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KING COUNTY DEPARTMENT OF EXECUTIVE SERVICES  
INQUEST PROGRAM

INQUEST INTO THE DEATH OF:  
  
JASON SEAVERS.,  
  
Deceased.

Inquest No.: 18IQ61954  
  
**SPD INVOLVED OFFICER'S  
MOTIONS *IN LIMINE* RE FAMILY'S  
EXPERT ASHLEY HEIBERGER**  
  
Noted for Consideration on April 17, 2023  
  
ORAL ARGUMENT REQUESTED

**I. RELIEF REQUESTED**

Seattle Police Department Officer, Erick Schickler (“Officer Schickler”) moves the Administrator for an order *in limine* precluding all parties, their witnesses and attorneys from offering any evidence, making any comment, or asking any question relating to matters which are the subject of this motion.

**1. Exclude expert testimony about the law or what the law permits.**

It is the role of the Court to instruct the jurors on the law, not an expert witness. The Court should prohibit any expert from testifying as to what the law is or what the law will tolerate.

1  
2           **2. Exclude any of Mr. Heiberger’s undisclosed opinions.**

3           According to his April 3, 2023, report and his April 7, 2023, interview, Mr. Heiberger is  
4 only prepared to opine that Officer Schickler violated SPD policy and training when he  
5 approached Mr. Seavers’ vehicle and failed to issue a warning prior to using force, not whether  
6 his decision to use deadly force complied with Seattle Police Department’s (“SPD”) policy and  
7 training. *See Heiberger recorded interview part two* (generally) and at 45:00-46:25<sup>1</sup>; 2:04:55-  
8 2:06:00 minutes<sup>2</sup>; *Heiberger Report* at p. 14-16 (generally).

9           It is clear that the SPD provided its officers with training on using both cover and de-  
10 escalation. As noted above, Officer Schickler approached Mr. Seavers’ vehicle despite  
11 the increased risk. By failing to utilize cover or de-escalation techniques, and failing to  
12 issue a warning prior to using deadly force, he did not act in accordance with SPD  
13 training. There was no compelling reason for the officer to approach the vehicle at that  
14 time. Had the officer taken cover at an appropriate distance, he almost certainly would  
15 have gained the advantage of time. Instead, the officer decided on a course of action that  
16 deviated from his training, and drove a confrontation that resulted in the use of deadly  
17 force.

18           *Id.* at p. 16. Accordingly, any new undisclosed opinions regarding Officer Schickler’s actions  
19 and/or decisions after he approached the vehicle are untimely and should be barred. On April 17,  
20 2023 – nine calendar days before the inquest start date – Mr. Heiberger was neither prepared nor  
21 willing to provide any opinions regarding Officer Schickler’s use of de-escalation tactics at the  
22 vehicle, decision to use lethal force, or his compliance with providing medical aid after using  
23 force. The Administrator should strike any opinion from Mr. Heiberger on these topics or any  
undisclosed opinions.

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<sup>1</sup> “Officer Schickler perceived a threat and responded with deadly force, rightly or wrongly, at that decision point, he made a decision. It’s my contention that had he followed policy and followed training he would not have had to make that decision, in other words, he would have never reached that decision point.”

<sup>2</sup> As of April 11, 2023, Officer Schickler has not received a copy of Mr. Heiberger’s interview transcript.

1           If an expert is prepared to address some issues but not others, the court may limit the  
2 expert's testimony to the issues or points on which the expert is sufficiently prepared. See  
3 generally, Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington*  
4 *Evidence*, §702:7 at 333 (2017-18 ed.); *State v. Johnson*, 150 Wn. App. 663, 208 P.3d 1265  
5 (2009). It is the burden of the late disclosing party to show that the failure to disclose is  
6 substantially justified or harmless. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101,  
7 1107 (9th Cir. 2001). In determining if a late disclosure is substantially justified, the court will  
8 look at (1) prejudice or surprise against the opposing party, (2) the ability of the opposing party  
9 to cure the prejudice, (3) the likelihood of disruption of trial, and (4) bad faith or willfulness.  
10 *Lanard Toys Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 713 (9th Cir. 2010) (citing *David v.*  
11 *Caterpillar Inc.*, 324 F.3d 851, 857 (7th Cir. 2003)).

12           First, if undisclosed options were allowed to stand, such late disclosures constitute unfair  
13 surprise and would cause Officer Schickler considerable harm as he has no further opportunity to  
14 assess the new issues. If permitted, Officer Schickler would be forced to question Mr. Heiberger  
15 about his opinions for the first time at the inquest. This is highly prejudicial and not remotely  
16 justified.

17           Second, as to potential cures, aside from striking any new opinions the only conceivable  
18 way to mitigate the prejudicial effect would be to provide Officer Schickler time to re-interview  
19 Mr. Heiberger. As the hearing is set to begin April 17, this does not seem feasible, and Officer  
20 Schickler would strenuously object to any continuance given the age of this incident and history  
21 of prior continuances. Finally, Mr. Heiberger had access to and prepared opinions on specific  
22 topics, there was ample evidence for him to address any issues that could be relevant.

1 Mr. Heiberger should be precluded from asserting any new opinions. It is too late for  
2 such disclosures, and the Family cannot demonstrate substantial justification or harmlessness.

3 **3. Exclude any of Mr. Heiberger's opinions based on facts and circumstances of the**  
4 **incident not known to Officer Schickler at the time.**

5 Mr. Heiberger refused to acknowledge or base his opinions off the facts that were known  
6 to Officer Schickler at the time of the incident; rather, he analyzed the situation with a 20/20  
7 hindsight and based his opinions off the other officers' testimony and opinions, which is  
8 inappropriate and irrelevant. ER 401, 402. Further, Mr. Heiberger's opinions lack foundation  
9 relevant to Officer Schickler's decision making process. Any valid measure of Officer  
10 Schickler's behavior would necessarily be premised upon the facts known to the officer at the  
11 time. Mr. Heiberger refused to do so.

12 For expert testimony to be admissible, the expert testimony must be helpful to the trier of  
13 fact. *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 168-69, 288 P.3d 1140 (2012). "Expert  
14 testimony is only helpful if it is relevant. *Id.* at 169. Here, Mr. Heiberger's opinions that fail to  
15 assess facts known to Officer Schickler and his state of mind would not be helpful to the jury in  
16 determining whether Officer Schickler's use of force complied with SPD's policy and training.

17 As one example, Mr. Heiberger concludes that:

18 When Officer Schickler arrived at the scene, the vehicle was "high-centered" and unable  
19 to be driven. Mr. Seavers was not attempting to get out of the vehicle. There were no  
20 community members in the vicinity. This was not an active shooter situation, and an  
21 immediate tactical force response would have been inappropriate here. Simply put, Mr.  
22 Seavers was not presenting an immediate deadly force threat at that time.

23 *Heiberger Report* at p. 14. However, during his interview he failed to point to specific evidence  
that Officer Schickler knew the vehicle was immobilized, and instead inferred Officer Schickler  
'should have known' the vehicle was immobile based off later discovered evidence. *See*  
*Heiberger recorded interview part two* at 16:00-29:45 minutes (generally).

1 Excerpts from Mr. Heiberger's interview further solidify this conclusion:

2 Ted Buck: Would you agree with me that what's important is what the officer knows at  
3 the time they are making their decisions, not information that becomes available later.

4 Mr. Heiberger: Yes.

5 *Id.* at 26:15-26:30.

6 Ted Buck: You didn't take into account one way or another whether or not Officer  
7 Schickler might have believed that the vehicle might still be mobile, might still have been  
8 able to be driven?

9 Mr. Heiberger: Again, I think I relied upon the fact, as reported to me, that the vehicle  
10 was high-centered and unable to be driven. And I think a reasonable inference from that  
11 was that as Officer Schickler approached it, I mean, you should be able to see that a  
12 vehicle is high centered... um, so that's what I went with there.

13 ...

14 Ted Buck: Did you see anything from Officer Schickler's statement that indicated that he  
15 was aware the car was high-centered and could not be moved?

16 Mr. Heiberger: "I believe I answered that earlier, that I wasn't sure one way or another; I  
17 can't speak definitively to that as we sit here today... I believe I said that as Officer  
18 Schickler approached it, he should have been able to determine it was high-centered.... I  
19 don't believe he [Officer Schickler] address that one way or another."

20 *Id.* at 16:00-16:39; 17:00-17:44; 26:30-26:42.

21 Importantly, Officer Schickler's statement, ignored by Mr. Heiberger, clearly evidences a  
22 concern that Mr. Seavers could get the car to move:

23 "see officers... surrounding a g-, it looked like a gray SUV that was high centered on the  
east side of the street, on the rockery, or planting strip, not sure... what it was high  
centered on. But whatever it was, the engine was going full bore. The engine was revving  
full bore. And the w-, th-th-the tires were not squealing 'cause they were on...  
vegetation, but they were spinning. High rate of speed, spinning. There was officers I  
could see... coming up to car on the, um, passenger's side from the middle of the street,  
and then myself, and I knew, I believe I saw a rifle officer who was behind me, we're  
coming up from the driver's side. So ththey're yelling, 'He put it in reverse, he put it in  
reverse!' So I kinda positioned myself to the rear, uh, trunk, slash, corner of the driver's  
side, in a position where if he did get traction and it did go in reverse, I'd be able to step,  
I wouldn't get hit. I wouldn't be (unintelligible), I wouldn't have an issue."

1 Seavers\_J000673 (emphasis added). Indeed, Officer Schickler’s BWV evidences his repeated  
2 commands to Mr. Seavers to “turn off the car!” – a command that connotes an ongoing concern  
3 that car could yet be driven and present an immediate risk to the officers and others.  
4 Accordingly, Mr. Heiberger’s opinion is premised upon a fact that is nowhere in the evidence.  
5 Officer Schickler did not believe at the time of the incident the vehicle was immobile. Officer  
6 Schickler moves to exclude any of Mr. Heiberger’s opinions premised upon this unfounded  
7 assumption, including that Officer Schickler should not have approached the car at all..

8         There is a reason the term “Monday morning quarterback” exists – anyone can criticize  
9 an act once it has played out in context. It is for this reason the courts have uniformly held for  
10 decades that officers are to be judged on what they knew at the time, not in 20-20 hindsight, a  
11 premise first addressed in the seminal *Graham v. Connor* Supreme Court decision. Judging these  
12 officers in hindsight would be of no value to the jury, and hence not an appropriate topic for  
13 expert testimony.

14         **4. Mr. Heiberger lacks knowledge regarding SPD’s training; he should be**  
15         **precluded from testifying about whether Officer Schickler complied with SPD**  
16         **training.**

17         If expert testimony lacks an adequate factual or legal basis, it should be excluded because  
18 it would invite speculation from the jury; conclusory or speculative expert opinions lacking an  
19 adequate foundation are inadmissible. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835, 839  
(2001).

20         Here, the jury will be asked to determine whether Officer Schickler’s “actions were  
21 consistent with the SPD training he received ...?” While Mr. Heiberger reviewed SPD’s de-  
22 escalation and cover training<sup>3</sup> to form his disclosed opinions, during his April 7 interview he  
23

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<sup>3</sup> *Heiberger report* at p. 15-16.



1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies under penalty of perjury under the laws of the State of  
3 Washington that on the date indicated, they caused to be served in the manner noted below, a  
4 copy of the foregoing document on the following individuals:

5 Inquest Program Attorneys [ ] Via Facsimile  
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19  
20 DATED this 11<sup>th</sup> day of April, 2023, at Seattle, Washington.

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Karina Martin, Paralegal