

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

KING COUNTY DEPARTMENT OF EXECUTIVE SERVICES
INQUEST PROGRAM

IN RE INQUEST INTO THE DEATH OF
JASON SEEVERS.

No. 18IQ61954

CITY OF SEATTLE’S MOTION IN
LIMINE TO EXCLUDE TESTIMONY OF
ASHLEY HEIBERGER

The City of Seattle (“City”) has consistently objected to the employment of Use of Force or Police Practices experts in inquests generally, and in the instant case specifically. The April 7, 2023, interview of potential expert witness Captain Ashley Heiberger underscores why outside experts are inappropriate in an Inquest proceeding generally. Captain Heiberger explicitly stated during his interview that he was unfamiliar with Seattle Police Department (SPD) policies, which is the sole lens through which Ofc. Schickler’s conduct is evaluated in an Inquest proceeding. The City incorporates its prior briefings as to the scope of an Inquest and the role of SPD policy experts but will not belabor those arguments herein.

Instead, the City’s instant Motion *In Limine* focuses predominately on Capt. Heiberger’s repeated refusal to answer questions regarding generally accepted police practices, the subject area for which the family purportedly seeks to qualify Capt. Heiberger, and his repeated refusal to

1 answer questions regarding his opinions about specific actions of Ofc. Schickler. Captain
2 Heiberger’s interview was the sole opportunity of the parties to be informed of his potential
3 testimony mere days before the Inquest trial is scheduled to begin. The Family’s position that the
4 other parties must wait until the Inquest proceeding itself to learn of the scope, nature, extent, and
5 conclusions of Capt. Heiberger’s testimony is the antithesis of a full, fair, and transparent process.
6 The City, therefore, makes the following additional procedural and substantive objections to the
7 use of expert testimony and asks that the Inquest Administrator preclude testimony from Capt.
8 Heiberger.

9 **A. Use of Force and Police Practices expertise is outside the scope of an Inquest**
10 **Proceeding and should be excluded.**

11 The purpose of an Inquest proceeding is to “make findings regarding the cause, manner,
12 and circumstances of the death, including applicable law enforcement agency training and
13 policy.” *King County Executive Order* PHL-7-1-5-EO (EO), Appendix 2, § 3.2. Inquest
14 proceedings are limited to those purposes stated in RCW 36.24.030. Inquests are not a criminal
15 prosecution. *Id.*, at § 11.1. Inquests are not a determination of civil liability. *Id.* Consistent with
16 the sole purpose of determining “the causes and circumstances surrounding the death” of the
17 decedent, a party “may proffer its own witnesses to provide testimony that aids the panel in the
18 understanding of the facts, including *factual* areas of expertise” such as ballistics and forensic
19 medical examination. EO, Appendix 2, §§ 11.1, 12.1 (emphasis added). Factual experts, like
20 ballistics experts, forensic investigators, or medical examiners, *aid the jury* in assessing facts
21 jurors may not otherwise be able to interpret or understand on their own. This the very purpose of
22 Rule of Evidence (ER) 702. ER 702 applies to this Inquest, which solely determines “whether the
23

1 law enforcement officer complied with applicable law enforcement agency training and policy as
2 they relate to the death. EO, Appendix 2, §§ 12.2, 3.2.

3 Captain Heiberger is not an expert on *factual* areas of expertise, such as ballistics or
4 medical examination that a juror cannot understand on his or her own. This alone is a sufficient
5 basis for precluding Capt. Heiberger, as the City has repeatedly argued. However, Capt.
6 Heiberger's April 7th statements regarding his familiarity with SPD policy and training are
7 arguably more egregious than the fact that Use of Force and Police Practices expert testimony is
8 generally outside the scope of an Inquest. Captain Heiberger stated in his interview that (1) he
9 was unfamiliar with SPD policy and trainings,¹ (2) had not previously reviewed or opined as to
10 SPD policy or trainings,² (3) could not opine on the applicability of SPD trainings to the facts of
11 the instant Inquest,³ (4) had not thoroughly reviewed Capt. Caylor's Inquest interview,⁴ (5) had
12 not thoroughly reviewed Dr. Alpert's Inquest interview,⁵ (6) had not familiarized himself with the
13 complete set of SPD policy and trainings provided to the Inquest Attorneys,⁶ and (7) had not
14 utilized any other external reference or resource to familiarize himself with SPD training and
15 policy.⁷ Bluntly, in this context Capt. Heiberger's opinion is neither expert, nor helpful.

16 Again, the determination of the Inquest is whether Ofc. Schickler's actions complied with
17 applicable SPD training and policy as they relate to Mr. Seavers' death. EO, Appendix 2, § 3.2.

18 Given Capt. Heiberger's lack of expertise as to SPD policy and training, it is axiomatic that his
19

20 ¹ As of the deadline for pre-Inquest motions, only the recordings of Capt. Heiberger's interview are available. *See Heiberger*
21 *recorded interview part one* (Recording One), at 21:07, 24:00, and 24:45; and *Heiberger recorded interview part two*
(Recording Two), at 30:04, 43:20, 53:06, and 54:04.

22 ² *See* Recording Two at 50:10, 50:27, 50:34, and 51:10.

23 ³ *See* Recording Two at 30:04, 43:20, 54:53, 1:04:24, 1:07:48, 1:10:44, and 1:30:36.

⁴ *See* Recording One at 13:09 and 13:26; and Recording Two at 12:34; 13:00, 50:40, and 53:45.

⁵ *See* Recording One at 12:34 and 13:26.

⁶ *See* Recording One at 13:26; and Recording Two at 30:04, 42:34, 43:20, 54:04, and 54:33.

⁷ *See* Recording Two at 54:33, and 55:14.

1 testimony should be precluded. Consequently, the City reiterates its request for the exclusion of
2 such testimony altogether.

3 **B. Testimony at trial that was previously undisclosed to any party is highly**
4 **prejudicial and anathema to the Inquest process, and as such should be excluded.**

5 Captain Heiberger’s lack of expertise as to SPD policy and training is sufficiently
6 problematic to warrant exclusion solely on that basis. Despite this, the City is even more alarmed by
7 the Family’s position that Capt. Heiberger can refuse to answer questions as to his opinion on the
8 facts at issue in this Inquest during his interview, and then testify to such opinions at the Inquest
9 proceeding. Such sandbagging is highly prejudicial and anathema to the Inquest process.

10 After the Family’s late-in-the-game decision to retain a new expert, this Inquest was continued
11 from its hearing date in March, and the deadline for submission of the expert opinion of the
12 Family’s new expert was set for Friday, March, 31st at 5:00pm. The report was not provided to
13 the parties until April 3rd and was, essentially, limited to Cap. Heiberger’s conclusion that Ofc.
14 Schickler’s decision to approach the vehicle Mr. Seavers was occupying was inconsistent with
15 policy because Ofc. Schickler “manufactured” a danger. *Expert Report of Ashley Heiberger*, p.
16 12; Recording Two at 42:30.

17 Then, Captain Heiberger repeatedly stated on April 7th that he was not prepared to opine, at
18 that time, on *any* aspect of the facts at issue in this Inquest other than his conclusion regarding
19 “officer-created jeopardy.”⁸ Captain Heiberger refused to answer interview questions persisted
20 despite repeated questioning and explicit statements that the interview was the only opportunity for
21 the other parties to question Capt. Heiberger prior to the Inquest proceeding a week away.⁹

22 _____
23 ⁸ See, e.g., Recording One at 14:53 and 26:15; and Recording Two at 14:05, 35:00, 38:24, 39:36, 40:43; 42:30, 44:20,
1:04:44, and 1:32:40.

⁹ See, e.g., Recording Two at 1:05:34, 1:09:28 1:13:40, and 1:14:19.

1 Furthermore, every effort to have Capt. Heiberger apply his expertise to hypotheticals was met with
2 refusal and objection from the Family’s attorney.¹⁰ Consequently, no party was able to ascertain Capt.
3 Heiberger’s potential testimony as to any fact or opinion *other* than the approach of the vehicle.

4 Captain Heiberger’s refusal to provide answers to questions as to his opinion on any
5 aspect other than his conclusion about officer-created danger deprives the other parties of any
6 opportunity, outside of the Inquest proceeding itself, to learn about, or prepare for, Capt.
7 Heiberger’s testimony. Despite depriving the other parties of any meaningful opportunity to learn
8 about Capt. Heiberger’s potential testimony, the Family has indicated that they are offering this
9 expert to testify as to “issues including BUT NOT limited to: Police Practices such as Use of
10 Force (including De-Escalation concepts, principles, and techniques), Police Policy, and Police
11 Training as it relates to the Seavers case.” *Family of Jason Seavers Motions in Limine and*
12 *Briefing*, p. 6.¹¹ Such undisclosed testimony is patently inappropriate.

13 Inquest Administrators “shall strive to minimize delay, cost, and burden to participants
14 while promoting fair and open proceedings.” EO, Appendix 2, § 3.1. It is difficult to overstate
15 how inconsistent with “fair and open proceedings” it would be to permit Capt. Heiberger to
16 testify at the Inquest proceeding as to *any* fact or opinion for which he refused to answer
17 questioning on April 7th. Although they are not binding on an Inquest proceeding, the decisions of
18 Washington courts are replete with the exclusion of testimony at trial that was not previously
19 provided to the other parties. *See, e.g., Miller v. Peterson*, 42 Wn.App. 822, 826 (1986)
20 (precluding trial testimony where opposing party was unable to depose late-disclosed expert);
21 *Lampard v. Roth*, 38 Wn.App. 198, 201 (1984) (excluding testimony that would result in
22

23 ¹⁰ *See, e.g.,* Recording Two at 29:40, 1:06:08, 1:07:30, 1:08:40, 1:12:50, 1:14:40, and 1:15:43.

¹¹ *See also* Email from Deborah Alexander, timestamped April 8, 2023, at 10:20 a.m.; Recording Two at 27:10.

1 prejudice and surprise); *Roemmich v. 3M Company*, 21 Wn.App.2d 939, 959 (2022) (excluding
2 portion of expert testimony that was based on undisclosed studies).

3 The extensive caselaw excluding testimony not previously provided to the other parties should be
4 followed here. The purpose of the Rules of Evidence, which are binding in this Inquest, is to “secure
5 fairness in administration, elimination of unjustifiable expense and delay... to the end that the truth
6 may be ascertained and proceedings justly determined.” The caselaw and ER 102 both counsel
7 against permitting undisclosed testimony because they share the same underpinnings: ensuring parties
8 have a meaningful opportunity to be heard. *See, e.g., State v. Judge*, 100 Wn.2d 706, 716 (1984), and
9 *Meister v. Davis*, - P.4th --, 2022 WL 4482758, *18 (D. Idaho, 2022), acknowledging the Due Process
10 implications of undisclosed testimony. Permitting Capt. Heiberger to testify at the Inquest proceeding
11 on any subject where he explicitly refused during his April 7th interview is inconsistent with relevant
12 caselaw, the Rules of Evidence, the Executive Order governing Inquests, and the concept of Due
13 Process. As a result, the City moves for an order limiting Capt. Heiberger’s testimony to his
14 conclusion regarding officer-created danger.

15
16 DATED this 11th day of April, 2023.

17 ANN DAVISON
18 Seattle City Attorney

19 By: /s/ Jessica Leiser
20 Alexandra Nica, WSBA #58299
21 Jessica Leiser, WSBA #49349
22 Assistant City Attorneys
23 E-mail: Alexandra.Nica@seattle.gov
E-Mail: Jessica.Leiser@seattle.gov

Seattle City Attorney’s Office
701 Fifth Avenue, Suite 2050

Seattle, WA 98104
Phone: (206) 684-8200
Attorney for the City of Seattle

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

CERTIFICATE OF SERVICE

I certify that on the 11th day of April, 2023, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

<p>Matt Anderson, WSBA#27793 Anuradha (Anu) Zangri, WSBA #40481 Florence Armah, Coordinator (back up) Angelina Jimeno, Coordinator (main) 401 5th Avenue, Suite 131 Seattle, WA 98104 (206) 477-8804 – Anu</p>	<p>E-Mail: matt.anderson@kingcounty.gov azangri@kingcounty.gov claire.thornton@kingcounty.gov farmah@kingcounty.gov ajimeno@kingcounty.gov</p>
<p>Attorneys for IO Erick Shickler Ted Buck, WSBA# 22029 Delany DiGiovanni, WSBA# 56851 Karina Martin Frey Buck P.S. 1200 Fifth Avenue, Suite 1900 Seattle, WA 98101 (206) 486-8000</p>	<p>E-Mail: tbuck@freybuck.com ddigiovanni@freybuck.com kmarina@freybuck.com</p>
<p>Attorney for Seavers Family Deborah Alexander, WSBA #21505 Attorney at Law 11900 NE 1st Street, Suite 300 Bellevue, WA 98005</p>	<p>E-Mail dalexander@alexanderlawoffice.com</p>

/s/ Jessica Leiser
Jessica Leiser, Assistant City Attorney