IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

PATRICIA McATEE, as Administrator of the Estate of Kyle Andrew Wasson, Deceased, Plaintiff, vs. JIM WARKENTIN and CITY OF NORTH LIBERTY, IOWA, Defendants.	No. 3:05-cv-0104-JAJ **ORDER**

This matter comes before the court pursuant to plaintiff's April 19, 2007, Motion in Limine [dkt #63]; plaintiff's April 19, 2007, Motion to Bifurcate Trial [dkt #65]; plaintiff's October 16, 2007, Motion to Strike Defendants' Supplemental Expert Report [dkt #104]; and defendants' May 10, 2007, Motion in Limine [dkt #84]. Some of the issues in these motions were addressed by the Honorable Charles R. Wolle in an order dated July 9, 2007 [dkt #103]. This matter has more recently been transferred to the undersigned to preside over the trial.

The court held oral argument on these issues on December 18, 2007, at which the plaintiff was represented by Patrick O'Connell. The defendants were represented by Terry Abernathy and Thad Collins. All Daubert issues will be addressed in a separate order.

NATURE OF THE CASE

This is an action commenced by Patricia McAtee, as Administrator of the Estate of Kyle Wasson, against James Warkentin and the City of North Liberty, Iowa. It arises out of the August 28, 2003, shooting of Kyle Wasson by Chief of Police Warkentin after an extended, on-again, off-again high speed pursuit. Discovery in this matter shows that the

facts leading up to the shooting are highly disputed. Both sides agree that Chief Warkentin first pursued Kyle Wasson based on his visual observations of Wasson speeding on a motorcycle. Both sides agree that Wasson lost control of his motorcycle on more than one occasion and that the pursuit ended at a bike trail adjacent to a North Liberty, Iowa, elementary school.

At this point, the allegations differ dramatically. Plaintiff intends to argue that Chief Warkentin pursued the plaintiff through a field and intentionally or recklessly collided with the plaintiff, pinning the plaintiff under the police car. Plaintiff contends that Chief Warkentin drove his vehicle in a forward motion over the plaintiff. He then got out of his vehicle and shot the plaintiff with his .40 caliber handgun.

Chief Warkentin admits pursuing Kyle Wasson and accelerating through the field in an effort to apprehend him. As he approached Wasson, he claims that he applied the brakes and accidentally collided with the plaintiff. According to Warkentin, Wasson then actively resisted arrest. Warkentin claims that he gave verbal commands to the plaintiff and a physical struggle ensued as Warkentin attempted to arrest Wasson. During the course of the altercation, Warkentin claims that he used pepper spray unsuccessfully. He then used an ASP baton and struck the plaintiff. During the struggle, Warkentin observed a handgun in the plaintiff's waistband and was able to disarm the plaintiff by grabbing the gun and throwing it. According to Warkentin, Wasson then got into Warkentin's police car. Wasson put the car in reverse and Warkentin struggled to disable the vehicle or shift the car into park. After repeated commands to stop, Warkentin claims that he intended to disable the plaintiff by shooting him in the leg. He fired one shot that went through the plaintiff's torso. Warkentin took Wasson from the car onto the bike path. As he removed him from the car, the car was still in reverse gear. The car rolled backwards, pinning Wasson under the car on the bike path.

Other police officers quickly arrived. Efforts to resuscitate Wasson were

unsuccessful. A team of other law enforcement officers came to conduct an investigation of the shooting.

Small amounts of blood were found on the door, the steering wheel and on a ticket book in the console. One of these samples was tested and found to be the blood of Kyle Wasson. A .40 caliber shell casing was found in the console between the front passenger seats of the vehicle. There was pepper spray on plaintiff's shirt and it was apparent that both Warkentin and Wasson had suffered traumatic injuries of varying degrees.

An autopsy was conducted. The bullet traveled at a downward angle through the plaintiff's torso and remained within his body. Toxicological testing demonstrated a large amount of methamphetamine in Wasson's system, together with evidence of cocaine and marijuana ingestion. The plaintiff was on probation for a felony drug offense at the time of the events set forth above.

PLAINTIFF'S MOTION IN LIMINE

The plaintiff seeks to exclude any evidence of Kyle Wasson's drug use, contending that it is irrelevant and that the prejudicial value of such evidence substantially outweighs its probative value. The plaintiff contends that Chief Warkentin's conduct must be judged against the standard of an objectively reasonable officer under similar circumstances, without the benefit of hindsight. Chief Warkentin admitted in his deposition that he did not know that the plaintiff was under the influence of methamphetamine at the time of this incident.

Given the wildly divergent factual scenarios developed by the parties, the court concludes that evidence of Kyle Wasson's drug use is admissible. The evidence tends to corroborate key elements of Chief Warkentin's testimony. Specifically, it corroborates behavior that Warkentin claimed to observe, such as why the plaintiff would repeatedly state that he could not be taken into custody and that his mother would kill him. It

corroborates a repeated refusal to comply with Warkentin's commands. It also tends to explain why Warkentin's use of pepper spray and the ASP baton did not have their intended effect.

The evidence is prejudicial. Generally speaking, the public does not like what methamphetamine has done to people and communities in Iowa. Generally speaking, people do not have great respect for people who use methamphetamine. However, the prejudicial impact of this testimony must substantially outweigh its probative value to exclude it. If the jury were otherwise inclined to believe Warkentin's testimony about what happened, they would simply be left to speculate as to why Wasson would act so irrationally. Conversely, if the jury was not inclined to believe the officer's testimony, the evidence of Wasson's drug ingestion would be only slightly more prejudicial than other excessive force cases where the plaintiff is noticeably drunk when confronted by the police. The fact that many of those cases are successful suggests to the court that the same would likely be true for cases involving the ingestion of methamphetamine. The plaintiff is concerned that the mere fact of his drug ingestion might cause the jury to favor Chief Warkentin's testimony, not because it corroborates it, but simply because it casts Wasson in a negative light. The court concludes that the danger of this kind of unfair prejudice is not so great as to substantially outweigh the probative value of the evidence as set forth above.

Because this evidence will be admitted for both liability and damage issues, the Plaintiff's motion to bifurcate the liability and damage issues is denied.

There are a number of other things in Kyle Wasson's background that similarly concern the plaintiff. First is his angry and somewhat bizarre cellular telephone greeting. Having read a typed version of that greeting, the court concludes that it is exactly the kind of character evidence that FEDERAL RULE OF EVIDENCE 404(a) is designed to exclude. That is, evidence of an angry, aggressive personality trait is not admissible to show that

the plaintiff acted in conformity with that character trait on any particular occasion. For the same reason, evidence that Wasson made a threatening gesture to Adam Grabin a couple days prior to the shooting, while both parties were traveling on Interstate 380, is not admissible. It is simply evidence of a generally aggressive, angry personality trait. It is not admissible to show that Wasson acted in any particular manner on August 28, 2003.

Plaintiff also moves to exclude evidence of Kyle Wasson's criminal history. The court finds that the decedent's criminal history is irrelevant, with one exception. The defendants may offer evidence of the nature of the offense for which the decedent was on supervision at the time of his death. If the defendants show that the decedent was on supervision for a drug offense and that he was committing drug and gun offenses at the time of Chief Warkentin's pursuit, these facts could be relevant to the decedent's alleged motive to resist apprehension and flee. This behavior has a direct bearing on the reasonableness of force that was used. They would also explain the decedent's state of mind in uttering words attributed to him by Chief Warkentin regarding the reasons for his resistance and flight. Similarly, if there was a warrant outstanding for the decedent for failure to appear in court, this would also be admissible. All other criminal history matters will be excluded, as will his prior drug use, prior sales of drugs, and prior instances involving the carrying of weapons. They were not known to Chief Warkentin at the time and do not tend to explain Wasson's behavior on the day in question.

DEFENDANTS' MOTION IN LIMINE

The defendants move to exclude evidence of the City of North Liberty's policy on pursuit and use of a police vehicle as a weapon or for ramming. The defendants contend this evidence is irrelevant and inadmissible as a matter of law. The defendants cite Scott v. Harris, 127 S. Ct. 1769 (2007) and Hernandez v. German, 340 F.3d 617 (8th Cir. 2003)

for the proposition that no Fourth Amendment violation occurred as a result of the collision between Chief Warkentin's patrol vehicle and Kyle Wasson on his motorcycle. Defendants earlier renewed their motion for summary judgment based on the court's decision in Scott v. Harris and that renewed motion was denied by Judge Wolle on July 9, 2007. The court agrees with Judge Wolle's decision.

In Scott v. Harris, the Supreme Court held that a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. The decision in Scott was unique in that there was a videotape of the events in question. From that videotape, the Supreme Court was able to determine conclusively that the suspect raced down narrow, two-lane roads in the dead of night at speeds that the Supreme Court called "shockingly fast". His car swerved around more than a dozen other cars, crossed a double yellow line and forced cars traveling in both directions to their respective shoulders to avoid being hit. Id. at 1775. The Supreme Court described it as resembling a Hollywood style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury. Id. at 1775-76. In short, it was clear from the videotape that the suspect posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists and to the officers involved in the chase. Id. at 1778.

In Scott, the Supreme Court found that the police officers there had no obligation to abandon their pursuit of the suspect. The Court did not absolve all police officers from liability for force used to terminate high-speed car chases. Rather, it stated that where the chase threatens the lives of innocent bystanders, the police officers' attempt to terminate that event does not violate the Fourth Amendment.

Central to the court's ability to resolve this matter on summary judgment was the presence of a videotape of unquestioned integrity. The extent to which the high-speed

chase in this case jeopardized the lives of innocent bystanders, whether on the road or the nearby elementary school, is the subject of factual dispute for which there were certainly eyewitnesses, including defendant Warkentin and an adult at the elementary school. However, such witnesses are not the objective equivalent of a videotape recording. The court concludes that the decision in Scott does not preclude the plaintiff from pursuing a claim for the alleged ramming of Kyle Wasson on the bike path.

The court will admit evidence of the North Liberty pursuit and ramming policies. They will not be admitted to support any claim that Kyle Wasson was deprived of Fourth Amendment rights by Chief Warkentin's decision to pursue a high-speed chase. The Scott decision makes it clear that the decision to engage in a high-speed chase alone cannot support a Fourth Amendment claim. Similarly, the plaintiff will not be permitted to argue for responsibility based on the failure of Chief Warkentin to abandon the pursuit.[1]* However, the pursuit is part and parcel of the events giving rise to Kyle Wasson's ultimate death. The extent to which Chief Warkentin was willing to violate internal policies crafted for the safety of the police and public may be probative of other issues concerning the chief's judgment and intent on the evening in question. An appropriate jury instruction will be given, upon request, to place this evidence in its proper context.

One or more of plaintiff's experts has made reference to "national standards" for the use of deadly force in police-citizen encounters. The defendants object to evidence of "national standards", arguing that the standards for the use of force should be derived solely from the Fourth Amendment. Occupational or industry groups or associations

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[1]See also Hernandez v. German, 340 F.2d 617 (8th Cir. 2003) In determining whether a similar use of force was objectively reasonable, the Eighth Circuit Court of Appeals stated that it considers only whether the seizure itself, not pre-seizure conduct, was reasonable. However, the court here is not admitting pre-seizure conduct to determine the reasonableness of the shooting, rather, it is admitted only for the purposes set forth in the text above.

closely associated with particular types of liability claims often promulgate standards for performance, either formally or informally. These standards might be as formal as highly refined manufacturing standards for safe products. They may be as informal as the standard of care for medical professionals. In whatever form they exist, the extent to which occupations and professions promulgate guidelines for balancing effectiveness and safety while complying with the law, is relevant. These guidelines are relevant to the extent that they reflect the informed experience of the occupation or profession. They do not, in any way, supplant standards provided for by the law. In the context of an excessive force case, standards relating to the continuum of force and training in the use of deadly force are helpful in that they are not commonly known by laypersons and represent the study and experience of the profession. The motion to exclude reference to "national standards" is denied. Again, instructions to the jury will put this testimony in proper context.

No evidence will be offered concerning the "reputation" of any police department associated with this case unless the plaintiff first approaches the court with this evidence outside the presence of the jury. No evidence concerning Chief Warkentin's consultation with legal counsel following the shooting will be admitted.

PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' SUPPLEMENTAL EXPERT REPORT

The parties in this case have no issues arising out of the timeliness of the original expert witness designations. In Dr. William Lewinski's November 21, 2006, report, he states the following in page 8:

> Simply put - if you do no know how a gun is held and manipulate it at the moment it was fired, the presence of a spent shell casing at a scene simply informs you that a weapon was fired at the scene and tells you little if anything else.

Dr. Lewinski has not been deposed. Plaintiff's experts, Dr. Michael Lyman and Gary

Rini, were deposed in May and June of 2007, respectively. In his deposition, Gary Rini states that the placement of the spent cartridge shell in the console of the patrol car was evidence of improper alteration of evidence at the scene. See Rini depo. at pp. 57-60; 70-71. Dr. Lyman testified that the shell casing should have landed outside the car near a tree area or tree line. See Lyman depo. at pp. 72-73. Dr. Lyman testified that he had read numerous studies dealing with shell case ejection patterns. Id. at 74. He then elaborated on what those studies would indicate as to the presence of the spent shell casing in this case. Id. at 75.

Dr. Lewinski's September 28, 2007, supplemental report references the details of studies investigating the impact of weapon manipulation on spent shell case ejection. The first was a study done by Lewinski's company using a nine millimeter Glock handgun. He then references a Los Angeles sheriff's department study using a Glock .40 caliber weapon such as that carried by Chief Warkentin. The supplemental report concludes the following:

> [I]f you do not know how a gun is held and manipulated at the moment it was fired, the presence of an undisturbed spent shell casing at a scene simply informs you that a weapon was fired at the scene and tells you little if anything else.

This is nearly word for word identical to Dr. Lewinski's original, and timely, opinion.

Between the time of Dr. Lewinski's initial report and the September 28, 2007, supplemental report, several significant things happened. First, the plaintiff's experts were deposed and both testified that they were aware of studies on shell case ejection patterns. Second, Daubert issues were raised in which the bases for expert opinions became an issue. Third, Dr. Lewinski was not deposed.

There is nothing wrong with disclosing additional information that supports the conclusion of the defendants' expert, especially after plaintiff's experts both testified about the presence of studies on the subject of spent shell case ejection patterns. The studies are completely consistent with the expert's original opinion. It is the kind of information that

would easily be revealed had a deposition been taken. There is certainly nothing wrong with refusing to take such a deposition and now, even without the deposition, the information is known many months prior to the commencement of trial.

The plaintiff is free to respond in kind. Meaning, if there are studies that support plaintiff's experts' opinions, they can be revealed. If the plaintiff wants to depose Dr. Lewinski, the plaintiff can still do that.[2] The plaintiff has suffered no prejudice as a result of this supplemental report. The Motion to Strike is denied.

Upon the foregoing,

IT IS SO ORDERED

That plaintiff's Motion in Limine [dkt #63] is granted and denied as set forth in the text above; defendants' Motion in Limine [dkt #84] is granted and denied as set forth in the text above; plaintiff's Motion to Bifurcate the Trial [dkt #65] is denied; plaintiff's Motion to Strike the Supplemental Expert Report of Dr. Lewinski [dkt #104] is denied.

DATED this 31st day of December, 2007.

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA

[2]This deposition should be taken in January if it is going to be taken.