.R. Co.</i> , 215 F.3d 1083 (10th Cir. 2000) .....	8
<i>Jacobsen v. Deseret Book Co.</i> , 287 F.3d 936 (10th Cir. 2002) .....	7
<i>Kumho Tire Co., Ltd. v. Carmichael</i> , 526 U.S. 137 (1999).....	2, 3
<i>Milne v. USA Cycling Inc.</i> , 575 F.3d 1120 (10th Cir. 2009) .....	5
<i>Norris v. Baxter Healthcare Corp.</i> , 397 F.3d 878 (10th Cir. 2005) .....	8

*Ralston v. Smith & Nephew Richards, Inc.*,  
275 F.3d 965 (10th Cir. 2001) .....2, 3

*Reed v. Binder*,  
165 F.R.D. 424 (D.N.J. 1996).....7

*Sanford v. Stewart*,  
No. 5:11CV2360, 2013 WL 3729175 (N.D. Ohio July 12, 2013)  
.....6

*Thomas v. Sheahan*,  
514 F. Supp. 2d 1083 (N.D. Ill. 2007) .....3

*Williams Sec. Litigation*,  
496 F. Supp. 2d 1195 (N.D. Okla. 2007).....2

*Witherspoon v. Navajo Ref. Co., L.P.*,  
No. CIV. 03-1160BB/LAM, 2005 WL 5988649 (D.N.M. July 18, 2005).....3

Rules

Fed R. Civ. P. 26 .....6

Fed R. Civ. P. 37 .....6

Fed. R. Evid. 702 .....2, 3

## **MOTION AND MEMORANDUM IN SUPPORT**

Plaintiff moves the Court to disqualify Dr. Thomas Fowlkes (“Fowlkes”) as an expert witness and prevent him from offering opinion testimony because his expert report (“Fowlkes’s Report,” attached hereto as Exhibit “A”), submitted by Defendants, (1) presents no qualification to opine about peritonitis, perforated gastrointestinal ulcers, or nursing care; (2) is unreliable in that it does not explain its methodology and does not “fit” this case because it ignores many undisputed facts; and (3) impermissibly opines on ultimate legal conclusions, including whether Defendants acted with “deliberate indifference.”

### **INTRODUCTION**

Fowlkes should not be permitted to offer his opinion testimony, including the outlandish and wholly unsupported conclusion that Lisa Ostler (“Lisa”) received “exemplary” care and that her death from peritonitis was unavoidable.

Fowlkes’s opinions are inadmissible because his report contains no information qualifying him to opine about (1) perforated gastrointestinal ulcers and peritonitis, the medical conditions that caused Lisa’s death, the obvious symptoms of which were ignored by Defendants or (2) *nursing* care.

Fowlkes’s Report is not reliable, and therefore not helpful to a jury, because it does not remotely fit the facts of the case. The report wholly ignores pivotal,

uncontroverted facts, including (1) the denial of prescribed, potentially life-saving medication, (2) a physician was not notified of Lisa's alarming vital signs, in violation of the Jail's written policy, (3) other inmates insisted to housing officers and nurses that Lisa was extremely ill and required urgent medical attention, and, (4) over the course of an entire horrifying evening, Lisa screamed in pain, begged for medical help, and repeatedly hit her emergency button, yet she was denied access to any medical care.

### **ARGUMENT**

Addressing whether an expert opinion is admissible, courts act as gatekeepers, performing a two-step analysis. First, they determine whether the expert is qualified "by knowledge, skill, experience, training or education," Fed. R. Evid. 702, "*specific to the matters he proposes to address as an expert.*" *Williams Sec. Litigation*, 496 F. Supp. 2d 1195, 1232 (N.D. Okla. 2007) (emphasis added) (citation omitted). *See also Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001). Second, they determine whether the expert's opinion and methodology are reliable and will assist the jury to determine a fact at issue. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 154 (1999).

**I. Fowlkes’s Report and Opinions Should Be Excluded in Their Entirety Because He Provided No Information Qualifying Him to Opine Regarding Peritonitis, Perforated Gastrointestinal Ulcers, or Nursing Care.**

**A. His Status as a Physician Is Not Sufficient to Qualify Fowlkes to Opine Regarding the Manifestation, Diagnosis, or Prognosis of Peritonitis and Perforated Gastrointestinal Ulcers.**

Under Rule 702, Fed. R. Evid., an expert must offer evidence of “knowledge, skill, experience, training, or education” about the *specific* issues of the case about which he will opine. *See Daubert*, 509 U.S. at 592; *Kumho*, 526 U.S. at 156. “[M]erely possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue.” *Ralston*, 275 F.3d at 970. Physicians are disqualified as expert witnesses where they do not demonstrate *relevant* experience and specialized knowledge. *See, e.g., id.* at 969–70 (orthopedic surgeon not qualified to render opinion on intramedullary nailing on a femur fracture); *Thomas v. Sheahan*, 514 F. Supp. 2d 1083, 1093 (N.D. Ill. 2007) (opinion regarding manifestation of meningitis “not sufficiently reliable” because no evidence was offered that physician was “an expert on meningitis or infectious diseases”); *Witherspoon v. Navajo Ref. Co., L.P.*, No. CIV. 03-1160BB/LAM, 2005 WL 5988649, at \*4 (D.N.M. July 18, 2005) (unpublished).

Fowlkes was designated to testify, in part, that “Ms Ostler’s death was neither reasonably foreseeable nor preventable.”<sup>1</sup> Fowlkes cites the medical examiner’s findings that Lisa “died as a result of peritonitis due to gastrointestinal perforation” and offers no independent opinion of Lisa’s cause of death.<sup>2</sup> Fowlkes never presents *any* qualification to opine regarding peritonitis or perforated gastrointestinal ulcers (“PGU”). Therefore, he may not opine about Lisa’s death or the medical condition that caused it, including the suddenness of its onset or the likelihood of death caused by it had Lisa been timely diagnosed and treated. Nothing is stated in Fowlkes’s Report regarding whether he ever treated a patient with either condition, ever performed any research or read any materials regarding those conditions, or has any other experience or training whatsoever providing him any expertise with respect to those conditions. Despite not providing any qualification to offer such opinions, Fowlkes opines regarding the manifestation, diagnosis, and prognosis of Lisa’s peritonitis and PGU. *See, e.g.*, Fowlkes’s Report at 14 (Lisa “did not present with signs or symptoms which should have alerted the nurses that Ms. Ostler was developing a perforated ulcer or peritonitis.”), 17 (“she suffered a *sudden* medical emergency” (emphasis added)), (“her presentation would not have alerted” staff), 19

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<sup>1</sup> Defendants’ DUCivR 26-1(b)(1)(A) Expert Disclosures (“Disclosures”) [ECF 184].

<sup>2</sup> Fowlkes’s Report, 13 ¶ 6.

(Lisa “developed an unforeseen condition which was rapidly fatal”), 20 (Lisa’s death was not “preventable”).

Since Fowlkes’s Report does not provide any information that would qualify Fowlkes to render any of those unfounded opinions, they are inadmissible. Further, Fowlkes’s opinions regarding the appropriateness of policies and of care provided (or not provided) to Lisa, premised on his unsupported and unreliable assessment of the manifestation and progression of Lisa’s peritonitis and PGU, without providing any qualification to offer them, are inadmissible.

**B. Fowlkes Has Offered No Information to Qualify Him to Opine Regarding Nursing Care.**

For an expert’s opinion to be admissible, the expert must be *specifically* qualified to address the issue at hand. *See, e.g., Milne v. USA Cycling Inc.*, 575 F.3d 1120, 1133 (10th Cir. 2009) (organizer of “paved road bike races” not qualified to testify about “mountain bike races”).

Fowlkes opines regarding the quality of *nursing* care provided to Lisa, but never presents any information supporting a finding that he is qualified to testify regarding nursing care (nor does he specify a standard of care when stating, sweepingly and unreliably, the “standard of care was exceeded”<sup>3</sup>). He offers no

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<sup>3</sup> Fowlkes’s Report, 20.

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. Accordingly, he is not qualified to opine regarding the sufficiency of *nursing* care provided, and not provided, to Lisa. *See, e.g., Sanford v. Stewart*, No. 5:11CV2360, 2013 WL 3729175, at \*3 (N.D. Ohio July 12, 2013) (unpublished) (“Defendants do not explain why their own physician expert witness seemingly waded into the ‘nursing standard of care’ waters.”).

**C. The Failure to Include the Necessary Qualifications in His Report Is Not Curable.**

Rule 26(a)(2)(B)(iv), Fed. R. Civ. P., requires disclosure of “the witness’s qualifications” in the expert witness report. Fowlkes has presented *general* information about his education and experience, but has not presented *any* information supporting a finding that he is qualified to opine, specifically, about peritonitis, PGU, or *nursing* care. “If a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). Accordingly, Fowlkes is limited to the information about his background and experience contained in his report, none of which establish his qualifications to testify regarding peritonitis, PGU, or nursing standards.

There can be no justification for Fowlkes failing to provide information about his qualification for offering the central opinions of his report. Further, “[p]rejudice results because the expert report[] did not reveal what the expert[] will testify to at trial.” *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 954 (10th Cir. 2002). “[A]s the language of Rule 37(c)(1) evidences, the Federal Rules impose an ‘automatic sanction’ of exclusion of a party's expert witness for failure to adhere to the expert witness requirements set forth in Rule 26(a).” *Campbell v. United States*, 470 F. App'x 153, 156 (4th Cir. 2012) (unpublished). “The test of a report is whether it was sufficiently complete, detailed and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced.” *Reed v. Binder*, 165 F.R.D. 424, 429 (D.N.J. 1996). “An inadequate expert witness report which fails to disclose the qualifications of an expert witness precludes the expert from testifying at trial.” *Arneson v. Michigan Tissue Bank*, No. CV 05-189-M-JCL, 2007 WL 4698986, at \*8 (D. Mont. Mar. 26, 2007) (unpublished) (citations omitted).

## **II. Fowlkes’s Report and Opinion Are Unreliable Because They Do Not Fit the Facts of This Case; Therefore, They Should Be Excluded.**

After determining whether a proposed expert is qualified, “the district court must further inquire into whether proposed testimony is sufficiently ‘relevant to the task at hand.’” *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 884 (10th Cir. 2005) (citation omitted). The trial court, as gatekeeper, must assess whether the methodology and reasoning of the expert are “applicable to a *particular set of facts.*” *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000) (emphasis added) (citation omitted). “A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). “[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.” *Id.* “Under *Daubert*, ‘any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible.’” *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1222–23 (10th Cir. 2003) (citation omitted).

Fowlkes’s opinions are inadmissible because he wholly fails to consider crucial, undisputed facts. Thus, his opinions do not relate to what happened to Lisa.

Fowlkes casually glosses over the time period of Lisa’s hellish night before she was found unresponsive and not breathing. For that time period, Fowlkes states

only as follows: “[T]here is some indication in the record that Ms. Ostler was activating the intercom which was re-routed to the control room during the overnight shift. . . . The records I reviewed do not indicate that Ms. Ostler complained of abdominal pain or of a new or changed condition.” Fowlkes’s Report, 11 ¶ 10. Fowlkes, utilizing the failures of Jail staff to make appropriate log entries as a basis for assuming certain things never happened, ignores critical facts of that time period sworn to by Defendants, including the following:

- “I was told” Lisa “had been **asking for medical help all night**. I was informed **she constantly pushed her intercom button asking for a nurse**.” Another inmate “was concerned about Ms. Ostler and told me **she had been yelling for help all night**.”<sup>4</sup>
- “I recall [Defendant Harris] saying that you’ve got a woman [Lisa Ostler] . . . who’s been **crying and screaming all night**.”<sup>5</sup>
- Defendant Harris testified that during that night “**three or four**” detainees “**asked for me to call the nurse for her** [Lisa Ostler].”<sup>6</sup>

Completely at odds with his conclusions (which are reached with no explanation of his methodology) about Lisa’s “presentation”,<sup>7</sup> Fowlkes fails to

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<sup>4</sup> Declaration of Walter M. Mason (“Mason Declaration”), attached hereto as Exhibit “B,” ¶ 38.

<sup>5</sup> Mason Declaration, ¶ 39.

<sup>6</sup> Mason Declaration, ¶ 34.

<sup>7</sup> Fowlkes’s Report, 14 (Lisa “did not present with signs or symptoms”), 17 (“her presentation would not have alerted” staff), 19.

consider critical uncontroverted evidence, including (1) the video evidence reflecting, objectively, Lisa's presentation;<sup>8</sup> (2) the testimony of detainees describing Lisa's presentation, including that Lisa was crying, screaming, and "shrieking" throughout the night as if "in agonizing pain" and that Lisa looked "miserable," "much worse" than someone withdrawing from heroin, "like she was in severe pain," like she "was in pain somewhere in her abdomen," "gray," "yellowish," "really pale," "very weak and sick," and like she might die;<sup>9</sup> (3) the testimony of detainees that they, as lay persons, recognized Lisa required immediate medical care;<sup>10</sup> and (4) the fact of Lisa's medical condition and subsequent death, which reflect she must have exhibited "signs and symptoms of extreme abdominal pain" and that she would necessarily be "perceived as being in extreme pain, having a serious medical condition, and needing urgent medical attention."<sup>11</sup>

Fowlkes failed to consider objective facts directly contravening his conclusion (which, again, is reached with no explanation of his methodology) that Lisa received treatment that "exceeded" the standard of care,<sup>12</sup> including that (1) she was not given

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<sup>8</sup> Mason Declaration, ¶¶ 8–9.

<sup>9</sup> Mason Declaration, ¶¶ 23–28, 35–37.

<sup>10</sup> *See, e.g.*, Mason Declaration, ¶¶ 27–37.

<sup>11</sup> Mason Declaration, ¶ 2h.

<sup>12</sup> Fowlkes's Report, 20.

Prilosec, contrary to a jail physician's orders, which could have saved Lisa's life<sup>13</sup> and (2) Lisa had no access to medical treatment for at least sixteen hours prior to her being found unresponsive and not breathing in her cell, during which time Lisa was repeatedly crying out in pain and begging and screaming for help and it was obvious to numerous lay people that Lisa was at risk of imminently dying.<sup>14</sup>

In stating that the jail's policies and protocols are "exemplary" and "reflect best practices,"<sup>15</sup> Fowlkes provides no methodology and failed to consider facts demonstrating (1) an established "ignore protocol," whereby communications from a detainee through her emergency button and intercom would be disregarded;<sup>16</sup> (2) an admitted custom of failing to call physicians upon presentation of abnormal, dangerously high heart rates, in violation of written policy;<sup>17</sup> (3) numerous instances of failures to provide WOWS and CIWA withdrawal assessments to other detainees;<sup>18</sup> (4) training provided to nurses to create false and incomplete medical

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<sup>13</sup> Mason Declaration, ¶¶ 2a, 2k.

<sup>14</sup> Mason Declaration, ¶¶ 2d, 2e, 26, 34–36.

<sup>15</sup> Fowlkes's Report, 20.

<sup>16</sup> Mason Declaration, ¶¶ 29–32.

<sup>17</sup> Mason Declaration, ¶¶ 2n, 2o, 3–7.

<sup>18</sup> Mason Declaration, ¶¶ 2m, 14–16, 18.

records;<sup>19</sup> and (5) a custom of nurses, for hours per shift, watching movies and otherwise entertaining themselves.<sup>20</sup>

### **III. Fowlkes Impermissibly Opines Regarding Ultimate Legal Questions.**

Defendants designated Fowlkes to testify, in part, that Defendants “did not at any time act with deliberate indifference.”<sup>21</sup> However, an expert may not opine on the ultimate issue of law that a defendant acted with deliberate indifference. *See, e.g., Cox v. Glanz*, No. 11-CV-457-JED-FHM, 2014 WL 916644, at \*5 (N.D. Okla. Mar. 10, 2014) (unpublished) (collecting authorities).

### **CONCLUSION**

Plaintiff urges the Court to disqualify Fowlkes as an expert because of his failure to present qualifications for his opinions regarding peritonitis, perforated gastrointestinal ulcers, and nursing care and because of the unreliability of his opinions rendered with no identified methodology and while disregarding undisputed evidence central to this case.

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<sup>19</sup> Mason Declaration, ¶ 43.

<sup>20</sup> Mason Declaration, ¶¶ 21–22.

<sup>21</sup> Disclosures [ECF 184]. *See also* Fowlkes’s Report, 15 (opining what practices were “designed” to do), 20 (same), (“These nurses and correctional officers had no awareness . . .”); 21 (“They were attempting . . .”).

DATED this 19th day of December 2019:

LAW OFFICES OF ROCKY ANDERSON

/s/ Walter Mason

Walter Mason

*Attorney for Plaintiff*

**CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT**

In compliance with the word-count limit of DUCivR 7-1(a)(3)(C), I certify that the foregoing *Motion to Disqualify Thomas D. Fowlkes as Expert Witness and Supporting Memorandum* contains 2,498 words, excluding the items that are exempted from the word count under DUCivR 7-1(a)(3)(C).

DATED this 19th day of December 2019:

LAW OFFICES OF ROCKY ANDERSON

/s/ Walter Mason  
Walter Mason  
*Attorney for Plaintiff*