IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01177-LTB-NYW

DAKOTA TYLER MCGRATH,

Plaintiff,

v.

FORT COLLINS POLICE SERVICES OFFICER NICK ROGERS, in his individual capacity,

Defendant.

MOTION FOR SUMMARY JUDGMENT FROM DEFENDANT

Defendant Fort Collins Police Services Officer Nick Rogers, through his counsel, Thomas J. Lyons and Matthew J. Hegarty of Hall & Evans, L.L.C., and pursuant to Fed.R.Civ.P. 56, respectfully submits his Motion for Summary Judgment as follows:

I. INTRODUCTION

Dakota Tyler McGrath ("McGrath") attempts against Defendant a single claim for alleged violation of his federal constitutional rights under 42 U.S.C. § 1983. This claim cannot survive, however, because the undisputed material facts in this case reveal McGrath did not obey multiple progressive commands from Defendant to stop, to turn around, to come towards Defendant, and to go prone on his stomach. He also did not heed Defendant's admonition that force might be used against him if he did not comply, and reached at his waist in continued defiance of Defendant's commands. McGrath's continuous defiance and Defendant's concern for his own safety, given his knowledge of McGrath, what other officers told him about McGrath, and the rapidly evolving situation,

justified Defendant's use of force upon McGrath. Moreover, the United States Supreme Court clearly established in 2007 that, where the account of an individual who alleges excessive force by the police is materially and "blatantly" contradicted by video evidence of the encounter in the record, that individual's account need not be credited as factual on summary judgment because no reasonable jury could believe it. *See generally* ***Scott v. Harris***, 550 U.S. 372 (2007). McGrath's own version of events is materially and blatantly contradicted by the bodycam video and, as such, cannot receive the imprimatur of fact. Thus, Defendant is entitled to judgment as a matter of law.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS ("SUMF")[1]

1. Defendant is an officer with Fort Collins Police Services ("FCPS"), a position he held since 2009. [Tr. Rogers Dep., relevant pages attached as **Exh. A**, at 2, 4:13-25.]

2. On the evening of October 20, 2016, Defendant heard a call from the police dispatcher as to a disturbance near the intersection of Linden Street and Vine in Fort Collins. [**Exh. A** at 4, 13:1-2.]

3. Prior to receiving the call, Defendant already ended his shift, docked his body cam at the District One Substation, and was on his way home in his police vehicle and still in uniform when he took the call. [**Exh. A** at 3, 12:18-25.]

4. Defendant heard the dispatcher relay the informant's report that the informant was assaulted by his brother after an argument with his brother. [**Exh. A** at 4, 13:2-5.]

5. At the time, Defendant did not have information as to whether the assault was a felony or a misdemeanor. [**Exh. A** at 16, 44:18-24; *id.* at 17, 45:6-8.]

[1] All facts in the SUMF are undisputed only for purposes of this Motion. Defendant reserves the right to contest each fact at any later stage of this case, including trial.

6. All Defendant knew about the injury was the informant reportedly was head-butted, which in Defendant's experience as an officer, including seeing the results of a head-butt several times, meant "a solid likelihood that will be a felony assault" if the head-butt was "to the nose or elsewhere on the face." [**Exh. A** at 17-18, 45:1, 45:18-46:7.]

7. Defendant was informed that the suspect was McGrath. [**Exh. A** at 4, 13:5-6.]

8. Defendant also heard FCPS Officer Todd Hopkins, who Defendant knew to engage in "multiple interactions" with McGrath previously, call out over the radio that McGrath was a "Code Zero," which Defendant understood to mean that he should "use caution regarding this particular person." [**Exh. A** at 4, 13:10-16.]

9. Defendant knew McGrath typically camped in a red Honda vehicle ("the Honda") parked in the 400 block of Linden Center Drive. [**Exh. A** at 4, 13:7-9.]

10. Defendant knew the plate of the Honda in which McGrath camped, when run, was "associated with a federal terrorist watch list" as to someone other than McGrath, in that McGrath was not the Honda's registered owner. [**Exh. A** at 4-5, 13:25-14:9.]

11. Defendant knew McGrath to be "antagonistic" and "argumentative" towards police. [**Exh. A** at 5, 14:10-15; N. Rogers Supplemental Report, attached as **Exh. B**.][2]

12. And Defendant knew McGrath to possess a semiautomatic weapon, namely an AR-15 with an attached launcher, the ammunition for which, "quite frankly, will go right through any armor that I'm carrying." [**Exh. A** at 5, 14:18-23; *id.* at 14, 39:14-24.]

[2] Entries in a police officer's or investigating officer's report that result from an officer's direct observations and personal knowledge are admissible under Fed.R.Evid. 803(6). ***United States v. Snyder***, 787 F.2d 1429, 1434 (10th Cir. 1986). Moreover, investigative reports containing an investigator's factual findings, including factually based conclusions or opinions, are admissible under Fed.R.Evid. 803(8). *See* ***Perrin v. Anderson***, 784 F.2d 1040, 1046-47 (10th Cir. 1986).

13. Defendant was "concerned about other types of firearms that I can't see, namely pistols." [**Exh. A** at 15, 41:17-20.]

14. Defendant also recalled a previous encounter he had with McGrath near the Honda where, after obtaining McGrath's consent to search the vehicle, Defendant found a number of alcoholic beverage containers and prescription medications for different types of mental illnesses. [**Exh. A** at 5-6, 14:24-15:5.]

15. Defendant originally intended to contact McGrath, to detain him if necessary, and to allow other officers to finish investigating the incident. [**Exh. A** at 6, 15:10-13.]

16. Defendant knew the area just west of where the Honda was parked contained rental storage units, and then the area just west of that was the Gustav Swanson Natural Area, which abuts the Poudre River. [**Exh. A** at 7-8, 16:20-17:3.]

17. When Defendant arrived at the area where the Honda was parked, it was "pitch black" aside from a little bit of overhead street lighting due to the conjunction of the time of year (late October) with the time of day (7:00 PM). [**Exh. A** at 6, 15:10-13.]

18. Defendant arrived in his police vehicle with both his vehicle's headlights on and his vehicle's overhead flashing red and blue lights engaged. [**Exh. A** at 8, 17:5-8; Bodycam Video, conventionally submitted as **Exh. C** (placement page), at 00:03-00:05.]

19. Plaintiff asserted no police vehicle parked in the area behind the Honda. [Tr. Dakota McGrath Dep., relevant pages attached as **Exh. D**, at 4-5, 116:18-117:2.]

20. Defendant saw McGrath near the Honda but could not see what McGrath was doing, so initially Defendant parked behind the Honda, exited his police vehicle, stayed near his police vehicle, and gave commands to McGrath. [**Exh. A** at 8, 17:5-8.]

21. Specifically, Defendant announced he was with FCPS and directed McGrath to stop what he was doing and come talk with Defendant. [**Exh. A** at 8, 17:14-18.]

22. McGrath did not heed this directive but "kept doing whatever he was doing, milling about his car," appearing to gather some of his property. [**Exh. A** at 8, 17:18-21.]

23. Defendant called to McGrath again, but in response McGrath shook his head, indicating to Defendant that McGrath was not going to comply. [**Exh. A** at 8, 17:21-23.]

24. Defendant then commanded McGrath "in a cordial but firm manner" to come to him and sit on the curb, and again McGrath shook his head. [**Exh. A** at 9, 18:3-6.]

25. McGrath then began walking away from Defendant to the west across the street and into an alley that is 40 or 50 yards long, adjoins at least one of the rental storage buildings, and leads into the Gustav Swanson Natural Area. [**Exh. A** at 9, 18:8-12.]

26. McGrath walked into the alley "at a decent clip." [**Exh. A** at 10, 35:11-12.]

27. Defendant then radioed for a cover officer to "step it up," indicating to other officers that Defendant needed a more urgent response. [**Exh. A** at 9, 18:12-15.]

28. Defendant asked his cover to step it up "based on all the information I had regarding [McGrath] prior to this incident regarding his argumentative hostile nature toward officers, his previous possession of firearms, the fact that he's occupying a vehicle that's on the federal terrorist watch list, and the fact that it's dark and that I'm going to contact a suspect who's uncooperative at that point." [**Exh. A** at 9, 18:16-25.]

29. The alley McGrath entered was "completely unlit." [**Exh. A** at 10, 35:15.]

30. Defendant entered the alley and, as he was beginning to pursue McGrath on foot, called out to McGrath, "Dakota, you need to stop. Dakota, you're not free to leave," several more times, but to no avail. [**Exh. A** at 10-11, 35:23-36:2.]

31. McGrath alleged between two and four officers yelled at him from about 50 feet away at this point. [**Exh. D** at 2-3, 103:17-104:19.]

32. The bodycam video shows only Officer Rogers. [**Exh. C** at 00:08-00:18.]

33. To Defendant, it appeared McGrath would be uncooperative with him and, because McGrath was "taller" and "bigger" than Defendant, it appeared McGrath "was going to be resistive and/or aggressive to my contact with him." [**Exh. A** at 11, 36:3-14.]

34. Defendant then told McGrath he was under arrest, but McGrath continued down the alley, so Defendant began closing the distance. [**Exh. A** at 11, 36:15-17.]

35. Defendant then told McGrath that force might be used against him if he did not comply. [**Exh. A** at 11-12, 36:25-37:3.]

36. Faced with a continued lack of response, Defendant elected to deploy his Taser as both he and McGrath kept walking, [**Exh. A** at 12, 37:4-11.]

37. Defendant recalled that McGrath then responded, "Do what you got to do, man," as he kept walking away from Defendant. [**Exh. A** at 18-19, 48:13-49:2.]

38. Defendant did not believe his Taser would be effective, so he holstered his Taser and started closing more distance. [**Exh. A** at 12-13, 37:12-38:4; 18, 49:12-15.]

39. At this point, Defendant's intent was elevated to arrest McGrath for obstruction of an investigation, yet still recognizing McGrath was a suspect in an assault investigation. [**Exh. A** at 16, 44:12-17; 31, 70:11-19.]

40. Defendant recalled, "The situation progressed from the time that he offered resistance, began walking away, knowing full well that I was a police officer and calling to him to stop. So as we're walking down that alley, we crossed a line to where he's going to be uncooperative." [**Exh. A** at 19, 47:16-20.]

41. Defendant did not observe McGrath wearing earbuds. [**Exh. A** at 20, 48:7-9.]

42. The video does not show McGrath wearing earbuds. [**Exh. C** at 00:08-04:40.]

43. After he holstered his Taser, Defendant took out his department-approved wood straight baton and began closing the distance to McGrath. [**Exh. A** at 21, 49:16-25.]

44. This baton weighs between 2 and 3 pounds. [**Exh. A** at 23, 53:20-25.]

45. Simultaneous with Defendant beginning to close the distance with baton in hand, another police vehicle pulled into the alley behind McGrath and Defendant with its headlights "backlight[ing]" the alley. [**Exh. A** at 22, 50:1-4; **Exh. C** at 00:08-00:15.]

46. But McGrath testified there was no change in the lighting in the alley from the time he entered it to the time he was struck from behind. [**Exh. D** at 6, 128:2-5.]

47. At that point, because McGrath was nearing the end of the alley, Defendant did not want to allow McGrath to go further, so Defendant "responded to [McGrath's] resistance on scene by applying a two-handed straight strike with my baton towards his sort of left sort of scapular/lat area." [**Exh. A** at 22, 50:7-11; **Exh. C** at 00:16-00:19.]

48. This single strike knocked McGrath to the ground. [**Exh. A** at 22, 50:11-13; **Exh. C** at 00:18-00:19.]

49. McGrath "more or less immediately sat up." [**Exh. A** at 24, 56:16-18; **Exh. C** at 00:20, 00:22 (center of left hand side of frame).]

50. Defendant repositioned himself more towards McGrath's head and gave McGrath multiple additional commands, probably "a half-dozen times," that McGrath was under arrest and should get on his stomach, "giving him opportunity to comply after the use of force." [**Exh. A** at 22-23, 56:18-57:3; *id.* at 32, 89:4-18; **Exh. C** at 00:25.]

51. McGrath did recall Defendant giving commands at this time but could not remember what those commands were. [**Exh. D** at 7, 130:4-9.]

52. McGrath received "several seconds" of an opportunity for compliance, but McGrath still did not obey Defendant's commands. [**Exh. A** at 22-23, 56:24-57:3.]

53. Instead, McGrath reached to the right of his waist with his right hand, which struck Defendant as a "big red flag" due to his noncompliance, "do[ing] the exact opposite" of what Defendant wanted, and Defendant's concern for the presence of weapons like firearms or knives. [**Exh. A** at 23, 57:4-12; *id.* at 32, 89:4-18; **Exh. C** at 00:26.]

54. McGrath agreed Defendant did not know why McGrath was reaching for his backpack. [**Exh. D** at 8, 131:5-22.]

55. The backpack posed an "overt threat" to Defendant's safety because Defendant did not know what was contained within that backpack, nor did Defendant know what was contained on McGrath, in McGrath's pants pockets, in McGrath's jacket pockets, "or anything like that." [**Exh. A** at 33, 92:1-13.]

56. Defendant could not see what portions of the backpack were open or closed, and it was "a black backpack in a black setting with nothing but car headlights splashing you in the face." [**Exh. A** at 35-36, 107:13-108:13; *see* **Exh. C** at 00:25-00:28.]

57. Defendant thought "there was a real risk to [McGrath] having a weapon either in the backpack or on him." [**Exh. A** at 37, 109:20-25.]

58. Defendant did not kick McGrath's backpack away because: (a) he did not know how heavy it was; (b) he did not want to destabilize his footing; (c) he was concerned about McGrath grabbing his other foot while he was off balance; (d) he believed McGrath

would return to the backpack if he tried to kick it; (e) it was outside his training; and (f) he was concentrating on McGrath and McGrath's behavior. [**Exh. A** at 38-40, 110:17-112:3.]

59. Defendant believed going hands-on was insufficient. [**Exh. A** at 38, 110:1-7.]

60. Defendant also thought McGrath could have lunged at or attacked him while McGrath was on the ground at this point. [**Exh. A** at 34, 104:1-13.]

61. In response to McGrath's "ongoing resistance and possible aggression," Defendant delivered a single strike with his baton to McGrath's lower right leg. [**Exh. A** at 25, 57:12-15; **Exh. C** at 00:28.]

62. Defendant did not intend his baton to create long-lasting injury to McGrath, but only to respond to his resistance and gain his cooperation. [**Exh. A** at 41, 116:18-25.]

63. Defendant did not see McGrath lose consciousness. [**Exh. A** at 27, 59:11-12.]

64. McGrath responded by stating, "Fuck you." [**Exh. A** at 25, 57:16-18.]

65. Defendant gave McGrath, who did not appear to feel the baton strike, yet another opportunity to comply by reiterating his commands to McGrath that he must get on his stomach on the ground and he was under arrest. [**Exh. A** at 25-26, 57:24-58:2.]

66. Officer Jake Schneider (controlling the K-9) directed McGrath, "Comply with our commands or the dog will bite you, do you understand that?" [**Exh. C** at 00:32-00:35.]

67. In response, McGrath again grabbed his backpack, which appeared "to be a more overt attempt to either get at something out of the backpack or to get away." [**Exh. A** at 26, 58:8-13; **Exh. C** at 00:36-00:38.]

68. Defendant saw other officers were on scene, so he felt it was proper to go hands-on, which he did with another officer by securing McGrath's arms and pulling him onto his stomach to get him into custody. [**Exh. A** at 26, 58:6-17; **Exh. C** at 00:38-00:42.]

69. As McGrath was being taken into custody on the ground, he uttered, "I'm not afraid of dogs!" [**Exh. C** at 00:40-00:41.]

70. Defendant stated to McGrath, "It could have gone a lot better for you, Dakota, geez man," and McGrath replied, "What the fuck are you -- you guys haven't done shit for me, what the fuck are you talking about?" [**Exh. A** at 26, 58:18-23; **Exh. C**, 01:02-01:08.]

71. While Defendant tried to apply handcuffs, McGrath clenched his fists, but other officers helped secure him in the cuffs, and Defendant requested a medical response and a supervisor. [**Exh. A** at 26-27, 58:23-59:4; **Exh. C** at 01:13-01:15, 02:12-02:15.]

72. McGrath appeared to notice he was bleeding through his pant leg by stating, "Oh shit, really?", only after Defendant remarked generally about the state of McGrath's right leg. [**Exh. A** at 30, 62:2-7; **Exh. C** at 02:50-03:02; **Exh. D** at 9, 134:7-10.]

73. During and after the time period in which Defendant and others finally brought McGrath into custody, Defendant recalled noticing a "very strong" and "heavy" odor of "some type of booze" surrounding McGrath at this time. [**Exh. A** at 28, 60:1-17.]

74. A blood draw of McGrath not long after his encounter with Defendant revealed he had a blood ethanol level of 0.265, or more than four times the legal limit. [Medical Records, submitted as Level 1 Restricted under D.C.COLO.LCivR 7.2 as **Exh. E**, at 5.]

III. STANDARD OF REVIEW

Summary judgment is proper where no genuine dispute on any material fact exists and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). A motion for summary judgment assesses whether trial is needed. *See* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 323 (1986). Initially, the movant must show the absence of a genuine issue of material fact. *See id.* This means a defendant moving for summary judgment on an

affirmative defense must show no disputed material fact exists regarding that affirmative defense. ***Helm v. Kansas***, 656 F.3d 1277, 1284 (10th Cir. 2011). After the movant meets its burden, the nonmovant must do more than show metaphysical doubt. *See* ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475 U.S. 574, 586 (1986). The nonmovant, rather, must set forth specific facts showing a genuine issue for trial. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 250 (1986). Hence, if a plaintiff cannot show with specificity a disputed material fact exists, the affirmative defense bars the plaintiff's claims and the defendant enjoys summary judgment. ***Helm***, 656 F.3d at 1284.

In deciding whether to grant a motion for summary judgment, generally a court views the facts in the light most favorable to the nonmovant. *See* ***Simmat v. United States Bureau of Prisons***, 413 F.3d 1225, 1229 (10th Cir. 2005). But just because an inference on summary judgment is possible does not make it reasonable:

> If the defendant ... moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Anderson, 477 U.S. at 252 (emphasis added).

Permissible inferences must be within the range of reasonable probability, and the court must withhold a case from a jury when a necessary inference is so tenuous it rests upon speculation and conjecture. ***Dillon v. Fibreboard Corp.***, 919 F.2d 1488, 1490 (10th Cir. 1990). It is "far too tenuous" for a plaintiff to ask a jury "to make an inference based on an inference based on an inference." ***Bleil v. Williams Prod. RMT Co. LLC***, 911 F. Supp. 2d 1141, 1163 (D. Colo. 2012). And mere allegations or conclusions from the

plaintiff are insufficient to create factual issues on summary judgment. *See* ***SEC v. Smart***, 678 F.3d 850, 858 (10th Cir. 2012). Further, an alleged factual issue is "material" only if it might affect the outcome of the suit under the governing law, and "genuine" only if it would be sufficient to show a reasonable jury could return a verdict for the plaintiff. ***Bennett v. Windstream Comm'cns, Inc.***, 792 F.3d 1261, 1265-66 (10th Cir. 2015).

Notably, § 1983 "creates no rights," "is not a carte blanche statute authorizing recovery for negligence or other common law torts standing by themselves," and "is not a general tool to discipline" the police. ***Quezada v. Cnty. of Bernallilo***, 944 F.2d 710, 714 (10th Cir. 1991). Where the individual defendant in a § 1983 action asserts qualified immunity on summary judgment, the plaintiff has the burden to prove (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established. *See* ***Thomson v. Salt Lake Cnty.***, 584 F.3d 1304, 1312 (10th Cir. 2011).

Moreover, and especially in the context of § 1983 summary judgments, the facts are viewed in the light most favorable to the nonmovant "only if there is a 'genuine' dispute as to those facts." ***Scott***, 550 U.S. at 380. A plaintiff's version of events must have record support. ***Thomson***, 584 F.3d at 1312. Hence, when opposing parties tell two different stories, one of which video evidence in the record blatantly contradicts so no reasonable jury could believe it, a court should not adopt that version of the facts in ruling on a motion for summary judgment. ***Scott***, 550 U.S. at 380 ("so utterly discredited by the record that no reasonable jury could have believed [it]"). Indeed, the Court "cannot ignore clear, contrary video evidence in the record depicting the events as they occurred." ***Carabajal v. City of Cheyenne***, 847 F.3d 1203, 1207 (10th Cir. 2017) And where video evidence contradicts the factual basis of a particular argument, that argument cannot be credited.

Farrell v. Montoya, 878 F.3d 933, 938 (10th Cir. 2017). A plaintiff's allegations of fact must needs be "sufficiently grounded in the record such that they may permissibly comprise the universe of facts that will serve as the foundation for answering the legal question before the court." ***Thomson***, 584 F.3d at 1316 (Holmes, J., concurring).

IV. ARGUMENT

A. Tenth Circuit Law on Qualified Immunity Generally

Qualified immunity is not only a defense to liability—but also an immunity from suit. ***Mitchell v. Forsyth***, 472 U.S. 511, 526 (1985). Qualified immunity permits resolution of claims against public officials before subjecting them "'either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time." *Id.* at 526 (quoting ***Harlow v. Fitzgerald***, 457 U.S. 800, 817-18 (1982)). The "central purpose" of qualified immunity is to protect officials "from undue interference with their duties and from potentially disabling threats of liability." ***Elder v. Holloway***, 510 U.S. 510, 514 (1994). Qualified immunity is both an entitlement not to stand trial, *see* ***Workman v. Jordan***, 958 F.2d 332, 336 (10th Cir. 1992), and a shield against burdens associated with trial, *see* ***Pueblo Neighborhood Health Ctrs., Inc. v. Losavio***, 847 F.2d 642, 645 (10th Cir. 1988). Because Defendant asserts qualified immunity, McGrath bears a "heavy" two-part burden. ***Mick v. Brewer***, 76 F.3d 1127, 1134 (10th Cir. 1996). First, Defendant's conduct must have violated a constitutional right, with contours sufficient for a reasonable officer in Defendant's position to have understood his conduct to be unlawful. ***Saucier v. Katz***, 533 U.S. 194, 201-02 (2001). Second, even if a constitutional right was violated, the law on the alleged violation must have been "clearly established" such that Defendant would

not be entitled to immunity. *See* ***Kerns v. Bader***, 663 F.3d 1173, 1180 (10th Cir. 2011) ("every reasonable official" must understand he violated the law (quoting ***Ashcroft v. al-Kidd***, 131 S. Ct. 2074, 2081 (2011))). The Court considers these prongs in any order. ***Pearson v. Callahan***, 555 U.S. 223, 232, 236 (2009).

For the law to be "clearly established" in the Tenth Circuit, generally there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must find the law to be as McGrath maintains. ***Medina v. City & Cnty. of Denver***, 960 F.2d 1493, 1498 (10th Cir. 1992). And there is an overarching touchstone of reasonableness for the belief of officers in Defendant's position as to the lawfulness of his alleged conduct: "The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." ***Pearson***, 555 U.S. at 244. Qualified immunity gives officers like Defendant breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law. ***Ashcroft***, 131 S. Ct. at 2081. Such immunity shields officers "who act in good faith, on the basis of objectively reasonable understandings of the law at the time of their actions, from personal liability on account of later-announced, evolving constitutional norms." ***Pierce***, 359 F.3d at 1299.

In assessing whether the law in a given case was clearly established, an officer cannot be said to violate a clearly established right unless the right's contours were sufficiently definite that any reasonable officer in his shoes would have known he was violating it. ***Plumhoff v. Rickard***, 134 S.Ct. 2012, 2023 (2014). In this regard, a crucial point of the qualified immunity calculus the United States Supreme Court took pains to emphasize recently is that "the law is not defined at a high level of generality," because

"doing so avoids the crucial question whether the official acted reasonably in the particular circumstances" he faced. *Id.* The Supreme Court "repeatedly" tells courts "not to define clearly established law at a high level of generality." ***City & Cnty. of San Francisco v. Sheehan,*** 135 S.Ct. 1765, 1775-76 (2015). Clearly established law cannot be defined at a high level of generality. *See* ***White v. Pauly***, 137 S.Ct. 548, 551 (2017) (per curiam).

Further, "existing precedent" must have placed the statutory or constitutional question the public official faced "beyond debate." ***Mullenix v. Luna***, 136 S.Ct. 305, 308 (2015) (per curiam). Specificity is "especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." ***Kisela v. Hughes***, 138 S.Ct. 1148, 1152 (2018) (per curiam) (quoting ***Mullenix***, 136 S.Ct. at 308). "[A] hint as to what the law may be" is no substitute. ***Carabajal***, 847 F.3d at 1213. Also, arguments and allegations are not treated as factual when qualified immunity is assessed. *See* ***Lawmaster v. Ward***, 125 F.3d 1341, 1349 (10th Cir. 1997). To this end, speculation and conjecture an officer maybe overreacted "is insufficient to show a constitutional violation." ***Estate of Larsen v. Murr***, 511 F.3d 1255, 1263-64 (10th Cir. 2008). And an "inference" or "implication" from case law "cannot put the unlawfulness of certain conduct beyond debate." ***Carabajal***, 847 F.3d at 1210.

B. Relevant Law From United States Supreme Court, Tenth Circuit Court of Appeals, and Other Circuit Courts of Appeals on Uses of Force

Generally: "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion of the individual's Fourth Amendment interests' against the

countervailing governmental interests at stake." ***Graham v. Connor***, 490 U.S. 386, 396 (1989) (quoting ***Tennessee v. Garner***, 471 U.S. 1, 8 (1985)). However, a police officer's right to make either an arrest or an investigatory stop "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* The Fourth Amendment "recognizes" this right. ***Hinton v. City of Elwood***, 997 F.2d 774, 781 (10th Cir. 1993). The calculus of reasonableness must allow for the fact that "police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." ***Graham***, 490 U.S. at 396-97 (citation and internal quote marks omitted). An officer facing a noncompliant suspect need not "stand down and hope for the best." ***Carabajal***, 847 F.3d at 1210. And a reasonable officer need not await the "glint of steel" before taking self-protective action. ***Estate of Larsen***, 511 F.3d at 1260. Further, in an excessive force inquiry, the Court asks whether the force used "would have been reasonably necessary if the arrest or the detention were warranted." ***Cortez v. McCauley***, 478 F.3d 1108, 1126 (10th Cir. 2007). The totality of the circumstances matter, and the reasonableness standard does not require officers to use alternative less intrusive means of effecting an arrest. ***Waters v. Coleman***, 632 F. App'x 431, 437 (10th Cir. 2015).

In addition to assessing the totality of the circumstances, the court may employ three factors in the excessive force inquiry: the severity of any crime in issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether the suspect is resisting arrest or trying to evade arrest by flight. ***Fisher v. City of Las Cruces***, 584 F.3d 888, 894 (10th Cir. 2009) (citing ***Graham***, 490 U.S. at 396). This also includes whether a suspect is merely resisting seizure or attempting to evade seizure by flight.

Cavanaugh v. Woods Cross City, 718 F.3d 1244, 1251-52 (10th Cir. 2013). A suspect's refusal to comply with instructions during an investigatory stop may be considered in assessing whether physical force is needed to effect compliance. *See* ***Mecham v. Frazier***, 500 F.3d 1200, 1205 (10th Cir. 2007). Disobeying the direct orders of an officer has been held to be "active[] resist[ance]." ***Aldaba v. Pickens***, 777 F.3d 1148, 1158 (10th Cir. 2015). Further, "any effort made by the officer to temper or limit the amount of force" is relevant. ***Kingsley v. Hendrickson***, 135 S. Ct. 2466, 2473 (2015) (relying on ***Graham***).

Also, a given aspect of an excessive force claim is not cognizable without evidence of physical injury regarding that aspect of the claim. ***Christiansen v. City of Tulsa***, 332 F.3d 1270, 1279 (10th Cir. 2003). Moreover, mere negligence of law enforcement is not actionable under § 1983. *See* ***Daniels v. Williams***, 474 U.S. 327, 331-33 (1986). In the end, the court still must decide whether an officer's actions were "objectively reasonable" given the facts and circumstances he confronted, regardless of underlying intent or motivation, and a given use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." ***Graham***, 490 U.S. at 396. Objective circumstances that "would not have been lost on a reasonable officer" at the scene can be credited too. *See* ***George v. Newman***, ___ F. App'x ____, 2018 U.S. App. LEXIS 5553, at *15 (10th Cir. Mar. 5, 2018).

Use of Force in Course of Investigative Stop: An investigative stop, in which an officer can "stop and briefly detain a person for investigative purposes," ***United States v. Sokolow***, 490 U.S. 1, 7 (1989), was first authorized by ***Terry v. Ohio***, 392 U.S. 1 (1968). A detention changes from a ***Terry*** stop to an arrest if it continues for an excessive length of time or "closely resembles a traditional arrest." ***Morris v. Noe***, 672 F.3d 1185, 1192

(10th Cir. 2012). During a ***Terry*** stop, the use of firearms, handcuffs, and other forceful techniques "does not necessarily transform a ***Terry*** detention into a full custodial arrest--for which probable cause is required--when the circumstances reasonably warrant such measures." ***United States v. Melendez-Garcia***, 28 F.3d 1046, 1052 (10th Cir. 1994). To this end, officers can restrain a suspect to preserve the status quo during a ***Terry*** stop. *See* ***Gallegos v. City of Colo. Springs***, 114 F.3d 1024, 1030-31 (10th Cir. 1997). This includes the use of a takedown maneuver where officer safety concerns exist. *See id.*

For purposes of identifying when an arrest may have occurred, an officer "seizes" a suspect when, through physical force or a show of authority, terminates or restrains the suspect's freedom of movement "through means intentionally applied." ***Brendlin v. California***, 551 U.S. 249, 254 (2007). However, to comply with an order to stop--and thus to become seized--a suspect must do more than halt temporarily; he must submit to police authority, for there is no seizure without actual submission. ***Farrell***, 878 F.3d at 938 (quoting ***United States v. Salazar***, 609 F.3d 1059, 1066 (10th Cir. 2010)).

Use of Baton: There does not appear to be any published case originating from the Tenth Circuit assessing whether an officer's use of a baton upon the person of a suspect was or was not constitutionally reasonable. In an unpublished case, the Tenth Circuit did hold it is reasonable from an officer's vantage point at the scene "to use some degree of force" to prevent the plaintiff from accessing weapons. ***Winship v. Lumpkin***, 1999 U.S. App. LEXIS 425, at *6 (10th Cir. Jan. 14, 1999).[3] Other circuits recognize a

[3] While ***Buck v. City of Albuquerque***, 549 F.3d 1269, 1289 (10th Cir. 2008), tangentially involved the use of a baton upon the person of an arrestee to knock her to the ground, a careful reading of the opinion demonstrates the Tenth Circuit focused solely on the unreasonableness of repeated shooting of pepper ball rounds at the arrestee.

baton strike is "intended to induce compliance by causing sudden, debilitating, localized pain." ***Glenn v. Washington Cnty.***, 673 F.3d 864, 871 (9th Cir. 2011). It is in light of this purpose that circuit cases involving baton strikes must be viewed.

The Fifth Circuit held it was not constitutionally unreasonable for a police officer who did not know the offense for which an arrest was being made to use a hickory wood baton "repeatedly" (as many as ten times) upon the person of an arrestee who failed to comply with verbal directives and actively resisted all attempts to subdue and detain him. ***Carroll v. Ellington***, 800 F.3d 154, 176 (5th Cir. 2015); *see id.* ("We find it significant that only nonlethal force was used throughout this portion of the encounter.").

The Sixth Circuit held it was not constitutionally unreasonable for a police officer to tackle a noncompliant arrestee who moved his hands towards his jacket pockets, which the officer interpreted as reaching for a gun, and whom the officer suspected was "capable of violence." ***Zucker v. City of Farmington Hills***, 643 F. App'x 555, 568-69 (6th Cir. 2016). Nor was it constitutionally unreasonable for officers to knee and kick an arrestee in the course of handcuffing him, even though they allegedly broke the arrestee's rib and fractured his hip. ***Goodrich v. Everett***, 193 F. App'x 551, 556-57 (6th Cir. 2006). Nor did the Sixth Circuit consider it unreasonable for officers to direct multiple strikes and jabs to the person of a suspect for a period of 59 seconds with their batons where all jabs and strikes were "to non-critical areas of [his] body" and where the suspect repeatedly refused to comply with officers' orders. ***Jones v. City of Cincinnati***, 736 F.3d 688, 695 (6th Cir. 2012). And the Sixth Circuit also considered two strikes of a baton, in combination with a physical takedown and a taser, to be "brief" and "used only to bring a non-compliant [arrestee] under control," and thus objectively reasonable. ***Williams v. Ingham***, 373 F.

App'x 542, 544, 548 (6th Cir. 2010); *see* ***Frodge v. City of Newport***, 501 F. App'x 519, 531 (6th Cir. 2012). The Sixth Circuit even held multiple baton blows along with pepper spray and thirty-seven Taser activations was not objectively unreasonable. ***Williams v. Sandel***, 433 F. App'x 353, 362-63 (6th Cir. 2011). In contrast, when a suspect was subdued and handcuffed and showed no sign of noncompliance, multiple nightstick blows were unreasonable. ***McDowell v. Rogers***, 863 F.2d 1302, 1307 (6th Cir. 1988).

The Seventh Circuit held it was not constitutionally unreasonable for several police officers to use four baton strikes and two or three sprays of mace on an arrestee, and keep the arrestee in a prone position, when the arrestee did not comply with commands to step out of his car. ***Padula v. Leimbach***, 656 F.3d 595, 597-98, 603-04 (7th Cir. 2011). "The Officers faced a fluid situation; as the struggle with [arrestee] escalated, the Officers appropriately increased their force in order to keep the situation under control." *Id.* at 604.

The Eighth Circuit held it was not constitutionally unreasonable for several police officers to use "a number of" baton strikes on and spray mace in the face of an arrestee who was noncompliant, especially where the officers submitted "overwhelming" evidence to refute Plaintiff's version of events, consisting only of an ER physician's medical assessment after the arrest, the officers' deposition testimony, and a contemporaneous incident report. ***Reed v. City of St. Charles***, 561 F.3d 788 (8th Cir. 2009). The Eighth Circuit also recently observed "the use of a standard defensive tactic" is reasonable as a matter of law. ***Cravener v. Shuster***, 885 F.3d 1135, 1139 (8th Cir. 2018).

And even the Ninth Circuit upheld the use of pain compliance techniques, in a situation where such techniques, when used on demonstrators who were passively resisting arrest, caused multiple injuries including bruises, a pinched nerve, and one

broken wrist. *See* ***Forrester v. City of San Diego***, 25 F.3d 804, 807-08 (9th Cir. 1994); *see also* ***Felarca v. Birgeneau***, ___ F.3d ____, ____, 2018 U.S. App. LEXIS 14335, at *24-28 (9th Cir. May 31, 2018) (not clearly established as of Nov. 2011, that using batons for jabbing in abdomen, for striking to right forearm causing bleeding and swelling, and for jabbing in ribcage and chest "perhaps ten times" was unreasonable); ***Ruvalcaba v. City of Los Angeles***, 64 F.3d 1323, 1325-26 (9th Cir. 1995) (plaintiff raised no challenge to reasonableness of use of force where officers, effecting a traffic stop upon a vehicle containing the plaintiff which failed to stop at a stop sign, used their batons to subdue the plaintiff and one of the officers was familiar with plaintiff from prior contacts and, due to this familiarity, anticipated the possibility of danger in stopping the vehicle).

Ultimately, if the officer's actions fall into the "hazy border between excessive and acceptable force," it cannot be said the law existing before he acted "clearly established" his conduct violated the Fourth Amendment. ***Saucier***, 533 U.S. at 206.

C. The Undisputed Facts Show McGrath's Claim Is Barred by Applicable Law

No Violation of Constitutional Rights: Given the totality of the circumstances Defendant confronted, Defendant did not violate McGrath's constitutional rights.

First, as to the initial baton strike to McGrath's left shoulder, application of the non-exclusive ***Graham*** factors shows all such factors weigh in favor of Defendant and, thus, his use of force was constitutionally reasonable. (1) The severity of the crime weighs in favor of Defendant, because McGrath was suspected of having assaulted his brother, a crime of violence. [SUMF ¶¶ 4-7.] Notably, the first ***Graham*** factor does not require the presence of probable cause before it can weigh in favor of the officer. *See* ***Rojas v. Anderson***, 2012 U.S. Dist. LEXIS 81602, at *16 (D. Colo. June 13, 2012) (first ***Graham***

factor weighed in defendant officer's favor where plaintiff was merely suspected of having committed an assault). (2) Whether McGrath posed an immediate threat to the safety of Defendant or others is at least neutral if not weighing slightly in favor of Defendant. This is so because while McGrath neither walked towards Defendant nor brandished a weapon at Defendant, Defendant specifically knew McGrath to own at least one assault-weapon firearm and also saw McGrath frequently reaching into his coat pockets, which concerned Defendant that McGrath might use a concealed weapon against him. [SUMF ¶¶ 12-13, 28, 53-57]; *e.g.*, ***Zucker***, 643 F. App'x at 568-69. (3) McGrath was actively trying to evade detention by continuously moving away from Defendant, never heeding any command of Defendant despite Defendant's repeated shouting of commands at him, shaking his head from side to side at Defendant, stating, "Do what you gotta do man," and never otherwise responding either physically or verbally to Defendant's commands or attempts to get his attention. [SUMF ¶¶ 23-26, 30, 34, 36-37, 40, 47]; *see* ***Aldaba***, 777 F.3d at 1158; ***Pearce v. Lucero***, 2012 U.S. Dist. LEXIS 77541, at *12-13 (D. Colo. June 5, 2012). Under the rapidly evolving circumstances of this case, there is no basis to conclude Defendant acted unreasonably in quickly and decisively taking down McGrath, a suspected assailant.[4]

An analogous case reveals the high degree of Defendant's restraint here. In ***Kellough v. Bertrand***, 22 F. Supp. 2d 602 (S.D. Tex. 2002), an officer used a leg sweep technique to knock to the ground the plaintiff, who was suspected of having committed a robbery, after the plaintiff refused to heed officers' commands to go to the ground. *Id.* at

[4] That Defendant later developed probable cause to arrest McGrath for obstruction of justice or resisting arrest is merely tangential to the first ***Graham*** factor, because the reported crime of assault was the sole reason for Defendant's response. [SUMF ¶¶ 4-7.]

606, 608. The district court concluded the plaintiff's lack of immediate compliance "would probably justify a reasonable officer's decision, in light of the circumstances, to employ some force to take him to the ground." *Id.* at 608. Such is the case here, as Defendant's concern for officer safety (his own) justified the use of his takedown maneuver here to preserve the status quo and prevent McGrath from entering the Gustav Swanson Natural Area. *See* ***Gallegos***, 114 F.3d at 1030-31; [SUMF ¶¶ 7-47].

To any degree McGrath alleges more than one officer was shouting commands at him, or he was wearing earbuds, or there was no change in lighting prior to Defendant's takedown, or that Defendant's baton was aimed at his head, the video evidence materially and blatantly contradicts this account and, hence, McGrath's version of events cannot be credited as factual on summary judgment. *See* ***Scott***, 550 U.S. at 380; ***Thomson***, 584 F.3d at 1312, 1316. Also, Defendant reasonably could have misconstrued McGrath's complete lack of responsiveness to him, and moving in the opposite direction despite Defendant's commands to stop, as resistance requiring use of force after a warning. *See* ***Aldaba***, 777 F.3d at 1158. This is important because McGrath's subjective awareness is not relevant either to the perception of a reasonable officer in Defendant's position or to the necessity to use force in effecting McGrath's arrest. *See* ***Strepka v. Jonsgaard***, 2011 U.S. Dist. LEXIS 77516, at *32-33 (D. Colo. July 18, 2011); *adopted*, 2011 U.S. Dist. LEXIS 132499 (Nov. 16, 2011). And even if McGrath's subjective awareness was relevant, it is unreliable, because McGrath was so intoxicated he was found to have a blood alcohol level of .265 not long after his encounter with Defendant. [SUMF ¶ 74.]

Second, as to the single baton strike to McGrath's right tibia, application of the ***Graham*** factors demonstrates this use of force was constitutionally reasonable as well.

(1) As already established, the severity of the crime at issue weighs heavily in favor of Defendant. *See* [SUMF ¶¶ 4-7]; ***Rojas***, 2012 U.S. Dist. LEXIS 81602, at *16. And even if Defendant only had probable cause to believe Plaintiff committed obstruction of justice or resisting arrest, the fact remains, and need not have been ignored by Defendant in any sense, that McGrath still was a suspect in an open assault investigation. *See* ***George***, 2018 U.S. App. LEXIS 5553, at *15. (2) While the immediacy of McGrath's threat to the safety of Defendant or others was at least neutral before the takedown, this factor now weighed fully in favor of Defendant, because McGrath continued to ignore Defendant's commands to go prone on his stomach and even reached toward his backpack behind his waist and in an area where Defendant could not see what McGrath was doing with his hands. [SUMF ¶¶ 50-61]; *see* ***Hargraves v. D.C.***, 134 F. Supp. 3d 68, 86-88 (D.D.C. 2015) (not unreasonable to use baton on right leg of arrestee who was noncompliant with commands) (collecting cases). (3) McGrath still was attempting to evade detention or arrest via a sustained lack of immediate compliance with Defendant's explicit commands. [SUMF ¶¶ 50-61.] *See* ***Pearce***, 2012 U.S. Dist. LEXIS 77541, at *12-13. It was reasonable for Defendant to use the degree of force necessary to put McGrath in a position where McGrath could not as easily access Defendant (on the ground) while at the same time minimizing the amount of time Defendant was in close proximity to McGrath. *See* ***Sisneros v. Taylor***, 2011 U.S. Dist. LEXIS 26045, at *22 (D. Colo. Mar. 10, 2011).

It is not as though McGrath (who notably never advanced a claim of alleged illegal arrest) was a fully compliant arrestee. Also, Defendant studiously avoided using the baton to strike McGrath on areas of his body likely to cause grievous bodily injury or death to McGrath, such as the groin, femur, kidneys, abdomen, heart, throat, or head. Further,

after Defendant's baton strike that took McGrath to the ground, McGrath still did not unconditionally surrender. [SUMF ¶¶ 50-61.] In addition, Defendant did not keep using his baton while McGrath finally was subdued and fully complying with Defendant's orders. And Defendant testified as to why going hands-on with McGrath prior to the baton strike to McGrath's leg would be insufficient, strengthening his entitlement to qualified immunity. [SUMF ¶ 59]; *see* ***Thompson v. City of Kansas City***, 1996 U.S. App. LEXIS 4469, at *15 (10th Cir. Mar. 13, 1996). Importantly, once Defendant's cover officer was within TRUE hands-on range, Defendant deescalated and went hands-on with his cover officer. [SUMF ¶¶ 67-68]; *cf.* ***Hinton v. City of Elwood***, 997 F.2d 774, 777-81 (10th Cir. 1993) (reasonable because force stopped once secured). To any degree McGrath alleges Defendant struck his right fibula, the video materially and blatantly contradicts this version of events as well and, hence, this allegation of McGrath also cannot be credited as factual on summary judgment. *See* ***Scott***, 550 U.S. at 380; ***Thomson***, 584 F.3d at 1312, 1316.

No Clearly Established Law: Even if the force used is to be found constitutionally excessive, which Defendant does not concede, the law was not clearly established in the Tenth Circuit that Defendant's acts or failures to act were unconstitutional "beyond debate." *See* ***Kisela***, 138 S.Ct. at 1152. Not only was it clearly established in the Tenth Circuit that using a takedown maneuver to effect an investigatory detention was constitutionally allowed, *see* ***Gallegos***, 114 F.3d at 1030-31, and that "some degree of force" is permitted to prevent a suspect from accessing weapons, *see* ***Winship***, 1999 U.S. App. LEXIS 425, at *6, but also the great weight of authority from other circuits allow baton use in the manner employed by Defendant in circumstances comparable to those Defendant faced when confronted with McGrath's sustained noncompliance. [*See* pp. 18-

21 *supra*]; *see also* ***Williams v. Schismenos***, 258 F. Supp. 3d 842, 854-58 (N.D. Ohio 2017) (baton use reasonable); ***Hargraves***, 134 F. Supp. 3d at 86-88; ***Rachel v. City of Mobile***, 112 F. Supp. 3d 1263, 1283-84 (S.D. Ala. 2015); *cf.* ***Wertish v. Krueger***, 433 F.3d 1062, 1067 (8th Cir. 2000) (with passive resistance, more force may be needed).

Casey v. City of Federal Heights, 509 F.3d 1278 (10th Cir. 2007), is not to the contrary. In ***Casey***, the Tenth Circuit held it was unreasonable for one officer to tackle a plaintiff, and for another officer to Taser him, where the officer was aware he committed at most a "harmless" misdemeanor, he did not pose an immediate threat to the officers or others, he was given no warning about the use of force, and he was neither resisting arrest nor attempting to flee. *Id.* at 1281-82, 1285-86. In contrast: Defendant intended to detain McGrath for an assault involving a headbutt that could have been a felony [SUMF ¶¶ 4-7]; Defendant had concerns for his own safety not only due to his prior contacts with and knowledge of McGrath, but also due to the "code zero" advisement Defendant specifically heard [*id.*, ¶¶ 7-14]; Defendant gave multiple commands to McGrath that went unacknowledged and unheeded and specifically recalled warning McGrath that force might be used against him if he did not comply [*id.*, ¶¶ 20-24, 30, 34-35]; and McGrath continuously evaded detention prior to Defendant's takedown of McGrath [*id.*, ¶¶ 23-26, 30, 34, 36-37, 40, 47]. Further, the Tenth Circuit in ***Casey*** held the Fourth Amendment "permits increased force" when a subject is attempting to evade capture. *Id.* at 1282.

Morris v. Noe, 672 F.3d 1185 (10th Cir. 2012), is not to the contrary either. In ***Morris***, the Tenth Circuit held it was unreasonable for an officer to take down or "tackle" a plaintiff where the officer had reason to believe plaintiff was at most a misdemeanant, plaintiff did not pose a threat to the officer or others, plaintiff was given no warning about

the use of force, and plaintiff was neither resisting arrest nor attempting to flee. *Id.* at 1195-96, 1198. In contrast: Defendant was intending to detain McGrath for an assault involving a headbutt that could have been a felony [SUMF ¶¶ 4-7]; Defendant had concerns for his own safety not only due to his prior contacts with and knowledge of McGrath, but also due to the "code zero" advisement Defendant specifically heard [*id.*, ¶¶ 7-14]; Defendant gave multiple commands to McGrath that went unacknowledged and unheeded and specifically recalled warning McGrath that force might be used against him if he did not comply [*id.*, ¶¶ 20-24, 30, 34-35]; and McGrath continuously evaded detention prior to Defendant's takedown of McGrath [*id.*, ¶¶ 23-26, 30, 34, 36-37, 40, 47]. Moreover, the Tenth Circuit in ***Morris*** recognized, relatedly, that "[a] forceful takedown or 'throw down' may very well be appropriate in arrests or detentions for assault." 672 F.3d at 1195.

Ultimately, because none of the factors in ***Casey*** and ***Morris*** were present here, and because the weight of authority from the Tenth Circuit and other circuits indicates the course of Defendant's conduct was allowed by the Fourth Amendment, it cannot be said the "clearly established" weight of authority finds the law to be as McGrath maintains, and the use of force at best fell within that "hazy border" within which Defendant is entitled to qualified immunity. *See* ***Waters v. Coleman***, 632 F. App'x 431 (10th Cir. 2015) (reversing determination that it was clearly established the force used was unreasonable).

D. McGrath Cannot Assert Entitlement to Exemplary Damages at Trial

In addition, McGrath is not entitled to exemplary damages against Defendant, for want of the requisite intent. A § 1983 plaintiff claiming exemplary damages must prove the defendant's conduct either "is shown to be motivated by evil motive or intent" or "involves reckless or callous indifference to" his federal constitutional rights. ***Smith v.***

Wade, 461 U.S. 30, 56 (1983). Barring pleading and proof that a defendant "either acted with malice or knew [his] actions were unconstitutional," a § 1983 plaintiff cannot pursue a claim for exemplary damages. *See* ***Jolivet v. Deland***, 966 F.2d 573, 577 (10th Cir. 1992). Even if Defendant's actions were objectively unconstitutional as McGrath alleges, that fact "is not considered" respecting whether exemplary damages can be awarded. *Id.* (no exemplary damages against a § 1983 defendant who "stopped his actions after he was informed they were unconstitutional"). In the course of discovery, McGrath adduced no evidence that Defendant objectively acted with malice, with evil motive, willfully, wantonly, or with reckless indifference to McGrath's civil rights, or that he objectively knew his actions were unconstitutional or contrary to clearly established law — dooming a request for exemplary damages. *See* ***Smith***, 461 U.S. at 56; ***Jolivet***, 966 F.2d at 577.

V. CONCLUSION

In conclusion, for the foregoing reasons, Defendant Fort Collins Police Services Officer Nick Rogers respectfully requests that this Court enter an Order: granting Defendant's Motion for Summary Judgment; dismissing Plaintiff's Complaint against him with prejudice; and awarding all other and further relief deemed just and appropriate.

Respectfully submitted this 6th day of June, 2018.

s/ Matthew J. Hegarty

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that, on this 6th day of June, 2018, I filed the foregoing **MOTION FOR SUMMARY JUDGMENT FROM DEFENDANT** electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following email address:

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