UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ELIZABETH GOODWIN,	:	**Case No. 1:15-cv-0027**
Administrator of the Estate of Tanisha	:	
Anderson, Deceased	:	
	:	**Judge Donald C. Nugent**
Plaintiff,	:	
	:	
v.	:	
	:	
CITY OF CLEVELAND, et al.	:	
	:	
Defendants.	:	

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANTS AND MEMORANDUM IN SUPPORT

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Plaintiff moves, pursuant to Rule 56(a) (2) of the Federal Rules of Civil Procedure, for Partial Summary Judgment against Defendants Aldridge and Myers who used excessive force against Tanisha Anderson causing her to suffer injury and death due to positional asphyxia and who were deliberately indifferent to her serious medical needs on November 12, 2014 in violation of the Fourth Amendment to the United States Constitution and state law. Partial Summary Judgment is also sought against the City of Cleveland because the City's failure to train and supervise officers on positional asphyxiation caused the injury to Tanisha Anderson. The bases for this filing are fully set forth in the attached Memorandum in Support, which is incorporated herein.

MEMORANDUM

I. Introduction

This civil rights and wrongful death action challenges the use of excessive force and the deliberate indifference to the obvious medical needs of Tanisha Anderson by Defendants Aldridge, Myers and the City of Cleveland. Tanisha Anderson was mentally ill but generally stable with the help of medication. On November 12, 2014, however, she was experiencing a period of instability and the Defendant police officers responded to her home. Tanisha was not armed, not dangerous, and was not accused of committing any crime. She simply needed mental health treatment. After initially using verbal control techniques, the officers escalated to physical force, ultimately holding her on the ground, prone and cuffed behind her back, causing her respiratory problems, suffering and ultimately causing her death due to positional asphyxia.

Plaintiff files this motion for partial summary judgment at this time because the uncontested facts about positional asphyxia make that claim ripe for decision and because the issue is urgent for the City of Cleveland. The City is preparing for the Republican National

Convention which is likely to generate numerous protests and arrests. The family of Tanisha Anderson wants to encourage the City, through the problems exposed through this motion, to provide immediate education and training on positional asphyxia and hopefully save lives. The issue could be addressed initially through roll call training and eventually through a more comprehensive program. Action is needed now.

This motion addresses only the issues of positional asphyxia and deliberate indifference to Tanisha's serious medical need. Discovery is far enough along to make liability on those issues clear. The expert report of police practices expert Lou Reiter addresses many issues. This motion however, does not address whether the defendant officers had *any* basis to use physical force, whether there was deliberate indifference by the city regarding training and supervision on mental health response and medical care, ratification, or any other issue. Discipline of Defendants Aldridge and Myers for Tanisha's death remains stalled 20 months after her death. The criminal investigation and prosecution of Aldridge and Myers for Tanisha's death remains stalled 20 months after her death. This motion for partial summary judgment under Fed. Rule 56 (a)(2), is one way for the family to move forward on the merits as they continue to seek justice for Tanisha and encourage action that will prevent any more suffering and death in Cleveland due to positional asphyxia[1].

II. Statement of Facts[2]

[1] Case Track. This case has been pending for 17 months. Because of the pending criminal investigation Defendants Aldridge and Myers have not yet answered the complaint. More than twenty persons have been deposed and many more will be taken. Thousands of documents have been produced and many more have been requested. Plaintiff respectfully requests that this case be adjusted from the standard track to the complex track. This memorandum satisfies the page limit for cases assigned to the complex track.

[2] Much of the discovery material in this case is subject to a protective order because the death is the subject of an open criminal investigation and many of the witnesses have been granted *Garrity* immunity. Doc. 21. The City has not stamped as confidential all of the documents that are subject to the protective order but Plaintiff will nonetheless follow the order to the best of her ability. It is clear that the *Garrity* statements are subject to a protective order and the summaries and testimony regarding statements by Defendants Aldridge and Myers made at the walk-through are

A. Tanisha Lived Safely with her Loving Family

1. Tanisha Anderson was a 37 year-old African American woman and mother of a teenage daughter. She suffered from bipolar disorder and schizophrenia, but her condition was generally well controlled with medication. Cassandra Johnson Declaration, Ex. B.
2. Tanisha lived in one side of a duplex with her mother, Cassandra Johnson and teenage daughter, Mauvion Green. The other side of the duplex was occupied by Tanisha's brother, Joell Anderson and his fiancé, Theresa Overton. Cassandra Johnson Declaration, Ex. B.
3. Tanisha loved to laugh and was a loving daughter to Cassandra, mother to Mauvion and sister to her siblings, Joell Anderson and Jennifer Johnson. Cassandra Johnson Declaration, Ex. B.

B. On November 12, 2014, Tanisha Anderson suffered a mental health episode

4. On November 12, 2014, Tanisha was in the midst of a mental health episode. She was not armed, violent toward any person, intoxicated, or suspected of having committed any crime. Cassandra Johnson Declaration, Ex. B; Joell Anderson Declaration, Ex. B.

[redacted]

6. That day she had been disoriented, she had trouble sleeping, and she was moving things, flipping switches, and disturbing the family. That evening she seemed confused and exited the home in a gown too light for the freezing weather and went to her

therefore subject to the protective order. To the extent possible plaintiff will cite to discovery material not covered by the protective order and submit any covered evidence in a sealed envelope pursuant to the order.

[3] To establish the uncontested nature of the facts in this case while keeping the discovery material subject to the protective order under seal, duplicate facts have been included where appropriate.

grandmother's house next door. The family was worried. Cassandra Johnson Declaration, Ex. B; Joell Anderson Declaration, Ex. A.

7. Concerned for his sister's well-being, Joell Anderson called 911 to request an ambulance or medical professionals to assist her. Police Dispatch Event Chronology #1, Doc. 54-1.

8. At approximately 9:31 p.m., two Cleveland police officers arrived at Tanisha's mother's home at 1374 Ansel Road, Cleveland, Ohio. Police Dispatch Event Chronology #1, Doc. 54-1.

9. The officers spoke with Tanisha and her family calmly and it was anticipated that Tanisha would get something to eat and then go to bed. The officers left the home. Cassandra Johnson Declaration, Ex. B; Joell Anderson Declaration, Ex. A.

[redacted]

11. Tanisha became disoriented again, and the family called 911 again to ask the officers to come back. Police Dispatch Event Chronology #2, Doc. 54-4.

C. Officers Aldridge and Myers Used Excessive Force Against Tanisha and were Deliberately Indifferent to her Risk of Positional Asphyxiation

12. At approximately 10:51 p.m., different officers, Defendants Scott Aldridge and Bryan Myers, responded to the family home. Police Dispatch Event Chronology #2, Doc. 54-4; Joell Anderson Declaration, Ex. A.

13. Defendants Aldridge and Myers escorted Tanisha to the back seat of their zone car to transport her to the hospital for a voluntary mental health evaluation. Rochelle Bottone Form 1, Doc. 54-23.

[redacted]

15. Inside the zone car, Tanisha became anxious and began to panic and exited the zone car. Joell Anderson Declaration, Ex. A; Rochelle Bottone Dep., pp. 18-19 Doc. 54-5.

[redacted]

17. Officers Aldridge and Myers tried to force her into the zone car. Joell Anderson Declaration, Ex. A; Rochelle Bottone Dep., p. 19 Doc. 54-5.

[redacted]

19. A terrified Tanisha called out for her mother and brother, and loudly counted and recited the Lord's Prayer. Joell Anderson Declaration, Doc. Ex. A.

[redacted]

21. It is undisputed that Tanisha ended up prone on the ground, with Officer Aldridge's knee putting pressure on her back and Officer Myers holding her legs and arms. Joell Anderson Declaration, Doc. Ex. A; Rochelle Bottone Dep., pp. 31, 43 Doc. 54-5.

[redacted]

23. She was held this way for several minutes. Joell Anderson Declaration, Ex. A.

[redacted]

D. Tanisha Anderson suffered and died of positional asphyxiation at the hands of Officers Aldridge and Myers

25. Tanisha became unconscious while she was cuffed from behind and prone on the ground. At some point, she stopped breathing. Joell Anderson Declaration, Ex. A.

[redacted]

27. Family members feared that she wasn't breathing. They asked the officers to check on her. They were told she was sleeping. Defendant Aldridge claimed to check her pulse. The family provided a coat to cover her. Joell Declaration, Ex. A.

[redacted]

29. Tanisha was left prone and handcuffed in the tree lawn. During this time, the officers did not provide medical care or call EMS. They did call for a supervisor at 11:20 p.m. Joell Anderson Declaration, Ex. A; Rochelle Bottone Dep., p. 19, 25 Doc. 54-5; Police Dispatch Event Chronology #3, Doc. 54-7.

[redacted]

[redacted]

31. At 11:35 p.m., a call was finally placed for EMS, 14 minutes after calling for a supervisor. Police Dispatch Event Chronology #3, Doc. 54-7.

32. At 11:41 p.m., the EMS squad arrived at the scene. EMS personnel found Tanisha unresponsive and not breathing, with her hands still cuffed behind her back. EMS personnel had trouble finding a pulse. Melissa Patton Dep., pp. 36, 43-44 Doc. 54-8; Rochelle Bottone Dep. p. 37 Doc. 54-5.

33. EMS personnel had the police remove Tanisha's handcuffs and they secured her to a backboard. At that time, EMS personnel confirmed that Tanisha had no pulse. EMS personnel were unable to revive her with CPR. Melissa Patton Dep., pp. 36, 47 Doc. 54-8.

34. Tanisha was transported to the Cleveland Clinic where she was later pronounced dead. Cleveland Clinic Records, p. 12 Doc. 54-9.

35. The Cuyahoga County Coroner ruled the death of Tanisha Anderson a homicide. Her cause of death was "[s]udden death associated with physical restraint in a prone position in association with ischemic heart disease and Bipolar disorder with agitation." Autopsy, Depo. Ex. 4, Doc. 54-10.

E. The Dangers of Positional Asphyxiation have been Well Known to the Law Enforcement Community for More than Twenty Years

36. Positional asphyxiation, formerly known as "sudden in-custody death syndrome" has been well established in the law enforcement community for decades. Plaintiff's Expert Report, p. 8 Doc. 62.

37. Deaths by positional asphyxiation were first documented in the mid 1970s. Plaintiff's Expert Report, pp. 8-9 Doc. 62.

38. The San Diego City Police Department conducted nationwide surveys and published them in 1983 and 1992. Police agencies across the country were contacted for information and supplied responses for these surveys. Plaintiff's Expert Report, p. 9 Doc. 62.

39. Videotaped training programs were developed following the surveys, including the 1994 New York City Medical Examiner's tape of the consequences of compression deaths during suspect handcuffing and control and the 1994 presentation by the Commissioner of the California Highway Patrol, relying heavily on the San Diego police survey. Plaintiff's Expert Report, p. 9 Doc. 62.

40. In 1995, the Department of Justice, National Law Enforcement Technology Center, and National Institute for Justice published a training bulletin, "Positional Asphyxia – Sudden Death." Depo. Ex 41 Doc. 54-11. That bulletin specifically listed "obesity" as a "Predisposing Factor[s] to Positional Asphyxia."The dangers of improper restraint techniques have been described in longstanding reference on police handling of emotionally disturbed persons, including the *Manual for the Police: How to Recognize and Handle Abnormal People,* by Matthews and Rowland, *Special Care: Improving the Police Response to the Mentally Disabled* in 1986, *Managing Persons with Mental Disabilities* in 1989, and *Abnormal Behavior* in 1979. Plaintiff's Expert Report, p. 10 Doc. 62.

41. In 1996, and in the updated version in 2005, the International Association of Chiefs of Police's Law Enforcement Policy Center reissued its paper and model policy on

"Transportation of Prisoners," which discussed the lethal issue of positional asphyxia and prone positioning of subjects. Plaintiff's Expert Report, p. 10 Doc. 62.

F. The City of Cleveland Has No Policy or Training on Positional Asphyxiation

42. The Cleveland Division of Police has nothing in its written policies, procedures, directives or training materials that references positional asphyxiation in any manner. Plaintiff's Expert Report, p. 11 Doc. 62.

43. Lieutenant Robert Tucker was responsible for determining if Defendants Aldridge and Myers followed departmental policy. He stated in deposition that there is no training on positional asphyxiation. Robert Tucker Dep., p. 78 Doc. 54-6.

44. Lt. Tucker also stated that there are no policies or procedures on positional asphyxiation. Robert Tucker Dep., p. 78 Doc. 54-6.

45. Lt. Tucker stated that "to the best of my knowledge the officers were not trained to do it. I wish that would have happened." Robert Tucker Dep., p. 79 Doc. 54-6.

46. Michael McGrath, Director of the Department of Public Safety of the City of Cleveland has charged Defendants Aldridge and Myers with violating the City Use of Force Policy based on their handling of Tanisha Anderson but action on the discipline is stayed pending the conclusion of a criminal investigation. Depo. Ex. 12, Doc. 54-12; Depo. Ex. 33, p. 1 Doc. 54-13.

47. Lt. Tucker, at pages 80 – 81, agreed that the City needed to train officers about positional asphyxia:

So you'd agree that this report should have
24 included some notice to the higher-ups that they
25 implement better training on subject control so that it
Page 81
1 include clear direction on positional asphyxiation.
2 **A. I would agree.**

Robert Tucker Dep., pp. 80-81 Doc. 54-6.

III. Argument

Defendants Aldridge and Myers used excessive force against Tanisha Anderson and were deliberately indifferent to her need for medical care. Their actions caused her suffering and wrongful death by positional asphyxiation. Defendant City of Cleveland was deliberately indifferent to the known risks of positional asphyxiation when it failed to institute adequate policies, failed to adequately train and failed to adequately supervise its officers regarding positional asphyxiation. The City's complete lack of training or supervision on positional asphyxiation was the moving force behind Tanisha's death. Partial Summary Judgment should be granted against the Defendants on these issues in this case.

A. Standard for Summary Judgment

Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Hunt v. Sycamore Community School Dist. Bd. of Educ*., 542 F.3d 529 (6th Cir. 2008). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *S.S. v. Eastern Kentucky University*, 532 F.3d 445 (6th Cir. 2008), *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In evaluating motions for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *E.E.O.C. v. Watkins Motor Lines, Inc*., 463 F.3d 436 (6th Cir. 2006), *citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-159 (1970). Nevertheless, "the mere existence of some alleged factual dispute will not defeat an otherwise properly supported

motion for summary judgment; the requirement is that there be no genuine issues of material fact." *Baker v. Sunny Chevrolet, Inc*., 349 F.3d 862 (6th Cir. 2003), *citing Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248 (1986) (emphasis in original). In this case, there are no contested issues of material fact. There indeed are some factual discrepancies, including discrepancies between different versions of facts told by the involved officers themselves, but these are not material to the issues raised in this motion. Summary judgment should be granted against the City of Cleveland. *Jacobs v. Village of Ottawa Hills*, 159 F.Supp.2d 693, 698 (N.D. Ohio 2001) (granting plaintiff's motion for summary judgment against officer for use of excessive force).

B. Defendants Aldridge and Myers violated Tanisha Anderson's Constitutional Rights

Defendants Aldridge and Myers used excessive force against Tanisha Anderson on November 12, 2014 causing her to experience positional asphyxiation and related pain, suffering and death in violation of the Fourth Amendment to the United States Constitution and state law.

1. Tanisha Anderson suffered a violation of the Fourth Amendment when Defendants Aldridge and Myers used excessive force against her, causing her to suffer and die of positional asphyxiation

"The right to be free from excessive force is a clearly established Fourth Amendment right." *Neague v. Cynkar*, 258 F.3d 504, 507 (6th Cir. 2001) (*citing to Walton v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir.1993)). An excessive force claim invokes "the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons ... against unreasonable ... seizures" of the person. *Graham v. Connor*, 490 U.S. 386, 394 (1989). Excessive force claims turn on whether or not the officer's actions were "objectively reasonable." *Neague v. Cynkar*, 258 F.3d 504, 507 (6th Cir. 2001)(*citing to Graham*, 490 U.S. at 394-395).

Defendants Aldridge and Myers used excessive force against Tanisha two times for the purpose of this motion. First, when they put substantial pressure on her back while she was incapacitated. Second, when they created an asphyxiating condition by handcuffing an overweight woman and leaving her prone to asphyxiate under her own weight.

On the evening that Defendants Aldridge and Myers used force against Tanisha Anderson, she was experiencing a mental health episode, but was not armed, violent, intoxicated, or suspected of having committed any crime. Cassandra Johnson Declaration, Ex. B; Joell Anderson Declaration, Ex. A; [redacted] That day, she had been disoriented. She had trouble sleeping, was moving things, flipping switches, and disturbing the family. Cassandra Johnson Declaration, Ex. B; Joell Anderson Declaration, Ex. A. That evening, after becoming disoriented again, the family called 911. Police Dispatch Event Chronology #2, Doc. 54-4. Defendants Aldridge and Myers responded to the call, and escorted her to their zone car for a voluntary mental health evaluation at a local hospital. Rochelle Bottone Form 1, Doc. 54-23; [redacted] However, once inside the zone car, Tanisha became anxious and began to panic. She tried to leave the zone car. Joell Anderson Declaration, Ex. A; Rochelle Bottone Dep., p. 19 Doc. 54-5; [redacted]

Sgt. Bottone spoke with Defendant Aldridge shortly after the altercation and again at the hospital and indicated that he had taken Tanisha Anderson to the ground and placed his knee on her back to get her cuffed:

> Q. But on at least two occasions, both at the house
> 14 and at the hospital, he indicated that he had taken her

15 to the ground to get her cuffed, and in the course of
16 that use of force he had placed his knee on her back;
17 is that fair?
18 **A. Right.**

Rochelle Bottone Dep., p. 43 Doc. 54-5. See also, "the best way to gain control of her was just to put his weight on her back to get her arms behind her back." Rochelle Bottone Dep., p. 31 Doc. 54-5. Because "that was just the most effective way to get her cuffed." Rochelle Bottone Dep., pp. 31-32 Doc. 54-5.

The Medical examiner ruled her death a homicide and stated that Tanisha was subjected to "physical restraint in a prone position." Autopsy, Depo. Ex. 4, p. 6 Doc. 54-10.

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[redacted]

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"Creating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004). Aldridge and Myers clearly put "substantial or significant pressure" on Tanisha her back. And by doing so while she was handcuffed, they were using such force against "an incapacitated and bound" subject. These actions were objectively unreasonable, and doing so violated Tanisha's right to be free of excessive force.

Even if the Defendant officers were to dispute whether the pressure was applied before, during or after they handcuffed Tanisha, they would still be liable. In *Martin v. City of Broadview Heights*, 712 F.3d 951, 961 (6th Cir. 2013), the Sixth Circuit clarified that the "better view is that *Champion* proscribes the use of "substantial or significant pressure" that creates asphyxiating conditions in order to restrain a subject who does not pose a material danger to the

officers or others." Even accepting for purposes of summary judgment that the Defendant officers were justified in taking Tanisha into custody and that they were justified in using some amount of force against her, once they had her on the ground, it is undisputed that they continued to put pressure on her back for some period of time. As an unarmed woman who had not committed a crime, who had already been taken to the ground and who was currently being restrained by two police officers, she could not have presented "a material danger to the officers or others" at that time, even if she were not handcuffed. Despite this, they continued to put "substantial or significant pressure" on her back. This use of force was objectively unreasonable, and violated Tanisha's right to be free of excessive force, even when the facts are viewed in the light most favorable to the Defendants.

Finally, the Defendants' use of excessive force continued even after they stopped putting the pressure of their own weight onto Tanisha's back because the way they handcuffed her was also unreasonable. Handcuffing itself is a use of force and can be excessive. *Walton v. City of Southfield*, 995 F.3d 1331, 1342 (6th Cir. 1993). As noted above in *Champion*, it is objectively unreasonable excessive force to create "*asphyxiating conditions* by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect." *Champion* at 903.

When Aldridge and Myers handcuffed Tanisha, they created an asphyxiating condition by incapacitating her in a position where her own weight would cause her to asphyxiate. When someone is prone, his/her own body weight puts pressure on the lungs, creating a risk of asphyxiation. Positional Asphyxia – Sudden Death, Depo. Ex 41, p. 2 Doc. 54-11. Because of this, people who are overweight or obese, like Tanisha, are at greater risk of positional asphyxiation. Autopsy, Depo. Ex. 4, p. 1 Doc. 54-10 (stating that she was 251 pounds at the time

of her death); Robert Tucker Dep., pp. 78-79 Doc. 54-6 (stating that he is aware that persons who are overweight are at greater risk of positional asphyxiation when they are restrained in a prone position). When she was left handcuffed in a prone position, her substantial body weight was more than enough to create an asphyxiating condition.

Even accepting the version of the facts most in the Defendants' favor, they created an asphyxiating condition by placing and leaving her prone and handcuffed to asphyxiate under her own substantial weight. This was an unreasonable use of force against an incapacitated woman.

2. Tanisha Anderson also suffered a constitutional violation when Defendants Aldridge and Myers were deliberately indifferent to her serious medical need by delaying any call to EMS for at least 14 minutes.

Under the Fourth Amendment and the Fourteenth Amendment Due Process clause, persons detained by the police have a right to adequate medical treatment. *Watkins v. City of Battle Creek*, 273 F.3d 682, 685-86 (6th Cir. 2001). When Defendants failed to roll the cuffed, prone Tanisha onto her side, or even call for EMS to respond to the scene for 14 minutes, they were deliberately indifferent to her serious medical needs.

"To sustain a cause of action under §1983 for failure to provide medical treatment, plaintiff must establish that the defendants acted with "deliberate indifference to serious medical needs." *Id*. at 686. The deliberate indifference standard encompasses both an objective and a subjective element. *Blackmore v. Kalamazoo*, 390 F.3d 890, 895 (6th Cir. 2004). "Deliberate indifference requires that the defendants knew of and disregarded a substantial risk of serious harm to [the detainee's] health and safety." *Watkins*, at 686. The Supreme Court defined deliberate indifference as lying somewhere higher than negligence but lower than "acting with a purpose or knowledge." *Jones v. Muskegon County*, 625 F.3d 935 (citing *Farmer v. Brennan*, 511 U.S. 825, 835, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

The objective component is met, because Tanisha Anderson was in fact at "substantial risk of serious harm." She was struggling to breathe, and because she received no medical treatment, it killed her. Autopsy, Depo. Ex. 4, p. 6 Doc. 54-10. There is no question that asphyxiation presents a "substantial risk of serious harm." *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596, 603 (6th Cir. 2005) (plaintiff who asphyxiated following restraint by police had "substantial risk of serious harm to [his] health and safety" satisfying deliberate indifference standard); *Jones v. City of Cincinnati*, 521 F.3d 555 (6th Cir. 2008) (plaintiff who asphyxiated following use of force by police had "substantial risk of serious harm to [his] safety" because he "was not breathing").

In this case, the subjective component is also met. "To satisfy the subjective component, the plaintiff must allege facts which… would show that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk." *Johnson v. Karnes*, 398 F.3d 868, 873-874 (6th Cir. 2005). See also, *Brown v. Chapman*, 814 F.3d 447, 466 (6th Cir. 2016) (Cleveland Police Officer denied summary judgment where he witnessed subject state he could not breathe, responded by saying "who gives a fuck" and did not seek medical help.).

Tanisha's brother Joell states that Tanisha was cuffed behind her back, prone and nonresponsive on the tree lawn for an extended period of time. Joell Anderson Declaration, Ex. A. He says that Defendant Aldridge claimed to be checking on her. *Id*. As set out above, the police records show that Tanisha Anderson was in this dangerous position in need of medical care for at least 14 minutes before EMS was even summoned. This extended delay reflects deliberate indifference to her serious medical need.

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Taking the Defendants' version of the facts to be true, we must assume that what the officers saw led them to infer that she needed her vitals checked and continuous monitoring. Joell Anderson Declaration, Ex. A. Despite all this, the Defendants provided no medical care and did not call EMS until 14 minutes later, when prompted by their supervisor. Police Dispatch Event

Chronology #3, Doc. 54-7; Rochelle Bottone Dep., p. 29 Doc. 54-5. This is not in dispute. They disregarded the risk they had inferred when they chose to call their supervisor but failed to provide care to Tanisha, to roll her over, or to even call EMS. Lt. Tucker observed correctly in his deposition that "*if [Aldridge] felt it was necessary to check [Tanisha's] pulse, then he should probably have called for EMS*." Robert Tucker Dep., p. 93 Doc. 54-6 (emphasis added). Plaintiff's police practices expert correctly concluded that Defendants' actions were deliberately indifferent to Tanisha's obvious medical needs. Plaintiff's Expert Report, p. 19-20 Doc. 62. As of November 12, 2014 delaying a call to EMS for 14 minutes when a suspect in custody is not conscious and having breathing trouble violated clearly established law. See *Owensby*, *supra,* (delay in 2000 of six minutes in calling EMS deliberately indifferent) and *Jones*, supra (delay in 2003 in calling EMS re suspect who stopped breathing is deliberately indifferent at the point the defendants have "time to consider the consequences of their actions.").

C. Defendants Aldridge and Myers are Liable for The Wrongful Death of Tanisha Anderson Under State Law

Tanisha Anderson died as a result of the actions of the Defendant officers. The reckless and wrongful conduct of Defendants Aldridge and Myers directly and proximately caused Tanisha's death. Although police officer are protected from liability by O.R.C §2744.03, it does not apply when they act recklessly. Under Ohio law, "[r]eckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Anderson v. Massillon*, 2012-Ohio-5711, ¶ 34, 134 Ohio St. 3d 380, 388, 983 N.E.2d 266, 273 (Ohio 2012), citing *Thompson v. McNeill*, 53 Ohio St. 3d 102, 104-105, 559 N.E.2d 705, 708 (Ohio 1990).

Courts have frequently held that where the facts of a case are sufficient to prove a federal excessive force claim, the same facts are sufficient to overcome the recklessness standard of O.R.C. § 2744.03. *Sabo v. City of Mentor*, No. 1:10-cv-00345, 2010 WL 4008823, at *9 (N.D. Ohio Oct. 12, 2010); *Chappell*, 585 F.3d at 907 fn. 1. This is because although the standards are different, the standard for a state law claim is lower than that of a constitutional claim. For this reason, the actions of Defendants Aldridge and Myers establishing that they used excessive force and were deliberately indifferent, also established that they acted recklessly, and summary judgment on this claim is appropriate as well.

D. The City of Cleveland was deliberately indifferent to the risks of positional asphyxiation by failing to adequately train and supervise its officers on that issue

"A plaintiff who sues a municipality for a constitutional violation under §1983 must prove that the municipality's policy or custom caused the alleged injury. *Ellis ex rel. Pendergrass v. Cleveland Mun. School Dist.*, 455 F.3d 690, 700 (6th Cir. 2006), *citing Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 69-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). When the City of Cleveland failed to institute any policy or training on positional asphyxiation or to adequately supervise its officers in that regard, it acted with deliberate indifference to the known risks of positional asphyxiation and this inadequate training, policy or custom was the moving force behind Tanisha's death.

There are "two different issues when a §1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins v. City of Harker Heights, Tex.*, 503 U.S 115, 120 (1992). Defendants Aldridge and Myers violated Tanisha's constitutional rights both by using excessive force against her and by being deliberately indifferent to her need for medical care

following that use of force. The excessive force in this case flows directly from their use of subject control techniques that caused positional asphyxia. Those techniques reflect in part the inadequate training they received as officers in the Cleveland Division of Police.

"One way to prove an unlawful policy or custom is to show a policy of inadequate training or supervision." *Id. citing City of Canton v. Harris*, 489 U.S. 378, 387, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). To succeed on a failure to train or supervise claim, "the plaintiff must prove the following: (1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference, and (3) the inadequacy was closely related to or actually caused the injury." *Ellis ex rel. Pendergrass v. Cleveland Mun. School Dist.*, 455 F.3d 690, 700 (6th Cir. 2006); See also *Brown v. Chapman*, 814 F.3d 447, 463 (6th Cir. 2016) (deny summary judgment to City of Cleveland on claim of inadequate taser training). Because Defendants Aldridge and Myers did violate Tanisha's Fourth and Fourteenth Amendment rights, the City of Cleveland's deliberate indifference to train and supervise its officers regarding positional asphyxiation will subject them to liability.

1. The complete lack of any training on positional asphyxiation was inadequate for the tasks performed by the City of Cleveland's police officers

The imposition of municipal liability requires that the city's "training or supervision was inadequate for the tasks performed." *Id*. Indeed, this case fits famous footnote 10 from *City of Canton* about firearms training:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

City of Canton, Ohio v. Harris, 489 U.S. 378, 390, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412 (1989).

Similarly here, city policymakers know to a moral certainty that their police officers will be required to restrain persons during arrests. Some of those restraints will be placed on subjects that are prone. See Subject Control Techniques 2012, p. 5 Doc. 54-19; Jennifer Kemer Dep., p. 11 Doc. 54-22. Thus the need to train officers in the constitutional limitations on the use of restraints on prone subjects can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights. Because the City of Cleveland had no policy and no training on positional asphyxiation, it was inadequate for the tasks performed by its police officers.

The Cleveland Division of Police has nothing in its written policies, procedures, directives or training materials that references positional asphyxiation in any manner. Plaintiff's Expert Report, p. 10 Doc. 62. There is no mention of positional asphyxia in the policies on handling the mentally ill, on crisis intervention, or on prisoner supervision and restraints. Depo. Ex. 8, Doc. 54-14; Depo. Ex. 9, Doc. 54-14; Depo. Ex. 10 Doc. 54-14; GPO 7.1.05, Doc. 54-15. There is also no mention of positional asphyxia in the training on observable symptoms and commitment procedures, on subject control, or even on the training specifically on prone cuffing principles. Subject Control Techniques 2012, Doc. 54-19; Subject Control Techniques 2006, Doc. 54-18; Subject Control Techniques 2003, Doc. 54-17; Subject Control Techniques 1999, Doc. 54-16; CIT In-Service 2010, Doc. 54-21; CIT In-Service 2008, Doc. 54-20.

Lieutenant Robert Tucker, responsible for determining if Defendants Aldridge and Myers violated any department policies, concurred with this analysis in his deposition, noting that there was no policy or training on positional asphyxiation. Robert Tucker Dep., pp. 77-78 Doc. 54-6. Part of Lt. Tucker's responsibility when conducting an administrative review, such as he

performed on the actions of Defendants Aldridge and Myers, is to identify inadequate policies. *Id*. at 80. He agreed based on his review that his "report should have included some notice to the higher-ups that they implement better training on subject control so that it includes clear direction on positional asphyxiation." *Id*. at 80-81.

This is not a case where a fact-finder is required to evaluate the strengths and weaknesses of a particular policy or training program to determine if it is sufficient to adequately prepare police officers to perform their jobs, because there is in fact no policy or training at all. When courts in the Sixth Circuit have evaluated the issue of adequate training, they have always required that there be some degree of training on positional asphyxiation. In *Pirolozzi v. Stanbro*, 2008 WL 1977504, 12 (N.D. Ohio 2008), the court found a municipality's training on positional asphyxiation inadequate when it had been nonexistent for ten years. And in *Martin v. City of Broadview Heights*, 2001 WL 3648103 (N.D. Ohio 2011), the court found that even a municipality with a policy and training, which both outlined the dangers of asphyxiation and identified individuals who were at high risk of asphyxiation, was *still* inadequate because they failed to require "hands-on training."

Thus the City of Cleveland clearly demonstrated deliberate indifference to the safety of arrestees such as Tanisha Anderson who would predictably be restrained in the prone position.

2. This inadequacy was the result of the City of Cleveland's deliberate indifference to the known risks of positional asphyxiation and the foreseeable consequences of failing to train officers about those risks

This inadequacy, the complete absence of any policy or training on positional asphyxiation, "was the result of the municipality's deliberate indifference" to the known risks of positional asphyxiation and the foreseeable consequences of training officers about those risks. *Ellis* at 700.

The risks of positional asphyxiation are well known and long established. *Champion*, at 904, citing *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013, 1019-20 (S.D. Ohio 1999) (finding that information existed in the law enforcement community, which put officers on notice of the dangers of positional asphyxiation). Positional asphyxiation, then known as "sudden in-custody death syndrome" was well established in the law enforcement community by 1994. Plaintiff's Expert Report, p. 8 Doc. 62.

Deaths by positional asphyxiation were first documented by law enforcement in the mid 1970s. *Id*. at 8-9. Data about the phenomenon was collected by the San Diego City Police Department, which conducted nationwide surveys and published them in 1983 and 1992. Police agencies across the country were contacted for information and supplied responses for these surveys. *Id*. at 9. Videotaped training programs were developed following the surveys, including the 1994 New York City Medical Examiner's tape of the consequences of compression deaths during suspect handcuffing and control and the 1994 presentation by the Commissioner of the California Highway Patrol, relying heavily on the San Diego police survey. *Id*.

The dangers of improper restraint techniques have been described in longstanding reference on police handling of emotionally disturbed persons, including the *Manual for the Police: How to Recognize and Handle Abnormal People,* by Matthews and Rowland, *Special Care: Improving the Police Response to the Mentally Disabled* in 1986, *Managing Persons with Mental Disabilities* in 1989, and *Abnormal Behavior* in 1979. *Id*. at 10. In 1994, the Department of Justice, National Law Enforcement Technology Center, and National Institute for Justice published the paper "Positional Asphyxia – Sudden Death" warning of the risks of positional asphyxiation. *Id*. at 9. And in 1996, and in the updated version in 2005, the International Association of Chiefs of Police's Law Enforcement Policy Center reissued its paper and model

policy on "Transportation of Prisoners," which discussed the lethal issue of positional asphyxia and prone positioning of subjects. *Id*. at 10.

By failing to respond to the long established risks of positional asphyxiation, Cleveland was deliberately indifferent to the foreseeable consequence that someone would die in custody as a result of positional asphyxiation while being restrained in a prone position. This was entirely foreseeable. Restraint in a prone position is something that all Cleveland police officers are instructed on as part of their training. Subject Control Techniques 2012, p. 5 Doc. 54-19; It is foreseeable that a police officer will handcuff subjects behind their backs, who are prone on the ground. Jennifer Kemer Dep., p. 11 Doc. 54-22. It is thus foreseeable that without training or policies on the risks of positional asphyxiation, that an officer restraining a prone subject will put them at risk of positional asphyxiation, and the failure of Cleveland to establish policies or training on positional asphyxiation was deliberately indifferent to this risk.

3. This inadequacy caused Tanisha Anderson's death by positional asphyxiation

Finally, it was in fact this inadequacy, that the City of Cleveland failed to adequately train or supervise its officers on how to avoid positional asphyxiation, that "was closely related to or actually caused" Tanisha's death. *Ellis*, at 700. The coroner determined that Tanisha's death was a homicide and that she died of "[s]udden death associated with physical restraint in a prone position in association with ischemic heart disease and bipolar disorder with agitation." Autopsy, Depo. Ex. 4, p. 1 Doc. 54-10.

The City of Cleveland did not have a policy or train its officers how to restrain someone safely while prone. The City of Cleveland did not have a policy or train its officers on the need to roll over a prone subject who has been restrained to avoid the danger of positional asphyxiation. When the Defendant officers acted in accordance with City policy and training, they caused

Tanisha's death. As a result, the City of Cleveland caused Tanisha's suffering and ultimately her death, and is liable for the constitutional violations committed against her.

IV Conclusion

For these reasons, the court should enter summary judgment against Defendants Aldridge and Myers on the issue of excessive force, deliberate indifference to Ms. Anderson's serious medical needs and wrongful death and against the Defendant City of Cleveland on the issue of deliberate indifference to the health and safety of Tanisha Anderson as she was a subject who would be foreseeably restrained in the prone position.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2016, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

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