Court of Appeal Docket No. 07-15572

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

CHARLA CONN, DUSTIN CONN,

Plaintiff-Appellants,

vs.

CITY OF RENO, RYAN ASHTON, DAVID ROBERTSON,

Defendants-Appellees.

District Court No. 3:05-cv-00595 HDM

* * *

APPEAL FROM GRANT OF SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
UNITED STATES DISTRICT JUDGE HOWARD D. MCKIBBEN

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Brenda Clustka's life was a sad story. Equally disturbing is defendants' cynical answering brief ("AB"). The big picture of what defendants assert is "nothing matters." It does not matter to them that Clustka attempted to choke herself, yelled she wanted to die, begged to be killed, and screamed she would kill herself, the officers had no idea she was serious. It does not matter that the officers knew they were required to report all suicidal gestures and failed to do so, nobody would have helped Clustka in any event.

It is defendants' position throughout that they were free to close their eyes to what they saw, close their ears to what they heard, and turn their back on their duty to protect this obviously unbalanced, self-destructive, and intoxicated detainee. The Fourteenth Amendment says different—when these officers took Clustka into protective custody, they assumed an obligation to protect her from self-harm. They failed in that obligation and her death was the result.

I.

FOURTEENTH AMENDMENT REQUIRES "MORE CONSIDERATE TREATMENT"

Defendants misstate the law to apply in this case. They assert, "The Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amendment, prohibits the infliction of 'cruel and unusual punishments' on those convicted of crimes" (AB 23:16-19).

Defendants disregard that, when Robertson and Ashton encountered Clustka, she was not convicted of any crimes. She was not arrested for any crime (ER 189@41:1-3). She was a civil detainee in protective custody. This case is not about "cruel and unusual punishment" because the officers had no right to punish her. They took her into custody because she was incapable of caring for herself (ER 189@41:4-7). When the officers took Clustka into custody, they took on a duty to protect.

As stated in plaintiffs' opening brief ("OB"), "The Fourteenth Amendment – rather than the Eighth Amendment – applies to protect" persons in civil protective custody (OB 25). Because Clustka was not convicted of any crime, her constitutional rights derive from the substantive due process clause of the Fourteenth Amendment and not the Eighth.

Accordingly, the Eighth Amendment may not be used to delimit Clustka's rights. It provides "a **minimum standard of care,**" not the ceiling. *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003). In *Mink*, the Ninth Circuit emphasized, "We reject [the defendants'] claim that the deliberate indifference standard governs the due process rights of incapacitated criminal defendants." *Id.*

Thus, while defendants assert the Eighth Amendment "bans only cruel and unusual punishment," the concept of punishment has **no place** in this analysis. Clustka was entitled to greater constitutional protections than is afforded a convicted criminal. In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Supreme Court held, "Persons who have been involuntarily committed are entitled to **more considerate treatment** and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Id.* at 321-22.

In *Jones v. County of Sacramento*, 393 F.3d 918 (9th Cir. 2004), the Ninth Circuit applied *Mink* to the civil detainee context, finding, "If an incapacitated **criminal** defendant need not prove "deliberate indifference" to state a substantive due process claim, then neither should a **civil** detainee, who retains greater liberty protections than his criminal counterpart." *Id.* at 933.

II.

DEFENDANTS ARE WRONG ON THE FACTS, MISTAKEN ON THE LAW, MISGUIDED ON THE ANALYSIS

A. Deliberate Indifference to Suicide Threats

1. Triable Issue Whether Officers Had Discretion to Disregard Clustka's Suicide Threats

Defendants assert Robertson and Ashton "reasonably understood" Clustka's act in wrapping the seatbelt around her neck to be simply an attempt to "manipulate" her situation (AB 27:11-12, 28:1-2). According to defendants, because it was not a "serious" suicide attempt, they had discretion to ignore it: "When she told the officers to kill her or she would kill herself, the officers had no more reason to believe Clustka would kill herself than she did that the officers would actually kill her" (AB 27:6-15). Cynically, both officers deny her actions were in any way connected to suicide. Ashton was clear: "It was not a suicide attempt" (ER 186@31:22-24). Robertson was equally clear: Suicide threats by intoxicated persons "don't count" (ER 230@108:5-11).

Thus, the officers claim: (1) They were free to assume Clustka was being manipulative; and (2) because she was being manipulative, her suicidal

threats were not serious. To them, her death by suicide two days later was unforeseeable, something they could not know would occur and for which they are not liable. In their eyes, it bore no relationship to what they saw and heard her do in the paddy wagon.

Defendants' position runs counter to the testimony of RPD officials, jail officials, and medical staff. It runs counter to admissions by Robertson and Ashton, counter to common sense and counter to Ashton's understanding of the police officer's purpose, to "help people in need" (ER 197@76:6-8) as well as Robertson's belief that it is "his job" to take every precaution to ensure people do not harm themself (ER 225@86:20-24). The officers' admissions create a triable issue whether Clustka's conduct constituted a suicide attempt that the officers knew to take seriously, whether they had discretion to ignore it, whether it was connected to her death two days later, and whether it was reasonable for them to fail to report it.

a. <u>Triable Issue re Intoxication</u>

Defendants claim Clustka's intoxication nullified their obligation to take her suicide attempt and threats seriously (AB 27:16-28:2). Robertson testified he is not obligated to take seriously suicide threats made by intoxicated persons (ER 216@51:4-7, 230@107:5-11). It is "his call" to decide whether or not someone making such a threat means it and whether or not he will report it to jail staff (ER 216@51:8-14, 216@52:6-14). Ashton agreed, he would not consider a statement from an intoxicated person "credible" (ER 193@58:17-24).

Robertson's and Ashton's supervisor Sgt. David Evans, RPD Deputy Chief James Johns, Washoe County Lt. Milt Perry (a former RPD officer), and Washoe County Jail Health Services Administrator Gail Singletary all

contradicted defendants' position. They testified that **<u>all</u>** suicidal statements must be taken seriously. It was not for Robertson and Ashton to decide whether Clustka was serious, manipulative or unreasonable when she tightened her seatbelt around her neck and screamed suicidal threats. These witnesses were clear: These officers had **<u>no discretion</u>** to disregard Clustka's suicidal gestures and words even if she was intoxicated.

Robertson and Ashton had no idea what Clustka was capable of. What they did know from the wants and warrant's check was that she had violent tendencies and a history of mental problems (ER 181@11:12-18). What they saw was a woman unable to care for herself, disheveled, angry, emotional, distraught, unable to walk and yelling at the top of her lungs she wanted to die, begging to be killed and choking herself with a seatbelt (ER 188@37:5-38:23).

Johns testified it is "never" okay to ignore a suicide threat (ER 264@55:15-18). A threat of suicide from an intoxicated detainee should be taken as seriously as a threat from a non-intoxicated detainee (ER 262:47:25-48:4). It is "not" RPD's policy to ignore suicide threats by intoxicated people (ER 262@21-24).

Evans testified that threats of suicide from intoxicated persons are not to be disregarded (ER 276@34:4-14). He would "never" advise officers under his control to disregard a detainee's suicide threat (ER 275@29:25-30:15). Evans further testified it would not be appropriate for transporting officers to disregard an intoxicated person's suicide threat because it's an "important statement" (ER 276@34:15-35:25).

Perry added it would be "against the rules" to disregard the suicide threats of an intoxicated person." "[T]he threat to kill themself by any detainee should be taken seriously" (ER 305@27:6-21). Had he transported

an intoxicated person who said she wanted to kill herself and wrapped a seatbelt around her neck, he would have told jail staff" (ER 259@35:9-19).

Finally, Singletary testified that "threats of an intoxicated person...should be taken seriously" (ER 165@19:20-20:7). She never heard that the suicide threat of an intoxicated person should be disregarded (ER 165@20:15-20). She is aware of a statistical correlation between intoxication and suicide (ER 165@18:24-19:7).

b. Triable Issue re Need for Medical/Psychiatric Care

Defendants insist Clustka's suicidal threats were unworthy of "comment or treatment" by a doctor (AB 29:2-5). They argue her gestures and threats did not demonstrate an "objectively serious medical need," required no medical care, and triggered no reporting obligation (AB 29:14-19). Perry, Singletary, Evans, and Johns flatly disagree. These witnesses testified that, anytime the "possibility" of suicide is raised, it **must** be reported because that is the only way to insure medical care. There is no discretion to not report.

Perry, a former RPD officer and jail operations chief, testified he wants every suicide threat taken seriously and every person making such a threat to be seen by medical personnel (ER 316@69:23-70:3). Jail procedures dictate that a report of suicide threats will initiate medical intervention. When a person expresses suicidal intent, the jail must consult with medical staff (ER 313@59:22-50:9) "We rely on the medical staff and [ask what] we should do" (ER 309@43:3-6). All communications between transporting officers and jail staff regarding even the "possibility" of suicide must be reported and documented and given to medical staff (ER 312@53:15-19).

Whether an inmate is in CPC or the regular jail does not change the equation. Regardless of where an inmate is placed, suicidal persons must be reported so medical help may be obtained. Perry testified it is "very important" to monitor an inmate in CPC who has stated intent to kill oneself: "We have a duty to make sure people don't hurt themselves" (ER 302@16:5-17:21).

Singletary testified that the threats of "anyone" who states they want to commit suicide should be inquired into. Such persons are in need of urgent medical intervention and the only way that can be obtained is if the threats are reported when heard (ER 165@20:9-13). She agreed such threats are important because "two-thirds" of all suicide victims communicate intent to commit suicide before actually doing it (ER 165@20:21-166@21:1). At the very least, the information should be given to a nurse who will then do an "assessment" (ER 171@41:3-16). "[T]he more information that can be given to medical staff at a jail about a potential suicide at a jail about a potential suicide risk the better job the medical staff can do to avert suicide" (ER 164@14:11-15).

Evans testified the reason medical personnel should be involved whenever suicide threats are made is because "a doctor is probably better suited than a police officer to make determinations" regarding the potential for suicide. In his opinion, someone with some type of medical training is in a "better position" to accurately evaluate a person who has threatened to kill themself than a police officer (ER 274@25:7-23). Accordingly, when an officer hears from someone that they intend to kill themself, the officer should make a report (ER 274@28:24-29:6). Had Evans transported

someone who said he wanted to kill himself, he would have reported it to jail staff (ER 279@47:14-18, 288@81:18-23, 280@49:10-21).

Finally, Johns confirmed that the officers should have told jail staff what Clustka had done in their transport vehicle: "They should have told the jail when they were there" (ER 260@39:13-19). He would want someone at the jail with medical training to handle the matter (ER 265@58:22-59:1).

c. Jail Changed Policy Upon Clustka's Death

So seriously does the jail take its need to be alerted to potential suicide threats that it changed its policy one month after Clustka's death to add a written reporting requirement. No longer may transporting officers simply "drop off" detainees for booking and processing. Now they all must fill out a form specifically designed to elicit information regarding potential suicides (ER 166@21:19-24).

This new policy is expressly designed to prevent what happened to Clustka. Singletary testified that because suicide prevention is such a high priority, "when officers transport individuals to the jail they're given this form which references suicide risk" (ER 166@23:21-25). All transporting officers must complete it and hand it to the intake nurse (ER 166@22:19-20). This policy change is strong circumstantial evidence of the importance the jail places on reporting such conduct and its recognition of the harm "discretionary" failures to report suicide threats can cause.

d. Defendants Disingenuous in Claiming No Suicide Risk Because Others Did Not Recognize It

Defendants further claim that, not only did the facts fail to indicate that Clustka presented an objectively serious threat of suicide, others besides Robertson and Ashton failed to recognize the threat as well – inferentially,

because others did not recognize the threat, it was reasonable for Robertson and Ashton to not recognize the threat. Defendants point to Dr. Caplan, ambulance medical technicians, the jail intake nurse, and the emergency room physician who saw Clustka hours after her release from CPC. They argue that "none of these people who came in contact with Clustka thought she was a suicide risk" (AB 28:3-6). This argument is disingenuous.

The fallacy with defendants' approach is that **only** Robertson and Ashton witnessed Clustka wrap the seatbelt around her throat and yell she wanted to die. These others did not. Dr. Caplan, the ambulance technicians, the jail intake nurse, and the emergency room doctor **did not see or hear** what Robertson and Ashton saw and heard. The jail intake nurse and the emergency room doctor saw her after the paddy wagon incident but had no knowledge of it. None of these persons were privy to what Robertson and Ashton saw and heard. Accordingly, without notice of the suicide attempt, none of them had a basis to consider Clustka at risk for a repeated suicide effort. That is the point of this lawsuit, had Robertson and Ashton simply told these others what they witnessed when they witnessed it, there would have been opportunity to save her.

2. Triable Issue re Actual Knowledge

In addition, defendants maintain that the evidence set forth by plaintiffs is not probative of the officers' awareness that Clustka was at risk of self-harm (AB 33:5-15). First, defendants assert, the fact that the officers saw Clustka wrap the belt around her neck did not mean they knew she wanted to kill herself (AB 33:16-18). Second, defendants assert, the words spoken by Clustka ("Kill me, or I'll kill myself") conveyed nothing of significance to them.

Despite the officers' denials, their knowledge may be inferred based on circumstantial evidence. In *Lolli v. County of Orange*, 351 F.3d 410 (9th Cir. 2003), the Ninth Circuit recognized the importance of circumstantial evidence in the analysis of deliberate indifference. *Id.* at 420-21. In *Lolli*, the plaintiff testified he told the defendant officers that he was diabetic and needed food. To establish that the officers acted with deliberate indifference, however, the plaintiff must also demonstrate that the officers "inferred from this information that Lolli was at serious risk of harm if he did not receive the food." *Id.* at 420. Like Robertson and Ashton, the officers in *Lolli* denied they knew of this risk of harm.

Notwithstanding the officers' denials in *Lolli*, the Ninth Circuit found an issue of fact over their indifference based on the detainee's extreme behavior, his obviously sickly appearance and his explicit statements that he needed food because he was a diabetic. The court stated, "Much like recklessness in criminal law, deliberate indifference to medical needs may be shown by circumstantial evidence when the facts are sufficient to demonstrate that a defendant actually knew of a risk of harm." *Id.* at 421.

> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence,...and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

Farmer v. Brennan, 511 U.S. 825, 842 (1994); see also, *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2001) (plaintiff may demonstrate officers "must have known" of risk of harm by showing obvious and extreme nature of detainee's behavior).

Plaintiffs have set forth much circumstantial evidence from which the officers' indifference to Clustka's suicide risk may be inferred. Clustka's attempt to choke herself by lapping the seatbelt about her neck was so obvious and extreme that the officers immediately stopped the paddy wagon, went to the back, unwrapped the seatbelt from her neck, restrained her with handcuffs and secured her with the seatbelt. Clustka's attempt to choke herself coupled with her repeated threats to kill herself is obviously extreme conduct that would place any officer on notice of her suicide risk.

The officers admit Clustka was disheveled, belligerent, angry, "clearly upset," "agitated," and "irrational" when she arrived at the jail (ER 188@37:5-17, 188@37:24-38:5, 195@38:3-23). She was so "emotionally distraught" that, Ashton testified, she yelled she wanted the officers to "kill her" or she would "kill herself" (ER 188@39:4-17, 188@40:2-7). What more could Clustka have done to communicate her extreme distress and urgent desire to kill herself? At the very least, the obvious and extreme nature of her behavior creates a triable issue over whether the officers actually knew she presented a suicide risk.

a. <u>Triable Issue Based on Ashton's Pre-Lawsuit Admissions</u>

Defendants further assert that neither Ashton nor Robertson inferred a serious risk of harm from Clustka's conduct in the paddy wagon. However, before Ashton was sued – before defendants manufactured their defense dismissing Clustka's gesture and threats as manipulation and not suicidal – he made revealing admissions. On April 28, 2005, the day Clustka killed herself, Ashton admitted to jail deputy Dennis Hippert that two days earlier, while he and Robertson transported Clustka to the jail, she had **"<u>tried to</u>**

hang herself" in the paddy wagon and they made a decision to not report her "**suicide attempt**" (ER 74). Ashton did not tell Hippert at the time, before he was sued, that Clustka was "manipulating" the situation – he told Hippert straight out she had attempted suicide. Ashton made additional admissions to the effect Clustka had actually attempted suicide. Before this lawsuit was filed, Ashton expressed to other individuals that Clustka had "tried to choke herself" (ER 180@7:14-20, 149:18-19). Also, in the heat of the moment, when he saw Clustka wrap the seatbelt around her neck through the video monitor, Ashton told Robertson she was "choking herself" (ER 195@65:2-7).

Ashton also told Hippert immediately **after** the suicide that he "would be writing a report" and his "sergeant would be pissed" (ER 74). From this, it may be reasonably inferred that Ashton knew his failing to report what he witnessed was improper.

Ashton had such a guilty conscience that the day after Clustka was transported to the jail, he confessed to an associate, Officer Kelly Fox, how he was "**uncomfortable** with Clustka's transport and the fact that she had wrapped the seatbelt around her neck." Ashton's "confession" took place the day before Clustka actually took her life (ER 288@83:5-86:9). It may be inferred from his confession that he knew he had done the wrong thing in not reporting her suicide attempt and felt guilty.

b. Triable Issue re Lethality of Seatbelt Choking

In their answering brief, defendants assert as though it were fact that the officers were not deliberately indifferent to a serious risk of harm because "Clustka lacked the means to commit suicide." They state:

> Even had she managed to **pass out** from the seatbelt, she would have lost all tension on the belt and could not have killed herself (AB 32).

However, there is a clear triable issue as to their indifference based on the obvious extremity of her conduct. First, as a tool for suicide, a seatbelt is easily as lethal as a rope, a bed sheet, or any other hanging device. It can also make a loop that can be tightened about the neck. To kill herself, Clustka needed only to buckle the seatbelt into a loop after lapping it about her neck then drop her weight to the floor—exactly what she did with a bed sheet two days later.

Second, even if Clustka could not have killed herself using the seatbelt as a means to hang herself and merely "passed out" as defendants proffer, there can be no reasonable doubt that "passing out" also presented a serious risk of harm that the officers cannot have ignored.

Third, as Perry testified, it was obvious Clustka wanted to harm herself: "By wrapping it [seatbelt] around her neck whether or not it was tight, to me that would indicate that she's making ideations of wanting to harm herself" (ER 318@79:17-23). According to Evans, even if someone threatens suicide, stating they want to kill themself but without means to effect the deed, he would still feel it important to have the person "checked and explored a bit further" (ER 277@38:15-39:15).

c. Triable Issue Over Policy Violations

Ashton testified unequivocally to his belief that he and Robertson violated department policy and state law by failing to seatbelt Clustka on the drive to the jail (ER 185@25:11-15). Regardless of defendants' arguments—that technically the officers' failure to handcuff or seatbelt Clustka may not

have violated department policy or state law—the significance of Ashton's admission is undeniable. Because the officers were convinced they had violated department policy and state law, they were **motivated to conceal their role** in the resulting incident. They were reluctant to inform jail staff of her suicide attempt because that would necessarily mean they would have to explain why she was walking about the vehicle and how she happened to lap the seatbelt around her neck. Such explanations would reveal their ineptness. It matters not whether it actually was or was not a policy violation, Ashton thought it was and was motivated to keep quiet about it.

d. Triable Issue re Requirement to Report All Suicide Threats

Defendants further assert in their answering brief that Robertson and Ashton were not required to write reports or notify jail staff of what they witnessed. However their own testimony belies all claims to the contrary. Robertson testified there was a policy requirement that suicide threats **must be reported** to a supervisor (ER 237@133:13-19). Ashton similarly testified he knew suicide attempts should be reported and officers **do not have discretion** to decide not to report a suicide attempt (ER 197@75:15-17, 197@75:18-20).

B. Fourteenth Amendment Balancing Requires "More Consideration" than Owed a Convicted Criminal

Robertson and Ashton exercised their discretion to transport Brenda Clustka to jail in a civil protective custody. This is a decision they made, a decision that deprived Clustka of her liberty. The officers recognized Clustka was a troubled person in need of help and protection. In deciding to transport her to jail, they took on a constitutional obligation to respond reasonably to

her suicide risk. That is the essence of "civil protective custody"—to protect. As Perry testified, "Once someone's been placed in our care we've taken away their civil liberty to move around in normal care and part of that as peace officers we have a duty to protect them" (ER 302@16:5-17:21).

The officers recognized Clustka was impaired to the point where she was unable to care for herself. They cajoled her into entering the paddy wagon by lying to her. Robertson told Clustka they were taking her home to retrieve her belongings when they had no intention of doing so. Instead they took her to jail. When she saw the jail out the paddy wagon window, she became "emotionally distraught," grabbed a paddy wagon seatbelt and attempted to choke herself.

In a Fourteenth Amendment due process analysis, the court must first identify the substantive right at issue. *Mink*, 322 F.3d at 1121. As an incapacitated civil detainee, Clustka had a liberty interest in having her threats of self-harm responded to appropriately. *Id.* In *Mink*, the Ninth Circuit defined the liberty interest of incapacitated criminal detainees as an interest in a "realistic opportunity...to improve the mental condition for which they were confined." The next step after defining the liberty interest at stake is for the court to balance Clustka's liberty interest in receiving appropriate care against "the legitimate interests of the state." *Id.*

When Clustka threatened suicide in their presence, the officers thus were obliged to take steps to improve her mental condition by providing "a realistic opportunity" to protect her against suicide. Robertson and Ashton deliberately chose to do nothing besides unwrapping the seatbelt and securing her in her seat. They said nothing to the jail staff about what they had witnessed. Whether the officers' failure to take any steps to protect

Clustka violated her substantive due process rights depends on the result of the balancing of her rights against legitimate state interests.

The officers obviously fail such a balancing because there is no legitimate state interest in the officers' failure to report Clustka's suicide attempt and threats. Robertson testified it would have taken **five seconds** to advise jail staff of her suicide attempt (ER 215@48:1-9). This is not even a case about lack of funds, staff or facilities, as was argued without success in *Mink*. It is a case of "the officers couldn't care less." As Ashton admitted when asked why he didn't inform anyone at the jail about her suicide attempt, "Honestly, I didn't even think about it... [it] never really even crossed my mind" (ER 152:6-8).

C. Triable Issue Whether Officers' Violation Caused Clustka's Jail Suicide

1. Officers' Duty to Protect Under Custodial Detention Exception to *DeShaney* Rule

"There are two exceptions to the general rule that 'a State's failure to protect an individual against private violence...does not constitute a violation of the Due Process Clause.'" *Huffman v. County of Los Angeles*, 147 F.3d 1054, 1058 (9th Cir. 1998) (citing *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 197 (1989)). "First, 'when the State takes a person into its custody and holds him there against his will, the Constitution imposes some responsibility for [that person's] safety and general well-being.'" *Huffman*, 147 F.3d at 1057-58. Second, where the state affirmatively places the individual in a dangerous situation. See *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). "The state-created danger theory provides that a constitutional duty to protect may be imposed when state

actors have affirmatively acted to create a plaintiff's danger, or to render a plaintiff more vulnerable to danger. *Kneipp v. Tedder*, 95 F.3d 1199, 1207 (3rd Cir. 1996).

There is no doubt that Robertson and Ashton took Clustka into custody and owed her a duty of protection. The dispute revolves around the question whether that duty of protection extends to a duty to report Clustka's suicide attempt and threats. Had the officers reported what they had witnessed, that report would likely have triggered medical intervention—either a Legal 2000 initiated by jail or nursing staff or suicide prevention protocol while she was in CPC followed by a Legal 2000 if she continued to exhibit suicidal ideation. According to Perry and Singletary, under either scenario, Clustka likely would have been taken to the hospital for suicide assessment. The officers acted affirmatively to harm Clustka by failing to report her suicide attempt to jail staff, thereby depriving her of appropriate suicide intervention.

The officers also acted affirmatively to harm Clustka because they enticed her into the paddy wagon by **lying** that they would take her home to retrieve her possessions. They lied because it was the only way she would cooperatively enter the wagon. They admit they intentionally lied to her (ER 188@37:5-8, 213@39:4-9). They further acknowledge she was not suspected of committing any crimes when they lied to her (ER 189@41:1-3). The sole reason the officers took her to jail was because she had a diminished capacity to care for herself due to intoxication (ER 189@41:4-7). Their betrayal of Clustka's trust and the prospect of being jailed is what triggered her suicide attempt in the paddy wagon. The officers endangered her with their lies and

false promise, then they failed her by not reporting her resulting suicide attempt and threats.

2. Triable Issue over Cause in Fact

a. Triable Issue Whether Clustka's Suicide Threats Would Have Been Addressed If Reported

Jail officials Perry and Singletary agree there were several options available to protect Clustka had the officers only reported her suicide attempt. Had Perry been the intake sergeant at CPC when Clustka was brought to the jail, he would have placed her on suicide watch, mental health professionals would have talked to her, and she could have been taken on a Legal 2000 to the hospital (ER 318@77:20-78:16). Perry was adamant, it would have been a "sure thing" she would have been seen by a mental health professional (ER 319@83:11-84:3).

Singletary testified that, had Robertson and Ashton reported Clustka's suicide attempt, the jail nurses would have done a more complete evaluation (ER 174@53:13-54:6). Her recent suicide attempt and history of attempts would have been relevant (ER 175@57:6-10). Singletary added that, generally when staff is informed of a suicide attempt, the person is transported to a local emergency room on a Legal 2000 (ER 173@51:14-15, 173@52:9-18).

While it can never be certain whether being evaluated by mental health professionals would have prevented Clustka's suicide in jail two days later, what is certain that those individuals are trained to protect against suicide. Following each of Clustka's previous suicide attempts – when she received medical attention for suicide issues – her suicidal ideation ceased for a time. The medical professionals bought her time by injecting clear thinking into

her self-destructive tendencies. Because Robertson and Ashton failed to report Clustka's suicide threats, they deprived her of an opportunity for the suicide assessment, counseling, and supportive assistance she so desperately needed.

While it is a triable issue whether appropriate intervention would have prevented Clustka's suicide two days later, it is non-disputed that in the past **medical intervention had consistently protected her.** It consistently worked to buy her more time. Accordingly, it is not speculative that Clustka would have received the protections she needed on April 26, 2005, had the officers reported what they witnessed. It is highly likely her threats would have been taken seriously and she would have been helped to avert the crisis as she had been before.

b. Triable Issue Whether Clustka Would Have Been Sent to Hospital on Legal 2000

Defendants are mistaken when they assert that, because Clustka was intoxicated, she would not have been sent to the hospital on a Legal 2000 but would have been made to sober up first (AB 17:9-12).[1] Their position is contrary to the evidence. Perry, an RPD officer for eight years and a Washoe County sheriff's deputy for 14 years, knows how officers transport detainees to the jail and how the jail handles them once transported. Perry testified that, just because someone is intoxicated does not mean that person must go to CPC. The jail is not prohibited from taking an intoxicated person

[1] Defendants misrepresent psychiatrist Caplan's testimony that Clustka could not have been taken to the psychiatric hospital while intoxicated (AB 56:23-25). They ignore emergency physician Gansert's testimony that Clustka would have been taken, **first**, to the emergency room for detoxification/initial suicide assessment, **then** to the psychiatric facility as appropriate (ER 325@12:9-19).

to the hospital (ER 315@65:3-9, 314@63:13-24). Singletary added, if transporting officers alert CPC personnel of a suicide attempt, its staff are trained to refuse entry to the jail (ER 172@47:1-8; 48:3-12). Accordingly, had Robertson and Ashton notified jail staff of Clustka's suicide threats, deputies or nursing staff would likely have refused her entry to the jail and instructed she be taken to the hospital on a Legal 2000.

c. Triable Issue Whether Medical Intervention Would Have Prevented Clustka's Death

Defendants cynically assert there are no guarantees Clustka would not have killed herself anyway had she been taken to the hospital on a Legal 2000. Defendants' position is belied by the fact that Clustka had attempted suicide many times before and, after each intervention, was no longer suicidal. After previous suicide commitments, she generally remained "suicide free" between eight and 24 months (ER 97-142).

There is no dispute that Clustka was despondent and mentally ill when the officers took her to jail on April 26. She was estranged from her mother, locked out of her home, and intoxicated. But she had experienced similar problems before and, with appropriate intervention, successfully warded off her suicidal ideation. While Washoe Medical Center emergency physician Gansert could not testify with one-hundred percent certainty what would have happened had Clustka been taken to the hospital on April 26, 2005, he **was able** to testify with one-hundred percent certainty that the hospital would have taken her suicide threats very seriously (ER 325@12:21-13:2). Clustka would have received a thorough screening, evaluation, and an "alert team" would have assessed her. If warranted, she would have been transferred to a

psychiatric facility, generally NNMHI (ER 323@5:24-324@6:10, 324@7:24-8:20).

According to NNMHI psychiatrist Caplan, had Clustka been transferred to his facility following her renewed suicide threat, she would have been kept overnight, carefully assessed, closely monitored, and nurses and social workers would have interacted with her to remove suicidal thoughts and address her psychological issues (ER 336@14:16-15:2). According to Dr. Caplan, "most people" who are suicidal want to be saved and the fact that Clustka had "improved rapidly while receiving appropriate intervention and care" before was "a sign of a person who would want to be saved" (ER 335@20:12-21:1). She had a close relationship with her children. She had been at NNMHI only the day before, April 25, and had she been sent there again on April 26, most likely she would have been kept on an involuntary commitment because, according to Dr. Caplan, her intoxication and her repeated suicide attempts – two suicide attempts within two days – would have set off "alarm bells" (ER 336@25:4-23).

Medical intervention for someone as emotionally distraught as Clustka was absolutely necessary. Just as with heart attack victims or stroke sufferers there never are guarantees medical help will save a life. Just because medical help is necessary does not mean it will necessarily be successful. But one thing is certain: Without help, without effort, without trained professional intervention, heart attack victims, stroke sufferers, and the suicide prone have a reduced chance of survival. It is a triable issue that medical intervention for Clustka's renewed suicide threats in the paddy wagon would have saved her.

3. Triable Issue re Proximate Causation

a. Foreseeable Clustka Would Attempt Suicide in Jail

It was foreseeable to the officers that Clustka would attempt suicide in the jail within 48 hours of her encounter with Robertson and Ashton because they knew the prospect of being jailed was precisely what provoked her attempt to choke herself. The officers had deceived her into believing they were going to retrieve her belongings and she became extremely agitated on realizing they were taking her instead to jail.

If Robertson and Ashton did not get the message before, they certainly got it when she screamed at them, "You lied to me. Just kill me or I'll kill myself then" (ER 150:1-8, 195:66:7-10, 353:21-25, 363:10-15). The fact that she did not commit suicide during her initial brief stay at the jail but rather after being returned there the next day does not absolve the officers of responsibility for their failure to protect. Prompt medical attention could have assisted her as it had in the past. Had the officers reported what they saw when they saw it she would have received the intervention she so desperately needed and would likely have been protected.

b. There Was Neither Intervening nor Superseding Cause

Defendants further claim that Clustka's "several medical evaluations after she was removed form the transport vehicle on April 26" constituted an intervening and superceding cause of her suicide. They assert, "[T]he failures of the medical professionals to properly diagnose her were superseding causes of her suicide that were not foreseeable to the officers" (AB 50:22-51:14). Defendants' argument is that medical professionals failed to discern she was a suicide risk, so how could the officers? They ignore that none of the medical evaluations Clustka received during the time between

her suicide threats and her death contained the vital information that she had again attempted suicide. This vital information was known only to Robertson and Ashton and not shared with anyone who could have helped her. The medical professionals who encountered Clustka between her paddy wagon suicide threats and her ensuing death were never informed of those threats. They did not implement appropriate precautions because they had no way to know they were necessary. Given that no suicide precautions were in place, Clustka was foreseeably at high risk of killing herself on being returned to jail the next day.

D. Qualified Immunity Lacking

Robertson and Ashton lack qualified immunity. Long before the incident giving rise to this case, by at least 1995, it was clearly established that "officers could not intentionally deny or delay access to medical care." *Clement v. Gomez*, 298 F.3d 898, 906 (9th Cir. 2002).

E. Triable Issue re City's Liability Based on Failure to Train and Lack of Suicide Prevention Policy

Plaintiffs allege that City of Reno is liable for deliberate indifference to Clustka's serious medical needs because of its lack of policy regarding reporting potential suicides and absence of training for police officers who frequently encounter suicidal persons. The "inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)." City may be held liable under section 1983 if its deliberate policy caused the constitutional violation alleged. *See Monell v. Dep't of Social*

Services of New York, 436 U.S. 658, 694 (1978); see also *Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th Cir. 2001).

Because the policy plaintiffs complain of is a failure to train, they must show: (1) deprivation of a constitutional right, (2) that the municipality had a training policy that "'amounts to deliberate indifference to the [constitutional] rights of the persons' with whom [its police officers] are likely to come into contact;" and (3) that the constitutional injury would have been avoided had the municipality properly trained those officers. *Lee,* 250 F.3d at 681; *Gibson*, 290 F.3d at 1193-94.

As to the first requirement, plaintiffs have raised an issue of fact over the denial of necessary medical care to Clustka, a constitutionally protected right given her custodial status. As to the second, RPD's absence of a police policy or training procedure caused the defendant officers' **erroneous belief** they had "discretion to decide" whether Clustka's clear suicidal overtures were sufficiently "serious" to report, hence it caused a constitutional wrong. As to the third, had the City properly trained Robertson and Ashton to report all suicide attempts and threats, suicide precautions would have been in place to save Clustka's life.

While law enforcement officials agree suicidal attempts and threats should always be reported, Robertson and Ashton were never trained in their duty to report. Ashton testified he received no training at RPD on what is or is not a suicide attempt (ER 186@32:12-15). Ashton acknowledged that training in how to deal with potential suicide would "help to do the job better" and he thought he should have the training (ER 193@59:24-60:4; 194:62:13-18). Robertson, a 17-year RPD veteran, similarly testified he had

not received any training or classes on how to deal with potentially suicidal detainees (ER 228@98:2-4, 231@111:16-19).

RPD Deputy Chief Johns testified he was "not sure" if there was a policy in writing requiring officers to report suicide threats by detainees but agreed there should be: "I think that would be a good policy to have in writing," Johns testified (ER 261:40:21-41:15). He added, it is never "okay to ignore a suicide threat" by a detainee (ER 264@55:15-18). Evans similarly agreed he was not aware of "any" suicide prevention training given RPD officers (ER 274:26:3-9). He did not recall receiving suicide training in his 27 years with RPD (ER 277@18-38:13).

Defendants assert that plaintiffs cannot raise a failure to train issue because Clustka's situation was unique and not likely to reoccur (AB 55:25-26). This too is untrue. Robertson testified he regularly confronts suicidal individuals – approximately 500 to 1000 persons have told him they wanted to kill themselves during his career (ER 231@111:20-25). These high numbers are expected because police often encounter despondent people whose lives, through economic misadventures or criminal activities, are deteriorating. If one officer, Robertson, has encountered so many potentially suicidal persons, it is highly likely other officers have as well. Accordingly, what happened to Clustka could easily reoccur.

Suicide training is especially urgent for RPD officers because both Robertson and Ashton testified that should they encounter the same situation again –an intoxicated person making suicide gestures and verbal threats – they would do exactly as before and make no report (ER 236@130:6-7, 187@35:5-7). So long as officers like these believe they have complete discretion to ignore their duty to report potential suicides and so long as they

to fail to report such incidents, detainees like Clustka will continue to be at risk. The conduct at issue in this case took place in 2005. In 2006, when depositions were taken in this case, no new policy was in place. Johns admitted such a policy would be a "good idea" – yet he has done nothing to enact such a policy and knows of no such policy in the works. As defendants point out in their answering brief, Robertson and Ashton were never disciplined for their acknowledged failure to report Clustka's suicide attempt and threats. Accordingly, City of Reno through its police officers has demonstrated a deliberate indifference to a serious risk of harm for suicidal detainees.

III.

CONCLUSION

For reasons stated, plaintiffs again respectfully ask this Court to reverse the lower court's grant of summary judgment to the defendants and to remand this case for trial.

DATED this 30th day of January, 2008.

Diane K. Vaillancourt

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CERTIFICATE OF COMPLIANCE

Fed. R. App. 32(a)(7)(c) and Circuit Rule 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, I certify that the attached Reply Brief of Plaintiffs-Appellants is proportionately spaced, has a typeface of fourteen points and contains 7000 words (excluding all permitted material).

DATED this 30th day of January, 2008.

DIANE K. VAILLANCOURT
Attorney for Plaintiff-Appellants

CERTIFICATE OF SERVICE

I declare that:

I am a citizen of the United States, employed in the town of Santa Cruz, California, over the age of eighteen years, and not a party to the within cause. On this date, I served the attached document by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Cruz, California, addressed as follows:

APPELLANTS' REPLY BRIEF (2 COPIES)

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I declare under penalty of perjury that the foregoing is true and correct.

DATED: January 30, 2008.

DIANE K. VAILLANCOURT