

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cleo Daily, et al.,	}	No. CV-14-00825-PHX-SPL
	}	
Plaintiffs,	}	ORDER
	}	
vs.	}	
	}	
City of Phoenix, et al.,	}	
	}	
Defendants.	}	
<hr style="width: 50%; margin-left: 0;"/>		

Before the Court are thirteen motions in limine and two *Daubert*¹ motions filed by both Plaintiff and Defendant. Each motion was fully briefed on or before October 11, 2019. On October 25, 2019, the Court held a final pretrial conference and heard oral argument on all the pending motions. The Court’s rulings are as follows.

I. Background

This action arises from the fatal shooting of Zachariah Pithan (“Decedent”) by Phoenix Police Officer Clinton Brookins (“Defendant”). On April 20, 2013, Decedent’s neighbors called the police after observing him acting irrationally. (Doc. 341 at 2-4) Many of the factual details of the encounter are disputed, but the undisputed facts remain that four officers entered Decedent’s apartment, and ultimately, Defendant shot Decedent twice in the chest—killing him before medical help could arrive. (Doc. 341 at 2-4)

¹ See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir. 1995).

1 Decedent's mother ("Plaintiff") and father, as representatives of his estate, brought
2 several claims under 42 U.S.C. § 1983 and state law against the officers and the City of
3 Phoenix. (Doc. 81) On August 8, 2017, this Court granted the defendants' motion for
4 summary judgment on all the claims. (Doc. 289) Plaintiff appealed. (Doc. 299) The Ninth
5 Circuit affirmed the Order in part but reversed and remanded the Order in part after
6 determining that the Fourth Amendment excessive force claim remained at issue. (Doc. 314-
7 2 at 2) Plaintiff and Defendant are the only remaining parties in this case.

8 **II. Discussion**

9 **A. Plaintiff's Motion in Limine to Exclude Evidence of Decedent's Drug** 10 **History and Criminal History**

11 Plaintiff moves to exclude any reference to Decedent's alleged history of drug use,
12 drug possession, and criminal history. (Doc. 321 at 1) Plaintiff asserts that the evidence is
13 not relevant, lacks foundation, and constitutes unfair prejudice under Federal Rules of
14 Evidence ("FRE") 402, 403, 701 and 702. (Doc. 321 at 1-2) Plaintiff argues that Defendant
15 did not know or have reason to know that there were any illegal drugs or drug paraphernalia
16 in Decedent's apartment. (Doc. 321 at 1-2) In addition, Plaintiff argues that the evidence is
17 irrelevant for consideration of damages because an expert toxicologist confirmed to a
18 medical degree of certainty that Decedent was not under the influence of drugs during the
19 altercation—despite Decedent's toxicology report showing trace amounts of cocaine in his
20 system. (Doc. 321 at 2-3)

21 In response, Defendant concedes that the evidence is irrelevant for establishing
22 liability under the excessive force claim. (Doc. 353 at 1-2) However, Defendant asserts that
23 the evidence is relevant for establishing the scope of damages. (Doc. 353 at 2)

24 The Court finds that any prejudice resulting from the introduction of Decedent's drug
25 use on the date of his death does not substantially outweigh its probative value for
26 Defendant's arguments regarding the nature and extent of Plaintiff's damages. Plaintiff
27 asserts a claim for damages due to Decedent's "pre-death pain and suffering." (Doc. 81 at
28 10) Evidence of drug use is directly relevant to the extent of Decedent's pain and suffering.

1 Upon proper foundation, Plaintiff may question their toxicology expert and introduce the
2 expert report regarding Decedent's drug exposure at the time of his death to rebut any claims
3 made by Defendant, but the report itself does not provide a basis to exclude the evidence.
4 With regard to the criminal history, Defendant fails to show that Decedent's criminal history
5 is relevant and admissible at trial. Accordingly, the motion will be granted in part and denied
6 in part.

7 **B. Plaintiff's Motion in Limine to Exclude Witness Statements that Were**
8 **Not Communicated to Defendant**

9 Plaintiff moves to preclude Defendant from using statements in support of his
10 defense because Defendant had no knowledge of the information contained in the
11 statements at the time he shot Decedent. (Doc. 322 at 1) Plaintiff asserts that Defendant is
12 attempting to introduce statements by Decedent's neighbors that were made before the
13 incident, 9-1-1 dispatch calls, and information known by the other officers at the time of the
14 incident. (Doc. 322 at 2-3) Yet Plaintiff argues this information is inadmissible because it
15 was never communicated to Defendant before he shot Decedent. Plaintiff asserts that under
16 the excessive force test outlined in *Graham v. Connor*, 490 U.S. 386 (1989), Defendant is
17 limited to introducing information and knowledge that he gained leading up to the time he
18 shot Decedent. (Doc. 322 at 3)

19 In response, Defendant argues that the 9-1-1 calls are relevant and admissible
20 because they confirm how the Decedent was behaving prior to the shooting and they tend
21 to corroborate Defendant's version of the altercation. (Doc. 354 at 1-2) Citing *Boyd v. City*
22 *and County of San Francisco*, 576 F.3d 938, 944 (9th Cir. 2009), Defendant argues that
23 evidence supporting his version of the disputed events is relevant and admissible at trial.
24 (Doc. 354 at 2)

25 At the final pretrial conference, Plaintiff argued that the Ninth Circuit implicitly
26 overruled *Boyd*, and therefore the Court cannot allow Defendant to admit any evidence that
27 he did not know at the time of the shooting. In response, Defendant argued that no Ninth
28 Circuit case has directly overturned *Boyd*, and therefore, the case is still good law.

1 In *Boyd*, the Ninth Circuit stated that FRE 401 allows the admittance of evidence that
2 has a tendency to make a fact of consequence more or less probable, and the court explained
3 that the rule includes “evidence that may support one version of events over another” when
4 an officer’s perception just prior to the use of force is at issue. *Boyd*, 576 at 944. Since *Boyd*,
5 courts have disputed the scope of its ruling. *See Jackson v. Cty. Of San Bernardino*, No.
6 EDCV 13-01650-JGB (DTBx), 2016 WL 7495816, at *3 (C.D. Cal. April 21, 2016)
7 (recognizing that “Ninth Circuit case law appears to be inconsistent on whether information
8 not known to an officer is admissible to support an officer’s version of events” before
9 denying the admittance of corroborative evidence); *Korff v. City of Phoenix*, No. CV-13-
10 02317-PHX-ESW, 2015 WL 1402996, at *2-3 (D. Ariz. March 25, 2015) (finding that
11 “*Boyd* remains the law in the Ninth Circuit” and allowing the discovery of evidence that
12 tended to corroborate the officers’ version of events); *Ruvalcaba v. City of Los Angeles*,
13 2014 WL 4426303, at *1-2 (C.D. Cal. Sept. 8, 2014) (finding that “the Ninth Circuit has
14 clarified its position on unknown, preshooting knowledge, holding that it is inadmissible to
15 establish the reasonableness of an officer’s conduct”); *Turner v. Cty. of Kern*, 2014 WL
16 560834, at *2-3 (E.D. Cal. Feb.13, 2014) (relying on *Boyd* to admit evidence that the
17 decedent was on drugs at the time of the shooting to corroborate the officers’ account of
18 events). But the Ninth Circuit has never directly addressed these differences in
19 interpretation. Consequently, the Court finds that *Boyd* remains precedential law in the
20 Ninth Circuit.

21 Here, Defendant asserts that at least one 9-1-1 call shows that Decedent was carrying
22 a wooden object and threatening to hit the caller with it. (Doc. 354 at 2) Because Defendant
23 asserts that he shot Decedent after seeing a wooden object in his hand that he believed
24 Decedent was attempting to use as a weapon, the 9-1-1 call tends to corroborate Defendant’s
25 version of events. Defendant may introduce the one 9-1-1 call. However, Defendant has not
26 made a sufficient showing that any of the other evidence is relevant and admissible in
27 support of his defense. Accordingly, the motion will be granted in part and denied in part.
28

1 **C. Defendant’s Motion in Limine to Exclude Defendant’s Prior**
2 **Employment and Psychological Testing**

3 Defendant moves to exclude the introduction of his employment history, arguing that
4 the evidence is irrelevant and prejudicial under FRE 401 and 403. (Doc. 329 at 1) In
5 addition, Defendant moves to exclude the introduction of his prior psychological testing,
6 arguing that the evidence is inadmissible character evidence under FRE 404. (Doc. 329 at
7 2)

8 In response, Plaintiff argues that under FRE 611(b), Defendant is subject to cross-
9 examination on matters affecting his credibility and qualifications. (Doc. 343 at 1) Plaintiff
10 asserts that Defendant’s employment history is relevant for purposes of impeachment
11 because Defendant “claims that he [is] a highly trained officer with sufficient competency
12 to handle situations properly without the unnecessary need for deadly force.” (Doc. 343 at
13 2) Additionally, Plaintiff argues that the evidence is admissible under FRE 404 to prove
14 motive, opportunity, intent, preparation, plan, knowledge, and absence of mistake/accident.
15 (Doc. 343 at 2) Additionally, Plaintiff argues that Defendant’s past psychological testing is
16 relevant to: 1) impeach Defendant on his qualifications and credentials as an officer, and 2)
17 establish punitive damages by showing Defendant’s “relative incompetence and instability
18 resulted in the severe and excessive use of deadly force.” (Doc. 343 at 3)

19 Here, Defendant’s employment history indicates that his past employers described
20 him as an unreliable and untruthful employee. (Doc. 343-1) The Court finds that the risk of
21 prejudice is not greatly outweighed by the evidence’s relevance as impeachment evidence
22 in this case. If Defendant testifies that he has the competency of a reasonable police officer,
23 then the employment history may be used to impeach him under FRE 611(b).

24 Regarding the psychological testing, the Court finds that the testing is not relevant
25 impeachment evidence, but the psychological testing is relevant for punitive damages. *See*
26 *Smith v. Wade*, 461 U.S. 30, 56 (1983) (“[A] jury may be permitted to assess punitive
27 damages in an action under § 1983 when the defendant’s conduct . . . involves reckless or
28 callous indifference to the federally protected rights of others.”). Accordingly, the motion

1 will be granted in part and denied in part.

2 **D. A Defendant's Motion in Limine to Exclude Defendant's Army Service**
3 **Records**

4 Defendant moves to exclude the admission of his military service records at trial.
5 (Doc. 330 at 1) Defendant argues that the proposed records are irrelevant under FRE 401
6 and the introduction of the evidence would be prejudicial under FRE 403. (Doc. 330 at 2)
7 Additionally, Defendant argues that the evidence is inadmissible under FRE 404 as
8 improper character evidence that will be used to demonstrate an aggressive personality or
9 mental state. (Doc. 330 at 2)

10 In response, Plaintiff argues that Defendant's service in the military is relevant
11 employment history and has bearing on his qualifications to become a police officer—
12 including the handling of a firearm. (Doc. 334 at 1-2) Plaintiff asserts that Defendant was
13 honorably discharged for “unsatisfactory performance” and his discharge is therefore
14 inconsistent with the conclusion that Defendant had the necessary background of a
15 competent officer. (Doc. 344 at 2)

16 At the final pretrial conference, Plaintiff asserted that Defendant's honorable
17 discharge means he is ineligible to reenlist in the military, and that fact is relevant work
18 history to show Defendant's incompetence. Defendant argued that he passed all of the
19 necessary qualifications to become a City of Phoenix police officer, and whether he is
20 qualified to reenlist in the military has no bearing on whether he is qualified to serve as a
21 police officer.

22 Here, Defendant's military service is part of his employment history. However, the
23 Court finds that the evidence is irrelevant to impeach Defendant on cross-examination
24 pursuant to FRE 608(b) and 611(b) because the fact has no bearing on his credibility.
25 Accordingly, the motion will be granted.

26 **E. Defendant's Motion in Limine to Exclude Evidence of The Alleged**
27 **Incident with Tia Hernandez**

28 Defendant moves to exclude any reference to a 2012 altercation with Tia Hernandez.

1 (Doc. 331 at 1-2) Hernandez asserts in an affidavit that Defendant refused to let her use the
2 restroom while in custody and she was forced to urinate on the floor. Hernandez further
3 asserts that Defendant used her clothing and body to clean up the urine. (Doc. 331 at 2)
4 Defendant argues that Hernandez's affidavit is hearsay and inadmissible at trial. (Doc. 331
5 at 2) Defendant further argues that the incident is irrelevant under FRE 401, prejudicial
6 under FRE 403, and improper character evidence under FRE 404. (Doc. 331 at 2)

7 In response, Plaintiff argues that the incident is relevant and admissible under FRE
8 404(b) to prove punitive damages. (Doc. 345 at 1) Plaintiff further asserts that this other act
9 of excessive force is admissible to prove evil motive, reckless or callous indifference to the
10 rights of others. (Doc. 345 at 2-3)

11 In determining whether evidence of a prior wrongful act is admissible under FRE
12 404(b), a district court must use the four-factor test outlined in *United States v. Miller*, 874
13 F.2d 1255, 1268 (9th Cir. 1989). The factors include: (1) whether sufficient evidence exists
14 to support a finding by the jury that the defendant committed the similar act; (2) the prior
15 act must not be too remote in time from the commission of the incident at issue; (3) the prior
16 act must be similar to the offense charged; and (4) the prior act must be introduced to prove
17 an element of the charged offense that is a material issue in the case. *Id.*

18 Here, each factor is met. Plaintiff lists Tia Hernandez as a witness to be called at trial;
19 the prior act is alleged to have occurred less than a year before Decedent's death; the prior
20 act is an alleged instance of excessive use of force by Defendant; and Plaintiff intends to
21 introduce the evidence to prove evil motive and/or reckless or callous indifference to the
22 rights of others as a required element of her punitive damages claim. Accordingly, the
23 motion will be denied.

24 **F. Defendant's Motion in Limine to Exclude the Alleged Incident with**
25 **Charles Hill**

26 Defendant moves to exclude any reference to a 2013 alleged altercation with his
27 neighbor Charles Hill. (Doc. 332 at 2) Defendant argues that his interaction with Hill while
28 off-duty has no relevance to any issue in this case. (Doc. 332 at 1-2) In addition, Defendant

1 argues that Plaintiff improperly seeks to admit hearsay evidence of a complaint filed by Hill
2 against Defendant with the City of Phoenix. (Doc. 332 at 2-3)

3 In response, Plaintiff argues that the incident is relevant character evidence that can
4 be used to impeach Defendant. (Doc. 346 at 1) Plaintiff asserts that Defendant confronted
5 Hill regarding a private matter while wearing his uniform and intentionally used his status
6 as a police officer to intimidate Hill and Hill's son. (Doc. 346 at 1-2) Additionally, Plaintiff
7 argues that the prior act is admissible to support her claim for punitive damages. (Doc. 346
8 at 2)

9 Using the four-factor *Miller* test, the Court finds that the factors do not favor
10 admission of the evidence. *Miller*, 874 F.2d at 1268. Plaintiff lists Hill as a witness unlikely
11 to be called at trial (Doc. 341 at 19); the prior act is not an offense similar to the excessive
12 force claim; and Plaintiff seeks to introduce the incident as impeachment evidence, but the
13 incident is irrelevant to show Defendant's reputation for truthfulness or untruthfulness.
14 Accordingly, the motion will be granted.

15 **G. Defendant's Motion in Limine to Exclude Testimony by Plaintiff**

16 Defendant moves to exclude the testimony of Plaintiff (Cleo Daily) as irrelevant
17 under FRE 401 and prejudicial under FRE 403. (Doc. 333 at 2) Defendant argues that this
18 Court has already dismissed Plaintiff's claim for loss of familial association, and therefore,
19 Plaintiff's testimony regarding her son's quality of life is irrelevant. (Doc. 333 at 2)
20 Defendant asserts that Plaintiff's testimony would only serve to "introduce highly emotional
21 testimony in an attempt to tempt the jury to decide this case on emotions rather than facts
22 and evidence presented." (Doc. 333 at 2)

23 In response, Plaintiff argues that her testimony is relevant to her claim for hedonic
24 damages. (Doc. 347 at 2-3) Plaintiff asserts that her testimony will not be used to establish
25 liability but only for the purposes of establishing damages. (Doc. 347 at 1) Plaintiff further
26 asserted that her deposition served as sufficient notice of her as a witness, and the scope of
27 the deposition included Plaintiff's relationship with Decedent while he was alive. (Doc. 347
28 at 2)

1 At the final pretrial conference, Defendant argued that hedonic damages are not
2 allowed in this case, and in any event, Plaintiff was not timely disclosed as a witness and
3 should be precluded from testifying under Federal Rule of Civil Procedure 37. In response,
4 Plaintiff argued that hedonic damages are available, and her deposition served as a sufficient
5 disclosure.

6 The Court finds that hedonic damages are recoverable in the District of Arizona for
7 § 1983 claims. *See Gotbaum v. City of Phoenix*, 617 F.Supp.2d 878, 882-86 (D. Ariz. 2008);
8 *Sanchez v. Jiles*, No. CV 10–09384 MMM (OPx), 2013 WL 12242051, at *2 (C.D. Cal.
9 Jan. 2, 2013). However, “[t]estimony describing pain, suffering, or loss of enjoyment of life
10 that the plaintiffs themselves experienced following the decedent’s death is not relevant.”
11 *Id.* at *3. The Court finds that Plaintiff’s testimony is relevant to establish Decedent’s
12 quality of life. However, Plaintiff may not opine on her personal experience following
13 Decedent’s death. The Court further finds that Plaintiff’s deposition served as sufficient
14 notice for her to testify as a witness. *See Chinacast Educ. Corp. v. Chen Zhou Guo*, No.:
15 2:15-cv-05475-AB-E, 2018 WL 7448913, at *6 (C.D. Cal. Dec. 28, 2018) (finding that
16 deposition testimony was sufficient evidence to put the other party on notice of a witness’s
17 likeliness to be called at trial). Plaintiff was deposed in August 2016. (Doc. 148)
18 Accordingly, the motion will be denied.

19 **H. Defendant’s Motion in Limine to Exclude Evidence of the Decedent’s**
20 **Mental Health Issues**

21 Defendant moves to exclude any admission of evidence showing that Decedent was
22 emotionally disturbed or mentally ill as irrelevant and unfairly prejudicial under FRE 401,
23 402 and 403. (Doc. 334 at 1-2) Defendant argues that there is no evidence in the case to
24 support a finding that any of the responding officers knew that Decedent was emotionally
25 disturbed or mentally ill. (Doc. 334 at 2)

26 In response, Plaintiff argues that a factual question exists as to whether Defendant
27 could perceive that Decedent was mentally ill on the day of the incident, and this fact has
28 goes to the objective reasonableness of Defendant’s actions. (Doc. 348 at 1-2) Additionally,

1 Plaintiff argues that the evidence is relevant for damages to establish Decedent’s loss of
2 enjoyment of life. (Doc. 348 at 2)

3 The Court finds that Plaintiff has not established any facts to support her contention
4 that Defendant should have perceived Decedent’s mental illness during the altercation.
5 Therefore, introduction of the evidence to prove liability at trial would be irrelevant and
6 unduly prejudicial to Defendant. To the extent that Decedent’s mental illness is probative
7 of “whether and how much [Decedent] enjoyed his life prior to his death,” the evidence is
8 admissible to prove damages—subject to any objection by Defendant at that time. *See*
9 *Sanchez*, 2013 WL 12242051 at *3. Accordingly, the motion will be granted in part and
10 denied in part.

11 **I. Defendant’s Motion in Limine to Exclude Evidence of the Decedent’s**
12 **2012 Motor Vehicle Accident**

13 Defendant moves to exclude evidence of Decedent’s 2012 motor vehicle accident
14 and resulting medical and billing records. (Doc. 335) Defendant argues the accident is
15 irrelevant under FRE 401 and the records are impermissible hearsay under FRE 801. (Doc.
16 335) Defendant further argues that the evidence is prejudicial under FRE 403 and will only
17 serve to confuse the jury and waste time. (Doc. 335)

18 In response, Plaintiff argues that the evidence is admissible impeachment evidence.
19 (Doc. 349 at 1-2) Specifically, Plaintiff asserts that Decedent had limited range of motion
20 in his right arm due to the 2012 accident, and this fact tends to disprove Defendant’s account
21 of the altercation because Defendant contends that Decedent moved his right arm in an
22 “extremely active way to attempt to strike [the] officers.” (Doc. 349 at 1) In addition,
23 Plaintiff argues that the evidence is relevant to prove damages because it shows Decedent’s
24 quality of life. (Doc. 349 at 2)

25 The Court finds that Decedent’s medical records fall within the hearsay exception
26 under FRE 803(4), and the evidence is relevant impeachment evidence because it directly
27 relates to the accuracy of Defendant’s version of the altercation. However, to the extent that
28 Decedent’s medical history and billing are probative of whether and how much Decedent

1 enjoyed his life prior to his death, the evidence is inadmissible to prove damages.
2 Accordingly, the motion will be granted in part and denied in part.

3 **J. Defendant’s Motion in Limine to Exclude Evidence of Officers Hilger**
4 **and Rogers’ Contact with the Decedent**

5 Defendant moves to exclude all evidence relating to contact made between Decedent
6 and Officers Martin Hilger and Richard Rogers. (Doc. 336 at 1) Defendant argues that the
7 evidence is irrelevant under FRE 401 because Defendant did not know that the officers
8 previously communicated with Decedent on the date of the altercation. In addition,
9 Defendant argues that the evidence is prejudicial under FRE 403 because it will only serve
10 to confuse the issues, mislead the jury, and cause undue delay. (Doc. 336 at 2)

11 In response, Plaintiff argues that Defendant has already sought to introduce evidence
12 of Decedent’s prior conduct before the altercation, and Plaintiff intends to use the encounter
13 with Officers Hilger and Rogers to show that Decedent was not acting irate—as Defendant
14 claims—on the date of the incident. (Doc. 350 at 2) Plaintiff asserts that she does not intend
15 to introduce the evidence to support her claim for liability unless Defendant first addresses
16 the encounter between Decedent and the officers. (Doc. 350 at 2) Plaintiff further argues
17 that the evidence is relevant to establish that Decedent’s life was worth more than just a
18 nominal value. (Doc. 350 at 3)

19 The Court finds that any evidence regarding Officer Hinger and Rogers’ contact with
20 Decedent on April 20, 2013, is irrelevant to this case. In accordance with the ruling made
21 in Section II.B, Defendant may not reference the encounter, and therefore, Plaintiff may not
22 reference the encounter. Accordingly, the motion is granted.

23 **K. Defendant’s Motion in Limine to Exclude Evidence of Certain Estate**
24 **Damages**

25 Defendant moves to limit the presentation of evidence regarding Decedent’s pre-
26 death pain and suffering and exclude any evidence concerning Decedent’s loss of enjoyment
27 of life, or hedonic damages. (Doc. 337 at 1) First, Defendant argues that “any pre-death pain
28 and suffering is limited to the minimal time frame between which Decedent was shot and

1 when he died.” (Doc. 337 at 2) Second, Defendant argues that hedonic damages for loss of
2 enjoyment of life are barred by Arizona law. (Doc. 337 at 3) Finally, Defendant argues that
3 Plaintiff may not introduce evidence of compensatory damages related to funeral or medical
4 expenses because Plaintiff has not disclosed any evidence regarding these damages in
5 violation of Federal Rule of Civil Procedure 37.

6 In response, Plaintiff argues that the jury should evaluate “the nature, magnitude, and
7 circumstances of [Decedent’s] pain and suffering in arriving at an award,” and therefore,
8 the Court should not give a limiting instruction for consideration of Decedent’s pre-death
9 pain and suffering. (Doc. 351 at 2) In addition, Plaintiff further argues that in Arizona,
10 hedonic damages are compensable in § 1983 cases. (Doc. 351 at 4) Plaintiff does not
11 respond to Defendant’s argument regarding funeral and medical expenses.

12 At the final pretrial conference, Defendant further argued that Plaintiff never
13 disclosed any type of hedonic damages and Defendant was therefore prejudiced from
14 preparing to rebut the damages (i.e. obtaining an expert witness). Plaintiff argued that this
15 Court made a ruling in a prior case allowing hedonic damages and should do the same in
16 this case.

17 The Court finds that Defendant does not request in his motion in limine any kind of
18 limiting instruction stating that the consideration of pre-death pain and suffering should be
19 limited to the injuries caused by the two gunshots, and the Court finds no reason to include
20 such a limiting instruction at trial. Plaintiff may introduce evidence of the surrounding
21 circumstances during the altercation with Defendant at the time of Decedent’s death, and
22 the jury is not limited in considering the totality of the circumstances when making a
23 damage determination. Second, as stated before, courts in this district have held that hedonic
24 damages are available notwithstanding Arizona’s survival statute. *See Gotbaum*, 617
25 F.Supp.2d at 882-86; *Sanchez*, 2013 WL 12242051, at *2; *see also Erickson v. Camarillo*,
26 No. CV-14-01942-PHX-JAT, 2017 WL 2335659 (D. Ariz. May 30, 2017). The Court finds
27 that Plaintiff may introduce evidence of hedonic damages. Finally, because Plaintiff does
28 not rebut Defendant’s argument regarding medical and funeral expenses, the Court finds

1 that Plaintiff may not introduce evidence regarding these expenses to establish damages at
2 trial. Accordingly, the motion will be granted in part and denied in part.

3 **L. Defendant's Motion in Limine to Exclude Evidence of Defendant and the**
4 **Other Officers' Post-Shooting Conduct**

5 Defendant moves to exclude evidence relating to the post-shooting conduct of
6 himself and the other three officers present during the shooting. (Doc. 338 at 1) Defendant
7 argues that the officers' decision, based on police department policy, not to discuss the
8 shooting with each other is irrelevant under FRE 401. (Doc. 338 at 2) Additionally,
9 Defendant argues that the evidence is unduly prejudicial under FRE 403 because the
10 officers' conduct post-shooting has no bearing on the factual question of whether Defendant
11 was justified in the moment for shooting Decedent. (Doc. 338 at 2) Defendant asserts that
12 the evidence would only serve to confuse the issue, mislead the jury, cause undue delay and
13 waste time at trial. (Doc. 338 at 3)

14 In response, Plaintiff asserts that the conduct directly following the incident is
15 trustworthy and relevant to what may have occurred moments before, and therefore, the
16 evidence is admissible in this case. (Doc. 352 at 1) Plaintiff asserts that one officer yelled
17 in response to Defendant shooting Decedent, and the jury should be permitted to weigh the
18 credibility of such evidence. (Doc. 352 at 3) In addition, Plaintiff argues that a jury should
19 be able to determine if it was believable that none of the other officers spoke with Defendant
20 after the incident. Plaintiff does not cite to any legal authority to support her argument.

21 Here, the Court finds that Plaintiff's assertion that an officer yelled in response to the
22 shooting is admissible under FRE 803 as an excited utterance. However, the Court finds
23 that Plaintiff has not shown a legal basis for introducing evidence that Defendant never
24 spoke to the other officers after the shooting. Accordingly, the motion will be granted in
25 part and denied in part.

26 **M. Defendant's Motion in Limine to Exclude Evidence of Defendant's Social**
27 **Media Posts**

28 Defendant moves to exclude evidence related to his past social media posts. (Doc.

1 339 at 1) Defendant argues that the posts are irrelevant under FRE 401 and are unduly
2 prejudicial under FRE 403. (Doc. 339 at 2-3) Additionally, Defendant argues that the
3 evidence is improper character evidence prohibited by FRE 404. (Doc. 339 at 3)

4 In response, Plaintiff argues that the evidence is admissible under FRE 404(b). (Doc.
5 342 at 3) Specifically, Plaintiff submits several posts that relate to Defendant's on-the-job
6 conduct and asserts that the posts contain "self-proclamations of future killing/deadly force"
7 and are therefore directly relevant to Defendant's credibility. (Docs. 342 at 3-4; 339-2)
8 Additionally, Plaintiff argues that the social media posts are relevant for punitive damages
9 to show that Defendant's conduct was malicious, oppressive, and in reckless disregard of
10 Decedent's rights. (Doc. 342 at 4)

11 The Court finds that the social media posts are irrelevant for establishing liability.
12 *See Graham*, 490 U.S. at 396. However, the Court finds that the posts are admissible to
13 prove punitive damages under FRE 404(b). The factors in *Miller* favor admission of the
14 evidence because: 1) the posts are non-hearsay statements admissible under FRE 801(d) and
15 Defendant does not dispute the legitimacy of the posts; 2) some of the posts show that
16 Defendant contemplated using excessive force at work before shooting Decedent; and 3)
17 malicious intent and/or reckless disregard for the rights of others is a required element to
18 prove punitive damages. *See Miller*, 874 F.2d at 1268. Accordingly, the motion will be
19 denied.

20 **N. Defendant's Daubert Motion to Exclude the Opinions of David Balash**

21 Defendant moves to preclude the expert testimony of forensic examiner David
22 Balash, arguing that the dismissal of Plaintiff's *Monell*² claim renders Balash's expert
23 testimony irrelevant under FRE 401. (Doc. 327 at 1) Additionally, Defendant argues that
24 Balash is not a medical examiner by experience or by trade, and therefore, pursuant to FRE
25 702, he cannot give expert opinion on whether Decedent's wound trajectories are consistent
26 with, or contradictory to, Defendant's version of the altercation. (Doc. 327 at 4)

27
28 ² *Monell v. Dep't of Social Serv. of City of New York*, 436 U.S. 658 (1978).

1 In response, Plaintiff argues that Balash is a qualified expert witness under FRE 702
2 because he has over twenty years of experience investigating shootings at crime scenes as
3 a forensic scientist and crime scene analyst. (Doc. 355 at 2) Plaintiff asserts that the jury
4 must decide how much weight to give to Balash’s experience when deciding whether to
5 accept his opinion. (Doc. 355 at 3)

6 The central issue of the case is whether Defendant’s use of deadly force was
7 reasonable under the circumstances. *See Graham*, 490 U.S. at 396. Here, the circumstances
8 at issue include Defendant’s perceived threat of Decedent. The Court finds that a
9 determination of how Decedent was shot may assist the trier of fact in analyzing the totality
10 of the circumstances in the case. The Court further finds that Plaintiff has established that
11 Balash’s training and experience qualifies him as an expert witness. Therefore, Balash may
12 opine on whether the bullet trajectories in Decedent’s body support or negate Defendant’s
13 version of the altercation. Accordingly, the motion will be denied.

14 **O. Defendant’s Daubert Motion to Exclude the Opinions of Roger Clark**

15 Defendant moves to preclude the expert testimony of Roger Clark, arguing that the
16 testimony is irrelevant and inadmissible under FRE 401 and 702. (Doc. 328 at 1) Defendant
17 asserts that the majority of Clark’s expert report focuses on whether the City of Phoenix had
18 liability under Plaintiff’s *Monell* claim—rendering Clark’s opinion irrelevant because that
19 claim is no longer part of the case. (Doc. 328 at 6) Defendant also argues that Clark’s
20 opinion is not based on undisputed facts because he only relied on the facts as stated in the
21 Fifth Amended Complaint. (Doc. 328 at 4)

22 In response, Plaintiff argues that Clark’s report offers relevant opinions on the
23 excessive force claim, and therefore, his testimony is admissible. (Doc. 356 at 2-3)
24 Additionally, Plaintiff argues that Clark’s expert testimony is based upon true facts that are
25 supported by the evidence in this case. (Doc. 356 at 2)

26 The Court finds that Clark’s report focuses mainly on an evaluation of the City of
27 Phoenix’s police policies and practices. (Doc. 328 at 17-38) In his report, Clark only offers
28 a conclusory statement that Defendant had “a systemic Animus and intent towards

1 [Decedent] and similarly situated persons” and that Defendant’s actions constituted “a
2 reckless disregard for the rights and well-being of [Decedent].” (Doc. 328 at 40-41) The
3 Court finds that such conclusory statements will not help the trier of fact in understanding
4 the evidence in this case. The Court further finds that Plaintiff has not shown that Clark’s
5 education, experience, or training would help assist the jury in understanding evidence
6 regarding the excessive force claim. Accordingly, the motion will be granted.

7 **P. Additional Outstanding Issues**

8 At the final pretrial conference, Defendant requested permission to reference in his
9 opening statement the Court’s prior summary judgment ruling. The Court requested briefing
10 on the issue, and the parties shall provide written arguments in accordance with this Order.
11 In addition, the Court requested that the parties file an amended final pretrial order one
12 month after the issuance of this Order. Accordingly,

13 **IT IS ORDERED** that the Plaintiff’s motion in limine (Doc. 321) is **granted in part**
14 **and denied in part;** and

15 **IT IS FURTHER ORDERED** that the Plaintiff’s motion in limine (Doc. 322) is
16 **granted in part and denied in part;** and

17 **IT IS FURTHER ORDERED** that the Defendant’s motion in limine (Doc. 329) is
18 **granted in part and denied in part;** and

19 **IT IS FURTHER ORDERED** that the Defendant’s motion in limine (Doc. 330) is
20 **granted;** and

21 **IT IS FURTHER ORDERED** that the Defendant’s motion in limine (Doc. 331) is
22 **denied;** and

23 **IT IS FURTHER ORDERED** that the Defendant’s motions in limine (Docs. 332)
24 are **granted;** and

25 **IT IS FURTHER ORDERED** that the Defendant’s motion in limine (Doc. 333) is
26 **denied;** and

27 **IT IS FURTHER ORDERED** that the Defendant’s motion in limine (Doc. 334) is
28 **granted in part and denied in part;** and

1 **IT IS FURTHER ORDERED** that the Defendant's motion in limine (Doc. 335) is
2 **granted in part and denied in part;** and

3 **IT IS FURTHER ORDERED** that the Defendant's motion in limine (Doc. 336) is
4 **granted;** and

5 **IT IS FURTHER ORDERED** that the Defendant's motion in limine (Doc. 337) is
6 **granted in part and denied in part;** and

7 **IT IS FURTHER ORDERED** that the Defendant's motion in limine (Doc. 338) is
8 **granted in part and denied in part;** and

9 **IT IS FURTHER ORDERED** that the Defendant's motion in limine (Doc. 339) is
10 **denied;** and

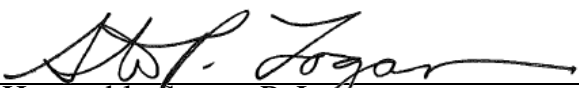
11 **IT IS FURTHER ORDERED** that the Defendant's *Daubert* motion (Doc. 327) is
12 **denied;** and

13 **IT IS FURTHER ORDERED** that the Defendant's *Daubert* motion (Doc. 328) is
14 **granted;** and

15 **IT IS FURTHER ORDERED** that Plaintiff and Defendant shall submit briefing
16 regarding the issue of opening statements. Defendant shall have until **December 5, 2019** to
17 file no more than five (5) pages setting forth the points and authorities relied upon in support
18 of their position. Plaintiff will then have fourteen (14) days to submit a response of no more
19 than five (5) pages in accordance with Local Rule 7.2(c); and

20 **IT IS FURTHER ORDERED** that the parties shall file an amended final pretrial
21 order on or before **December 5, 2019.**

22 Dated this 5th day of November, 2019.

23
24 
25 Honorable Steven P. Logan
26 United States District Judge
27
28