Strickland v State of New York
2016 NY Slip Op 32891(U)
September 28, 2016
Court of Claims
Docket Number: 120654
Judge: Frank P. Milano

STATE OF NEW YORK COURT OF CLAIMS

SELENA STRICKLAND AS
ADMINISTRATRIX OF THE ESTATE OF
LEONARD STRICKLAND,

Claimant, DECISION

-v-

THE STATE OF NEW YORK, Claim No. 120654

Defendant.

BEFORE: HON. FRANK P. MILANO
Judge of the Court of Claims

APPEARANCES: For Claimant:
STEIN SCHWARTZ CHESIR & ROSH, LLP
By: Law Offices of John R. Seebold, PLLC
By: John R. Seebold, Esq.

For Defendant:
HON. ERIC T. SCHNEIDERMAN
New York State Attorney General
By: Michael C. Rizzo, Esq.
Assistant Attorney General

Leonard Strickland, while an inmate in the custody of defendant at Clinton Correctional Facility (Clinton), died on October 3, 2010. Mr. Strickland's death followed a physical altercation with corrections officers. Following the altercation, Mr. Strickland was escorted on foot to Clinton`s medical facility/hospital (medical facility) to be searched and medically evaluated. Once at Clinton's medical facility, Mr. Strickland, initially conscious and verbally responsive, became unresponsive and lost consciousness. Mr. Strickland received medical

treatment at Clinton's medical facility in an attempt to resuscitate him, and he was then transported off premises by ambulance to an outside hospital, where he was subsequently pronounced dead. Selena Strickland, mother of Mr. Strickland and the representative of his estate, brought this amended claim, filed January 5, 2012, as a result of Mr. Strickland's death.[1]

The amended claim set forth a number of theories of liability, alleging that defendant used excessive force upon claimant on October 3, 2010, and further alleging that defendant negligently failed to appropriately treat claimant's mental health condition(s) and failed to administer proper medication related to his mental health. Thereafter, claimant's amended verified bill of particulars, in amplification of his amended claim, alleged the following negligence, inter alia: "In failing to obtain proper medical personnel with appropriate knowledge and training to properly and timely perform CPR and administer other medical treatment to decedent, to enable necessary breathing and prevent his heart and other bodily organs from failing thereby causing death; in administering CPR, emergency first aid and secure breathing in a negligent, careless, inept, incompetent and wrongful manner; in failing to ensure a prompt timely response from emergency medical services; in failing to contact emergency medical services in a timely and prompt manner . . . in failing to use proper equipment including but not limited to an Automated External Defibrillator and an Artificial Manual Breathing Unit, to resuscitate decedent Leonard Strickland; in negligently attempting to resuscitate decedent Leonard Strickland."

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[1] Unless otherwise noted, all references hereafter to "claimant" shall refer to Leonard Strickland alone.

Accordingly, by date of trial, the two causes of action set forth in the amended claim, for wrongful death and for personal injuries and conscious pain and suffering, were predicated upon allegations of defendant's use of excessive force upon claimant on October 3, 2010, allegations of medical malpractice in failing to properly treat and medicate claimant's mental health condition(s), and allegations of medical malpractice in failing to provide claimant timely and adequate emergency medical care on October 3, 2010.

The use of physical force against an inmate is governed by statute, regulation and case law. Correction Law § 137 (5) provides as follows:

> "No inmate in the care or custody of the department shall be subjected to degrading treatment, and no officer or other employee of the department shall inflict any blows whatever upon any inmate, unless in self defense, or to suppress a revolt or insurrection. When any inmate, or group of inmates, shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the officers and employees shall use all suitable means to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape."

Corrections officers may use physical force to maintain order and discipline in correctional facilities, but "[w]here it is necessary to use physical force, only such degree of force as is reasonably required shall be used" (7 NYCRR 251-1.2 [b]).

The limited circumstances in which use of force is permitted by corrections officers are set forth at 7 NYCRR 251-1.2 [d]: "[F]or self-defense; to prevent injury to person or property; to enforce compliance with a lawful direction; to quell a disturbance; or to prevent an escape."

In claims involving inmate allegations of excessive force by corrections officers, the credibility of the witnesses is generally the dispositive factor (Davis v State of New York, 203

AD2d 234 [2d Dept 1994]). To determine whether the use of force was necessary and, if so, whether the force used was excessive or unreasonable, a court must examine the specific circumstances confronting the officers (see Wester v State of New York, 247 AD2d 468 [2d Dept 1998]; Lewis v State of New York, 223 AD2d 800 [3d Dept 1996]; Quillen v State of New York, 191 AD2d 31 [3d Dept 1993]; Arnold v State of New York, 108 AD2d 1021 [3d Dept 1985], *appeal dismissed* 65 NY2d 723 [1985]).

A correctional facility superintendent has discretion to "provide for such measures as he may deem necessary or appropriate for the safety, security and control of correctional facilities" (see Correction Law § 137 [2] and § 18 [2]; see Matter of Shabazz v Portuondo, 260 AD2d 733 [3d Dept 1999], *lv denied* 94 NY2d 756).

"Prison officials are solely responsible for the preservation of order and security in the facilities they administer" (Matter of Gross v Henderson 79 AD2d 1086, 1087 [4th Dept 1981], *appeal denied* 53 NY2d 605 [1981]). In general, courts should defer to prison authorities in matters of internal prison security (Matter of Blake v Selsky, 10 AD3d 774, 775 [3d Dept 2004]).

As the court explained in Arteaga v State of New York (72 NY2d 212, 218-219 [1988]):

> "Because of the problems of maintaining security and discipline within correctional facilities, the discretion delegated to the employees and officers is necessarily comprehensive and calls for the exercise of judgment under widely varying conditions."

Addressing claimant's allegations of medical malpractice, a claimant must prove, generally through expert medical opinion testimony, two essential elements: (1) a deviation or

departure from accepted practice, and (2) that such departure was a proximate cause of plaintiff's injury (Carter v Tana, 68 AD3d 1577, 1579 [3d Dept 2009]).

Defendant is required to exercise professional medical judgment within the range of accepted medical standards in its treatment of claimant. The law is clear that "neither a medical provider . . . nor the State or governmental subdivisions employing the medical provider, may be held liable for a mere error in professional judgment" (Ibguy v State of New York, 261 AD2d 510, [2d Dept 1999], *lv denied* 93 NY2d 816 [1999]; Sciarabba v State of New York, 182 AD2d 892, 893-894 [3d Dept 1992]).

Conclusory allegations of medical malpractice, unsupported by competent evidence establishing its essential elements, are insufficient to state a prima facie case. Through a medical expert, it must be shown that defendant deviated from the standard for good and acceptable care in the locality where the treatment occurred and that the deviation was the proximate cause of the injury (Torns v Samaritan Hosp., 305 AD2d 965, 966 [3d Dept 2003]; Yamin v Baghel, 284 AD2d 778, 779 [3d Dept 2001]; Bracci v Hopper, 274 AD2d 865, 867 [3d Dept 2000]).

The Court of Appeals additionally explains, in Oakes v Patel (20 NY3d 633, 647 [2013]), that:

> "It is often true, as it is in this case, that causation issues are relevant both to liability and to damages. Thus, in a medical malpractice case, liability cannot be established unless it is shown that the defendant's malpractice was a substantial factor in causing the plaintiffs injury . . . But even where liability is established, the plaintiff may recover only those damages proximately caused by the malpractice."

Trial of the claim was conducted on November 2, 2015, November 4, 2015, November 5, 2015, November 9, 2015 and November 13, 2015. The Court has considered all of the trial

evidence. The Court additionally and carefully observed the twelve trial witnesses as they testified, having also observed their demeanor as they did so, and has made determinations on issues of credibility with respect to those witnesses.

Selena Strickland, claimant's mother and the individual who filed the claim representing her son's estate, was the trial's first witness and she testified briefly. Her testimony was devoted, in part, to pedigree information about claimant, including testimony about his upbringing, his family history, and his educational, employment and criminal history.

Ms. Strickland further testified that claimant had exhibited irrational behavior while incarcerated (e.g. claiming to be God, to be a millionaire, etc.), had been diagnosed with schizophrenia and been prescribed medication for it, had been confined to a psychiatric facility for two months in 2008, and that she had spoken with claimant's prison counselor to express concerns about claimant's mental health. She additionally indicated that claimant, outside of prison, had never received mental health treatment, and that between August 2010, the time of her last visit with claimant at Clinton, during which she observed concerning behavior from claimant ("he was talking out of his head . . .[s]aying things that didn't make sense to me"), and October 2010, she had not called Clinton to express any concerns about the demeanor of claimant that she had observed during her August visit.

On the morning of Sunday, October 3, 2010, claimant was moving from a cell on a higher floor of F Company to a cell on a lower floor of F Company at Clinton ("Upper F"). As was the customary practice with relocating inmates, claimant was carrying his own bedding, including his mattress. His move was being monitored by corrections officer Casey Strong. Officer Strong, prior to that day, had never before had any personal interaction with claimant, nor was he aware

of any mental health or behavioral issues involving claimant. The claimant, trial evidence suggests, may have been agitated by the confiscation of a mirror prior to his cell move and insisting, as a condition of his move, that his mirror be returned.

The following description of events recounts the substance of Officer Strong's relevant and material trial testimony. At the top of a set of 10 to 15 concrete stairs to the lower floor, stairs bordered by concrete walls and metal handrails, claimant stopped and said that he did not want to descend the stairs and lock-in at his newly assigned cell, and that he would not. Officer Strong gave claimant several direct orders to proceed. Claimant descended a few steps, stopped, and again was directed by Officer Strong to descend the stairs. Claimant then threw his mattress down the stairs, and Officer Strong said that "[i]nmate Strickland came up after me and started swinging at me" (Trial Transcript [hereafter, "TT"], November 2, 2015, p 127). Claimant began swinging at Officer Strong with a closed fist, striking the officer once. Officer Strong began swinging his fists in return, striking claimant in the face and in the chest. During the encounter, Officer Strong ordered claimant to stop resisting and fighting and to lock-in at his new cell. The officer then "bear-hugged" claimant and they began to struggle/grapple, before they both fell down the stairs. Claimant fell the entire stairway to the lower floor and Officer Strong fell half-way to three-quarters of the way down the set of stairs.

The commotion had resulted in a "Level Two" emergency response (hereafter, Level Two) being called, and responding officers flooded the scene. Officer Strong then observed claimant and responding corrections officer Cory Liberty fighting at the bottom of the set of stairs. Officer Strong descended the rest of the stairs, ordered claimant to stop fighting and get on the ground, and when claimant refused, and continued fighting with Officer Liberty by

punching with closed fists and kicking his legs, Officer Strong struck claimant in the back and in the legs with his baton. Claimant was finally brought under control by Officer Strong (grabbing claimant's right arm) and Officer Liberty and by several other responding officers, by an officer each grabbing an arm and a leg of claimant. Officer Strong was the only involved officer to strike claimant with a baton, and neither he nor the other officers were ever ordered to strike claimant with a baton. Mechanical restraints were placed on claimant's wrists, as claimant was handcuffed behind his back while on the ground.

With an officer under each arm, claimant was able to stand under his own power and maintain his own balance after rising, with no buckling of his legs. Officer Strong did not observe claimant gasping for air or make any complaint of having difficulty breathing. Other officers then escorted claimant to Clinton's medical facility, and Officer Strong sought medical treatment for back injuries that he had sustained in the altercation. Officer Strong thereafter was out of work for three months by reason of back and hand injuries that he had sustained in the altercation.

Officer Strong's testimony was specific and detailed, without appearing rehearsed. It appeared to the Court to be the product of genuine reflection upon past events being contemporaneously remembered and reported, without the exaggeration or hyperbole so commonly observed in a fabricating or embellishing witness. For example, when given several opportunities to provide testimony that could have portrayed himself or other responding officers in a more favorable light and/or claimant in a more negative manner, he demurred, indicating either that he was uncertain or that he did not know certain facts or information. Illustrative of this point, after claimant had fallen down the stairs and was then engaged with Officer Liberty,

when asked if he observed claimant strike Officer Liberty, Officer Strong responded, "I saw him swinging at him." When asked a follow-up question about whether claimant was observed to have physically struck Officer Liberty, Officer Strong responded, "I wasn't really focused on that part of it" (TT, November 2, 2015, p 141).

The Court fully credits Officer Strong's testimony regarding the events that led to the physical altercation between the officer and the claimant, and further, fully credits the officer's described use of the physical force that he employed and that he observed, in response to a physical altercation that claimant had initiated.

A number of other officers were either stationed near the scene that unfolded on Upper F the morning of October 3, 2010 or responded to the scene after the Level Two had been called. Some officers were physically involved in bringing claimant under control at the bottom of the stairs, and some arrived after the physical altercation had concluded. At trial, the Court heard from the following involved officers, beyond Officer Strong: Benjamin Malark, Cory Liberty, Nicholas Stowe, Betsy Whelden Berglund, Christopher Rock, Steven Sweeney and Terry James. Additionally, the deposition testimony of Officer Gene Palmer was admitted as Exhibit II. The following account of events sets forth the substance of each officer's relevant and material testimony:

A) Benjamin Malark - - Officer Malark, stationed in the nearby "cage" or "bubble" at the top of the stairs, did not respond to the scene, but observed certain events. He had no prior familiarity with claimant. Claimant appeared initially compliant with the cell move, but after hearing a "shuffling" of feet, Officer Malark observed claimant throwing closed fist punches at

Officer Strong. After turning away to check on other nearby inmates, he turned back only to find no one in sight, "and they were there - - no longer there."

B) Cory Liberty - - Officer Liberty was the first officer to respond to the bottom of the stairs. When he attempted to restrain claimant, claimant spun away and punched Officer Liberty to the back of the head. Officer Liberty struck claimant with a closed fist to the claimant's neck and head area, and they fell to the ground, with claimant fighting and kicking "violently." During the altercation, Officer Liberty did not observe anyone strike claimant with a baton, nor did he observe anyone be ordered to strike claimant with a baton. The officer grabbed claimant's right leg and, with the assistance of other responding officers, claimant was eventually subdued. Officer Liberty made no observations of any abrasions, bruising or bleeding on claimant at that time. He reported that claimant had no trouble standing after the altercation, that claimant made no complaint of any pain, including chest pain, or of any difficulty breathing, nor did he observe claimant to have any difficulty breathing. Officer Liberty was out of work for approximately ten days as a result of the altercation.

C) Nicholas Stowe - - Officer Stowe responded to the scene within a minute of the Level Two being called, and upon arriving, saw two to four officers involved. All officers and the claimant were on the ground, and claimant was fighting the officers. He grabbed claimant's left arm, and he then cuffed claimant behind the back, overcoming claimant's resistance to being handcuffed. Claimant was then escorted to Clinton's medical facility, walking under his own power. Officer Stowe did not observe anyone strike claimant with a baton. Officer Stowe reported that claimant made no complaints of pain, no complaint that his chest was hurting nor did he say that he had any difficulty breathing.

D) Betsy Whelden Berglund - - Officer Berglund, at the time of the Level Two, was in the first officer's cage with Officer Christopher Rock, at the base of the Upper F set of stairs. Before the Level Two was even called, Officer Berglund saw the mattress come down the stairs. She observed the claimant falling down the stairs, followed by a falling Officer Strong. She observed claimant, with clenched fist, turn and move back toward officer Strong before he was intercepted by Officer Liberty, and then observed claimant punch Officer Liberty in the back of the head. She responded to the struggle, grabbed claimant's left leg and was kicked "numerous times in the head and the side, the shoulders, the arm" (TT, November 2, 2015, p 285). After claimant was cuffed, Officer Berglund was relieved of duty. Consistent with defendant protocol, any officer involved in a physical altercation with an inmate is relieved of duty, and non-involved officers are then assigned to thereafter escort the involved inmate(s). Officer Berglund did not use a baton on claimant, nor did she observe any others use a baton or be ordered to use a baton on claimant. She did not observe any cuts or bruising on claimant, nor did she hear claimant making any complaint of pain, including chest pain or any complaint of trouble breathing or observe him to be gasping for breath. Officer Berglund had previously known claimant but had observed no unusual behavior from him, nor had she previously observed him to be physically combative or verbally abusive. As a result of the events of October 3, 2010, Officer Berglund missed nine to twelve months of work with a slight concussion, bruising and soreness to a shoulder and several broken ribs on her right side.

E) Christopher Rock - - Officer Rock, stationed in the first officer's cage with Officer Berglund, was the individual who called the Level Two. Hearing a "thump," Officer Rock saw a mattress on the ground, saw claimant "turning around with fists and heading up the stairs at a

very fast pace" (TT, November 2, 2015, p 303). Officer Rock secured other nearby inmates and called the Level Two, but he did not respond to the scene. Officer Rock previously knew claimant, but had not observed any unusual, combative or abusive behavior from him. Officer Rock observed claimant being escorted away after having been cuffed, walking under his own power, and he reported seeing no cuts, bruising or blood on claimant.

F) Steven Sweeney - - Sergeant Sweeney heard the Level Two on radio and responded to the scene within sixty seconds. Sergeant Sweeney did not previously know claimant. Arriving on scene, Sergeant Sweeney observed a resisting claimant - - "thrashing . . . moving, kicking . . . [t]rying to get his arms free" - - being held on the ground by four officers. Sergeant Sweeney gave his cuffs to Officer Stowe, who then handcuffed claimant. As the ranking officer on scene, Sergeant Sweeney then relieved the "use of force" officers of their duties and called for two new, escort officers (Officers Terry James and Gene Palmer) to escort claimant to the Clinton medical facility - - "I called for a video camera to meet me in the hospital, and I escorted that inmate with those two officers out of Upper F Block en route to the hospital" (TT, November 4, 2015, p 370). Sergeant Sweeney reported seeing no cuts, abrasions, or scrapes on claimant at that time, nor did he observe any officer strike claimant with a baton. Observing claimant in Upper F, Sergeant Sweeney reported that claimant was able to stand on his own, that claimant made no complaint of chest pain, no complaint of numbness in his arms, no complaint of chest tightness, no complaint of any physical distress and that claimant was verbally coherent.

At this point, Officers James and Palmer and Sergeant Sweeney began a several minute walk/escort of claimant from Upper F to the Clinton medical facility. The following account of

events sets forth the substance of each officer's relevant and material testimony of that escort period of time:

A) Terry James - - Officer James, hearing the Level Two call, responded to Upper F in "a couple of minutes." When he arrived, the altercation had concluded and claimant was standing and cuffed. At that time, Officer James observed that claimant made no complaint of chest pain or tightness, no complaint of arm numbness, no complaint of difficulty breathing, nor did he observe claimant have difficulty breathing. He and Officer Palmer were then directed by Sergeant Sweeney to escort claimant to medical. Officer James did not know claimant. During the escort, with an officer on each arm and followed by Sergeant Sweeney, claimant "was being non-compliant. He was . . . shouting obscenities towards us. He tried kicking Officer Palmer, tried kicking myself on several occasions on the way up through" (TT, November 4, 2015, p 557). The escort took approximately six to seven minutes. Claimant would walk, stop, start, walk, stop, during the escort. During the escort, Officer James observed claimant to be breathing "fine," and, during the escort, no additional use of force (other than claimant being handcuffed) was applied to claimant. From time to time, claimant would "go limp," and cast his weight upon the officers - - claimant weighed well in excess of 200 pounds. He continued to attempt to kick the officers. Upon arriving at the medical facility, the group needed to ascend one flight of stairs. During the ascent, claimant "would go passive and then he would start not walking" (TT, November 4, 2015, p 561). Officer James reported that during the escort, claimant would engage in both active resistance, by attempting to kick the officers, and passive resistance, by not walking and by going limp. Upon arriving at the medical facility, Officer James remained as claimant was being prepared to be strip frisked - - defendant requires by protocol, for safety

reasons, that after any staff-inmate physical altercation, the involved inmate is to be strip frisked for any dangerous contraband, including weapons, and that the strip frisk is to be videotaped. According to Sergeant Sweeney, "this has got to be conducted before medical can see the inmate, to clear the inmate" (TT, November 4, 2015, p 426).

B) Gene Palmer - - Officer Palmer's deposition testimony was admitted as Exhibit II. As with Officer James, Officer Palmer arrived at Upper F at a time when claimant was already standing and cuffed, and he was assigned escort duty by Sergeant Sweeney. During the escort, claimant would intermittently stop walking and he kicked at the officers several times. The claimant would also go limp, forcing his weight upon the officers, requiring the escort officers to carry claimant in an upright position "for several yards." Claimant was verbally and profanely abusive toward the officers. Claimant kicked Officer Palmer in the right leg two or three times during the escort. No use of force, other than being handcuffed, was applied to claimant during the escort. Upon arriving at the medical facility, Officer Palmer departed to seek medical treatment for a strained shoulder that he suffered when "lifting him, keeping him up" during the escort.

C) Steven Sweeney - - Sergeant Sweeney followed the two escorting officers and claimant to the medical facility. Claimant, "angry," would stop and start, walk and stop on several occasions, and Sergeant Sweeney observed claimant kick Officer Palmer in the leg. Claimant, when walking, walked under his own power. No difficulty in his breathing was observed. "He never complained of any medical to me . . . [h]e never said a word to me about medical, and I - - like I said, I talked to him all the way up to the hospital, and he never said nothing to me . . ."(TT, November 4, 2015, p 388). Sergeant Sweeney described the escort as

"strictly disciplinary," not medical (TT, November 4, 2015, pp 388-389). As during the escort, upon ascending the one flight of stairs at the medical facility, "he would stop and he wouldn't walk, and then I would tell him, you got to walk up the stairs, or almost to where we're going, then he'd walk, and then he'd stop, and the officers would assist" (TT, November 4, 2015, p 412). The group then entered the medical facility's ER room (the ER room) to begin the videotaped strip frisk of claimant.

The testimony of the involved officers, describing events beginning with Officer Strong's initial verbal interaction with claimant at the top of the stairs on Upper F, continuing with the initiation of the physical altercation there, claimant's fall down the steps, the physical altercation between claimant and responding officers at the base of the stairs, the application of force used by the officers to eventually subdue claimant, and ending with the presentation of claimant to the medical facility's ER room to be strip frisked after claimant had been escorted there from Upper F, was individually credible, internally consistent and strongly consistent by and among the several witnesses to the same events.

Moreover, their testimony was strongly corroborated by eleven contemporaneously created "To/From" memos authored by the participants on the day of the incident (Exhibits D, F, G, H, I, J, K, L, M, P and HH), by an inmate misbehavior report written on October 3, 2010 by Officer Liberty (Exhibit E), by an incident report created October 3, 2010 (Exhibit AA), by supporting depositions signed on October 5, 2010 by Officers Malark, Sweeney and James (Exhibits CC, DD, and EE, respectively), by supporting depositions signed on October 6, 2010 by Officers Liberty, Strong, Palmer, Stowe and Whelden (Exhibits S, T, U, V and X,

respectively) and by an unusual incident report and a use of force report, each dated October 12, 2010 (Exhibits A and B, respectively).

Two additional pieces of documentary evidence further corroborated the testimony, and strengthened the credibility of the involved officers' trial and deposition testimony, describing the events which unfolded in Upper F and continuing to the arrival at the medical facility's ER room.

Exhibit FF is claimant's prison disciplinary record for the nine years preceding October 3, 2010. It documents no less than thirty-eight separate instances, involving a total of eight-seven charges, of prison misconduct proceedings brought against claimant, at six different correctional facilities. Included in these charges were allegations of assaults on staff, assaults on inmates and violent conduct, four allegations of fighting, six allegations of creating a disturbance and twenty-eight allegations of disobeying a direct order.

Finally, Exhibit KK is a discharge summary for claimant from Central New York Psychiatric Center, dated July 8, 2008, which documents claimant's Outpatient Diagnosis as "[p]sychosis NOS with a R/O of Paranoid Schizophrenia: R/O Bipolar DO, Manic episode," and under Mental Health notes, "[h]e has assaulted staff in the past." Claimant was confined at the Psychiatric Center from May 2008 to July 2008.

Notwithstanding the foregoing description of events which brought the participants to the ER room at the medical facility, the substantial and overriding focus at trial was devoted to the events which transpired once claimant had been escorted to the ER room. At that point, by reason of Sergeant Sweeney's earlier directive, the balance of the morning's events were videotaped and recorded, memorialized on a DVD admitted as Exhibit 1. The tape begins at the

announced time of day of 9:30 a.m. and concludes at the announced time of 10:15 a.m. The videotape recorded, unknowingly, the final stages of claimant's life and records him become unconscious, never again to regain consciousness. The tape, with a running time of 44 minutes, 18 seconds in length, is dramatic and, given claimant's ultimate medical outcome, heartrending.

The claimant is never struck on the videotape. However, after going to the floor in the ER room twice, the claimant, with his hands cuffed behind his back, is partially carried, partially dragged face down by officers pulling on his cuffed hands, along a corridor and onto an elevator, and then dragged along another corridor on a floor above the ER room, as he is being brought to the medical facility's mental health unit (also called OBS, for observation) for sedation and/or observation. Several of the officers testified, as will be discussed in greater detail, that given the events of earlier that morning, they had concluded claimant was willfully disregarding their several commands to stand on his feet and to walk, and that he was passively resisting being moved to the mental health unit on a higher floor, by going limp.

Claimant never verbally complains of chest pain or that he is having difficulty breathing at any point on the tape. The precise moment at which claimant loses consciousness was not established at trial and is not readily apparent or obvious when viewing the tape, but two officers observed claimant to have his eyes open/blinking while on the elevator, another officer observed claimant to be breathing on the elevator, the claimant moves his feet and legs on the elevator at 6:44 (of running time, not the time of day) on the tape and the claimant makes an audible expression of distress at 7:11 of the tape. At 9:25 of the tape, an officer calls for the intervention of medical staff and an ambulance is called for at 10:13 of the tape. The balance of the tape, approximately 34 minutes in all, records the efforts of several individuals, including RN Robert

Fitzgerald, to resuscitate the claimant through the use of an automatic external defibrillator (AED) - - seeking a specific heart rhythm that can be shocked via electric impulse in order to restart the heart - - and the use of CPR, using chest compressions, ultimately without success. The tape concludes with claimant being placed into an ambulance for transport to a local, outside hospital, where he was subsequently pronounced deceased at 10:45 a.m. on October 3, 2010.

The tape begins with claimant standing on a rubber mat in the corner of the ER room, per protocol, to begin the process of being strip frisked. The following represents a timeline of the most relevant and material events depicted in the videotape, expressed in minutes and seconds of running time:

TIMELINE

:07 recording of the tape begins; claimant, wearing white boxer shorts and a brown tee-shirt, is in the corner of the ER room facing the wall, handcuffed behind his back, and standing under his own power

:20 claimant moves his left leg and shifts his body

:30 claimant is informed that he is to comply with a strip frisk, and when asked if he understands, verbally replies, "yeah"

:37 claimant again verbally responds affirmatively ("yeah") when asked if he understands the procedure to have his cuffs removed and the instruction to place his hands on the wall to begin the strip frisk

1:14 claimant, under his own power, holds his right arm above his head against the wall after his right wrist is uncuffed

1:24 claimant is instructed to stand on his own and claimant remains standing under his own power

1:30 claimant moves his body under his own power

1:51 claimant suddenly reacts physically, moving his body backward, and non-verbally but audibly expresses pain, as officers attempt to uncuff his left wrist; officers repeatedly instruct claimant "to stay on the wall"

2:15 officers tell claimant to stop resisting

2:32 the officers continue to attempt to uncuff claimant's left wrist

2:38 an officer tells claimant to "stop pushing back"

2:45 claimant is told to put his "hands on the wall" and told to "stop resisting us"

2:51 an officer says, "Mr. Strickland, you have to comply with the orders"

2:58 three officers are supporting the upper back of claimant as he is told to step to the wall and put his hands on the wall

3:00 officers report, apparently to Sergeant Sweeney, "we have no compliance, sir"

3:05 claimant slumps backwards and sideways, as the three officers in physical contact with claimant seek to guide him to the floor; claimant is heard non-verbally, but audibly, to express pain

3:09 an officer says to claimant, now on the floor, "stop resisting us"

3:13 claimant is instructed to put his hand behind his back

3:20 an officer says, "stop pushing back"

3:27 now face down on the floor, both of claimant legs move, flexing at the knee

3:30 an officer says, "stop resisting"

3:45 handcuffs are re-secured behind claimant's back, and claimant regains his feet with officer assistance and is again placed against the wall

4:00 an officer says, "don't push back" and another says, "this cat is resisting"; claimant moves his right leg

4:15 three officers remain behind claimant and are supporting his shoulders in an upright position as claimant again faces the corner

4:21 an officer says, "he's still fighting with us"

4:30 an officer says, "Mr. Strickland, stop pushing back"

4:40 claimant can be observed moving his right leg, and an officer says, "don't even go there"

4:47 claimant continues to move his body of his own accord

5:00 Sergeant Sweeney orders the officers to "take control" of claimant in order to move him and claimant is brought backward and guided to the floor by the officers

5:10 claimant is repeatedly instructed to stand and walk on his own and an officer says, "he's refusing to walk"; officers now hold claimant's cuffed hands behind his back, face down, and his upper body is clear of the floor

5:12 an officer says, "pick him up"

5:14 claimant is carried by officers face down, by hands and feet, entirely clear of the floor, out of the ER room

5:30 claimant, now in the corridor and on the floor, is repeatedly directed to "stand up"

5:40 three officers drag claimant, lifting him by his cuffed hands behind his back and above his head, face down, to an elevator, on what appears to be a linoleum floor, as claimant's lower body slides along the floor

5:52 an officer says, "stop pulling your hands"

6:09 three officers drag claimant onto the elevator

6:15 an officer says, "I'm giving you an opportunity to stand up," and claimant is repeatedly directed to stand up; an officer says, "no compliance, Sergeant"

6:44 claimant, face down on the elevator floor, moves his body of his own accord, moving both of his feet and both of his legs, and flexing his legs at the knee

7:10 three officers drag claimant out of the elevator and down a corridor by his cuffed hands behind his back and above his head, face down, toward the mental health unit

7:11 claimant makes a non-verbal, but audible, expression of pain - - "argh"

7:35 claimant is placed face down on the floor in the entrance to the mental health unit - - no officers are in contact with him

7:45 an officer adjusts claimant's boxer shorts, pulling them higher up on his torso

7:56 an officer says, "we have no compliance" and mentions the need to strip claimant of his clothes

8:00 claimant is laying face down on the floor

8:40 an officer jostles claimant's left arm, checking on him

9:05 among discussion between officers, an officer says, "he wouldn't cooperate"

9:08 claimant is turned on his right side by an officer - - claimant is jostled to assess his reaction

9:25 an officer says, "let's get some medical down here"

9:27 RN Robert Fitzgerald enters the room, kneels next to claimant, and begins to assess him, appearing to take claimant's pulse

9:55 nurse Fitzgerald asks for a "BP kit"

10:00 nurse Fitzgerald checks claimant's mouth/nose area with his fingers, apparently to check claimant's breathing

10:13 several individuals call for an ambulance

10:27 a BP kit is brought to nurse Fitzgerald

10:52 claimant is turned onto his back; his cuffed hands are behind him, under his body

11:01 nurse Fitzgerald calls for an "ambu" bag

11:04 nurse Fitzgerald declares, "medical emergency"

11:15 nurse Fitzgerald instructs that an "ambu" bag for respiration be employed

11:33 nurse Fitzgerald begins chest compressions on claimant

12:40 a female aide resumes chest compressions on claimant

12:45 the automatic external defibrillator (AED) has been applied to claimant, and periodic instructions from it are heard thereafter

12:48 the AED reports "no shock advised, it is safe to touch the patient"

12:54 nurse Fitzgerald calls for "CPR"

13:19 nurse Fitzgerald begins mouth to mouth resuscitation on claimant

14:13 nurse Fitzgerald begins application of the "ambu" bag to claimant

14:28 nurse Fitzgerald calls for 10 liters of oxygen

15:40 chest compressions and "ambu" bag application continue

16:38 nurse Fitzgerald tells staff he is going to check for signs of life

16:45 nurse Fitzgerald checks for respiration and says, "I'm getting something"

17:03 nurse Fitzgerald instructs that CPR be continued

18:35 nurse Fitzgerald checks claimant for pupil dilation

20:15 chest compressions and "ambu" bag application continue to be intermittently utilized

21:30 nurse Fitzgerald instructs staff to "keep pumping" 0^2 (oxygen)

22:10 claimant has remained on his back with his cuffed hands behind his back, under his body, during the resuscitation efforts; his bloodied knees are apparent

22:25 an officer, now the third person not counting nurse Fitzgerald, begins chest compressions upon claimant

24:50 nurse Fitzgerald places a stethoscope on claimant's chest, and instructs staff to continue chest compressions

27:30 CPR efforts continue

29:10 nurse Fitzgerald checks claimant for "life signs," first checking respiration and then again using his stethoscope

31:02 nurse Fitzgerald says, "I got a good rise on that one," as a fourth person other than nurse Fitzgerald now continues chest compressions

31:30 nurse Fitzgerald says, "the chest is rising"

31:35 it is announced that the summoned ambulance has arrived

32:48 nurse Fitzgerald says, "we're not getting life signs, but we're getting air into the lungs"

34:20 CPR continues

35:05 nurse Fitzgerald notes that claimant's chest is rising

36:41 nurse Fitzgerald observes that there is an injury to the left side of claimant's head, but indicates that he is unaware of how it occurred

37:24 nurse Fitzgerald asks if claimant's cuffs can be removed

37:50 CPR efforts cease

38:03 claimant is rolled onto his right side to enable officers to remove his handcuffs

38:35 the cuffs are removed and claimant's arms are now at his side, as he lays flat on his back; a female individual says, "this guy is breathing"

38:55 claimant is lifted from the floor onto a gurney

39:54 an "ambu" bag is applied to claimant

41:20 responding emergency medical personnel are on scene and claimant is being wheeled by gurney to the waiting ambulance

42:20 CPR is applied to claimant in the elevator, and claimant is then wheeled outside to the waiting ambulance

43:55 claimant is placed into the ambulance

44:18 the ambulance doors are shut and the tape ends

At trial, Officer James and Sergeant Sweeney additionally testified about the events depicted on the videotape that begin in the ER room and that end when nurse Fitzgerald commences medical efforts seeking to resuscitate claimant. Many of the same events were also described by Officer Kevin Trombley in deposition testimony received as Exhibit BB.

Officer Trombley was waiting in the ER room for the escorted claimant to arrive, and it was he who relieved Officer Palmer, as Officer Palmer had been injured during the escort. Observing the first two to three minutes of the video at his deposition, Officer Trombley testified that claimant was resisting the officers, "[p]ushing against us" (Exhibit BB, p 22). Officer Trombley further testified that after claimant went to the floor at 3:05 of the tape, he continued to resist the officers - - "He wouldn't comply. He wouldn't put his hand behind his back" (Exhibit BB, p 24). Officer Trombley additionally testified that claimant continued "pushing us off the wall" (Exhibit BB, p 27). When asked, at 6:21 of the tape, while all are on the elevator, if claimant was conscious, Officer Trombley responded, "[h]e was looking right at me" (Exhibit BB, p 31). Once claimant was brought to the mental health unit, Officer Trombley had no further role in the events of the day.

Officer James, after having escorted claimant from Upper F, remained in the ER room to assist in the strip frisk of claimant. When initially placed in the corner, claimant was "leaning back," "pushing back into us," according to Officer James. Officer James testified that after claimant first went to the floor in the ER and the officers attempted to reapply handcuffs, claimant continued resisting the officers, "[h]e drew his hands up underneath himself to his chest area, and would not let us have his hands so we could reapply the restraints" (TT, November 4, 2015, p 569) and "I seen him draw his hands from his side up under to his chest" (TT, November 4, 2015, p 626). On the elevator, when Officer James advised claimant to stand up, "he just looked at me . . . he moved his leg, kicked his leg up a little bit . . ." (TT, November 4, 2015, p 579). On the mental health unit floor, as claimant was being dragged in the corridor, Officer James testified claimant "hollered out" (TT, November 4, 2015, p 582). When asked why, on the

mental health unit floor, claimant remained cuffed, Officer James answered, "[f]or the safety of everyone around, the civilians and the officers" (TT, November 4, 2015, p 591).

Officer James testified that he believed claimant's noncompliance with direct orders to walk from the ER room to the mental health unit was a continuation of claimant's passive resistance, first exhibited to Officer James during the escort, "all the way through, so I just thought he was doing the same thing" (TT, November 4, 2015, pp 615-616). At 5:52 of the tape, an officer directs claimant to "stop pulling . . . your hands." Officer James testified that he had said that, in response to claimant "pulling down on the cuffs" (TT, November 4, 2015, p 617). While on the elevator, Officer James indicated that claimant was looking at him and blinking his eyes. Finally, Officer James testified that he did not believe claimant to be in medical distress, but rather that he was continuing his previous conduct of passive and active resistance, drawing that belief by observing claimant's legs kick on the elevator, by observing claimant's open eyes on the elevator and by claimant's "holler" at approximately 7:11 on the tape.

Sergeant Sweeney was present from the time of his arrival at Upper F in response to the Level Two until the claimant was taken off premises by ambulance. Asked to explain the reason for claimant being strip frisked in the ER room, Sergeant Sweeney answered, "[t]he strip frisk is completed to make sure there's no other - - any type of dangerous contraband concealed in the inmate, in his anal area, or anywhere. And this has got to be conducted before medical can see the inmate, to clear the inmate . . . [for safety reasons]" (TT, November 4, 2015, p 426). During testimony related to the playing of the videotape, Sergeant Sweeney identified several instances when claimant was either noncompliant with officer commands or engaged in physical resistance. When asked why, prior to 9:10 of the tape, he had not requested medical staff to

provide claimant medical care, Sergeant Sweeney answered, "I didn't have a reason, because it was a disciplinary problem from the start for me" (TT, November 4, 2015, p 481), further stating that he observed claimant move his legs and breathe on his own while on the elevator (TT, November 4, 2015, p 483). Sergeant Sweeney testified to continuing to consider claimant to be a disciplinary problem thirty minutes into the tape, and that "[t]here's been no call made on what's going on with him, so I'm not going to take the handcuffs off of him" (TT, November 4, 2015, p 492). Sergeant Sweeney considered claimant a danger to the safety and security of the facility "at all times," due to claimant's assault on staff and due to his resistance to the strip frisk. He further concluded that claimant was willfully refusing to walk from the ER room to the mental health unit, and that claimant's conduct was the continuation of passive resistance of the kind claimant had previously employed and that Sergeant Sweeney had previously observed (see TT, November 4, 2015, pp 531-532).

The balance of trial testimony was provided by three experts, two for claimant, Dr. Alan Schechter and Ronald McAndrew, and one for defendant, Dr. Donald Doynow. As with most trial witnesses, the trial experts each had their respective strengths and weaknesses. Although each testified earnestly, each was more credible and/or persuasive in certain testimony and less so at other times, particularly when providing testimony that, in the Court's view, unfairly characterized facts or unfairly drew conclusions designed to support an opinion favorable to each party's respective position.

Mr. McAndrew, claimant's prison and jail consultant, was formerly the warden of the State of Florida's only maximum security prison, and had many, many years of experience in both field and administrative operations of correctional facilities. Although Mr. McAndrew did

opine upon defendant's use of force on claimant in Upper F, to be hereafter discussed, much of his testimony addressed the defendant's adherence, or lack of it, to proper correctional facility protocols once claimant had been brought to the ER room in Clinton's medical facility.

Mr. McAndrew referenced Exhibit 2, defendant's directive on "Use of Physical Force," Exhibit 3, defendant's directive concerning "Responses to Health Care Emergencies," applicable to both a facility's medical and correctional staff, and Exhibit 4, Clinton's policy and procedures for "Emergent/Urgent Health Care," one component of which details "Three Minute Response" training to health related situations. [2]

Mr. McAndrew testified that officer inaction between 3:02 and 5:05 of the tape was violative of Exhibits 2, 3 and 4, in that officers failed to question claimant about whether he needed medical assistance or about his ability to independently stand. He further opined that between 5:05 and 6:09 of the tape, defendant further violated the requirements of Exhibits 2, 3 and 4, in not calling medical to the scene, and in not using a gurney or restraint chair to transport claimant rather than by carrying claimant with his hands cuffed behind his back - - "[t]he method of carrying someone by picking them up handcuffed with their hands behind their back, and the full weight of their body against their shoulders or their arm pit area is not only dangerous, it's forbidden under any training that I've seen in correctional circles around this country" (TT, November 9, 2015, pp 939-940). Mr. McAndrew also testified that the dragging of claimant in the corridors "is prohibited by all standards of use of force that I have known" (TT, November 9, 2015, pp 942-943).

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[2] These three exhibits were misidentified during trial testimony of Mr. McAndrew as Exhibits 3, 4 and 5, respectively. The Court will refer to the correctly marked exhibits.

Mr. McAndrew acknowledged that given the claimant's reported behavior during the escort, in kicking at and in kicking officers, the officers beginning to transport the non-ambulatory claimant from the ER room to the mental health unit had reasonable concerns for their safety, but Mr. McAndrew also noted that claimant could have been transported by the gurney already present in the ER room, by another gurney or by means of a restraint chair.

Claimant's medical expert, Dr. Alan Schechter, and defendant's medical expert, Dr. Donald Doynow, disagreed upon claimant's cause of death. Dr. Schechter, consistent with the findings of the autopsy report (Exhibit Z-1), testified that claimant's cause of death was "cardiopulmonary arrest, due to ischemic heart disease." The autopsy report, specifically, listed claimant's cause of death as "[c]ardiorespiratory arrest due to cardiac ischemia." Cardiac ischemia is a term meaning that insufficient oxygen is being provided to the heart.

Dr. Doynow identified claimant's cause of death as "excited delirium syndrome" (EDS). Excited Delirium Syndrome, seen most often in people who abuse drugs or in those with psychiatric issues, describes people who become suddenly agitated and aggressive, who seem impervious to normal levels of pain and who appear to possess super strength, and who, after an episode calms, become exhausted and inexplicably die. Dr. Doynow identified patients at greater risk of EDS as those with mental illness and those noncompliant in taking their medications, both characteristics of claimant. Dr. Doynow opined that claimant's clinical criteria were consistent with death attributable to EDS, in that claimant was aggressive, involved in an excited event, seemed unfazed by pain and then succumbed after a period of calm, a period during which he became less and less responsive, before lapsing into unconsciousness. Dr. Doynow has never

treated a patient with EDS. Upon cross-examination, the doctor was unable to confirm which medical organizations recognize EDS and which do not.

Each doctor also discussed a variety of medical reasons and findings in support of his opinion, and which led him to believe that the other doctor's conclusion as to claimant's cause of death was in error. On this point, the Court found Dr. Schechter's opinion and reasoning to be more persuasive, particularly given the autopsy report's findings and conclusion, and Dr. Doynow's opinion and reasoning to be more speculative and, thereby, less persuasive. Even so, the Court ultimately found the exact nature of claimant's medical crisis to be of substantially less significance than the manner in which that medical crisis, whatever its nature or cause, was treated by defendant, and less significant than whether defendant's treatment of that crisis was a substantial factor in causing the death of claimant.

Dr. Schechter, board certified in both internal medicine and emergency medicine, offered a primary opinion that, once claimant had been escorted to the ER room, defendant provided claimant with untimely and inadequate medical care.

After referencing the emergency responder's report, the outside hospital's report and the autopsy report, Dr. Schechter detailed the injuries to claimant that were noted in the autopsy report and then observed the autopsy report's listed cause of death.

Asked later during direct examination about when the use of CPR is indicated, Dr. Schechter responded, "The use of CPR is indicated when someone has a nonperfusing rhythm or someone has ineffectual respirations" (TT, November 5, 2015, p 705).

Dr. Schechter then began testimony in review of the videotape. After 6:24 of the tape and after claimant has been brought to the elevator, seemingly unresponsive to commands, Dr.

Schechter indicated claimant's pulse should have been taken and his breathing observed, to assess whether a medical emergency existed. Observing claimant's legs move in the elevator at 6:44 of the tape, Dr. Schechter testified that claimant had blood circulating, that claimant was not in cardiopulmonary arrest and that "he hasn't had a heart attack yet" (TT, November 5, 2015, p 739). Noting a period where claimant lacked spontaneous movement and that he (Dr. Schechter) failed to observe claimant breathing at 7:44 of the tape, he testified to the need to begin CPR. He further noted that at 8:46 of the tape claimant is unresponsive to the officers contacting claimant's left side, and that at 9:02 of the tape, claimant's chest is not moving. At 9:28 of the tape, RN Fitzgerald is observed doing a medical assessment of claimant.

After concluding his observations of the videotape, Dr. Schechter provided the following expert medical opinions:

1. Claimant's cause of death "was cardiopulmonary arrest, due to ischemic heart disease as the autopsy said" (TT, November 5, 2015, p 790);
2. Defendant provided claimant untimely medical care in that claimant endured an acute medical emergency sometime between 5:00 and 5:28 on the tape, requiring an assessment of his pulse and of his breathing, a call for an ambulance if necessary, and for the activation of a three minute response and employment of the AED. This opinion was given, however, despite the doctor having earlier testified that as of 6:44 of the tape, claimant was not in cardiopulmonary arrest and that he had not yet suffered a heart attack;
3. Defendant improperly performed CPR on claimant because claimant's back was not flat on a hard surface, but rather, claimant was on his back with his hands

cuffed behind him and that his body acted as "a fulcrum," thereby depriving him of the full benefits of properly administered CPR, which would have otherwise maximized the energy transmitted to his chest. Further, properly administered CPR calls for fast and continuous pumping, and in claimant's case, there were multiple prolonged pauses in the application of CPR, diminishing the likelihood that a heart rhythm that could be defibrillated would be achieved;

4. Defendant committed medical malpractice upon claimant on October 3, 2010 by "not providing timely and effective cardiopulmonary resuscitation, and they deviated from the accepted standards of medical care by not doing timely evaluations of Mr. Strickland" (TT, November 5, 2015, p 799); and,

5. Had claimant received timely and proper medical treatment on October 3, 2010, "[t]he opinion is more likely than not, he would have survived" (TT, November 5, 2015, p 799).

Upon cross-examination, Dr. Schechter conceded that at no time on the tape did claimant ever complain of chest pain, complain of tightness in his chest, complain of numbness in his arms, indicate that he could not breathe, nor did claimant gasp or struggle for air at any point. He further allowed that when claimant moves his legs on the elevator at 6:44 of the tape, claimant was breathing, and that when claimant made an audible sound at 7:11 on the tape, it would be reasonable to assume that claimant was breathing at that point in time.

Dr. Schechter acknowledged the officers' articulated concerns for civilian (including medical personnel) and staff safety in their treatment of Mr. Strickland, that the officers had reported earlier conduct that day of passive resistance by claimant, and that the officers

repeatedly assessed and reported claimant as being willfully noncompliant, and actively and passively resistant to their commands and actions in the ER room.

Dr. Schechter further acknowledged that RN Fitzgerald, in first assessing claimant, reported detecting a pulse and respiration, that claimant was turned onto his back at 10:52 of the tape, at which point in time RN Fitzgerald testified claimant gave his last breath, that RN Fitzgerald called a medical emergency twelve seconds later, at 11:04 of the tape, that chest compressions began on claimant twenty-nine seconds after that, at 11:33 of the tape, that the AED was operational and had given a reading that there was no shockable heart rhythm by 12:48 of the tape, and that at no time at Clinton did the AED ever recommend a shockable rhythm (see TT, November 5, 2015, pp 850-857).

Dr. Doynow, board certified in both internal medicine and emergency medicine, testified as defendant's medical expert. Dr. Doynow detailed claimant's noted injuries and found them to be consistent with a fall down a flight of stairs and with being involved in a fight. He then testified in review of the videotape.

Dr. Doynow testified, as did Dr. Schechter, that at no time on the tape did claimant ever complain about "cardiorespiratory distress." Referring to the time of 7:11 on the tape, when claimant emits an "audible yell," Dr. Doynow testified that the yell indicated claimant was breathing, had a pulse and would have "had some state of consciousness." Dr. Doynow discussed the concept of a "shockable rhythm," explaining that if the heart has no rhythm (asystole) or slow rhythm, it will not be possible to shock the heart into restarting, and in those instances where there is no shockable rhythm, "the chances of returning . . . circulation are quite poor" (TT, November 13, 2015, p 1047).

Dr. Doynow opined that, based upon claimant being turned onto his back at 10:52 of the tape and RN Fitzgerald observing claimant stop breathing at that point, RN Fitzgerald calling a medical emergency at 11:04, CPR compressions starting at 11:33 and the AED reporting "no shock advised" at 12:48, timely CPR was initiated, stating, "[t]he period of times that you describe - - again, I'd have to look at, specifically, the video, it's a reasonable period of time to realize someone is not breathing, doesn't have a pulse, to be able to obtain the AED, to start CPR, to place the AED, and to basically push the button to see if he has a shockable rhythm" (TT, November 13, 2015, p 1051). He added that CPR is not administered if a patient has a pulse or if a patient is breathing (TT, November 13, 2015, pp 1051-1052). Upon redirect examination, he reaffirmed his opinion that CPR was timely employed, and again observed that no CPR or AED would be utilized if a patient had a pulse or was breathing (TT, November 13, 2015, pp 1120-1121).

Dr. Doynow conceded that the CPR performed upon claimant was "not specifically" in compliance with American Heart Association (AHA) standards, in that claimant was not on a hard, flat surface, though concluding "it was effective CPR, although not optimal CPR," depending upon where claimant's cuffed hands were located behind his back. He also observed defendant's failure to adhere to AHA guidelines detailing the manner in which chest compressions are to be performed by providing two minutes of uninterrupted CPR between checks for a pulse and respiration - - "there were - - are times that did they not continue for a full two minutes between checks (sic)" (TT, November 13, 2015, p 1056).

The doctor additionally testified that the AED reported that claimant had no shockable rhythm. Citing the American Heart Association's study *Heart Disease and Stroke Statistics for*

2013 and 2012, Dr. Doynow testified that the reported out-of-hospital survival rate in 2013, for patients treated by EMS personnel, when the patients are in cardiac arrest but have no shockable rhythm, to be 9.5%. Similarly situated patients with a shockable rhythm, upon whom CPR was administered, had a survival rate of 28.4%. Those patients in-hospital, without distinguishing between those with a shockable rhythm and those with no shockable rhythm, had a survival rate of 23.9% in 2013 (TT, November 13, 2015, pp 1084-1085).

Ultimately, when asked to opine whether claimant would have survived even if all applicable standards in administration of CPR to Leonard Strickland had been followed, Dr. Doynow testified that claimant's chances of survival were "less than ten percent," specifically noting that claimant had no shockable heart rhythm (TT, November 13, 2015, pp 1086-1087).

RN Fitzgerald's deposition testimony was received as Exhibit GG, and nurse Judith Collins' deposition testimony was received as Exhibit 15.

Nurse Collins was an RN in the mental health unit at Clinton on October 3, 2010. She, for brief periods of time, performed CPR upon claimant, as did a number of other individuals, after he had been brought to the mental health unit. Nurse Collins, although previously trained in CPR, had never performed chest compressions "on a human being." She testified that RN Fitzgerald told her that the compressions she was performing upon claimant were "fine."

Registered Nurse Robert Fitzgerald was, at Clinton, the primary medical caregiver to claimant on the morning of October 3, 2010. Having been informed in advance that claimant was being brought to the ER room after the Upper F altercation, RN Fitzgerald was immediately near and proximate to claimant at all times (other than during the elevator ride to the mental health unit floor) from the moment claimant was brought to the ER room until claimant was

transported off premises by ambulance. Trial witnesses testified that he was just inside or just outside the ER room at all times, as officers sought to initiate claimant's strip frisk. He can be partially seen at various times on the tape in the corridors as claimant is being taken by officers from the ER room to the mental health unit, and finally, he is at claimant's side (starting at 9:27 of the tape) for the final thirty-five minutes of the tape, checking claimant's vital signs and respiration, directing others in the care of claimant, performing CPR upon claimant, administering the AED to claimant, utilizing the "ambu" bag on claimant and performing mouth to mouth resuscitation upon claimant. RN Fitzgerald's efforts to resuscitate claimant were substantial and prolonged.

In his prior medical experience, RN Fitzgerald testified to having utilized CPR and the AED approximately two dozen times. He was a Red Cross instructor in CPR. He described the "three-minute response" as, "[t]hree- minute response is from the point that a medical emergency has been declared by a correctional officer or other personnel, we have three minutes to get there with the right equipment and with the right personnel, being myself or whoever is on duty in the emergency treatment room at the time" (Exhibit GG, p 36).

RN Fitzgerald then described several scenes as the videotape was played during his deposition. At 10:52 of the tape, claimant is turned over onto his back. RN Fitzgerald testified "[w]hen I turned him over, I heard what we call the death rattle . . . [i]t's like his last respiration" (Exhibit GG, p 119). Prior to hearing claimant's last breath, RN Fitzgerald detected claimant to have a pulse and to have respiration (Exhibit GG, pp 116-122).

He also noted that the AED did not provide a shock to claimant at 15:14 of the tape because "it didn't have a rhythm that we thought it could correct" (Exhibit GG, pp 129-131).

The balance of RN Fitzgerald's testimony narrated the resuscitation efforts upon claimant that were depicted in the videotape. RN Fitzgerald indicated that claimant's handcuffs were not removed prior to 38:08 of the tape, because to do so would have been a "delay of care." He further testified that the failure to remove claimant's cuffs during CPR, did not "in my estimation, no" hinder the CPR procedure.

DISCUSSION AND CONCLUSIONS

The claimant's theory of liability, beginning with the allegations set forth in the amended claim and the amended verified bill of particulars, through pre-trial discovery and concluding at trial, evolved, and changed substantially.

The amended claim's allegations of medical malpractice, in failing to properly treat and/or medicate Leonard Strickland's mental health condition(s), were abandoned at trial. No expert medical proof was presented to suggest, let alone prove, that defendant's care of claimant's mental health condition(s) was substandard.

Similarly, claimant's initial allegations that defendant used excessive force on claimant on October 3, 2010, were addressed in a substantially different fashion at trial than had been previously characterized. The explosive allegations set forth in claimant's amended claim and amended verified bill of particulars were unsupported by credible evidence presented at trial. Both documents alleged, "[d]efendant by its . . . employees negligently and carelessly with unreasonable [excessive] force, beat, battered, maimed and restrained inmate Leonard Strickland . . ." The amended verified bill of particulars added, "[t]he alleged competent producing cause of

death was a ferocious beating of Decedent by at least five or more prison personnel inflicting the said injuries with batons and/or other instruments to decedent's body, head and limbs causing cardiac arrest and Decedent's death."

First, credible trial evidence failed to support these allegations. Next, the Court credits the several officers' accounts of the circumstances under which the use of force upon claimant in Upper F on October 3, 2010 came to be used and credits their accounts about the manner and amount in which it was then employed. Finally, the testimony that Mr. McAndrew provided, specific to defendant's use of force in Upper F, was unpersuasive and the Court declines to credit it. Mr. McAndrew, in expressing his opinions about defendant's use of excessive force in Upper F, undermined his own credibility, in response to several questions, as follows:

1) In originally opining that excessive force had been used upon claimant in Upper F when Officer Strong first struck claimant with a baton, Mr. McAndrew, apparently operating under an incorrect assumption, misstated that, "four certified, trained and retrained, experienced correctional officers at the scene with one single offender to be taken into custody" was the setting. When, in response to an objection, the Court brought to the witness's attention that the record may have reflected that "maybe one or two correction officers [were] present at the time of the use of the baton," and the question to the witness was thereafter reframed by counsel to state the presence of one or two correctional officers at the scene at the time Officer Strong used his baton upon claimant, Mr. McAndrew gave the same opinion - - "Again, if there were less than four correctional officers present, even if there were two correctional officers present, two correctional officers trained in defensive tactics should be able to control one single offender " (TT, November 9, 2015, pp 944-947). It appeared to the Court that Mr. McAndrew, when

presented with a new set of facts, had, in the moment, simply tailored his testimony/opinion to conform to a preordained conclusion;

2) Mr. McAndrew acknowledged being aware that by reason of the physical altercation with claimant in Upper F, three of the corrections officers were injured and forced to miss work, one officer for the better part of a year; and,

3) Most damagingly, Mr. McAndrew refused to concede upon cross-examination that claimant's actions when being escorted from Upper F to the ER room, in cursing profanely at the officers and in kicking at Officers James and Palmer and in actually kicking Officer Palmer, were a form of active resistance (see TT, November 9, 2015, pp 965-967).

For all of the foregoing reasons, the Court finds that, based upon the credible trial evidence, defendant's use of force upon claimant while in Upper F on October 3, 2010 was appropriate to the circumstances then existing and that it was not excessive.

The same cannot be said, however, for certain of defendant's actions after claimant had been brought to Clinton's medical facility. The Court first finds that the ER room corrections officers had a good faith and reasonably held belief, shaped and informed in part by claimant's repeated conduct of active and passive resistance earlier that morning, that claimant was continuing to engage in active and passive resistance in the ER room, and that he was willfully refusing to walk to the mental health unit under his own power. Beyond the fact that several officers credibly testified to that belief, ample evidence of that belief is provided in the first five minutes of the videotape, in which the claimant is either given instructions of compliance, ordered to cease noncompliance or reported aloud as being noncompliant, dozens and dozens of times. On the other hand, defendant's conduct beginning at the 5:00 minute mark of the tape,

and continuing to 7:35 of the tape, when claimant then lies face down in the mental health unit untouched by officers, and more specifically, the method by which claimant was carried/dragged out of the ER room, down one corridor, onto an elevator, and then down a higher floor corridor, cannot be said to be reasonable or appropriate.

However legitimate or well-founded defendant's belief that claimant continued to passively resist or was willfully refusing to stand and walk from the ER room to the mental health unit despite repeated commands to do so, and further, additionally crediting the legitimate and articulated concerns for staff and civilian safety expressed by several officers, defendant's choice to drag claimant through a corridor, onto an elevator and down another corridor, face down, by his hands cuffed behind his back and above his head, placing his full (and substantial) body weight upon his hyper-extended shoulders, was inappropriate and negligent. Even with claimant remaining cuffed, claimant could have been carried in a more positionally appropriate manner, which would have generated far less bodily stress, or could have been transported by use of the immediately available gurney present and visible in the ER room, or by means of some other device that would have supported claimant's weight, such as a restraint chair or a wheelchair. This conclusion, and these observations, are well supported by the credible and uncontradicted testimony of Ronald McAndrew specific to defendant's conduct in transporting claimant from the ER room to the mental health unit, and further, by his conclusions that claimant's actions were violative of applicable protocols and were "forbidden under any training that I've seen in correctional circles around this country" and "prohibited by all standards of use of force that I have known."

Next, substantial effort and proof at trial were devoted to claimant's allegations that defendant provided claimant untimely and inadequate emergency medical care once the claimant had been escorted to the ER room. The Court initially finds that defendant provided claimant with timely emergency medical care on the morning of October 3, 2010, by reason of the following factors:

1) Claimant had initiated a violent physical altercation with a corrections officer that eventually required the involvement of several corrections officers, a number of whom incurred substantial injuries;

2) Subsequent to being subdued, claimant engaged in a continuing pattern of active and passive resistance, which included kicking at and kicking corrections officers;

3) Claimant, as he was being escorted from Upper F to Clinton's medical facility, intermittently engaged in passive resistance by going limp, requiring officers to support his weight and/or to carry him;

4) Claimant, required to ascend one set of stairs upon arrival at the Clinton medical facility, continued to passively resist while ascending the stairs, requiring officers to support his weight;

5) Once located in the ER room to begin the strip frisk, claimant continued to engage in acts of resistance, including refusal to surrender his hands to the officers to be re-cuffed, instead drawing them beneath his body;

6) The corrections officers in the ER room, informed by claimant's conduct of earlier that morning, had a reasonable and good faith belief that claimant was continuing to actively and passively resist their commands and actions;

7) The corrections officers transporting claimant from the ER room to the mental health unit, informed by claimant's conduct of earlier that morning, had a reasonable and good faith belief that claimant was continuing to consciously and passively resist their commands and actions;

8) This belief of the transporting officers was additionally well supported by claimant being observed on the elevator looking/blinking at the officers, by an officer observing claimant breathing while on the elevator, by claimant moving his feet and legs in the elevator at 6:44 of the tape and by claimant audibly indicating distress, described as a "yell" or as a "holler," at 7:11 of the tape;

9) The corrections officers in Clinton's medical facility, informed by claimant's conduct of earlier that morning, had a reasonable and good faith belief that claimant presented an ongoing threat to the safety of civilian and correctional staff, including medical personnel, until such time that it became clear that claimant represented no such continuing threat, which became apparent at 9:25 of the tape when an officer said, "let's get some medical down here";

10) The corrections officers in Clinton's medical facility, while acting under the reasonable and good faith belief described and specifically delineated immediately above in subparagraph 9, had the legal authority and discretion to consider the situation presented by claimant to be an ongoing issue of personnel safety and facility security and control, and to address that situation as they determined necessary;

11) After being subdued in Upper F, claimant stood under his own power;

12) While being escorted from Upper F, a walk of five to six minutes, claimant walked under his own power when not passively resisting;

13) While in the ER room, as the officers began the strip frisk procedure, claimant stood under his own power;

14) At no time that morning, not during the physical confrontation in Upper F, not after being subdued in Upper F, not during the five to six minute escort to the Clinton medical facility - - a period of time during which claimant was walking and speaking with Sergeant Sweeney - - not while otherwise verbally responsive in the ER room, and not while being taken from the ER room to the mental health unit, did claimant ever complain about pain, chest pain, difficulty in breathing or shortness of breath, chest tightness, numbness in his arms or any other aspect of physical distress, nor was he ever observed to be struggling or gasping for air;

15) RN Fitzgerald was in close proximity to claimant at all times (other than the elevator ride) after claimant was brought to the ER room;

16) Claimant's medical expert, Dr. Schechter, testified that when claimant moved his legs at 6:44 on the tape, claimant was breathing, claimant had blood circulating, claimant was not in cardiopulmonary arrest and that claimant had not had a heart attack;

17) Dr. Schechter also testified that when claimant made an audible expression of pain/distress at 7:11 on the tape, it was reasonable to assume claimant was breathing at that time;

18) The video timeline depicts the following defendant actions once an officer calls for medical intervention:

a) 9:25 - - an officer says, "let's get some medical down here"

b) 9:27 - - two seconds later, RN Fitzgerald is at claimant's side, assessing him and attending to him

c) 9:29 to 11:04 - - RN Fitzgerald asks for a blood pressure kit and checks claimant's breathing, an ambulance is called for, RN Fitzgerald receives the blood pressure kit and RN Fitzgerald calls for an "ambu" bag

d) 10:52 - - RN Fitzgerald testified to having heard a "death rattle" and to having observed claimant stop breathing after claimant was turned over

e) 11:04 - - twelve seconds later, RN Fitzgerald calls "medical emergency"

f) 11:33 - - twenty-nine seconds after a medical emergency is called, chest compressions upon claimant begin

g) 12:45 - - the AED is attached to claimant, seeking a shockable heart rhythm; by 12:48, the AED reported that claimant had no shockable rhythm;

19) RN Fitzgerald was at claimant's side, assessing and attending to him beginning at 9:27 of the tape, two minutes, sixteen seconds after the last objectively observed action of a breathing, apparently conscious claimant, his audible expression of distress at 7:11 of the tape, and two minutes, forty-three seconds after claimant moves his legs and feet on the elevator at 6:44 of the tape;

20) RN Fitzgerald, when first attending claimant, initially detected claimant to be breathing and to have a pulse; RN Fitzgerald first observes claimant stop breathing at 10:52 of the tape, when claimant is turned over and when RN Fitzgerald reports then hearing a "death rattle;"

21) CPR and AED are not utilized if a patient has a pulse (perfusing blood) or if a patient is breathing;

22) Chest compressions begin at 11:33 of the tape, forty-one seconds after RN Fitzgerald observes claimant stop breathing (at 10:52 of the tape), and the AED machine is attached by 12:45 of the tape, less than two minutes after RN Fitzgerald's observation of claimant cease respiration at 10:52; and,

23) Based upon the factors set forth above in paragraphs 18, 19, 20, 21 and 22, Dr. Doynow credibly opined that defendant provided claimant with timely CPR.

Ultimately, claimant received unrelenting resuscitation efforts by Clinton staff for over twenty-six minutes in the Clinton mental health unit before being attended by the ambulance emergency medical responders. Defendant's medical efforts to resuscitate claimant were, all parties agreed, compassionate and substantial, and, by reason of the foregoing factors, the Court finds them to have been timely undertaken.

Be that as it may, those efforts, specifically in respect of defendant's application of CPR to claimant, were nevertheless negligently performed and were substandard. At the time defendant employs chest compressions and undertakes CPR upon claimant, claimant is in full blown medical crisis. He has stopped breathing, is motionless and on his back, and the AED can find no shockable heart rhythm. Claimant, clearly, is no longer a security risk or threat, yet his

hands remain cuffed, behind his back, as CPR is then performed upon him for almost half an hour in a manner that both violates AHA guidelines and that fails to meet the standards of good and acceptable medical care.

Claimant's medical expert, Dr. Schechter, identified defendant's application of CPR to claimant to be substandard in two respects: a) claimant was not placed on his back on a hard, flat surface to maximize the effectiveness of the chest compressions applied to him - - instead, his cuffed hands remain folded underneath his back during CPR, bowing his back, and causing his body to act as a fulcrum; and, b) rather than receiving the proper administration of fast and continuous chest pumping, there were multiple prolonged pauses in defendant's application of chest compressions to claimant.

Even defendant's medical expert, Dr. Doynow, when asked if the CPR defendant provided claimant complied with AHA standards, replied, "not specifically," and although he described claimant as having received "effective CPR," depending on where claimant's hands were located behind his back, Dr. Doynow never testified to knowing or observing where claimant's hands were in fact actually located behind claimant's back while CPR was applied. Dr. Doynow also testified that defendant failed to adhere to AHA guidelines requiring that chest compressions be applied uninterrupted in two minute intervals.

In effect, both medical experts testified consistently, and provided credible expert proof that defendant failed to perform CPR upon claimant in a good and acceptable manner, but instead, provided claimant substandard medical care in its application.

To recover damages however, claimant must additionally prove that defendant's negligent application of CPR was a proximate cause of claimant's death. The New York Pattern Jury Instructions, Civil (PJI 2:70) describes proximate cause as follows:

> "An act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable people would regard it as a cause of the injury. There may be more than one cause of an injury, but to be substantial, it cannot be slight or trivial. You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it."

The Court of Appeals also explains, in Oakes v Patel (20 NY3d 633, 647 [2013]), that:

> "It is often true, as it is in this case, that causation issues are relevant both to liability and to damages. Thus, in a medical malpractice case, liability cannot be established unless it is shown that the defendant's malpractice was a substantial factor in causing the plaintiffs injury . . . But even where liability is established, the plaintiff may recover only those damages proximately caused by the malpractice."

Both medical experts noted that CPR is not used upon a patient who has a pulse or who is breathing. Both medical experts acknowledged that RN Fitzgerald reported claimant to have a pulse and to be breathing when he initially assessed claimant (beginning at 9:27 of the tape), and further acknowledged that RN Fitzgerald reported hearing claimant take his last breath at 10:52 of the tape, after claimant had been turned over. Critically, both medical experts agreed that once the AED was employed, at 12:45 of the tape, it never thereafter reported that claimant had a shockable heart rhythm - - that fact was undisputed.

Dr. Schechter, a sincere witness to be sure, gave a single sentence, eleven-word answer, as his expert medical opinion that had Leonard Strickland received timely and proper medical

treatment on October 3, 2010, it would have been more probable than not that he would have survived. Dr. Schechter's testimony, in its entirety, related to this opinion, was as follows:

"Q. And, Doctor, do you have an opinion with a reasonable degree of medical certainty as to whether it would be more probable than not that Leonard Strickland would have survived had he received timely and proper medical treatment, on October 3, 2010?

A. Yes, I do have an opinion.

Q. And, Doctor, what is that opinion?

A. The opinion is more likely than not, he would have survived." (TT, November 5, 2015, p 799).

Dr. Schechter testified, generally, that earlier medical intervention is better than later medical intervention, and, further, discussed the premise of a 7-10% increased chance of survival per minute of earlier defibrillation (which, again, is only used upon a nonperfusing, nonbreathing patient) - - however, these enhanced percentages are dependent upon the involved patient having a shockable heart rhythm (see TT, November 13, 2015, pp 1104 and 1119). Claimant did not, and never did.

Additionally, Dr. Schechter gave no opinion about when or if Mr. Strickland ever had a shockable rhythm, and his opinion about the probability of claimant surviving had he been given timely and proper medical treatment was provided without any additional supporting explanation, reasoning, analysis or citation to any applicable authoritative works or studies.

Said another way, claimant's expert medical proof that defendant's acts of medical malpractice on October 3, 2010 were a substantial factor or a proximate cause of his death, was

Dr. Schechter's single sentence of testimony, and it was testimony that was conclusory, speculative and unsupported.

Conversely, defendant provided more persuasive proof on the issue of proximate cause. Referencing the American Heart Associations's 2013/2012 study, even at its most generous interpretation to claimant, a patient in cardiac arrest receiving CPR in-hospital (an issue of some dispute between the parties, which the Court need not resolve) had a reported survival rate of 23.9%. Patients out-of-hospital with no shockable rhythm had a reported survival rate of 9.5%, and even those patients out-of-hospital who did have a shockable rhythm had a reported survival rate of 28.4%. Further, claimant's expert, Dr. Schechter, upon cross-examination, "accept[ed]" the reported survival rate of in-hospital cardiac arrest patients with no shockable rhythm to be 23% (TT, November 5, 2015, p 861).

For all of the reasons set forth above, claimant has failed to prove by a preponderance of the credible evidence that defendant's application of substandard CPR was a proximate cause of his death, especially in light of the fact that claimant was never found to have a shockable heart rhythm at any time during the application of CPR and during the use of the AED at the Clinton medical facility. Accordingly, claimant's remaining medical malpractice cause of action must and does fail.

Finally, defendant's suggestion in its post-trial submission that claimant be apportioned partial culpability for defendant's acts of negligence, by reason of claimant having initiated the physical confrontation with Officer Strong in Upper F and in thereafter engaging in active and passive resistance, is unavailing.

Defendant's use of excessive force is, by definition, the use of force beyond the acceptable level necessary when employing it. It is the disproportionate use of force, above and beyond appropriate and necessary level, and it is conduct for which defendant is entirely responsible.

Trial of this claim was bifurcated. As a result, the parties were neither expected to provide, nor did they submit, proof during trial regarding damages related to the use of excessive force, nor did they submit argument or case law in their post-trial submissions in support of an award for damages related to the use of excessive force. Accordingly, a trial on damages will be conducted to determine the extent to which claimant is entitled to compensation, if at all, for conscious pain and suffering, if proven, that claimant endured as a result of defendant's negligent and excessive use of force in transporting him from the ER room to the mental health unit on the morning of October 3, 2010.

A trial on damages will be scheduled, upon consultation with the parties, as soon as practicable.

All motions not previously decided are hereby denied.

Let interlocutory judgment be entered accordingly.

Albany, New York
September 28, 2016

Frank P. Milano

FRANK P. MILANO
Judge of the Court of Claims