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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 ROBERT JOHN PRESTON,

9 Plaintiff,

10 v.

11 RYAN BOYER, et al.,

12 Defendants.

Case No. C16-1106-JCC-MAT

ORDER ON PLAINTIFF'S MOTION
TO EXCLUDE EXPERT
TESTIMONY, MOTION TO STRIKE,
AND MOTION TO SEAL

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14 I. INTRODUCTION

15 In this 42 U.S.C. § 1983 action, plaintiff Robert Preston alleges that defendant Ryan Boyer,
16 now a Sergeant with the Snohomish County Sheriff's Office, used excessive force against him in
17 July 2014 and that Snohomish County was negligent in hiring and retaining Sergeant Boyer.¹
18 Currently before the Court are Plaintiff's motion to exclude certain opinions offered by the
19 County's expert witness, Colleen Wilson (Dkts. 171 (redacted), 173 (sealed)), motion to strike
20 portions of the County's response brief (Dkt. 181), and motion to seal (Dkt. 170). Having
21 considered the parties' submissions, the balance of the record, and the governing law, the Court

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23 ¹ Additional background facts and procedural history are available at Docket Numbers 42, 88, 113, and 152,
and will not be repeated here.

ORDER ON PLAINTIFF'S MOTION TO
EXCLUDE EXPERT TESTIMONY,
MOTION TO STRIKE, AND MOTION TO
SEAL - 1

1 GRANTS in part and DENIES in part the motion to exclude, and GRANTS the motions to strike
2 and seal.

3 II. BACKGROUND

4 Colleen Wilson is an experienced law enforcement executive who led three different police
5 departments during her 23 years as a police chief. (Dkt. 172 at 6.) During her career, she hired
6 approximately 60 police officers in Washington State and 20 civilian employees, and reviewed
7 approximately twice that many background investigations. (*Id.* at 7.) The County retained her to
8 review its hiring of Sergeant Boyer, as a transfer from the City of Snohomish, “particularly as
9 related to the background process and hiring decision by the Snohomish County Sheriff’s Office
10 in late 2011.” (*Id.* at 6.) Ms. Wilson based her opinion on a review of Sergeant Boyer’s personnel
11 file, other relevant documents the County provided to her, sections of the Revised Code of
12 Washington, published information on the disqualifiers used by police agencies in Washington,
13 and the Washington law enforcement accreditation standards from the Washington Association of
14 Sheriffs and Police Chiefs.² (*Id.* at 7.)

15 Plaintiff challenges the following opinions in Ms. Wilson’s expert report:

16 (1) “The process that Deputy Boyer participated in and passed not only complied with
17 the Revised Code of Washington and Washington Administrative Codes for law enforcement
18 candidate processing, but also complied with current State law enforcement accreditation
19 standards.” (*Id.* at 10.)

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22 ² Ms. Wilson’s report states that she also reviewed sections of the Washington Administrative Code (“WAC”) (Dkt. 172 at 7), but she testified during her deposition that she did not, in fact, review the WAC prior to rendering her opinion or refer to specific sections of the code in her opinion (*id.* at 37). She nevertheless testified that she believes the County complied with the WAC. (*Id.*)

1 (2) “The Snohomish County Sherriff’s Office decision to hire then Snohomish Officer
2 Ryan Boyer complied with the applicable laws and codes of the State of Washington.” (*Id.* at 11.)

3 (3) “The Snohomish County Sheriff’s Office had a statutory obligation to hire
4 [Sergeant Boyer] if he met their minimum qualifications for hire.” (*Id.*)

5 (4) “No disqualifiers were found in the investigation so the decision to hire was
6 appropriate under the law.” (*Id.*)

7 (5) “Snohomish County’s background check complied with [RCW 43.101.095].” (*Id.*
8 at 9.)

9 (6) “In compliance with the law, [Sergeant Boyer] was also required to take a medical
10 examination, a psychological examination and a polygraph to confirm his responses in the
11 background investigation.” (*Id.*)

12 (7) “RCW 43.101.095 requires certification of Peace Officers in Washington State.”
13 (*Id.*)

14 (8) “The Snohomish Police Department services were to be contracted to the Sheriff’s
15 Office pursuant to RCW 41.14.250[.]” (*Id.* at 8.)

16 (9) “. . .[Sergeant Boyer] made application through Civil Service as outlined in RCW
17 41.14.260.” (*Id.* at 9.)

18 (Dkt. 171 at 8-9.) Plaintiff argues that these opinions should be excluded because they constitute
19 legal opinions by instructing the trier of fact what the law is and how it should be interpreted;
20 invade the jury’s role of finding facts and the Court’s role of making ultimate legal conclusions;
21 and they are unreliable because they are unsupported by specific facts or relevant specialized
22 knowledge. (*Id.* at 9.) Plaintiff does not challenge Ms. Wilson’s opinion that “[t]he background
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1 investigation conducted by Snohomish County meets or exceeds the industry standard.” (Dkt. 172
2 at 10; *see also* Dkt. 171 at 7 n.1.)

3 In response, the County argues that Ms. Wilson is qualified to and properly opined about
4 the standard of care for law enforcement hiring and whether the County complied with that
5 standard of care. (*See* Dkt. 179.) The County asserts that Ms. Wilson did not opine on the ultimate
6 issue—whether the County was negligent—and instead merely addressed the standard of care,
7 which is the proper role of an expert. The County further argues that certain opinions plaintiff
8 challenges address facts, not the law. The County also attacks plaintiff’s expert, Scott DeFoe.

9 In reply, plaintiff argues that the County misunderstands what he seeks to exclude as he
10 does not challenge Ms. Wilson’s testimony regarding industry standards, only her legal opinions.
11 (*See* Dkt. 181.) He also asserts that the County misconstrues Ms. Wilson’s opinions to the extent
12 it maintains that she merely laid out the law enforcement hiring standards in Washington,
13 reiterating his position that Ms. Wilson improperly offered legal opinions. Finally, plaintiff asks
14 the Court to strike the County’s references to Mr. DeFoe as improper and irrelevant.

15 III. DISCUSSION

16 A. Motion to Exclude

17 To be admissible, expert opinion evidence must “assist the trier of fact to understand the
18 evidence or to determine a fact in issue.” Fed. R. Civ. P. 702(a). Such testimony must “be both
19 relevant and reliable.” *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014).
20 The relevancy bar is low, demanding only that the evidence “logically advances a material aspect
21 of the proposing party’s case.” *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1315 (9th
22 Cir. 1995). The reliability threshold requires that the expert’s testimony have “a reliable basis in
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1 the knowledge and experience of the relevant discipline.” *Kumho Tire Co., Ltd. v. Carmichael*,
2 526 U.S. 137, 149 (1999).

3 While expert testimony that is otherwise admissible may “embrace[] an ultimate issue to
4 be decided by the trier of fact,” Fed. R. Civ. P. 704(a), an expert witness “cannot give an opinion
5 as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law,” *Nationwide Transp. Fin.*
6 *v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (quoted source omitted, emphasis in
7 original) (excluding expert testimony labeling conduct as “wrongful” or “intentional,” but
8 allowing testimony on “industry standards” and “factual corporate norms”). An expert is not
9 permitted to testify about legal conclusions because the law is the province of the court. *See Crow*
10 *Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (“Experts ‘interpret and analyze
11 factual evidence. They do not testify about the law.’”) (quoted source omitted). However, the
12 Ninth Circuit has recognized that “a witness may refer to the law in expressing an opinion without
13 that reference rendering the testimony inadmissible. Indeed, a witness may properly be called
14 upon to aid the jury in understanding the facts in evidence even though reference to those facts is
15 couched in legal terms.” *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 (9th
16 Cir. 2004) (quoted source omitted) (holding that expert witness did not “usurp the court’s role”
17 where his references to California statutory provisions, which informed his understanding of
18 insurance industry norms, were “ancillary to the ultimate issue of bad faith”).

19 The Court concludes that challenged opinions (1) – (6) and (9) should be excluded to the
20 extent they reference the Revised Code of Washington and WAC.³ Under Washington law, “[T]o
21 hold an employer liable for negligently hiring or retaining an employee who is incompetent or
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23 ³ For example, the Court does not exclude Ms. Wilson’s statement in opinion (1) that the hiring process
complied with current State law enforcement accreditation standards.

1 unfit, a plaintiff must show that the employer had knowledge of the employee’s unfitness or failed
2 to exercise reasonable care to discover unfitness before hiring or retaining the employee.”
3 *Anderson v. Soap Lake School District*, 191 Wash.2d 343, 356 (2018). In addition, the plaintiff
4 must show that the negligently hired or retained employee proximately caused the plaintiff’s
5 injuries. *Carlson v. Wackenhut Corp.*, 73 Wash. Ct. App. 247, 253 (1994) (cited with approval in
6 *Anderson*, 191 Wash.2d at 356). In the pending motion for partial summary judgment, the County
7 argues that because it performed all requirements established by state statute or code, plaintiff’s
8 negligent hiring claim must be dismissed. (Dkt. 159 at 10 (“Since the standards were met, there
9 cannot be an action for negligent hiring.”).) Thus, an opinion that the County complied with state
10 law is tantamount to an opinion that the County was not negligent. *See Bona Fide Conglomerate,*
11 *Inc. v. SourceAmerica*, No. 14-751, 2019 WL 1369007, at *15 (S.D. Cal. Mar. 26, 2019).⁴
12 Opinions (1), (2), (4), (5), and (6) all state that the County complied with applicable laws, and
13 therefore tell “the jury which result to reach.” *Hygh v. Jacobs*, 961 F.2d 359, 364 (9th Cir. 1992)
14 (quoting Fed. R. Evid. 704 advisory committee’s note). These opinions are distinguishable from
15 the testimony in *Hangarter*, which the County cites, which referred to statutory provisions that
16 were ancillary to the ultimate issue. *See Hangarter*, 373 F.3d at 1017 (“Caliri’s references to
17 California statutory provisions—none of which were directly at issue in the case—were ancillary
18 to the ultimate issue of bad faith.”). In addition, although the statutes Ms. Wilson references may

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22 ⁴ “In this case, the ultimate issue is whether [defendant] breached its contractual obligations in designing and
23 assigning the Opportunities challenged by Bona Fide. Ms. Wills’s proffered testimony goes to this ultimate issue
because her theory (and indeed, SourceAmerica’s theory upon its motion for summary judgment) is that the Settlement
Agreement requires only regulatory and statutory compliance. Therefore, proffered testimony that SourceAmerica
has fulfilled its regulatory and statutory duties (and adequately applied its internal policies) is nothing more a pure
legal conclusion on an ultimate issue of law, once removed. It is excludable on that basis.” *Bona Fide Conglomerate,*
Inc., 2019 WL 1369007, at *15.

1 establish industry standards, as the County argues, these opinions are not framed as opinions
2 regarding industry standards. Accordingly, they will be excluded.

3 Opinion (3)—that the County had a statutory obligation to hire Sergeant Boyer if he met
4 the minimum qualifications—improperly sets forth the law, rather than interpreting or analyzing
5 factual evidence. *See Crow Tribe of Indians*, 87 F.3d at 1045 (“Experts ‘interpret and analyze
6 factual evidence. They do not testify about the law.’”) (quoted source omitted). Similarly, opinion
7 (9)—that Sergeant Boyer applied as outlined in RCW 41.14.260—states which law applies to his
8 application and thus invades the province of the Court. *See Burkhart v. Wash. Metro. Area Transit*
9 *Auth.*, 112 F.3d 1207, 1211 (D.C.C. 1997) (courts generally exclude expert testimony that attempts
10 to define the applicable legal standard or the law governing the case); *Specht v. Jensen*, 853 F.2d
11 805, 809-10 (10th Cir. 1988) (expert may not “attempt to define the legal parameters within which
12 the jury must exercise its fact-finding function”). As such, they should be excluded.

13 The Court concludes that opinions (7) and (8) should not be excluded. Although opinion
14 7 states that RCW 43.101.095 requires certification of peace officers, this background fact is not
15 disputed by the parties. The statement in opinion (8) that the city police services were to be
16 contracted with the County under RCW 41.14.250 reflects the Interlocal Agreement Between
17 Snohomish County and the City of Snohomish for the Provision of Law Enforcement Services
18 (*see* Dkt. 166-5 at 10, ¶ 4.9) and is also a background fact. Neither opinion “attempt[s] to define
19 the legal parameters within which the jury must exercise its fact-finding function.” *Specht*, 853
20 F.2d at 809-10. Thus the Court will allow them.

21 In sum, the Court GRANTS the motion to exclude as to opinions (1) – (6) and (9), and
22 DENIES the motion as to opinions (7) and (8).

1 B. Motion to Strike

2 Plaintiff moves to strike the County’s references to his expert, Mr. DeFoe, in its response
3 brief. Federal Rule of Civil Procedure 7(f) provides: “The court may strike from a pleading an
4 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” The
5 County’s references to Mr. DeFoe are wholly immaterial to the question of whether Ms. Wilson’s
6 testimony should be excluded. Accordingly, plaintiff’s motion to strike is GRANTED.

7 C. Motion to Seal

8 Plaintiff moves to seal the unredacted version of his motion to exclude (Dkt. 173), as well
9 as Exhibits 1 and 3 to the declaration of Christian Marcelo filed in support of the motion to exclude
10 (Dkt. 174). (Dkt. 170.) Defendants agree that the motion to seal should be granted. (Dkt. 178.)
11 The Court previously ordered that the same type of information be maintained under seal. (Dkts.
12 112, 128, 135, 144.) For the reasons previously articulated, the Court GRANTS plaintiff’s motion
13 to seal.

14 IV. CONCLUSION

15 Plaintiff’s motion to exclude portions of Ms. Wilson’s testimony (Dkts. 171 (redacted),
16 173 (sealed)) is GRANTED in part and DENIED in part, plaintiff’s motion to strike the County’s
17 references to Mr. DeFoe in its response brief (Dkt. 181) is GRANTED, plaintiff’s motion to seal
18 (Dkt. 170) is GRANTED, and the Clerk is directed to maintain plaintiff’s unredacted motion to
19 exclude and Exhibits 1 and 3 to Mr. Marcelo’s declaration (Dkts. 173, 174) under seal. The Clerk
20 also is directed to send copies of this order to the parties and to the Honorable John C. Coughenour.

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1 Dated this 23rd day of October, 2019.

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4 Mary Alice Theiler
5 United States Magistrate Judge
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