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' MOTION TO STAY PROCEEDINGS

Defendants RANDALL KLAMSER, in his individual capacity, and CITY OF FORT COLLINS, a municipality, (collectively "Defendants"), by and through their attorneys, Hall & Evans, L.L.C., submits the following as their Motion to Stay Proceedings:

Certificate of Conferral

Undersigned counsel conferred with counsel for the Plaintiff regarding this request for a stay of proceedings; Plaintiff's counsel stated that Plaintiff objects to the requested relief.

INTRODUCTION

This matter arises out of Plaintiff's April 6, 2017, arrest, which resulted in her convictions for Resisting Arrest and Obstructing a Peace Officer. Plaintiff has appealed her convictions, and her appeal remains pending. Defendants have filed a (fully briefed) motion to dismiss Plaintiff's excessive force claim pursuant to ***Heck v. Humphrey***, 512 U.S. 477 (1994), and her municipal liability claim based upon the resultant lack of an underlying constitutional

violation and for failure to state a claim. As argued in Defendants' Motion to Dismiss, because Plaintiff's underlying conviction has not been overturned, a determination in her favor on the excessive force claim would necessarily undermine one or both of her criminal convictions and be directly inconsistent with the conclusion already reached by the jury in the criminal matter, requiring dismissal of the civil tort claim pursuant to ***Heck.*** Accordingly, Defendants request a stay of these proceedings until a final determination results from Plaintiff's pending criminal charges stemming from Plaintiff's April 6, 2017, arrest and Defendants' pending Motion to Dismiss.

FACTS ALLEGED IN COMPLAINT

Defendants do not agree with many of the allegations contained in the Complaint and believe significant facts were omitted from Plaintiff's narrative of the circumstances of her arrest. However, because Defendants filed a motion pursuant to FED. R. CIV. P. 12(b)(6), they were required to accept Plaintiff's allegations as true for purposes of their Motion to Dismiss. To provide this Court context for the instant motion, Defendants have included a summary of the facts alleged in the Complaint below, but reserve the right to dispute each factual allegation in any future proceedings.

Plaintiff alleges the police were called to a bar after her boyfriend was asked by staff to leave following an altercation [ECF 1, ¶15-16.] Plaintiff grabbed her boyfriend's arm and tried to pull him away as he was speaking with Fort Collins Police Officer Garrett Pastor, at which point she alleges Fort Collins Police Officer Randall Klamser indicated her boyfriend was not free to go, but she "can keep walking" [*Id*, ¶18.] Plaintiff alleges Officer Klamser told her to "back off," while pushing her shoulder backwards with his hand, and then grabbed her wrist [*Id*, ¶19, 21.]

She told him, "'you don't need to fucking touch me,' and attempted to free herself from his grasp[,]" and he pulled her arm behind her back and advised that she was under arrest [*Id*, ¶18.] Plaintiff alleges Officer Klamser held her arm in a rear wristlock hold as Plaintiff alleges the two continued "speaking over one another," and that Officer Klamser then pulled her arm and "forcefully threw her face-down to the ground," causing her injury. [*Id*, ¶22-24, 26-27.] According to the Complaint, "[t]he entire encounter between Ms. Surat and Defendant Klamser happened in thirty-two seconds" [*Id*, ¶28.]

Plaintiff was criminally charged. A five-day criminal jury trial was held, following which she was convicted of violating C.R.S. § 18-8-103 (Resisting Arrest) and C.R.S. § 18-8-104(1)(a) (Obstructing a Peace Officer) [*Id*, ¶37.] On January 18, 2019, the Plaintiff filed a Notice of Appeal and Designation of Record (***Exhibit A***) ("Appeal"). Plaintiff's express intention in filing of the Notice was to appeal the verdict in the criminal matter (***Exhibit A***).

On June 7, 2019, the Defendants filed a Motion to Dismiss ("Motion") pursuant to FED. R. CIV. P. 12(b)(6) [ECF 23]; Plaintiff filed a Response on July 3, 2019 [ECF 28]; and Defendants are filing their Reply contemporaneously with this Motion. The Motion seeks dismissal on the basis that (1) Plaintiff's excessive force claim is barred based on her underlying convictions pursuant to ***Heck,*** and, (2) there is no underlying Constitutional violation sufficient to maintain a claim against the City of Fort Collins pursuant to ***Monell v. Dept of Soc. Servs. of the City of N.Y.***, 436 U.S. 658, 694 (1978), and ***Jenkins v. Wood***, 81 F.3d 988, 993 (10th Cir. 1996) (failure to show the existence of a municipal custom or policy).

ARGUMENT

A. Because Plaintiff's Excessive Force Claim Necessarily Addresses the Validity of the Underlying Convictions in Her Criminal Matter, It Is Barred By *Heck*.

Based on the pending criminal appeal and the Motion to Dismiss, Defendants request this matter be stayed. Defendants' Motion to Stay argues all of Plaintiff's claims are subject to dismissal because her excessive force claim is barred by ***Heck***. Defendants should not be required to go through discovery or otherwise expend time and resources in litigation because these claims would be barred if this Court grants Defendants' Motion to Dismiss. Although Plaintiff has a pending appeal, her criminal convictions have not been overturned and any ruling in this matter would necessarily call into question their validity.

"[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." ***Vasquez Arroyo v. Starks***, 589 F.3d 1091, 1094 (10th Cir: 2009) (*citing* ***Heck***, 512 U.S. 487; ***Wallace v. Kato***, 549 U.S. 384, 393 (2007)). A civil claim is not the proper place to challenge a criminal conviction. *Id.* at 486. The Complaint identifies the length in dates, location and disposition of Plaintiff's trial and resultant criminal convictions resulting from her April 6, 2017, arrest by Officer Klamser. Following the five-day misdemeanor trial, she was convicted of C.R.S. § 18-8-103 (Resisting Arrest) and C.R.S. § 18-8-104(1)(a) (Obstructing a Peace Officer). [*Id*., ¶37.]

Plaintiff's convictions for resisting arrest and obstructing a peace officer necessarily entail the same considerations with respect to her excessive force claim against Officer Klamser. Pursuant to Colorado law, a person is guilty of obstructing a peace officer "when, by using or threatening to use violence, force, physical interference, or an obstacle, such person knowingly obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace

by a peace officer, acting under color of his or her official authority." C.R.S. § 18-8-104(a). A person commits resisting arrest if he knowingly prevents or attempts to prevent a peace officer from effecting an arrest of the actor or another by either: (a) using or threatening to use physical force or violence against the peace officer or another; or (b) using any other means which creates a substantial risk of causing bodily injury to the peace officer or another. C.R.S. § 18-8-103.

"'[S]elf-defense is an available defense' against both charges 'when a defendant reasonably believes that unreasonable or excessive force is being used by the peace officer.'" ***Johnson v. Heinis,*** No. 11-cv-3135-WJM-KLM, 2013 U.S. Dist. LEXIS 62342, *8-10 (D. Colo. March 28, 2013)[1]; ***Dye v. Colo. Dep't of Corr***., No. 120cv020601-PAB-KLM, 2013 U.S. Dist. LEXIS 42453, *16-22 (D. Colo. March 26, 2013). Where the factfinder for the underlying criminal court considered the affirmative defense of self-defense to charges of resisting arrest or obstruction of justice, courts in this Circuit have repeatedly determined that a subsequent Section 1983 excessive force claim is barred by ***Heck*** because an ultimate determination by this Court that the officer used excessive force would call into question the validity of the underlying conviction. ***Agyemang v. City of Aurora Mun. Court***, No. 15-cv-734-LTB, 2015 U.S. Dist LEXIS 60628, *8 (D. Colo. May 8, 2015); ***Kennedy v. Golden***, No. 13-cv-00920-REB-KLM, 2014 U.S. Dist. LEXIS 106409, at *1 (D. Colo. Mar. 4, 2014)[2]; ***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).[3] Throughout these

[1] *Adopted by* ***Johnson v. Heinis***, 2013 U.S. Dist. LEXIS 62347 (D. Colo., May 1, 2013).

[2] *Adopted by* ***Kennedy v. Golden***, 2014 U.S. Dist. LEXIS 106408 (D. Colo., Aug. 1, 2014).

[3] *Adopted by* ***Oates v. Patella***, 2012 U.S. Dist. LEXIS 22716 (D. Colo., Feb. 22, 2012).

cases, the plaintiffs were convicted of resisting arrest, obstructing a peace officer, or both, and subsequently filed Section 1983 civil suits against arresting officers for excessive force during the arrest. In determining ***Heck*** barred the Section 1983 claims, the courts all noted the respective juries in the underlying criminal trials received the self-defense/excessive force affirmative defense jury instruction, but rejected the affirmative defense and convicted.

Similarly, in ***Adams v. Dyer***, 223 Fed.Appx. 757, 759-60 (10th Cir. 2007), the Tenth Circuit affirmed summary judgment where officers were alleged to have used excessive force during an arrest. The suspect was subsequently convicted of resisting arrest and other crimes. ***Id***. He brought Section 1983 claims against arresting officers alleging excessive force during and after the arrest. ***Id***. The Tenth Circuit examined the conduct of each of the officers during each phase of the arrest and held that ***Heck*** barred all claims which were based on actions the officers took as they attempted to arrest him because the claim called into question the legitimacy of the resisting arrest conviction. ***Id***.

In this matter, during the Plaintiff's criminal trial, the jury instructions included a "defense of person" affirmative defense, which informed the jury that Plaintiff could not be found guilty if she was defending herself from unreasonable or excessive force. The instruction further stated that burden rested with the prosecution to prove that Surat's conduct was not legally authorized by the defense. [Jury Instruction No. 10, Larimer County Court Case No. 2017M965, attached as Exhibit B.] *See* ***Sweesy v. Sun Life Assur. Co.***, 643 Fed. Appx. 785, 789 (10th Cir. 2016) (court permitted to take judicial notice of facts which are a matter of public record); ***Hayes v. Lowe***, No. 13-cv-3239-LTB-KMT, 2014 U.S. Dist. LEXIS 179998, *7-8 (D. Colo. Dec. 22, 2014) (taking judicial notice of public documents from County Court proceedings

without converting Rule 12(b)(6) motion into motion for summary judgment); ***Makeen v. Colo***., No. 14-cv-3452-WJM-CBS, 2016 U.S. Dist. LEXIS 186118, n. 6 (D. Colo. Sept. 16, 2016).

Thus, the jury received an instruction that Ms. Surat was legally authorized to use physical force upon Officer Klamser to defend herself from what a reasonable person would believe to be the use or imminent use of "**unlawful physical force**" by him. Exhibit B, Instruction 10 (emphasis added). The jury convicted Plaintiff of resisting arrest *and* obstruction a peace officer, thereby making a finding beyond a reasonable doubt that there was no unlawful (or excessive) physical force by Officer Klamser justifying any claim of self-defense by Ms. Surat. Critically, because this instruction related to both charges for which Plaintiff was ultimately convicted, it is impossible to for this Court to now determine that Officer Klamser unlawfully used excessive force during the course of the arrest without undermining this affirmative defense and, by extension, the validity of Plaintiff's underlying convictions. *See, e.g.,* ***Adams***, 223 F. App'x at 761 ("To find in favor of Adams, the district court would have been required to nullify the jury's rejection of Adams' 'excessive force' defense[.]")

As demonstrated by the allegations of the Complaint, the alleged use of excessive force and the Plaintiff's resistance and obstruction were contemporaneous. The Complaint alleges the entire encounter between Plaintiff and Officer Klamser happened in thirty-two seconds, demonstrating the use of force and the resistance and obstruction are inextricably intertwined.[4]

[4] Plaintiff's specific allegation that the alleged force which forms the basis of her claim against Officer Klamser occurred *during* the arrest and was all contained in a 32-second timeframe distinguishes this instance from cases within this Circuit where alleged excessive force occurred as part of a separable series of events from the arrest. *See* ***Dye***, 2013 U.S. Dist. LEXIS 42453 at *18-21, *citing* ***Martinez v. City of Albuquerque***, 184 F.3d 1123, 1127 (10th Cir. 1999) (contrasting allegations of force which are "inextricably intertwined" with the arrest to those allegations of force which occurred separately from the arrest because the underlying

[ECF 1, ¶28."] Indeed, ***Heck*** bars a plaintiff's civil claim where, as here, "the conviction and the civil claim both arise from a single, continuous struggle . . . [meaning] they are inextricably intertwined." ***Matheney v. City of Cookeville***, No. 08-cv-0066, 2010 U.S. Dist. LEXIS 34515, *13 (M.D. Tenn. Apr. 7, 2010), *citing* ***Cummings v. City of Akron***, 418 F.3d 676, 682-83 (6th Cir. 2005). Accordingly, ***Heck*** bars Plaintiff's excessive force claims against Officer Klamser must be barred and judgement entered for Defendants.

B. Because Plaintiff's Conviction Has Not Been Overturned, Defendants' Motion to Dismiss is Case Dispositive and this Court Should Stay Discovery Pending an Opinion

Although the Federal Rules of Civil Procedure do not expressly provide for a stay of proceedings any time a motion to dismiss is pending, the Rules do "permit the court to 'make any order which justice requires to protect a party…from undue burden or expense.'" ***String Cheese Incident, LLC v. Stylus Shows, Inc.***, 2006 WL 894955 at *4 (D. Colo., Civil Action No. 05-cv-01934-LTB-PAC, March 30, 2006) citing FED. R. CIV. P. 26(c). Factors considered when reviewing a request for a stay, include "(1) plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." ***String Cheese Incident***, *supra* at *4 referring to ***Federal Deposit Ins. Corp. v. Renda***, No. 85-2216-0, 1987 WL 348635 at *2 (D. Kan. 1987) (unpublished). Here, all the factors, when viewed in conjunction with the existing case law, lean in favor of imposing a stay of discovery until resolution of the motion to dismiss.

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criminal conviction was based on a separable initial flight from officers prior to the actual use of force when placing suspect into custody).

Pursuant to the reasoning in ***Heck*** and ***String Cheese Incident***, and to avoid inconsistent results, the matter should be stayed pending a determination of Defendants' Motion to Dismiss. Defendants' Motion seeks dismissal of all of Plaintiff's claims, which are barred by ***Heck*** due to her two criminal convictions. Although Plaintiff has appealed her convictions, her excessive force claim remains subject to dismissal because a ruling otherwise, which would allow the civil matter to proceed, risks the possibility that Plaintiff obtains a judgment in her favor that is inconsistent with the conviction.

Aside from initial disclosures, discovery has not yet commenced in this matter. To proceed with discovery without first obtaining a ruling on the legal question of whether a favorable ruling on Plaintiff's excessive force claim necessarily undermines her criminal convictions risks a substantial risk to all of the litigants, as well as the Court, that judicial resources would be wasted. *See* ***Benevolence Int'l Found. v. Ashcroft***, 200 F.Supp.2d 935, 940 (N.D. Ill. 2002) (noting one factor weighing in favor of granting a stay of the civil case was that the civil proceedings had just commenced and no discovery had taken place yet). Moreover, given this matter has not been set for trial and, indeed, the scheduling conference has not yet occurred, Plaintiff will not be unduly burdened by extension of dates which have already been set.

Plaintiff may assert an interest in proceeding expeditiously in order to resolve the matter quickly. Any such interest is inherent in most civil litigation. But here, Plaintiff's criminal convictions bar her civil rights claims; and any professed interest in expeditious case management is outweighed by the potential of Plaintiff's convictions being upheld and her civil claims precluded under ***Heck***. In addition, there are no significant factors that a delay in the proceedings would negatively affect the Plaintiff.

The same considerations with respect to inconsistent results and judicial economies, also weigh in favor of concluding the burden to the Defendants justifies a stay in this matter. Specifically, Defendants will be forced to defend a matter which might otherwise prove to be barred. In addition, as argued above, a stay in this matter supports the notion of convenience to the Court. Any inconsistent results would necessarily result in protracted litigation to address the issue, which might have otherwise been avoided if a stay had been imposed.

Lastly, a stay would be in the best interests of persons not parties to the civil litigation as well as the public interest. Defendants' Motion to Dismiss seeks a ruling as a matter of law that Plaintiff's claims are barred and, therefore, her lawsuit is subject to dismissal in its entirety. Moreover, it is axiomatic that *consistent* results would support judicial economy and obviate the necessity of further litigation to clarify issues. *See e.g.*, 8 Moore's Federal Practice, sec. 42.10(4) (3d ed. 2018) (considering the factor of inconsistent results when looking at consolidation of lawsuits); ***Dutcher v. Bold Films, LP***, 2018 U.S. Dist. LEXIS 192314 at *2-3 (D. Utah, November 8, 2018, Case No. 2:15-cv-00110-DB-PMW) (considering inconsistent results as a factor for lifting stay due to bankruptcy of party).

C. Because the Criminal Case Is Still Pending, the Court Should Stay this Matter

The United States Supreme Court in ***Wallace v. Kato***, 549 U.S. 384 (2007), addressed the issue of whether ***Heck*** bars a Section 1983 claim where the underlying criminal action is still pending. In ***Wallace***, the Supreme Court found that ***Heck*** does not serve as a bar to asserting a Section 1983 claim when criminal charges are pending. The Supreme Court instead found the proper procedure is to stay the case in circumstances where a criminal conviction might result in a ***Heck*** bar to the civil claims.

> [l]t is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended. If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit.

Wallace, 549 U.S. at 394-95, (citations omitted). Defendants could not identify specific guidance from the Tenth Circuit regarding whether a Section 1983 claim barred by ***Heck*** must be stayed pending exhaustion of the Plaintiff's appeals in state court.[5] However, a federal court in South Carolina recently performed a survey of numerous United States District Courts which have, in response to pending criminal cases that might cause a Section 1983 claim to be barred by ***Heck***, imposed a stay of proceedings until the criminal cases have been resolved. ***McCall v. McAlhaney***, 2017 U.S. Dist. LEXIS 145702, *13-17 (D. S.C. July 24, 2017) (collecting cases).[6] *See also* ***Roberites v. Huff***, 2012 U.S. Dist. LEXIS 46206, *17-19 (W.D. N.Y March 28, 2012) (collecting cases). This Court should follow the direction of the Supreme Court and stay proceedings in this matter until the Plaintiff's criminal proceedings are resolved. A risk of inconsistent results exists if this matter progresses through discovery, and Plaintiff's conviction is ultimately upheld. A stay of discovery would be justified, in order to avoid this inconsistent result, and to conserve judicial resources.

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[5] *See* ***Harris v. Garcia***, No. 14-cv-23-RM-BNB, 2014 U.S. Dist. LEXIS 78191 (D. Colo. May 8, 2014)(ordering administrative closure where matter had been stayed pending criminal prosecution and Plaintiff requested additional stay pending appeal of conviction).

[6] The ***McCall*** court went a step further than merely requiring a stay of proceedings pending exhaustion of criminal appeal of the underlying convictions. Instead, the ***McCall*** Court ruled, consistent with the Seventh Circuit, that the parties did not need to stay proceedings at all and, instead, since the conviction had not yet been overturned, immediate dismissal pursuant to ***Heck*** was appropriate. ***Id***. at *17. This result is consistent with Defendants' request for stay under the ***String Cheese*** factors in Section B until this Court has ruled on the pending Motion to Dismiss.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Defendants respectfully request this Court stay all proceedings until determination of (1) Plaintiff's pending appeal in her criminal proceedings, and (2) the Defendants' pending Motion to Dismiss [ECF 23].

Dated: July 24, 2019

Respectfully submitted,

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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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