IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KELLY JONES as personal representative for the estate of Michael Townsend Plaintiff, v. City of Portland, Defendants.	Case No. 22CV05575 JUDGMENT DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The matter before the court is on the Defendant's Motion for Summary Judgment. On February 27, 2024, the court heard oral argument. Attorney Michael Fuller appeared on behalf of Plaintiff, Nathan Haberman-Ducey, appeared on behalf of the City of Portland. The Court, having reviewed the provided memoranda and related materials, having heard the parties' arguments during the hearing, and having analyzed the pertinent statutes and case law, rules as follows.

I. INTRODUCTION

Summary Judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Under ORCP 47 C:

> "No genuine issue as to a material fact exists if, based upon the record before the Court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment."

Summary judgment is "designed to cut off litigation *** where it appears that one of the parties has no case." *Tiedemann v. Radiation Therapy Consultants*, 299 Or 238, 245 (1985). Summary Judgment shall be granted if the pleadings, depositions, and admissions on file, together with any affidavits and declarations, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Jones v. General Motors Corp*, 325 Or 404, 407 (1997). "No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." *Hinchman v. UC Market, LLC*, 270 Or App 561, 566 (2015).

Plaintiff's claims essentially are that Defendant reasonably should have recognized Michael Townsend's 911 call and subsequent behaviors as an attempt to commit "suicide by cop" and responded differently. Plaintiff's Compliant is less than clear about what the specific claims are under the "Negligence" banner. At the hearing, Defendant's' counsel set out a list of "specifications" that she understood to be the particular actions or inactions that Plaintiff appeared to be alleging. Plaintiff's counsel agreed that Defendant's counsel correctly set forth were the specifications. Therefore, I will use that list to explain my reasoning in this Opinion and

Ruling. But, first, I begin with the statement of facts, as set forth by Plaintiff and as perceived while watching the video of the incident, which has no audio, narrated by Defense counsel, in the light most favorable to Plaintiff.

II. FACTS

On June 24, 2021, Michael Townsend (Townsend) called 911, saying he is suicidal, high on methamphetamine, and "fist-packing a screwdriver". While on the call, the 911 operator asks Townsend if he wants to talk to the crisis line or wants an ambulance, and Townsend responds, "[y]eah." The 911 operator asks Townsend if he is able to put the screwdriver away and Townsend responded, "Yeah". Townsend asks the dispatcher to send police four times.

The dispatcher responded by sending a Portland Fire and Rescue team, two non-ECIT[1]-certified Portland Police Bureau (PPB) officers (Brown and Emmons, collectively referred to as "PPB officers"), and an ambulance. The team of firefighters arrive first. They find Townsend, who looks angry, standing on a median near the Motel 6. Townsend approaches the firefighters and informs them that he is the person who called 911.

During a brief conversation with Townsend, he tells the firefighters that he is on "all of [the drugs]" and wants to return to his hotel room before going to the hospital. The firefighters do not want Townsend to return to his room because they fear that he may grab a weapon. The lead firefighter on the call makes it clear that going to the hospital is conditioned on

[1] ECIT stands for enhanced crisis intervention team

Townsend not returning to his room. Townsend does not listen and goes to the second floor of the hotel and makes his way to his room, entering briefly.

Meanwhile, the PPB officers then arrived on scene in separate vehicles. Emmons was lead on the call, and Brown was the cover officer. Because Townsend has gone toward his room, the PPB officers and firefighters begin getting in their vehicles to leave. Townsend then is seen on the second-floor balcony as Emmons begins to drive away. Emmons stops and re-engages with Townsend, calling out to him and inviting him to come back downstairs.

Townsend walks down the stairs, then sits on a lower stair at Emmons' request. Emmons exits his vehicle, and walks until he is standing a few feet in front of Townsend. Brown follows closely behind. The officers are joined by firefighters and ambulance personnel, all situated in the parking lot near the bottom of the stairs.

Townsend again states that he is feeling suicidal and wants to go to the hospital. He converses with the firefighters in a calmer manner, but when he looks at the police, his facial expression and body posture changes, indicating that the PPB officers' presence agitates him. Emmons tells Townsend that if he wanted to go to the hospital, Townsend would need to submit to a pat down. The mention of the pat down makes Townsend's demeanor change; Townsend becomes upset and nervous.

In addition to looking upset, Townsend touches (indexes) his left front pocket and continues to repeat this action. The officers tell Townsend not to touch his pockets, as they suspect he has contraband in his pocket—possibly a weapon. Townsend also starts to take off his shirt. Officer Emmons thought this could be because Townsend was preparing to fight. Townsend clenches, or balls up, his fists. While sitting, Townsend glances around him, possibly looking for a target—which is behavior Emmons recognizes as a pre-assault indicator. Townsend's veins pop out as he sits at the stairs, an additional pre-assault indicator observed by both officers.

While Townsend is displaying behavior the officers are trained to recognize as pre-assault indicators, the officer's step within arm's reach of Townsend. At this distance, Emmons concluded Brown was too close to use a taser on Townsend. Both officers speak to Townsend once they are closer and they adopt a more forceful tone.

Townsend indicates he will not agree to a pat down in order to get in the ambulance, which he has been told is a prerequisite. The first responders, as a group, then begin to disengage again. They make it a couple steps back when Townsend's hand goes back to his pocket as he sits; both PPB officers react to this by placing their hands on their firearms. Brown does not perceive Townsend as a threat as he disengages the safety on his holster. Emmons moves away from Townsend laterally, maintaining a bladed stance and moving towards his vehicle. Meanwhile Brown takes one step backwards and waits until Townsend stands.

Townsend stands, pulls out a screwdriver from his left pocket, and moves towards Brown for 3-4 seconds covering approximately 10-15 feet. Brown slowly stepped backwards, taking 7 or 8 steps over the 3-4 seconds, and shoots Townsend twice in the chest. Townsend falls to the ground and is later taken to a hospital and pronounced dead.

At the hearing, Defense Counsel played a video of the incident that began just before any Portland First Responders arrived on the scene. This is Exhibit 4. Plaintiff's Counsel agreed that the video Exhibit accurately depicted the full incident, sans audio. There were three "phases" of the incident, as described by Defendant's counsel while playing the video.

PHASE ONE—The first phase was the initial arrival phase. The firefighters and paramedics arrive, followed by the PPB officers. They engage Townsend until he goes up to his room.

PHASE TWO—The second phase was the re-engagement phase. Emmons speaks to Townsend again. Townsend was cooperative. During this phase, no officer appears to consider using, attempted to use, or used a taser.

PHASE THREE—The third phase was the moments just before the shooting and the shooting itself. This phase begins as most of the first responders begin to leave. Then, Townsend begins to rise from the stairs and simultaneously produces the "screwdriver" from his pocket and stumbles or lurches toward Brown as he raises his left hand, which holds the screwdriver. He is focused on Brown. Brown is focused on Townsend.

Brown pulls his pistol and fires twice. During this time, several of the first responders stop their movement and appear to watch the incident unfold. One turns and runs from the scene.

III. ANALYSIS

Plaintiff does not claim that OB was negligent in shooting Townsend. Indeed, the shooting was indisputably intentional. Plaintiff claims Townsend should have been treated as if he was dangerous, a threat to himself or others, the entire time. He argues that the PPB officers and dispatch did not apply City policy at several key moments, that Defendant's employees made negligent tactical decisions, and that these actions and omission created a foreseeable and unreasonable risk that Townsend would be unnecessarily killed.

Defendant makes three arguments on its motion for summary judgment. First is that Plaintiff has not established the foreseeability and causation elements of negligence. Second, that it is immune from liability under ORS 31.180, arguing that Townsend was attempting to commit a felony, which was a substantial factor in the shooting. And, third, that it is immune under ORS 30.265(1) discretionary immunity.

As I noted above, Defense counsel broke down Plaintiff's claim into nine specifications, or points, at which negligence is alleged to have occurred. I set them out now:

1. Sending first responders who were not ECIT trained.

2. Sending armed responders.
3. Violating Defendant's policies regarding this type of encounter.
4. Failing to retreat.
5. Failing to use less than lethal force.
6. Failing to disarm Townsend.
7. Crowding Townsend while assuming a fighting stance.
8. CONCEDED
9. Failure to train Brown for "suicide by cop."

A. **Defendant's Arguments**.

1. Plaintiff has failed to produce evidence of negligence

a. At no stage of the incident was it foreseeable that Townsend would attack Brown.

Defendant does not dispute that the PPB officers were not ECIT trained. It argues, however, that it was not foreseeable that the situation would require the dispatcher send ECIT trained officers, because there is no evidence that Defendant knew or should have known they would need to respond with force. It posits that although Plaintiff claims ECIT trained officers use better communication techniques, Plaintiff failed to put on evidence that the outcome would have been better. In any event, Defendant claims that the closest ECIT trained officer was 14 miles away, and that Plaintiff did not dispute that (although at hearing Plaintiff said this was the first time he heard that).

Plaintiff responds that he has submitted an ORCP E declaration to rebut this element. Plaintiff's counsel set out the oft-quoted passage concerning ORCP 47 E affidavits and declarations:

> "[A]ssessing the adequacy of an ORCP 47 E affidavit to defeat summary judgment can 'sometimes require an act of imagination by the summary judgment court.'" *Hofer v. Or. Health & Sci. Univ*., 328 Or App 352, 361 (2023); quoting *Hinchman*, 270 Or App 561, 570 (2015). However, because "[t]he court must accept an attorney's ORCP 47 E affidavit at face value, presume that they have such testimony available and that they plan to prove their case with it at trial, and deny summary judgment. ORCP 47 E, in effect, leaves very little to the court's imagination." *Id*.

I can imagine a scenario in which an expert is able to testify that with a person calling 911, stating that he is suicidal and high on fentanyl and that he was "fist-packing a screwdriver," which the dispatcher must have believed constituted a potential weapon since they asked if Townsend could put it away, and where Townsend replied "yeah" to an inquiry of whether he wanted to talk to a crisis line or wanted an ambulance called, and four times asks for the police to be called, should have foreseen that this situation would have been better handled by officers who had ECIT training.

As Plaintiff likely intends to argue at trial with his expert witness, Townsend's responses should have alerted the dispatcher that he was considering harming himself and that Townsend's request for police to

come was a warning he was considering “suicide by cop” since there was no other apparent need for a police response.

b. Brown’s (and the other first responders’) conduct was reasonable

Defendant noted in the hearing that over 300 calls coded for suicide had been received by Defendant and on those calls the responders sent were of the same categories. They argue that not only was it reasonable to send the police, Townsend requested that police be sent. Defendant argues that Townsend’s call in which he discussed that he was “fist-packing a screwdriver” meant the dispatcher’s protocol was to dispatch police. A call from someone who says they are suicidal goes to the Multnomah County Crisis Line only if the caller does not have a weapon and does not ask for police.

Plaintiff responds that a reasonable jury could look at defendant’s dispatch policy and make reasonable inferences that the reason that defendant instructs dispatch to send ECIT officers to suicide calls where the individual has a weapon is because ECIT officers have an additional forty hours of training on “communication techniques” and “tactical considerations” that would have helped them avoid doing unnecessary harm to Townsend because they would not have made the same tactical errors that the PPB officers made. That assertion lacks any citation to evidence in the record. In fact, Plaintiff continues on with argument about unreasonableness, and cites only one piece of evidence throughout—the

City's Policy 1010 and Policy 850.20 about using force against a mentally ill individual, from which he asserts a jury could make an inference that sending the officers it did was unreasonable. I'm not sure I can go that far, even on a motion for summary judgment.

However, Plaintiff's raises his ORCP 47 E declaration. I can use my imagination that the expert could provide testimony that meet the arguments he lays out above and would assist the jury in making the leap Plaintiff suggests. I return to my response above—with the possibility that Townsend wanted to cause on officer to kill him, a jury could find that Defendant's employees' decisions were not reasonable.

c. Not the cause of Townsend attacking Brown.

This argument really is a repeat of the argument above that there was no evidence offered that had ECIT trained officers responded, that the outcome would have been any different. This argument fails for the same reason as the foreseeability argument.

Plaintiff's argument about its theory of causation is centered on *Box v. Dep't. of Or. State Police*, 311 Or App 348, 385 (2021), in which the court held that "absent * * * the [officers'] negligent tactical approach to [Townsend], the troopers would not have been in the circumstances that required them to make the decision whether or not to use lethal force." He argues that had Defendant's officers not sent armed police officers who lacked the proper training and made numerous tactical errors, Townsend would not have been shot.

Defendant claims Brown was put in the position where lethal force was used because of the unexpected and unpredictable actions of Townsend when he suddenly charged with the sharpened screwdriver. In Plaintiff's view, that begs the question. It is a bit of a "what comes first, the chicken or the egg?" question, and thus is one best left to the jury.

2. Defendant is immune from liability under ORS 31.180, arguing that Townsend was attempting to commit a felony, which was a substantial factor in the shooting.

ORS 31.180 provides that "[i]t is a complete defense in any civil action for personal injury or wrongful death that * * * (a) [t]he person damaged was engaged in conduct at the time that would constitute aggravated murder, murder or a Class A or a Class B felony; and (b) [t]he felonious conduct was a substantial factor contributing to the injury or death." ORS 31.180(1)(a)-(b). ORS 31.180(2) requires that "[t]o establish the defense described in this section, the defendant must prove by a preponderance of the evidence the fact that the person damaged was engaged in conduct that would constitute aggravated murder, murder or a Class A or a Class B felony." Defendant bears the burden to establish this defense.

Defendant asserts that Townsend "was in the commission of attempted aggravated murder and attempted assault in the first degree." Plaintiff contends that because Townsend was suicidal and acting strangely, a reasonable jury could find that he lacked the *mens rea* necessary to be convicted for attempted murder.

Defendant retorts that the video leaves no question that Townsend intended to harm Brown and that Brown had too little time to resort to any option except to use lethal force. I have seen the video. I agree that it is undisputable that the rush towards Brown with the upraised "fisted" screwdriver was a substantial factor leading to Townsend being shot and killed.

I will focus on attempted assault, as that is the crime that most closely aligns with what the video depicted. A person commits the crime of assault in the first degree if they Intentionally causes serious physical injury to another person by using deadly or dangerous weapon. ORS 163.185. Assuming, as I do, that a sharpened screwdriver constitutes a deadly weapon, the only question left is if Townsend was not intending to harm Brown, what was he intending? The fact that he had a short, sharpened screwdriver and continued his approach toward Brown, even after Brown drew and aimed his weapon at Townsend, leaves open a jury question of whether Townsend actually intended to harm Brown or was seeking to complete his desire to kill himself by forcing a "suicide by cop."

3. Defendant is immune from liability under "discretionary immunity" principles.

Analyzing this argument is made difficult by the format and wording of the Second Amended Complaint. As I understand Plaintiff's response to this part of the motion, he is not saying the policies themselves are

negligent, or were negligently created. Rather, he is saying, primarily, that Defendant's employees' failure to implement certain polices led to the negligent conduct. In other words, it was the failure by the on-the-street employees in the day-to-day roles to follow the policies that are what is alleged to be negligent. There is no discretionary immunity for decisions made by rank-and-file employees acting in the course of their everyday duties. *Vokoun v. City of Lake Oswego*, 335 Or 19, 31 (2002)

Thus, to the extent that Plaintiff's claims rely on the failures of the Defendant's employees to do or not do something, those claims are not precluded by discretionary immunity. To the extent that Plaintiff intends to argue that the policies themselves are deficient, those claims are precluded by discretionary immunity. For example, if an argument were to be made at trial by Plaintiff that the policies themselves were negligently propounded, or not good policy, or that decisions about timing or who gets what training are negligent, those types of claims are precluded by discretionary immunity.

IV. CONCLUSION

None of Defendant's theories of summary judgment are sufficient to deprive Plaintiff of the opportunity to try this case to a jury.

NOW, THEREFORE,

Defendant's Motion for Summary Judgment is DENIED.

3/11/2024 2:51:34 PM

Beth A. Allen

Circuit Court Judge Beth A. Allen