

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF OKLAHOMA**

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(1) GARY CLARK,  
  
Plaintiff,

v.

Case No.: 6:16-cv-00115-SPS

(2) ROBERT COLBERT, in his official  
and individual capacity as Sheriff of  
Wagoner County, Okla.

(3) BOARD OF COUNTY  
COMMISSIONERS OF THE  
COUNTY OF WAGONER,

(4) DUSTIN DORR, in his individual  
capacity,

(5) EUGENE SMITH, in his individual  
capacity;

(6) VICKI HOLLAND, in her individual  
capacity, and

(7) GAY PARKER, in her individual  
capacity,

Defendants.

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**AMENDED COMPLAINT**

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Gary Clark (“Gary”), for his cause of action against the above-named Defendants,  
would state as follows:

## INTRODUCTION

This is an action for excessive force, deliberate indifference, malicious prosecution, and deprivation of due process in violation of the Fourth and Fourteenth Amendments to the United States Constitution, actionable pursuant to 42 U.S.C. § 1983. These claims arise from decisions by Wagoner County, its elected officials, and employees to recklessly provoke and shoot a person they knew was suffering from a mental illness on August 18, 2014, to then knowingly and publically mischaracterize that shooting to conceal their own provocation, before finally denying the shooting victim access to physician ordered medical care in the post-operative period.

This action includes a claim for the violation of Title II of the Americans with Disabilities Act, as Amended, (“ADA”) based upon the failure of Wagoner County to implement policies and procedures to accommodate citizens with a mental illness in the context of a police-citizen confrontation where there is no complaining party to any crime, where the safety of the general public is not of immediate concern, and where law enforcement has time and opportunity to engage professionals who are specifically trained in both mental health and crisis intervention.

Finally, this action also includes claims under state law pursuant to the Oklahoma Governmental Tort Claims Act (“GTCA”), 51 O.S. § 151 *et seq.*, for Wagoner County’s failure to take reasonable steps in responding to a call knowing the Plaintiff was a mental health patient, in violation of the standards set forth in *Morales v. City of Okl. City ex rel. Okl. City Police Dept.*, 230 P.3d 869 (Okla.2010).

## **JURISDICTION**

1. This action arises under Title 42 of the United States Code, Sections 1983 and 12132, and Title 51, Section 151 *et seq.* of the Oklahoma statutes. The unlawful acts and practices alleged herein occurred in Wagoner County, Oklahoma, which is within this judicial district, this court has federal question jurisdiction.

## **PARTIES**

2. The Plaintiff, Gary Clark, is and was at all times herein mentioned a citizen of the United States residing in Wagoner County, Oklahoma. Gary has a prior diagnosis of paranoid schizophrenia, and is a qualified individual with a recognized disability pursuant to 42 U.S.C. § 12132.

3. Robert Colbert (“Colbert”) is the elected Sheriff of Wagoner County, Oklahoma. He is a final policymaker for Wagoner County in that capacity. He is sued in both his official and individual capacities. As Sheriff of Wagoner County, the acts of Colbert are considered the acts of Wagoner County and bind the county and its taxpayer for payment of any civil liability.

4. The Board is the legislative body for Wagoner County, Oklahoma. Pursuant to the ADA, Board is responsible for the actions of county employees under a theory of *respondeat superior*. See *Doe v. Bd. of Co. Commr’s of Craig County, Oklahoma*, United States District Court for the Northern District of Oklahoma, Case No. 11-CV-298-CVE, Dkt. No. 70; see also *Doe v. Bd. of Co. Commr’s of Payne Co.*, United States District Court for the Western District of Oklahoma, Case No. CIV-13-108-F, Dkt. No. 43. Under state law,

Board and/or Colbert is responsible for the good faith actions of county employees under a theory of *respondeat superior*.

5. Dustin Dorr (“Dorr”) is or was an employee with the Wagoner County Sheriff’s Department. Dorr was a supervisory employee with the Wagoner County Sheriff’s Office at the scene, and was the person who signed the probable cause affidavit that triggered the detention and prosecution of Gary.

6. Eugene Smith (“Smith”) is or was an employee with the Wagoner County Sheriff’s Department (“WCSO”). Upon information and belief, Smith was the employee who transported Gary from the St. John’s Medical Center (“SJMC”) to the Wagoner County Detention Center (“WCDC”)

7. Upon information and belief, Gay Parker (“Parker”) and Vickie Holland (“Holland”) are or were employees with the WCSO working in the medical unit at the WCDC.

8. The events giving rise to this lawsuit occurred on August 18, 2014. Plaintiff timely served Board and Colbert with a notice of tort claim pursuant to the Oklahoma Governmental Tort Claims Act on July 22, 2015. That notice was deemed denied by operation of law on October 20, 2015. Plaintiff has timely complied with all prerequisites to filing suit.

**STATEMENT OF FACT**

9. On August 18, 2014, Larry Clark suspected that his brother Gary was off his medication and needed treatment for his mental health condition. Gary had exhibited erratic

and delusional behavior for the week prior.

10. Larry is the primary caretaker for his brother Gary, who lives in a small 24x36 cottage located in Larry's backyard behind Larry's residence.



11. Larry went to the cottage to check on Gary, who answered the cottage door with a knife in his hand. Larry attempted to step inside the cottage and briefly came into contact with the knife enough to cause a small nick on Larry's arm:



12. Larry observed that Gary was not communicating, which, in addition to other behaviors he had observed, like Gary burning his belongings and household effects, leaving food out to spoil, and leaving clean clothes and cigarettes out in the rain, reaffirmed for Larry that his brother was in need mental health treatment.

13. Larry then turned and walked out of the cottage and back to his residence. Gary remained inside the cottage and did not follow Larry or make any attempt to communicate with him.

14. Once back inside his residence, Larry attempted to call Gary's pastor, but he was unable to reach him. Larry then called the Sheriff's Department at approximately 3:35 p.m. Larry advised the dispatcher that Gary had assaulted him, and that Gary was off his medication for schizophrenia. Larry was also cognizant that law enforcement may over-react, and specifically communicated to the dispatcher that his concern was for Gary. Larry also noted that he did not require any medical attention, that he was not in any danger, that Gary had decompensated, and he specifically asked the dispatcher to instruct responders not to arrive with their lights. Larry knew this could confuse Gary and cause the situation to deteriorate.

15. At approximately 3:58 p.m., Wagoner County Sheriff's deputies Robert Lively ("Lively") and Jason Hathcoat ("Hathcoat") arrived with their lights running. They met with Larry, who advised both deputies that Gary was a mental patient, off his medications, and acting irrationally. A minute or two later, deputy supervisor Dorr arrived and was also briefed on the situation and Gary's mental health status.

16. Dorr, Lively and Hathcoat then walked to the backyard and observed Gary standing on the porch to his cottage with a kitchen knife in his hand. Dorr approached to within approximately 40 feet of Gary with Lively and Hathcoat behind him with their firearms drawn and aimed at Gary. Dorr then called Gary by name, asked him to put the knife down, and asked to come speak with him. Dorr observed that Gary was nonverbal, made gestures towards Dorr with his middle finger, and motioned with his hand for Dorr to come closer. Gary made other hand gestures that were unintelligible to Dorr. At some point Dorr also told Gary that he was under arrest for assault and battery on Larry, despite the fact that Larry had never communicated any desire to press charges against Gary.

17. Dorr has no specialized mental health training, other than standardized material provided by the Council on Law Enforcement Education and Training (“CLEET”).

18. At approximately 4:03 p.m., Dorr directed Lively and Hathcoat to call the City of Broken Arrow (“City”) and have the City dispatch a team with “less lethal” measures based upon the belief that Dorr’s brief effort to speak with Gary had not yielded any results.

19. Dorr requested “less lethal” measures despite appreciating that the situation was not deteriorating.

20. Prior to arrival, the dispatcher advised the responding officers from City that they were dealing with an S171, a known designation for someone with a mental illness.

21. The responding officers brought a ballistics shield, two Tasers, one pepper ball launcher, an AR-15 rifle, and a K9 unit. Deputies with the WCSO did not request, and City did not send a crisis intervention team (“CIT”).

22. By 4:37 p.m. officers from City had arrived, along with Colbert. As Sheriff of Wagoner County, Colbert was the highest ranking member of law enforcement at the scene, and upon information and belief, Colbert either actively directed the on scene decision-making upon his arrival, or he knew about the decisions being made and either affirmatively ratified those decisions, or acquiesced in the decisions being made.

23. By this time the number of law enforcement on scene had reached eleven (11).

24. By 4:37 p.m., Colbert knew that Gary suffered from a mental illness, and had been off his medications for a few days.

25. Instead of calling for a CIT, Colbert allowed the “less lethal” team from City to gather in a group to launch an attack from a tree approximately 40-50 feet from the cottage porch. Upon information and belief, this group included Colbert.

26. Immediately prior to launching the attack, the “less lethal” team that told Gary to drop his knife, but Gary remained nonverbal and did not comply. Gary remained standing on his front porch as he had since the first two deputies arrived. Gary was not advancing on anyone, he was not verbalizing any threats, and Larry had already communicated to the officers on scene that Gary was alone, and that nobody else was in the cottage.

27. At 4:45 p.m., the “less lethal” team commenced the attack on Gary by shooting 30-40 pepper balls directly at him and the surrounding structure of the cottage using a high powered pepper ball launcher similar to a paint-ball gun. The exploding pepper balls hit the structure in rapid succession making loud popping sounds and caused the air surrounding the porch to fill with chemical agents. The pepper balls also exploded and hit Gary in the arm,

legs, torso, shoulder and head.

28. When the “less lethal” team commenced the attack, there was no indication that Gary posed an imminent threat of harm to any officer or any member of the public.

29. After being hit with the pepper balls, Gary stepped off the front porch in the direction of the group of officers that included Colbert.

30. Various reports describe Gary as shuffling his feet, running or charging at the officers with the knife still in his hand.

31. As Gary approached, Officer Arron Wylie discharged his Taser in dart mode, and upon information and belief, a single probe struck Gary in the face. The Taser is not effective unless both probes make positive contact.

32. Officer Shane Gibson (“Gibson”) discharged his Taser, and Gibson was in the process of discharging it a second time when another member of the “less lethal” team gave the order, “Shoot! Shoot!”

33. Gary was immediately hit a total of three times with gunfire from the AR-15 and from shots fired by Lively and Hathcoat. The multiple gunshot wounds to the abdomen and right lower extremity; caused a small bowel injury, a mesenteric injury, a right gonadal vessel injury, a fracture of the right distal femur; and caused acute blood loss anemia.

34. Gary fell to the ground still holding the knife and Gibson discharged his Taser again, striking Gary, who released his grip on the knife. A ballistic shield was then used to pin Gary as handcuffs were applied.

35. Gary was transported from the scene by ambulance where he underwent emergency surgery for the gunshot wounds.

36. Upon discharge from St. John's, Gary was diagnosed with the injuries described above and scheduled for follow-up appointments with a primary care physician in 3-4 days, an orthopedic surgery consult within 7-10 days, and a gastroenterology consult in 8 weeks (as deemed necessary). The instructions were provided to Smith, and Parker and Holland did not keep these appointments. Gary's injuries were left to heal without any directed therapy.

37. Within hours of the shooting, Colbert held a press conference to address the shooting. During that conference, Colbert publicized several facts about the shooting that were knowingly false, including: (1) that two to three "negotiators" were at the scene attempting to speak with Gary; (2) that efforts to negotiate with Gary lasted "a good hour, hour and a half or so," and (3) that pepper balls were not fired at Gary until after he left the porch. Colbert failed to inform the media that all responding officers knew that Gary was a mental health patient who was off his medications.

38. The statements by Colbert cast the shooting in a false light by leaving the impression that mental illness was not a factor at all, by suggesting that trained negotiators were summoned to the scene, that those negotiators were unsuccessful in communicating with Gary, and that the need to use deadly force was precipitated by something other than a decision to deploy high-powered pepper balls at Gary's face in a manner that was exceedingly reckless and would predictably provoke a confrontation where an escalation in

the use of force was necessary.

39. Upon information and belief, Colbert publicized these false and misleading statements to conceal evidence that he orchestrated the needless provocation of a mental health patient in a reckless manner that directly resulted in the escalation and need to use deadly force.

40. Colbert knew that he acted recklessly, and he further knew that omitting details about Gary's mental health status and characterizing law enforcement as the victim would likely prejudice Gary in the eyes of the public, and increase the likelihood that Gary would be prosecuted.

41. To that end, on August 19, 2014, Dorr signed a probable cause affidavit accusing Gary of committing five (5) counts of "Aggravated assault and battery on a police officer." In a lengthy narrative supporting the affidavit, Dorr omitted all references to Gary's mental health status, he omitted the reason why Larry had called dispatch in the first instance, and he omitted the information indicating that law enforcement provoked the confrontation by shooting a mental health patient in the face with a high powered pepper ball launcher despite the absence of any imminent threat.

42. The misleading narrative and material omissions contained in the affidavit are substantially similar to the misleading narrative and material omissions offered by Colbert, which supports the reasonable inference that Colbert and Dorr acted in concert to publicize a deliberately misleading version of what occurred.

43. By omitting material information, Colbert and Door were successful in having Gary charged with assault and battery with a deadly weapon.

44. During the preliminary hearing in the criminal case, Dorr was asked about Gary mental health status and confessed that he does not account for a person's mental health status when he goes on a call: "It doesn't matter to me if he's mental health or not." [Prelim. Hr'g. Tr. p. 67:20-68:8]

45. Upon information and belief, neither Board nor Colbert maintained any official policy for accommodating the mental health status of persons suspected of committing a crime. In the case of Gary, Colbert implemented a practice of disregarding his mental health status altogether or alternatively, Colbert ratified or acquiesced in the decisions made under his command and supervision.

46. On or about October 20, 2015, the State of Oklahoma stipulated to Gary's defense of not guilty by reason of insanity to all criminal counts. The stipulation is signed by the Wagoner County District Court Judge and filed of record in Wagoner County District Court Case No. CF-2014-421. Gary was later fully released from confinement after a competency evaluation.

47. The actions and omissions of the Defendants have caused or contributed to serious and permanent injuries, loss of liberty, extreme pain and suffering, confusion, healing complications, loss of mobility and a decreased life span.

**STATEMENT OF CLAIMS**

**TITLE II, AMERICANS WITH DISABILITIES ACT, AS AMENDED  
42 U.S.C. § 12131 *et seq.***

48. Gary hereby adopts the preceding facts as if more fully set forth herein.

49. Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. No may public entities may avoid liability under the Title II by delegating public services to third parties. *See* 28 C.F.R. § 35.130(b)(1)(i); *see also* 28 C.F.R. Appendix A Part 35.

50. In *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999), the Tenth Circuit rejected a categorical exclusion of arrests from Title II, and further discussed two potentially viable theories under the ADA involving police conduct, including the reasonable-accommodation-during-arrest theory.

51. Under the reasonable-accommodation-during-arrest theory municipalities may be liable if they fail to reasonably accommodate a person with a disability during the course of an investigation or arrest for a crime unrelated to that disability, thereby “causing the person to suffer greater injury or indignity in that process than other arrestees.”

52. In the present case, Gary brings an ADA claim against Board for failing to implement adequate policies and proper training to accommodate the needs of mental health patients during a police-citizen encounter, which resulted in the escalation of behaviors and conduct by law enforcement that resulted in the injuries sustained by Gary. As Deputy Dorr

testified, “*It doesn’t matter to me if he’s mental health or not,*”

53. The failure by Board to comply with the requirements of the ADA did not occur on the day that the Gary was shot; it occurred well before that day, when the policymakers failed to institute policies to accommodate disabled individuals such as Gary by giving employee law enforcement officers the tools, training, and resources necessary to handle the situation peacefully.

54. The Board’s failure to comply with the provisions of Title II is the direct and proximate cause of the injuries sustained by Gary, and for which Board is liable pursuant to the ADA.

**EXCESSIVE FORCE IN VIOLATION OF THE FOURTH AMENDMENT  
42 U.S.C. § 1983**

55. Gary hereby adopts the preceding facts as if more fully set forth herein.

56. Title 42, Section 1983 of the United States Code provides a cause of action against any person acting under color of state law who deprives a citizen of a right secured by the constitution or laws of the United States, including the Fourth Amendment’s prohibition against unreasonable seizures using excessive force.

57. The use of a pepper-ball launcher against a person with a mental health issue, who is holding a knife, but who is not an immediate threat to the general public or responding officers, is objectively unreasonable under the circumstances in violation of the Fourth Amendment where no mental health professional had been summoned to the scene, where the responding officers had the luxury of time to observe and contain the situation, and where agitating the person may predictably cause them to leave their contained position and

act irrationally in the direction of law enforcement, who may be incapable of interpreting the nature of the threat before the use of deadly force becomes necessary.

58. Furthermore, to the extent that law enforcement was authorized to use deadly force against Gary, the need to use deadly force was precipitated by the reckless conduct ratified or acquiesced in by Colbert as detailed above.

59. The actions of Colbert either caused or created a situation that necessitated an escalation in the need to use more force than what was necessary. *See Allen v. Muskogee, Okl.*, 119 F.3d 837 (10th Cir. 1997) (“[t]he reasonableness of Defendants’ actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants’ own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.”).

60. The reckless actions of Colbert in causing or creating the need to use force violates the Fourth Amendment to the United States Constitution for which Colbert is liable pursuant to 42 U.S.C. § 1983.

**MALICIOUS PROSECUTION IN VIOLATION OF THE FOURTH AMENDMENT  
42 U.S.C. § 1983**

61. Gary hereby adopts the preceding facts as if more fully set forth herein.

62. Where a detention occurs after the institution of legal process, a plaintiff can assert that the legal process itself was wrongful, and thereby state a Fourth Amendment violation sufficient to support a § 1983 malicious prosecution cause of action.

63. As detailed above, Dorr prepared a probable cause affidavit on August 19, 2014 for Gary’s detention at the Wagoner County Jail upon his release from the hospital.

64. Furthermore, the affidavit omitted material facts that were highly relevant to whether Gary had committed a crime in the first instance, and by omitting those facts from the probable cause affidavit, Dorr endeavored to mislead prosecutors regarding Gary's culpability for five counts of aggravated assault and battery.

65. As a direct and proximate result of Dorr's conduct, Gary was charged with multiple crimes based upon a narrative that was misleading in manner that was material to a determination of probable cause, or alternatively, the misleading narrative unnecessarily prolonged Gary's detention by creating a false impression that probable cause was not in question.

66. The conduct of Dorr in preparing a misleading affidavit for the purpose of having Gary detained upon his release from the hospital violated Gary's rights as secured by the Fourth Amendment to the United States Constitution for which Dorr is liable pursuant to 42 U.S.C. § 1983.

**DEPRIVATION OF LIBERTY**  
**42 U.S.C. § 1983**

67. Gary hereby adopts the preceding facts as if more fully set forth herein.

68. Title 42, Section 1983 of the United States Code provides a cause of action against any person acting under color of state law who deprives a citizen of a right secured by the constitution or laws of the United States, including the Fourteenth Amendment's prohibition against the deprivation of one's liberty interest without due process of law.

69. As detailed above, Colbert publicized false and misleading statements about the shooting, and Colbert publicized those statements knowing they were false in fact.

70. Colbert publicized the false and misleading statements for the purpose of casting Gary's behavior in a false light to provide justification for the reckless conduct that he orchestrated.

71. Colbert publicized the false and misleading information for the very purpose of depriving Gary of his liberty through criminal legal process, despite actual knowledge that Gary was, in truth, a mental health patient who simply needed treatment.

72. By falsely characterizing Gary as a person who would, in the absence of a mental illness, and without provocation, charge police officers with a knife, Colbert deprived Gary of a protected liberty interest which infringed and violated Gary's rights as secured by the Fourteenth Amendment to the U.S. Constitution, actionable through 42 U.S.C. § 1983 for which Colbert is liable.

**DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS  
FOURTEENTH AMENDMENT  
42 U.S.C. § 1983**

73. Gary hereby adopts the preceding facts as if more fully set forth herein.

74. As a pretrial detainee who is prohibited from obtaining medical care on his own, the Fourteenth Amendment to the United States Constitution provides Gary with a right to adequate medical care.

75. As detailed above, Gary's medical providers instructed Smith to provide medical consultations for Gary with a variety of physician specialists, but no follow-up consultation or derivative care was ever provided.

76. Upon information and belief, Smith either communicated those instructions to Parker and/or Hollard, or alternatively, Smith failed to forward the information to them with deliberate indifference to the consequences.

77. Alternatively, Smith communicated the instructions to Hollard and/or Parker, who, despite subjective knowledge of physician ordered care, made a decision to disregard those instructions with deliberate indifference to the consequences.

78. As a direct and proximate result, Gary received no physician consultation as ordered, and no directed post-surgical care throughout the entirety of his detention. The failure to provide Gary with any care thwarted his medical recovery and caused his condition to deteriorate.

79. By acting with deliberate indifference towards a serious medical need of which they had actual knowledge, or alternatively, by failing to exercise their gate-keeping function as the primary medical providers for Gary at the jail, Smith, Hollard and Parker acted with deliberate indifference to Gary's serious medical need in violation of the Fourteenth Amendment to the U.S. Constitution actionable through 42 U.S.C. § 1983.

**NEGLIGENCE**  
**51 O.S. § 151 et seq.**

80. Gary hereby adopts the preceding facts as if more fully set forth herein.

81. Under the theory of liability established in *Nail v. City of Henryetta*, 1996 OK 12, 911 P.2d 914, Colbert and/or Board are statutorily liable for the actions of their employees taken within the scope of their employment consistent with the provisions of the GTCA.

82. Upon information and belief, the use of force supervised by, orchestrated, and set in motion by Colbert and Dorr was objectively unreasonable under the circumstances in violation of the standards set forth in *Morales v. City of Okl. City ex rel Okl. City Police Dept.*, 2010 OK 9, ¶ 27, 230 P.3d 869, 880.

83. As a direct and proximate result of the excessive force dispatched by Colbert and Dorr, while acting within the scope of their employment consistent with the GTCA and Board and Colbert are statutorily liable to Gary pursuant to 51 O.S. § 151 *et seq.*

**WHEREFORE**, all premises considered, Plaintiffs respectfully request that the Court enter judgment against the Defendants in an amount that exceeds \$3,000,000.00 and set this matter for hearing on damages.

Respectfully submitted,

Bryan & Terrill

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**ATTORNEY'S LIEN CLAIMED  
JURT TRIAL DEMANDED**