APPEAL NO. 22-6033

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ARONDA PIGEON, individually and as Special Administrator of the Estate of Dustin Pigeon, Deceased,	)	
Appellant,	)	**Case No. 22-6033**
vs.	)	
KEITH PATRICK SWEENEY and CITY OF OKLAHOMA CITY, a municipal corporation, and WILLIAM CITTY, in his individual capacity,	)	
Appellees.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA - CASE NO. CIV-18-728-F- THE HONORABLE BERNARD JONES

APPELLANT ARONDA PIGEON'S REVISED OPENING BRIEF

Phillip P. Owens, II, OBA #15165
OWENS LAW OFFICE, PC
6907 N.W. 122nd Street
Oklahoma City, OK 73142-3903
(405) 608-0708
(405) 608-0709- Facsimile
po@owenslawofficepc.com
Attorney for Appellant Aronda Pigeon

ORAL ARGUMENT IS NOT REQUESTED BY APPELLANT

TABLE OF CONTENTS

Table of Authorities…..iii

Jurisdictional Statement………………………………………………….……vii

Statement of Issues Presented …………………………...…………………..…1

Standard of Review……….. ………………………...…………………..…1

Statement of the Facts…………………………………………………………..…2

Summary of the Argument……………………………………………….......4

Argument and Authorities ...……………………………………......….…....4

Proposition I:

The Trial Court Erred in Granting Citty's Motion for Summary Judgment on the Section 1983 claim 4

Proposition II:

The Trial Court Erred in Granting OKC's Motion for Summary Judgment on the Section 1983 claim.. 12

Proposition III:

The Trial Court Erred in Granting OKC's Motion for Summary Judgment on the negligence claim.. 15

Conclusion 23

Certificate of Compliance 23

Certificate of Service……………………………………………...………...24

COPY OF JUDGMENT…………………………. . . . ……………….Exhibit 1

TABLE OF AUTHORITIES

CASES

Allen v. Muskogee,
119 F.3d 837, 841–842 (10th Cir.1997) …………………………………………...8, 16

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 248 (1986) ……………………………………………………………1

Barnes v. United States,
11-CV-0582-HE, 2014 WL 12910559, at *8–9 (N.D. Okla. Jan. 24, 2014) ………...9-10

Bd. of Cnty. Comm'rs v. Brown,
520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) ………………………12, 13

Bryson v. City of Oklahoma City,
627 F.3d 784, 789 (10th Cir. 2010) ………………………………………………..9

City of Canton v. Harris,
489 U.S. 378, 389, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) ……………………...12

Conner v. Schnuck Markets, Incorporated,
121 F.3d 1390 (10th Cir. 1997) ……………………………………………………2

Davis v. Fed. Ins. Co.,
382 F. Supp. 3d 1189, 1196 (W.D. Okla. 2019) ……………………………………..5

Dodds v. Richardson,
614 F.3d 1185, 1195 (10th Cir.2010) ………………………………………….…6

EEOC v. Horizon/CMS Healthcare Corp.,
220 F.3d 1184, 1190 (10th Cir. 2000)……………………………………………….. 1

Kendrick v. Penske Transportation Services, Incorporated,
220 F.3d 1220 (10th Cir. 2000) ……………………………………………………2

Monell v. Department of Social Services,
436 U.S. 658, 691-92, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) …………………12-13

Morales v. City of Oklahoma City ex rel. Oklahoma City Police Dep't,
2010 OK 9, ¶ 15, 230 P.3d 869, 876 ……………………………………..…………16, 21

Myers v. Oklahoma County Bd of County Com'rs,
151 F.3d 1313 (10th Cir. 1998) ……………………………………………..………16

Nail v. City of Henryetta,
1996 OK 12, ¶ 3, 911 P.2d 914 ………………………………………………..….22

Palmer v. State,
1994 OK CR 16, 871 P.2d 429, 432, *overruled on other grounds*
by Willingham v. State, 1997 OK CR 62, 947 P.2d 1074 …………………………..22

Pembaur v. City of Cincinnati,
475 U.S. 469, 480, 106 S. Ct. 1292, 1298, 89 L. Ed. 2d 452 (1986) ………………..13-14

Randle v. City of Aurora,
69 F.3d 441 (10th Cir. 1995) …………………………………………………………2

Reeves v. Sanderson Plumbing Prods., Incorporated,
120 S.Ct. 2097 (2000)..1-2

Salve Regina College v. Russell,
499 U.S. 225, 236 (1991) ……………………………………………………………1

Samuel v. City of Broken Arrow,
506 Fed.Appx. 751 (10th Cir. 2012) ………………………………………………..16

Schneider v. City of Grand Junction Police Dep't,
717 F.3d 760, 767 (10th Cir. 2013) ……………………………………………………6, 8

Simms v. Oklahoma,
165 F.3d 1321 (10th Cir. 1999), cert. denied, 120 S.Ct. 53 (1999) ……………………. 2

State ex rel. Oklahoma Dep't of Pub. Safety v. Gurich,
2010 OK 56, ¶ 10, 238 P.3d 1, 3–4 ……………………………………………….15-16

Told v. Tig Premier Ins. Co.,
149 Fed. Appx. 722, 726 (10th Cir. 2005) ……………………………………………..5

Tuffy's, Inc. v. City of Oklahoma City,
2009 OK 4, ¶ 20, 212 P.3d 1158, 1167 ………………………………………..…….22

Union Ins. Soc. of Canton, Ltd. v. William Gluckin & Co.,
353 F.2d 946, 952 (2d Cir. 1965) ………………………………………………….. 5

Walker v. City of Orem,
451 F. 3d 1139, 1152 (10th Cir. 2006)……………………………………………….12

STATUTES

21 O.S. §701.8 ……………………………………………………………………..22

28 U.S.C. § 1291 vii

28 U.S.C. § 1331 vii

28 U.S.C. § 1343 vii

42 U.S.C. §1983 .... 3, 4, 5, 12-15

51 O.S. §152(12) ……………………………………………………...………21

51 O.S. §155(6) ……………………………………………………………….15

Fed. R. Civ. P. 56(C) .... …1, 5

OUJI-CR 4-91 ……………………………………………………………………22

STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to 10th Cir. R. 28.2(C)(1), Appellant states that there was a prior appeal in this matter, Case No. 21-6022, which was dismissed as premature.

JURISDICTIONAL STATEMENT

Appellant Aronda Pigeon appeals the District Court's order, entered on December 8, 2020, granting Appellees City of Oklahoma City ("OKC") and William Citty's ("Citty") Motions for Summary Judgment. **Aplt. App. Vol. 7 at 115-120**. The case was removed by Appellees to federal court from the District Court of Oklahoma County, Oklahoma. Jurisdiction in the trial court was pursuant to 28 U.S.C. § 1331 and 1343, as this matter involves constitutional claims.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1291, as this is an appeal from a final judgment of the United States District Court for the Western District of Oklahoma that disposed of all parties' claims.

The underlying judgment appealed from was filed in the District Court on December 8, 2020. After dismissal of Appellant's claims against the remaining party with prejudice on February 18, 2022, that judgment became final and appealable. Appellant's Notice of Appeal was timely filed on February 23, 2022.

STATEMENT OF ISSUES PRESENTED

1. Did the trial court err in granting Appellee OKC's Motion for Summary Judgment on Appellant's claims?
2. Did the trial court err in granting Appellee Citty's Motion for Summary Judgment on Appellant's claims?
3. Did the trial court err in determining that OKC was immune from liability pursuant to the Oklahoma Governmental Tort Claims Act?

STANDARD OF REVIEW

The standard of review applicable to an appellate court's review of a District Court's grant of summary judgment is *de novo*. "When *de novo* review is compelled, no form of appellate deference is acceptable." Salve Regina College v. Russell, 499 U.S. 225, 236 (1991).

Summary judgment is appropriate only if the admissible evidence shows there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(C); *see also* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1190 (10th Cir. 2000). A fact is material if, under the governing law, it could have an effect on the outcome of the lawsuit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Horizon/CMS, 220 F.3d at 1190.

In Reeves v. Sanderson Plumbing Prods., Inc., 120 S.Ct. 2097, 2110 (2000), the Court stated:

> . . . although the court should review the record as a whole, **it must disregard all evidence favorable to the moving party that the jury is not required to believe**. See Wright & Miller

> 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. (Emphasis added).

For purposes of summary judgment, Appellant's evidence was required to be believed and all justifiable inferences to be drawn from that evidence were required to be drawn in her favor. For purposes of the underlying motion, the trial court was required to assume that Appellant's version of the disputed facts was correct. Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1392, fn.2 (10th Cir. 1997); *see also* Kendrick v. Penske Transportation Services, Inc., 220 F.3d 1220 (10th Cir. 2000). The evidence of the party opposing summary judgment is to be believed and all justifiable inferences are to be drawn in the light most favorable to that party. Reeves, 120 S.Ct. at 2101; Simms v. Oklahoma, 165 F.3d 1321 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 53 (1999).

Summary judgment is inappropriate when the evidence presented by the parties is susceptible of different interpretations or inferences by the trier of fact. Randle v. City of Aurora, 69 F.3d 441, 453 (10th Cir. 1995). "[A]t the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Id. at 453.

STATEMENT OF THE FACTS

This civil rights action involves the unjustified and unwarranted fatal shooting of an unarmed and suicidal man by Keith Patrick Sweeney, while acting in the course and scope of his employment as a police officer with Appellee OKC. On November 15, 2017, Appellant's decedent, Dustin Pigeon, was severely depressed and engaged in a suicide

attempt when he contacted 911 to plead for help. When officers from the Oklahoma City Police Department arrived, they found Mr. Pigeon holding lighter fluid in one raised hand and a lighter in the other.

While two of the responding officers tried to calm Mr. Pigeon verbally and with the use of a bean bag shotgun, the third officer, Sweeney, did not. Sweeney arrived much later than the first two officers and did not communicate with them to determine the status of the situation. Sweeney then approached Mr. Pigeon with his gun drawn, yelling at him to get on the ground or Sweeney would shoot him. After Mr. Pigeon lowered his hands, Sweeney did exactly that, shooting five times at Mr. Pigeon with his handgun. Dustin Pigeon died at the scene.

An investigation later confirmed that Mr. Pigeon was unarmed and not a threat to the officers when he was fatally shot by Sweeney. Sweeney was charged with second degree murder as a result of the shooting. On November 4, 2019, Sweeney was convicted of second-degree murder in the District Court of Oklahoma County, Oklahoma, and was sentenced to 10 years in prison, where he remains today.

Plaintiff brought this action against Sweeney, OKC, and Citty, in his official capacity as Oklahoma City Police Chief. **Aplt. App. Vol. 1 at 178.** Plaintiff sought recovery against Sweeney for use of excessive force as well as a state-law negligence claim. Plaintiff's claims against OKC and Citty were for supervisory liability under 42 U.S.C. §1983. A state-law negligence claim was pursued against OKC only.

Sweeney, OKC, and Citty all filed motions for summary judgment. **Aplt. App. Vol. 2 at 91; Vol. 3; Vol. 4; Vol. 5; Vol. 6, 1-129.** Sweeney's was granted in part

and denied in part, with the excessive force and negligence claims remaining. **Aplt. App. Vol. 7 at 108.** The trial court granted OKC and Citty's motions in their entirety. **Aplt. App. Vol. 7 at 115.** This appeal ensued.

SUMMARY OF THE ARGUMENT

The trial court erred in granting Citty's Motion for Summary Judgment on the Section 1983 claim. Disputed issues of material fact remain present in the case, which precludes summary judgment. Moreover, Citty failed to establish the existence of undisputed facts in his Motion which would have entitled him to summary judgment.

Similarly, the trial court erred in granting OKC's Motion for Summary Judgment on the Section 1983 claim. The trial court engaged in no analysis of OKC's Motion on this issues, simply piggybacking its ruling on its ruling in favor of Citty. Questions of material fact exist which preclude summary judgment and require reversal.

Finally, the trial court erred in determining that OKC was immune from liability pursuant to the Oklahoma Governmental Tort Claims Act. Questions of fact exist as to Sweeney's subjective intent when he arrived on the scene and proceeded to murder Mr. Pigeon. Reversal of the trial court's rulings is required.

ARGUMENT AND AUTHORITIES

PROPOSITION I

THE TRIAL COURT ERRED IN GRANTING CITTY'S MOTION FOR SUMMARY JUDGMENT ON THE SECTION 1983 CLAIM

The trial court's decision engaged in virtually no analysis of the issues involved on Appellant's Section 1983 claim against Citty. The trial court summarily concluded that

Appellant had not set forth sufficient evidence to create a question of material fact as to Citty's deliberate indifference to Appellant's decedent's constitutional rights – ignoring the proper initial issue of whether Citty had presented undisputed facts that would support his position. The trial court conducted no further analysis of the issues before it on the Section 1983 claim. On the record before this Court, the trial court's grant of summary judgment to Citty was error and must be reversed.

It was Citty's burden on his Motion to establish the existence of undisputed material facts which would entitle him to summary judgment. Fed. R. Civ. P. 56(c)(1). He failed to do so. Indeed, while Citty attached voluminous exhibits to his Motion, the allegedly undisputed facts were mostly supported by a conclusory affidavit from the current OKC Police Chief.

That affidavit was nothing more than an attempt to verify otherwise unsupported statements of alleged fact in Citty's brief, with no indication that it was made from personal knowledge as required by Fed. R. Civ. P. 56. Indeed, the affidavit listed certain facts and sentences from facts set forth in Citty's brief and averred that those facts were "true and correct" with nothing more. This was not sufficient to establish any material facts for the purpose of summary judgment. Davis v. Fed. Ins. Co., 382 F. Supp. 3d 1189, 1196 (W.D. Okla. 2019); Told v. Tig Premier Ins. Co., 149 Fed. Appx. 722, 726 (10th Cir. 2005); Union Ins. Soc. of Canton, Ltd. v. William Gluckin & Co., 353 F.2d 946, 952 (2d Cir. 1965). Despite Citty's failure to establish the facts necessary to prevail on his Motion, the trial court apparently either assumed the existence of those facts or imposed an improper duty on Appellant to create a dispute as to facts that were not properly before it.

To prevail on her claim against Citty for supervisory liability, Appellant had to show "(1) personal involvement; (2) sufficient causal connection, and (3) culpable state of mind." Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760, 767 (10th Cir. 2013), citing Dodds v. Richardson, 614 F.3d 1185, 1195 (10th Cir.2010). And, of course, Appellant did not have to prove these elements outright on Citty's Motion for Summary Judgment – she had only to show the existence of disputed material facts on those issues.

The facts before the trial court were that Sweeney had a long history of failure to follow policies and procedures, including those dealing with use of force and dealing with mentally disturbed individuals, and that Citty was aware of that history but failed to take any action to remove Sweeney from the streets. Sweeney was placed on Early Intervention Review by OKC in 2011 and 2015, which included multiple formal complaint investigations. **Aplt. App. Vol. 5 at 246-252.**

Sweeney had previously been found to have violated OKC policy and escalated a situation in 2014 with an armed and mentally disturbed person. His actions in that case were found to have been "extremely dangerous." **Aplt. App. Vol. 8 at 3-64.**

Sweeney participated in an officer-involved shooting in 2015 in which he discharged his weapon, and the subject was fatally wounded. Sweeney did not follow procedures in that incident regarding felony/high risk traffic stops. **Aplt. App. Vol. 8 at 68-84.**

Sweeney received two reprimands in 2016 for failing to follow OKC policy regarding booking evidence into the property room, meeting with witnesses outside of the

workplace or work hours, changing his work schedule without supervisor approval, and failing to work his full shift. **Aplt. App. Vol. 8 at 82-177.**

In March of 2017, Sweeney improperly used his position as a police officer to obtain confidential information regarding a Department of Human Services case when OKC did not have any investigation underway regarding the matter. **Aplt. App. Vol. 8 at 178-211; Aplt. App. Vol. 6 at 211-223.**

Sweeney was placed on administrative leave on March 31, 2017, for violating procedure on timely turning in his investigation reports. **Aplt. App. Vol. 6 at 225-242; Aplt. App. Vol. 8 at 212-233.**

Sweeney used inappropriate and unprofessional profanity while making an arrest on November 4, 2017, less than two weeks before killing Mr. Pigeon. **Aplt. App. Vol. 8 at 234.** Citty was aware of Sweeney's prior officer-involved shooting and disciplinary issues. Prior discipline on Sweeney was "negotiated with the FOP." That "discipline" placed Sweeney in a position where he would be even more of a danger to the public and to people with mental issues such as Mr. Pigeon. **Aplt. App. Vol. 8 at 235-242.** The discipline memoranda generated regarding Sweeney would have gone up the chain of command to Citty as the chief of police. **Aplt. App. Vol. 6 at 222-224.** It would have been Citty who ultimately decided on any discipline officers would receive. **Aplt. App. Vol. 6 at 227-228.** The facts before the trial court demonstrated the existence of an issue of material fact as to Citty's culpable state of mind/deliberate indifference to Sweeney's repeated policy violations. Citty was aware of the many discipline issues and policy violations involving Sweeney, including violations dealing specifically with escalating

situations with mentally disturbed subjects. He chose, as the ultimate decision maker, not to discipline Sweeney and instead to negotiate a resolution of the issue with the police union.

The trial court determined that "deliberate indifference" was the proper standard for the required state of mind of the supervisor. However, it conducted no analysis of what "deliberate indifference" means or why it was ruling the way it did.

As stated in Schneider, 717 F.3d at 769:

> "[A] local government policymaker is deliberately indifferent when he deliberately or consciously fails to act when presented with an obvious risk of constitutional harm which will almost inevitably result in constitutional injury of the type experienced by the plaintiff." Hollingsworth v. Hill, 110 F.3d 733, 745 (10th Cir.1997)

This is the same standard applicable to municipalities themselves. As stated in Allen v. Muskogee, 119 F.3d 837, 841–842 (10th Cir.1997) (citing City of Canton, 489 U.S. at 389–91, 109 S.Ct. 1197):

> In order to prevail on a claim against a municipality for failure to train its police officers in the use of force, a plaintiff must first prove the training was in fact inadequate, and then satisfy the following requirements:
>
> > (1) the officers exceeded constitutional limitations on the use of force; (2) the use of force arose under circumstances that constitute a usual and recurring situation with which police officers must deal; (3) the inadequate training demonstrates a deliberate indifference on the part of the city toward persons with whom the police officers come into contact, and (4) there is a direct causal link between the constitutional deprivation and the inadequate training.

Further, as stated in Bryson v. City of Oklahoma City, 627 F.3d 784, 789 (10th Cir. 2010) a municipality may be held:

> . . . liable for its failure to train or supervise . . . [if] the City's policymakers "can reasonably be said to have been deliberately indifferent to the need" for further training or supervision. City of Canton, 489 U.S. at 390, 109 S.Ct. 1197. We discussed this requirement of deliberate indifference in Barney v. Pulsipher:
>
> > The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm. In most instances, notice can be established by proving the existence of a pattern of tortious conduct. In a narrow range of circumstances, however, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction, such as when a municipality fails to train an employee in specific skills needed to handle recurring situations, thus presenting an obvious potential for constitutional violations.
>
> 143 F.3d 1299, 1307–08 (10th Cir.1998) (internal quotation marks and citations omitted).

As stated in Barnes v. United States, 11-CV-0582-HE, 2014 WL 12910559, at *8–9 (N.D. Okla. Jan. 24, 2014):

> The City's principal argument is that plaintiff's evidence is insufficient to show that its officers were inadequately trained or that it was deliberately indifferent to the need for further training. The City claims plaintiff has not produced any evidence that shows it failed to notice that "Tulsa Police officers, specifically Jeff Henderson," prior to the event involving plaintiff, engaged in a pattern of violating

> individuals' constitutional rights and failed to take proper remedial action. Id.
>
> Plaintiff is not attacking the general training that the City provides its employees, but rather alleges the City had notice of prior misbehavior by Henderson and other officers and failed to take appropriate steps or failed to adequately supervise Henderson and other Tulsa police officers. Though there is some imprecision in the way the parties address the issue, it appears plaintiff's claim is more one of failure to supervise than it is one of failure to train. In any event, the court concludes plaintiff has offered sufficient evidence to create a fact dispute as to whether the City's policymakers "'can reasonably be said to have been deliberately indifferent to the need' for further ... supervision." Bryson v. City of Oklahoma City, 627 F.3d 784, 789 (10th Cir. 2010) (quoting City of Canton v. Harris, 489 U.S. 378, 390 (1989)). This is not like the situation in Bryson, where "the City had not yet received any complaints or criticisms of any of its forensic chemists' work at the time Ms. Gilchrist concealed exculpatory evidence and falsified her test reports in 1983." Id. at 789. **Here the City of Tulsa received multiple complaints about Henderson before he allegedly violated plaintiff's constitutional rights, see Doc. #122-4, 122-5, 122-6, 122-7, such that a reasonable jury might conclude that his alleged behavior was "a highly predictable or plainly obvious consequence of the ...lack of meaningful supervision" by the City**. Bryson, 627 F.3d at 789. See Schneider, 717 F.3d at 771 ("The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm. In most instances, notice can be established by proving the existence of a pattern of tortious conduct.) (quoting Barney v. Pulsipher, 143 F.3d 1299, 1307 (10th Cir.1998)). (Emphasis added.)

Here, the materials before the trial court indicated that there was, at the least, a question of material fact on the issue of deliberate indifference. As in Barnes, a reasonable jury could conclude from these facts that Citty chose to disregard what he already knew

about Sweeney's propensity to violate policies and procedures. There were many prior incidents involving Sweeney, including policy violations involving misuse of his position, numerous failures to follow policy and, most distressingly, another incident involving a mentally disturbed person where Sweeney dangerously, and in violation of OKC policy and procedure, escalated the situation unnecessarily. Citty's actions in the face of Sweeney's long disciplinary history led directly to the violation of Mr. Pigeon's constitutional rights and his death.

The trial court completely declined to address the other two elements of Appellant's claim against Citty. With respect to the requirement of personal involvement, the facts before the Court demonstrate, at the least, an issue of material fact. Citty was personally aware of the many discipline issues and policy violations involving Sweeney, including violations dealing specifically with escalating situations with mentally disturbed subjects. He was the ultimate decision maker on discipline to be meted out to Sweeney. He chose, as the ultimate decision maker, not to discipline Sweeney and instead to negotiate a resolution of the issue with the police union.

With regard to the causation requirement, Appellant submits that disputed material facts exist. On this record, a reasonable jury could conclude that, as set forth above, Citty's failure to act with respect to Sweeney set the events in motion that allowed him to violate Mr. Pigeon's constitutional rights. The trial court clearly erred in granting summary judgment to Citty, and its judgment must be reversed.

PROPOSITION II

THE TRIAL COURT ERRED IN GRANTING OKC'S MOTION FOR SUMMARY JUDGMENT ON THE SECTION 1983 CLAIM

The trial court's ruling on OKC's Motion on the Section 1983 claim amounted to a single sentence, concluding that since Appellant's Section 1983 claim against OKC was based on the acts of Citty, OKC was entitled to summary judgment as well. The trial court engaged in no further analysis or discussion of the issue. This was despite the fact that a different standard applies to a municipality on a Section 1983 claim. There can certainly be situations where a municipality might be liable where an individual municipal employee might not. The disposition of Appellant's claim against OKC was not dependent upon the success of her claim against Citty personally.

To succeed in a §1983 claim against a municipality, a plaintiff must show two elements:

> (1) a municipal employee committed a constitutional violation, and (2) a municipal policy or custom was the moving force behind the constitutional deprivation.

City of Canton v. Harris, 489 U.S. 378, 389, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989); Walker v. City of Orem, 451 F. 3d 1139, 1152 (10th Cir. 2006); Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997); Monell v. Department of Social Services, 436 U.S. 658, 691-92, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

In Monell, the Court held that a plaintiff must identify "a government's policy or custom" that caused the injury. In later cases, the Supreme Court required a plaintiff to show that the policy was enacted or maintained with deliberate indifference to an almost

inevitable constitutional injury. See Brown, 520 U.S. at 403, 117. The Monell Court further explained that liability under §1983 may be based upon a municipal "custom or usage" having the force of law, even though it has "not received formal approval through the body's official decision-making channels." Monell, 436 U.S. at 691.

In the present case, Appellant showed in response to OKC's Motion that Sweeney committed a violation of Mr. Pigeon's Fourth Amendment rights. His killing of Mr. Pigeon because he erroneously and unreasonably believed that he was holding a knife was not "objectively reasonable." OKC admitted as much in its Motion. The first element is met here.

With regard to the second element, in Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 106 S. Ct. 1292, 1298, 89 L. Ed. 2d 452 (1986), the Supreme Court held:

> With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy. See, e.g., Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (City Council passed resolution firing plaintiff without a pretermination hearing); Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) (City Council canceled license permitting concert because of dispute over content of performance). But the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. Monell's language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," Monell, *supra*, 436 U.S., at 694, 98 S.Ct., at 2037–2038, and

> whose decisions therefore may give rise to municipal liability under § 1983.
>
> Indeed, any other conclusion would be inconsistent with the principles underlying § 1983. To be sure, "official policy" often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. That was the case in Monell itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. However, as in Owen and Newport, a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

Here, the materials before the Court indicate that there is, at the least, a question of material fact on the issue of a whether a municipal policy or custom was the moving force behind Sweeney's deprivation of Mr. Pigeon's constitutional rights. As pointed out above, a single action or course of action, even standing alone, even if undertaken solely by the chief of police, is enough to support Appellant's claim here. Citty was aware of Sweeney's long history of policy violations and misconduct, including a prior incident in which he dangerously escalated a situation with a mentally disturbed individual, just as he did in the present case. Instead of getting Sweeney off the streets, OKC put him in a position where he was more likely to violate the rights of the public and, ultimately, to murder Mr. Pigeon.

A reasonable jury could conclude from the facts before the Court that OKC's action in disregarding Sweeney's known propensity to violate policies and procedures, including in a very similar prior situation, led directly to the violation of Mr. Pigeon's constitutional rights and his death. It is unconscionable that the trial court completely failed to even undertake any analysis of Appellant's Section 1983 claim against OKC. The trial court's grant of summary judgment must be reversed.

PROPOSITION III

THE TRIAL COURT ERRED IN GRANTING OKC'S MOTION FOR SUMMARY JUDGMENT ON THE NEGLIGENCE CLAIM

OKC contended that several provisions of the Oklahoma Governmental Tort Claims Act insulated it from liability in the present case. The trial court relied solely upon the OGTCA provision contained at 51 O.S. §155(6) in finding that OKC was immune from liability for Appellant's claims.

Section 155(6) exempts political subdivisions from liability for "[c]ivil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection." However, the Oklahoma Supreme Court has recognized that:

> . . . "the government retains its immunity with respect to formulation of policy, but is subject to liability for routine decisions and daily implementation of the policy or planning level decisions." Id., ¶ 5, 788 P.2d at 965. "Statutory immunity for providing protective services (police or fire) is not co-extensive with a blanket immunity from common-law negligence for carrying out law enforcement duties." Salazar, 1999 OK 20, ¶ 27, 976 P.2d at 1066. Negligent performance of a law enforcement function is not shielded from immunity

> under the GTCA. Id. State ex rel. Oklahoma Dep't of Pub. Safety v. Gurich, 2010 OK 56, ¶ 10, 238 P.3d 1, 3–4.

The trial court made what appears to be a finding of fact in its decision, stating that "the Court finds that the officers were there to protect Mr. Pigeon from harming himself or others rather than to carry out a law enforcement function." **Aplt. App. Vol. 7 at 119**. This improper finding of fact was not supported by the record before the trial court.

> "[F]indings of fact" are inappropriate in a summary judgment order, because if summary judgment is proper no findings of fact need be made and the case can be resolved as a matter of law. Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997).

The trial court relied upon two cases, Myers v. Oklahoma County Bd of County Com'rs, 151 F.3d 1313 (10th Cir. 1998), and Samuel v. City of Broken Arrow, 506 Fed.Appx. 751 (10th Cir. 2012) in support of its holding that Sweeney was undertaking protective services with respect to Mr. Pigeon, which would come within the §155(6) exemption, not law enforcement activities, which would not. However, as stated in Samuel, citing Morales v. City of Oklahoma City ex rel. Oklahoma City Police Dep't, 2010 OK 9, ¶ 15, 230 P.3d 869, 876:

> Under Oklahoma law, we may look to an officer's subjective intentions to determine whether the action was protective. See Morales, 230 P.3d at 876 (considering whether the officer's role was protective or law enforcement "[f]rom [the officer's] viewpoint"). Samuel v. City of Broken Arrow, 506 Fed.Appx. 751, at n. 3.

Despite the trial court's apparent ruling to the contrary, the fact that the original call was for a suicidal individual does not end the inquiry. The subjective intentions of the

officers must be looked to in order to make the determination as to whether they were engaged in protective action or law enforcement.

The facts before the trial court were that Sweeney arrived on the scene and saw Officers Nitzky and Howell pursuing Mr. Pigeon and giving him commands to "put it down" then perceived Mr. Pigeon holding something in his hand which Sweeney believed to be a knife. **Aplt. App. – Conventionally filed CD, Video interview of Sweeney, attached as Exhibit 80 to OKC's Motion, at 6:30.** Officer Nitzky considered this to be a situation requiring a non-lethal response from the police and never communicated otherwise to anyone. **Aplt. App. Vol. 6 at 284-286.**

Sweeney's commands were not consistent with the commands being given by Officers Nitzky and Howell. They were commanding Mr. Pigeon to drop the lighter fluid and were not threatening to shoot or otherwise harm Mr. Pigeon. Sweeney escalated the situation. **Aplt. App. – Conventionally filed CD, Body Cam Footage of Officers Nitzky and Howell, attached to OKC's Motion as Exhibits 77 and 78, respectively.**

Officer Nitzky believed Mr. Pigeon was a danger to himself. He did not believe he was in danger from Mr. Pigeon. Officer Nitzky fired his beanbag shotgun to try to keep Mr. Pigeon from lighting himself on fire. Mr. Pigeon had not made any aggressive move towards Officer Nitzky or Officer Howell at the time he discharged the beanbag shotgun. Officer Nitzky never saw anything in Mr. Pigeon's hands other than a lighter and lighter fluid. Mr. Pigeon did not threaten Officer Nitzky verbally and did not move towards him. **Aplt. App. Vol. 7 at 20-26.**

Mr. Pigeon was moving away from the officers after Sweeney threatened to "fucking shoot" him. **Aplt. App. – Conventionally filed CD, Body Cam Footage of Officer Howell, attached to OKC's Motion as Exhibit 78, at 00:59 and 1:03; Body Cam Footage of Officer Nitzky, attached to OKC's Motion as Exhibit 77, at 1:05.** Mr. Pigeon's reaction to being hit by the beanbag round was not in any way threatening to any of the officers, including Sweeney. **Aplt. App. Vol. 7 at 16-18.**

Officer Howell recognized that Mr. Pigeon was holding a bottle of lighter fluid, and stated so, before he and Officer Nitzky ever moved away from their vehicles. **Aplt. App. – Conventionally filed CD, Body Cam Footage of Officer Howell, attached to OKC's Motion as Exhibit 78, at 00:35**; **Body Cam Footage of Officer Nitzky, attached to OKC's Motion as Exhibit 77, at 00:33.** Officer Howell was confident that Mr. Pigeon was holding only a lighter and lighter fluid while he and Officer Nitzky were making their way towards Mr. Pigeon. **Aplt. App. Vol. 7 at 33-34.**

Twice after Sweeney's arrival on the scene, Officer Nitzky ordered Mr. Pigeon to drop the lighter fluid. **Aplt. App. – Conventionally filed CD, Body Cam Footage of Officer Howell, attached to OKC's Motion as Exhibit 78, at 00:59 and 1:03; Body Cam Footage of Officer Nitzky, attached to OKC's Motion as Exhibit 77, at 00:57 and 1:01.** Mr. Pigeon's hands were up until Sweeney threatened to "fucking shoot" him, at which point his hands went down and he backed further away from the officers. **Aplt. App. – Conventionally filed CD, Body Cam Footage of Officer Howell, attached to OKC's Motion as Exhibit 78, at 00:59 and 1:03; Body Cam Footage of Officer Nitzky, attached to OKC's Motion as Exhibit 77, at 1:03.**

Officer Nitzky fired his bean bag shotgun and the projectile hit Mr. Pigeon in his right hip, then Sweeney fired five shots at Mr. Pigeon, killing him. **Aplt. App. – Conventionally filed CD, Body Cam Footage of Officer Howell, attached to OKC's Motion as Exhibit 78, at 1:07; Body Cam Footage of Officer Nitzky, attached to OKC's Motion as Exhibit 77, at 1:05.** Officer Howell did not believe that he or Officer Nitzky were in imminent danger from Mr. Pigeon. The only person in danger from Mr. Pigeon was himself. **Aplt. App. Vol. 7 at 4-13.**

Mr. Pigeon was not threatening the officers and was backing away from them. Neither Officer Howell nor Officer Nitzky had their pistols drawn or pulled out any lethal weapon to use on Mr. Pigeon. Officer Nitzky only had the beanbag shotgun out. Mr. Pigeon was not advancing on any of the officers. Mr. Pigeon was not making any threatening comments towards Sweeney. **Aplt. App. Vol. 7 at 7-9, 12.**

Sweeney made no effort when he arrived on the scene to communicate with Officers Howell and/or Nitzky to determine what was going on or how he could assist. Normally, officers arriving to assist let the officer who made initial contact with the subject continue that contact. **Aplt. App. Vol. 7 at 10, 27-28.**

When Mr. Pigeon had his hands up, Officer Howell was positive that he did not have a gun or a knife and was only holding a lighter and a bottle of lighter fluid. He hoped they would be able to get Mr. Pigeon into custody and get him the help he needed. He had no reason to believe the situation would end violently. His weapon was still holstered. He would have had his weapon out if he thought there was any threat to himself or the other officers. **Aplt. App. Vol. 7 at 11-13.**

It never appeared to Officer Howell that Mr. Pigeon had a knife. It never appeared to him that Mr. Pigeon was a threat to any of the officers. Mr. Pigeon did not advance on the officers or make any verbal threats to any of them. **Aplt. App. Vol. 7 at 14-15.**

When Sweeney shot Mr. Pigeon, Officer Howell did not expect gunshots and did not believe it was necessary. His gun was still in its holster when Mr. Pigeon was shot. **Aplt. App. Vol. 7 at 19.** Sweeney escalated the situation and caused the chaos by responding too quickly and aggressively and failing to assess what was going on. **Aplt. App. Vol. 7 at 29-30.** Sweeney did not follow OKC procedures in this incident by rushing into the scene, failing to use de-escalation tactics, closing the distance with Mr. Pigeon, and failing to communicate with the officers already on scene. **Aplt. App. Vol. 7 at 73-75.**

The officers at the scene failed to communicate effectively or establish a plan of action. **Aplt. App. Vol. 7 at 76-91.** The officers on scene did not follow OKC's procedures for handling the mentally ill set forth in Policy 215.60. They failed to call for a Crisis Intervention Team member, failed to move slowly after initial contact, and failed to avoid the use of firearms. **Aplt. App. Vol. 7 at 76-91.**

The beanbag shotgun deployment by Officer Nitzky was not in compliance with OKC Policy 152.0 on less lethal devices. **Aplt. App. Vol. 7 at 76-91.** OKC's policy is deficient regarding the training, operation, and availability of a CIT team and in training and application of less lethal devices. **Aplt. App. Vol. 7 at 76-91.**

OKC does not specifically schedule officers to make sure a CIT officer is available at all times. The odds of there being a CIT officer available all the time is "probably slim." **Aplt. App. Vol. 9 at 238-240.**

The evidence before the trial court shows that, at the least, there was a question of material fact as to the subjective intent of Sweeney when he arrived on the scene. Regardless of the original reason for the call, upon his arrival Sweeney immediately, and erroneously, perceived Mr. Pigeon as being both armed and aggressive towards him and killed him as a result. He was engaged in law enforcement activity, not protective activity, and Appellant's claim is for his negligence in performance of that function. Section 155(6) does not immunize OKC from liability here. Morales v. City of Oklahoma City ex rel. Oklahoma City Police Dep't, 2010 OK 9, ¶ 15, 230 P.3d 869, 876.

OKC also asserted that it was not liable for Sweeney's actions because it may only be held liable for actions of its employees taken in the scope of their employment. 51 O.S. §153. The trial court declined to address this issue, finding that OKC was immune from liability whether or not Sweeney was in the course and scope of his employment. "Scope of employment" is defined at 51 O.S. §152(12) 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 including the operation or use of an agency vehicle or equipment with actual or implied consent of the supervisor of the employee, but shall not include corruption or fraud.

OKC's argument was that Sweeney, because he was convicted of second-degree murder in Mr. Pigeon's death, was not acting "in good faith" as required to make OKC

liable for his actions. However, OKC engaged in no analysis of what "good faith" means under the statute. Instead, it simply concluded that the criminal conviction means Sweeney was not acting in good faith.

21 O.S. §701.8, the statute under which Sweeney was convicted, defines second degree murder as a death caused:

> . . . by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; . . .

The statute, on its face, does not require any finding of "bad faith" or anything approaching "bad faith" to sustain a conviction. The "depraved mind" element means only that the person causing the death by engaging in "imminently dangerous conduct" with "reckless disregard of . . . the life and safety of another." Palmer v. State, 1994 OK CR 16, 871 P.2d 429, 432, *overruled on other grounds by* Willingham v. State, 1997 OK CR 62, 947 P.2d 1074; OUJI-CR 4-91. Nothing about Sweeney's conviction for second degree murder establishes that Sweeney was not acting in "good faith" so as to remove him from the scope of his employment. The question of whether an officer is acting within the scope of their employment is a jury question. Tuffy's, Inc. v. City of Oklahoma City, 2009 OK 4, ¶ 20, 212 P.3d 1158, 1167. Municipalities are not immunized from liability for the torts of their employees committed in the scope of employment. Nail v. City of Henryetta, 1996 OK 12, ¶ 3, 911 P.2d 914.

Although it is not before this Court on this appeal, the trial court, in denying Sweeney's Motion for Summary Judgment, determined that there was a disputed issue of

material fact as to Sweeney's good faith and, thus, whether he was acting in the course and scope of his employment.

Clearly, questions of material fact exist which precluded the trial court's grant of summary judgment to OKC and Citty. The trial court must be reversed, and this matter remanded for trial.

CONCLUSION

For the reasons stated herein, Appellant, Aronda Pigeon, individually and as Special Administrator of the Estate of Dustin Pigeon, Deceased, respectfully requests that this Court reverse the trial court's grant of summary judgment to Citty and OKC and remand this matter for trial on the merits.

Respectfully Submitted,

/s/Phillip P. Owens II
Phillip P. Owens, II, OBA #15165
OWENS LAW OFFICE, PC
6907 N.W. 122nd Street
Oklahoma City, OK 73142-3903
(405) 608-0708
(405) 608-0709- Facsimile
po@owenslawofficepc.com
Attorney for Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Certificate of Compliance With Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,696 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2020 in 13-point Times New Roman.

Date: March 25, 2022

/s/Phillip P. Owens II
Phillip P. Owens II, OBA #15165

CERTIFICATE OF SERVICE

I, Phillip P. Owens II, hereby certify that on March 25, 2022, I served copies of the foregoing Opening Brief on the following individuals by way of the CM/ECF filing system:

Richard C. Smith
Sherri R. Katz
200 North Walker, Suite 400
Oklahoma City, OK 73102
Attorneys for OKC and Citty

/s/ Phillip P. Owens II
Phillip P. Owens II

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

ARONDA PIGEON, individually and as Special Administrator of the Estate of DUSTIN PIGEON, deceased,	)	
Plaintiff,	)	
v.	)	Case No. CIV-18-728-J
KEITH PATRICK SWEENEY, et al.,	)	
Defendants.	)	

ORDER

Before the Court are Defendant City of Oklahoma City's (OKC) Motion for Summary Judgment [Doc. No. 88] and Defendant William Citty's (Citty) Motion for Summary Judgment [Doc. No. 90]. These motions are fully briefed. Based upon the parties' submissions, the Court makes its determination.

I. Background

On November 15, 2017, Dustin Pigeon called 911 and stated that he was attempting to commit suicide. Officers Erik Howell and Troy Nitzky arrived at the scene of the call first and observed Mr. Pigeon to be holding lighter fluid and a lighter. They communicated with him and directed him numerous times to put the lighter fluid down and put his hands up, which he ultimately did.[1]

While Officers Howell and Nitzky were communicating with Mr. Pigeon, Keith Patrick Sweeney (Sweeney)[2] arrived on the scene. Sweeney did not communicate with either Officer

[1] The method of suicide, type of weapons, and other information regarding what was in Mr. Pigeon's hands was not put out over the radio.
[2] At the time, Sweeney was an officer with the Oklahoma City Police Department.

EXHIBIT 1

Howell or Officer Nitzky when he arrived, and he started ordering Mr. Pigeon to "drop it" and get on the ground. When Sweeney said, "I will f***ing shoot you", Mr. Pigeon lowered his hands and backed further away from the officers. Officer Nitzky fired his bean bag shotgun, hitting Mr. Pigeon in his right hip, and Sweeney fired five simultaneous shots with his handgun, killing Mr. Pigeon.[3] An investigation was conducted, and Sweeney was charged with second degree murder. On November 4, 2019, Sweeney was convicted of second degree murder.

On June 29, 2018, Plaintiff filed this action alleging a 42 U.S.C. § 1983 claim for supervisory liability against OKC and Citty, a state law negligence claim against OKC and Sweeney, and excessive force and racial discrimination claims against Sweeney. OKC and Citty now move for summary judgment as to all of Plaintiff's claims against them.

II. Standard of Review

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. To determine whether this standard is met, the court views the evidence in the light most favorable to the non-moving party. *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014). "[T]he plain language of Rule 56(c) mandates entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case,

[3] Sweeney has stated that he thought Mr. Pigeon had a knife. Neither Officer Howell nor Officer Nitzky believed Mr. Pigeon had a knife. Mr. Pigeon did not have a knife.

and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

III. Analysis

A. Section 1983 claims

Plaintiff alleges 42 U.S.C. § 1983 supervisory liability claims against OKC and Citty. Having reviewed Plaintiff's responses to the motions for summary judgment, the Court concludes that Plaintiff is not alleging that OKC's use of force policies, procedures, and training per se are unconstitutional. Instead, Plaintiff is alleging that Citty was aware of Sweeney's history of policy violations and misconduct and that his failure to remove Sweeney from his position on the police force led directly to the violation of Mr. Pigeon's constitutional rights and his death.[4] Plaintiff, thus, appears to be bringing claims for inadequate discipline and supervision.

To prevail on a § 1983 claim against a defendant based on his supervisory responsibilities, a plaintiff must show: (1) personal involvement, (2) causation, and (3) culpable state of mind/deliberate indifference. *See Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013). "[A] local government policymaker is deliberately indifferent when he deliberately or consciously fails to act when presented with an obvious risk of constitutional harm which will almost inevitably result in constitutional injury of the type experienced by the plaintiff." *Id.* at 769 (internal quotations and citation omitted).[5]

Having carefully reviewed the parties' submissions, and viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Plaintiff has not set forth sufficient evidence to create a genuine issue of material fact that Citty was deliberately indifferent to Mr. Pigeon's

---

[4] Plaintiff's § 1983 claim against OKC is based on the actions of Citty.

[5] Because Plaintiff has not satisfied the state of mind element for summary judgment purposes, the Court declines to address the other two elements.

rights. The majority of Sweeney's prior policy violations and misconduct do not relate in any way to the use of force and thus would not have alerted Citty to any risk of constitutional harm of the type experienced by Mr. Pigeon. Further, the incident of Sweeney using a taser in relation to a person with mental health issues occurred three years prior to the shooting of Mr. Pigeon and Sweeney was counseled as a result of the incident; Sweeney's other use of force was found to be appropriate. These other incidents would also not have alerted Citty to any risk of constitutional harm which would almost inevitably result in the use of excessive force against Mr. Pigeon.

Accordingly, Citty is entitled to summary judgment as to Plaintiff's § 1983 claim. Additionally, because Plaintiff's § 1983 claim against OKC is based upon the actions of Citty, OKC is also entitled to summary judgment as to Plaintiff's § 1983 claim.

B. State law negligence claim

Plaintiff alleges that Sweeney, while within the course and scope of his employment with OKC, acted unreasonably and negligently when he encountered Mr. Pigeon, and that his negligence resulted in Mr. Pigeon's death. Plaintiff seeks to hold OKC liable for Sweeney's negligence based on the doctrine of respondeat superior.

OKC's liability is governed by the Oklahoma Governmental Tort Claims Act (OGTCA), Okla. Stat. tit. 51, § 151, *et seq.* The OGTCA provides that a political subdivision[6] is liable for any loss that results from "the torts of its employees acting within the scope of their employment subject to the limitations and exceptions specified in [the OGTCA]" and shall not be liable "for any act or omission of an employee acting outside the scope of the employee's employment." Okla. Stat. tit. 51, § 153(A).

[6] It is undisputed that OKC is a political subdivision.

OKC asserts that it is not liable under the OGTCA based upon the exemption set forth in Okla. Stat. tit. 51, § 155(6), which provides that "a political subdivision shall not be liable if a loss or claim results from: ... the method of providing, police, law enforcement or fire protection". Okla. Stat. tit. 51, § 155(6).[7] Under § 155(6), a political subdivision is not liable for the negligent acts of its employees that occur when taking individuals into protective custody. *See Schmidt v. Grady Cty., Okla.*, 943 P.2d 595, 598 (Okla. 1997). "The Oklahoma Supreme Court has held that 'protection' is the operative word, and that immunity therefore attaches under § 155(6) when police are providing 'protection' as opposed to carrying out a 'law enforcement function.'" *Samuel v. City of Broken Arrow, Okla.*, 506 F. App'x 751, 756 (10th Cir. 2012) (citing *Salazar v. City of Okla. City*, 976 P.2d 1056, 1066 (Okla. 1999)).

It is undisputed that Officers Howell, Nitzky, and Sweeney were responding to a 911 call regarding a suicidal individual – Mr. Pigeon. Having reviewed the parties' submissions, and viewing the evidence in the light most favorable to Plaintiff, the Court finds that the officers were there to protect Mr. Pigeon from harming himself or others rather than to carry out a law enforcement function. Accordingly, the Court concludes that the exemption set forth in § 155(6) applies and OKC is immune from liability for any negligent acts of Sweeney. *See Myers v. Okla. Cty. Bd. of Cty. Comm'rs*, 151 F.3d 1313 (10th Cir. 1998) (finding county immune under § 155(6) when officer shot suicidal individual when trying to take him into protective custody); *Samuel*, 506 F. App'x 751 (finding city immune from liability under § 155(6) when officer shot and killed suspect while responding to domestic violence call).

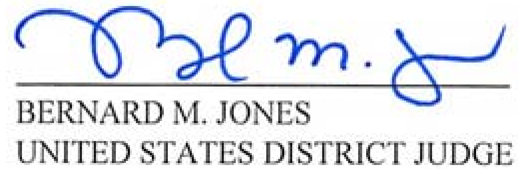
[7] OKC also asserts that it cannot be held liable under the OGTCA because Sweeney was acting outside the scope of his employment when he shot and killed Mr. Pigeon. Because the Court finds that even if Sweeney was acting within the scope of his employment OKC is immune from liability under § 155(6), the Court finds there is no need to address whether Sweeney was acting within the scope of his employment.

Accordingly, OKC is entitled to summary judgment as to Plaintiff's state law negligence claim.

IV. Conclusion

For the reasons set forth above, the Court GRANTS OKC's Motion for Summary Judgment [Doc. No. 88] and Citty's Motion for Summary Judgment [Doc. No. 90].

IT IS SO ORDERED this 8th day of December, 2020.



BERNARD M. JONES
UNITED STATES DISTRICT JUDGE