IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00901-WJM-NRN

MICHAELLA LYNN SURAT,

Plaintiff,

v.

RANDALL KLAMSER in his individual capacity, and
CITY OF FORT COLLINS, a municipality,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS [ECF No. 23]

Defendants RANDALL KLAMSER, in his individual capacity, and CITY OF FORT COLLINS, a municipality, by and through their attorneys, Hall & Evans, L.L.C., submit the following Reply in Support of Motion to Dismiss [ECF No. 23], as follows:

I. Plaintiff's Excessive Force Claim is Barred Based Upon Her Underlying Convictions

The basic premise of Supreme Court's holding in ***Heck*** is to "avoid[] parallel litigation" and "preclude[] the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." ***Heck v. Humphrey***, 512 U.S. 483 (1994). Based on the allegations contained in her complaint – that the officer's use of force was contemporaneous with the arrest and all occurred in thirty-two seconds – this Court cannot rule in Plaintiff's favor without indirectly invalidating her criminal convictions for resisting arrest and obstruction of a peace officer.

Plaintiff argues she is not attacking the lawfulness of her convictions, and Officer Klamser's alleged use of force against her is separable from the arrest which underlies her convictions. This is inaccurate. A civil judgment in Plaintiff's favor would create an inconsistency with the underlying criminal conviction, and the jury's determination Plaintiff's claim of self-defense was invalid for the crimes she was ultimately convicted on. This is precisely the inconsistency ***Heck*** dictates must be avoided. Plaintiff seeks to avoid this result with the unavailing argument that the "defense of person" jury instruction (which informed the jury that the Plaintiff could not be found guilty if she was defending herself from unreasonable or excessive force) is inapplicable to this matter, as it addressed *her* use of physical force and not the use of force by Officer Klamser. [ECF No. 23-1]. This argument misses the point. Although the language of the jury instruction was not explicitly directed toward Officer Klamser's actions, the jury nonetheless considered the behavior of both Plaintiff and Klamser. The instruction informed jurors Plaintiff would have been entitled to defend herself from "**unlawful physical force"** by the arresting officer. Thus, in convicting Plaintiff, the jury indisputably rejected this defense and, determined beyond a reasonable doubt there was not any "unlawful physical force" by Officer Klamser[1].

Indeed, numerous courts in this district have applied a ***Heck*** bar to excessive force claims where jurors considered nearly identical jury instructions which were focused on the behavior of the arrestee (as opposed to the officer's use of force). *See* ECF 23 at 5-6, citing ***Agyemang v. City of Aurora Mun. Court***, No. 15-cv-734-LTB, 2015 U.S. Dist LEXIS 60628, *8 (D. Colo. May 8,

[1] *See* ***People v. Barrus***, 232 P.3d 262, 268 (Colo. App. 2009) (concluding the affirmative defense of self-defense, includes the use of unreasonable or *excessive force*).

2015); ***Kennedy v. Golden***, No. 13-cv-00920-REB-KLM, 2014 U.S. Dist. LEXIS 106409, at *1 (D. Colo. Mar. 4, 2014); ***Johnson***, 2013 U.S. Dist. LEXIS 62342 at *8-10; ***Dye***, 2013 U.S. Dist. LEXIS 42453 at *16-22; ***Oates v. Patella***, No. 11-cv-1871-REB-KLM, 2012 U.S. Dist. LEXIS 22715, *9-11 (D. Colo. Feb. 1, 2012). Critically, Plaintiff's Response addressed none of these cases. Instead, Plaintiff relies solely upon opinions which do not contain discussion of the interplay between a jury's conviction, despite the Section 1983 Plaintiff's reliance on a self-defense affirmative defense in the underlying criminal matter. In so doing, Plaintiff evades addressing the heart of Defendants' ***Heck*** argument: that the Supreme Court has ruled Plaintiff cannot pursue a claim that the officer used unlawful force to effect arrest in federal civil court proceedings which would effectively undermine her state criminal convictions *because she specifically argued* that she should not be convicted where her resistance and obstruction were in response to "unlawful physical force" by the arresting officer[2].

Nonetheless, the cases upon which Plaintiff relies in her Complaint are distinguishable because Plaintiff specifically alleged in her Complaint that the use of force occurred within the same interaction as the arrest. This demonstrates the difference between Plaintiff's allegations and the facts identified in the Tenth Circuit opinion upon which she heavily relies. ***See Martinez v. City of Albuquerque***, 184 F.3d 1123, 1125 (10th Cir. 1999). As argued in Defendants' Motion to Dismiss, Colorado courts have distinguished the fact pattern in ***Martinez*** from cases such as this one, where the allegations of force are "inextricably intertwined" with the arrest. *See Motion* at fn. 5, *citing* ***Dye***, 2013 U.S. Dist. LEXIS 42453 at *16-22. Indeed, Plaintiff twice cites the Tenth

[2] *See* August 23, 2018 transcript of Plaintiff's closing argument in criminal matter, 2017M965, Div. 4D: ("If you believe that Klamser was in – involved in unreasonable or excessive force as it applies to Michaella Surat, then she is not guilty of resisting arrest."), attached as ***Exhibit A***, 171:24-25; 172:1). *See also* Fed. R. Evid. 201(b)(2) with respect to judicial notice of the Court transcript.

Circuit's holding in ***Fresquez v. Minks***, 567 F. App'x 662 (10th Cir. 2014) for the proposition that a favorable finding on an excessive force claim does not necessarily call into question an underlying obstruction conviction. However, ***Fresquez*** is inapposite. For starters, the Court specifically said, "there is a dispute as to whether the obstruction conviction stemmed from the incident with Deputy Sheriff Viers or from a subsequent altercation between Plaintiff and other deputy sheriffs." ***Id***. at 666. This stands in direct contrast to Plaintiff's own allegations in her Complaint in this matter, which explicitly demonstrate the use of force was inextricably linked with her arrest. More importantly, even though the ***Fresquez*** Court subsequently stated there may be instances where the level of force used to subdue a suspect during an arrest may, in certain circumstances, be separately considered without undermining an obstruction conviction, that is not the case here. Indeed, there is no indication in the ***Fresquez*** opinion that the criminal factfinder considered a self-defense instruction to make any assessment related to the amount or timing of use of force related to the conviction for obstruction of a peace officer. To the contrary, in this case, the jury found Plaintiff guilty of <u>both</u> resisting arrest and obstruction, and moreover, related to both charges, was instructed to consider Plaintiff's assertion that her physical resistance and acts of obstruction were excusable due to "**unlawful physical force"** by the arresting officer. Indeed, the jury's guilty verdicts were a direct rejection of Plaintiff's assertion. Consequently, a determination in this matter in Plaintiff's favor would be directly inconsistent with the conclusion already reached by the jury in the criminal matter, requiring Plaintiff's claims be dismissed pursuant to ***Heck.***

Plaintiff's secondary argument with respect to timing is also incorrect [ECF No. 28 at 6]. First, Plaintiff never addresses the fact that the Complaint alleges the entire interaction between

Plaintiff and Officer Klamser took thirty-two (32) seconds [ECF No. 1 at 5, para. 28]. There is no indication in the Complaint the entire second encounter could somehow be parsed to exclude the facts upon which her convictions were based. Thus, they are "inextricably linked" and must be dismissed pursuant to ***Heck***, as numerous other Courts of this circuit, and others, have held. *See* ECF No. 23 at p. 5-6 (collecting cases), p. 8 (*citing* ***Matheney v. City of Cookeville***); ***Norris v. Baikie***, No. 14-cv-1652, 2017 U.S. Dist. LEXIS 12147, at *12-13 (N.D. Ill. Jan. 30, 2017).

Plaintiff's Response makes great effort to separate her acts of physical resistance and obstruction from Officer Klamser's use of force, but these arguments are belied by the plain allegations of the Complaint. The Complaint alleges Officer Klamser grabbed Plaintiff's wrist [ECF 1, ¶¶19,21], and then she told him he didn't need to touch her and attempted to free herself from his grasp, at which time he pulled her arm behind her and advised she was under arrest. [Id. At 18.] The Complaint alleges the two continued speaking over each other as Officer Klamser continued his hold on her wrist and he then took her to the ground. [*Id*., ¶¶22-24, 26-27.] The Complaint subsequently alleges that Officer Klamser's alleged acts in both "pulling her arm by the wrist and throwing her face-first to the sidewalk" constitute the basis for her excessive force claim. [ECF 1, ¶ 63]. This stands in direct contrast to Plaintiff's Response, which now seeks to allege "The Complaint alleges that Defendant Klamser used excessive force against Plaintiff *after* her attempts at defending herself" in an effort to save her ***Heck***-barred claim. This does not comport with the Complaint, which alleges Officer Klamser's alleged act in grabbing her wrist started the alleged use of force, and her acts in arguing with him and pulling away were in self-defense to his assertion of force upon her and as alleged in the Complaint, occurred contemporaneously with the takedown. Moreover, as argued *supra,* this argument was placed

squarely before the jury when she presented the affirmative defense and they rejected it. Plaintiff's claims are therefore barred pursuant to the reasoning in ***Heck***.

II. The Claim against the City of Fort Collins Must Be Dismissed.

a. There is No Underlying Constitutional Violation

As the Plaintiff acknowledges, it is her burden to establish the existence of a Constitutional violation, as a necessary element of her claim pursuant to 42 U.S.C. § 1983 [ECF No. 28 at 7]. Plaintiff has insufficiently argued the existence of a Constitutional violation, pursuant to ***Heck***[3] and ***Ash v. Twp. Of Willingsboro***, No. 10-1900, 2012 U.S. Dist. LEXIS 179124, *12 (D. N.J. Dec. 18, 2012) ("Supervisory liability claims under ***Monell*** require an underlying constitutional violation and, where the underlying violation is barred by ***Heck***, it cannot form the basis for a derivative ***Monell*** claim.") (collecting cases). Thus, her municipal liability claim must be dismissed.

b. The Plaintiff has Failed to Properly Allege a Custom, Practice, Policy, or Procedure, in Anything Other Than a Conclusory Fashion

"It is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality," in order to satisfy her burden of establishing a custom, practice, policy or procedure. ***Bd. Of Cnty. Comm'rs of Bryan Cnty. v. Brown***, 520 U.S. 397, 404 (1998). In an effort to overcome her burden, Plaintiff references paragraphs 46-58 of the Complaint [ECF No. 28 at 9]. These paragraphs, however, are nothing more than conclusory statements which are insufficient pursuant to ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544, 545, (2007). *See e.g.*, "Defendant Fort Collins has a policy, custom, and practice of unlawful seizure and use of excessive force" [ECF No. 1 at 8, para. 46]; "(t)he reasonable inference is that the city's policy and training lead officers to act

[3] The Defendants incorporate those arguments made with respect to ***Heck***, above.

unconstitutionally." [ECF No. 1 at 8, ¶47]; "(i)n response to the incident…FCPS spokesperson…told the media that Defendant Klamser used 'standard arrest control' which indicates a custom and practice of unconstitutional use of force." [ECF No. 1 at 8, ¶ 47]; "Defendant Fort Collins continued not to provide adequate training to FCPS officers…." [ECF No. 1 at 10, ¶ 55]; "It is the longstanding widespread deliberately indifferent custom, habit, practice and/or policy of Defendant Fort Collins to fail to supervise and to train officers…" [ECF No. 1 at 11, ¶ 58]. None of these allegations raise to the level required for federal pleading standards, and are insufficient to establish a custom, practice, policy, or procedure in enough detail to overcome a motion to dismiss. Specifically, these paragraphs fail to provide any indication why there should be an inference of Fort Collins' policy and training (which is unidentified) lead officers to act "unconstitutionally [ECF No. 1 at 8, ¶ 47], why "standard arrest control" is a custom or practice of "unconstitutional force" [ECF No. 1 at 8, ¶ 48], or what training was supposedly inadequate [ECF No. 1 at ¶ 55].

Plaintiff also attempts to somehow establish a custom or policy, through the citation of previous lawsuits against Fort Collins. But, any such attempt is improper and misleading.[4] Tellingly, none of the instances are alleged to have resulted in a finding of liability or wrongdoing by the City of Fort Collins or any of its employees. For example, in *McGrath v. Fort Collins Police Services Officer Nick Rodgers* [ECF 1, ¶ 51], Plaintiff summarily discusses the purported facts of the lawsuit, but provides no evidentiary support for the conclusory statements. Additionally, Plaintiff provides no indication of any factual similarity between McGrath and the present matter

[4] Plaintiff provides no proper citation to the referenced lawsuits to support her allegations set forth in the Complaint.

which in any way could establish some sort of custom or policy. The Plaintiff also acknowledges the matter may have been "settled for an undisclosed amount." It could, therefore, have been resolved for any purpose other than an admission of liability. *See* ***Rowley v. Morant***, No. 10-cv-1182-WJ-GBW, 2014 U.S. Dist. LEXIS 186532, at *2 (D.N.M. July 14, 2014) ("[T]he mere fact that a lawsuit was filed without any mention of the disposition of the lawsuit or whether the City was found to have violated any rights does not establish a pattern and practice."); *see also* ***Morris v. City of N.Y.***, No. 12-cv-3959, 2013 U.S. Dist. LEXIS 154528, at *11 (E.D.N.Y. Oct. 28, 2013) ("The fact that two of the defendants as well as a non-defendant supervising officer have had civil suits brought against them in the past that resulted in settlements is not even evidence of wrongdoing, let alone that the City has a custom or policy that fosters or results in wrongdoing.").

Likewise, reference to the matter involving Mr. Heneghan is improper [ECF No. 1 at 9, para. 52]. Plaintiff has again pled the case settled, demonstrating a lack of a substantiated allegation which may form the basis of a municipal liability claim or otherwise provide notice to the City of some allegedly insufficient policy or training. As with the other lawsuits cited in the Complaint, there are no factual similarities and no judgment entered against the City or reference to any decisions which could be binding in this matter. *See e.g.* ***Connick v. Thompson***, 563 U.S. 51, 62-63 (2011) ("Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.")

The same can be argued with respect to the Chancellor and Patnode allegations referred to in the Complaint. [ECF No. 1 at paras. 53-54.] There is no allegation a lawsuit has been filed, binding decision promulgated or judgment entered in either matter; to the contrary, the Complaint acknowledges no lawsuit has been brought by Ms. Patnode. All of these lawsuits are irrelevant to

the issues in this matter, and certainly to the motion to dismiss. Unsubstantiated allegations from complainants related to discrete and dissimilar incidents, without more, do not put a municipality on notice of deficiencies in their policies or training programs. In her Complaint, Plaintiff acknowledges none of the instances cited resulted in a substantiated finding of wrongdoing, and consequently, none show any underlying custom, practice, or policy, or a causal link with the alleged Constitutional violation.

Likewise, Plaintiff's citation to ***Lynch v. Barrett***, 2012 U.S. Dist. LEXIS 72250 (D. Colo. May 24, 2012), is misleading. Plaintiff apparently addresses ***Lynch*** for the proposition *one* statement made in a newspaper article, is somehow sufficient to establish the "general culture" of a police department [ECF No. 28 at 10]. But, Plaintiff fails to offer a complete recitation with respect to the Court's analysis. In ***Lynch***, the Court held evidentiary statements contained in a newspaper article are unusual, and submission of this type of evidence (notwithstanding inadmissibility due to being hearsay), is based on the facts and circumstances of the particular case. ***Lynch***, 2012 U.S. Dist. LEXIS 72250 at *20. What the Plaintiff ignores, is that the article in ***Lynch***, was based on testimony made under oath at a Civil Service Commission hearing. ***Id.*** at *19-20. Here, there are no such factors provided by Plaintiff, establishing any of the allegations in the Complaint rise to the level of acceptance for the testimony in ***Lynch***.

With respect to the "single-incident" theory posited by the Plaintiff in support of her failure to train claim [ECF No. 28 at 10], the Supreme Court has held application is only available "in a narrow range of circumstances." ***Connick***, 563 U.S. at 62 referring to ***Bryan Cty. v. Brown***, 520 U.S. 397, 409 (1997). The ***Connick*** Court also warned that, "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. ***Id***. at 61. It is

well-settled in this District that "[m]ere conclusory allegations that an officer or group of officers are unsatisfactorily trained will not suffice to fasten liability on the city." ***Bark v. Chacon***, 2011 U.S. Dist. LEXIS 53245, 2011 WL 1884691, at *3 (D. Colo. 2011) (internal quotation marks omitted); ***Salazar v. Castillo***, 2013 U.S. Dist. LEXIS 2000, 2013 WL 69154, at *6 (D. Colo. Jan. 7, 2013). Here, Plaintiff presents no proper indicia to satisfy the pleading standard to sufficiently identify a the allegedly improper training or any direct causal connection to the alleged use of force – much less the "narrow range of circumstances" addressed by the Supreme Court.

No allegations are provided supporting any notion the City maintained any custom or policy relevant to the Plaintiff's 42 U.S.C. §1983 claim, or that anyone followed any specific custom or policy regarding the interaction between the Plaintiff and the City of Fort Collins. Nothing in the Complaint suggests that any specific policy or custom was implicated, deliberately followed, or how any such custom, practice or policy harmed the Plaintiff. Further, the Complaint (and Plaintiff's response) also fail to identify any proper allegation there was a deliberate choice to follow a specific course of action, made by anyone responsible for establishing any final policy with respect to any of the Plaintiff.

CONCLUSION

For all of the reasons addressed here and in the Motion to Dismiss [ECF No. 23], Defendants respectfully request this Court to dismiss Plaintiff's claims in their entirety with prejudice, and for all other and further relief as this Court deems proper.

Dated: July 24, 2019

Respectfully submitted,

s/ *Christina S. Gunn* _____

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 24th day of July, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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