

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 SUPPLEMENT THEIR MOTION TO DISMISS
PLAINTIFF'S COMPLAINT (ECF Nos. 23 and 34)**

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 as their Motion to Supplement Their Motion To Dismiss Plaintiff's Complaint (ECF 23 and 34), and in support state as follows:

CERTIFICATE OF CONFERRAL Pursuant to the Court's Practice Standards, undersigned Counsel conferred via e-mail with Counsel for Plaintiff on November 13, 2019. Counsel for Plaintiff stated Plaintiff opposes the motion.

1. Plaintiff alleges a violation of her rights under the Fourth Amendment to the United States Constitution due to an alleged use of force by Defendant Klamser during her arrest on April 6, 2017.

2. Plaintiff's Complaint states she "proceeded through a misdemeanor jury trial in Ft. Collins on August 20-24, 2018. 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) and sentenced to 12 months of supervised probation, 48 hours of community service, alcohol evaluation and treatment, monitored sobriety, and a Making a Better Choices class.” (ECF 1, ¶ 37.) A jury in Larimer County Court convicted the Plaintiff on both these charges. (*Id.*)

3. Defendants filed a Motion to Dismiss on June 7, 2019 (ECF 23) (“Motion”). The Motion argues for dismissal of Plaintiff’s excessive force claim because it is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), based upon her underlying convictions.¹

4. At the time the parties completed briefing on Defendants’ Motion to Dismiss, Plaintiff’s appeal of her criminal convictions for Resisting Arrest and Obstructing a Peace Officer was pending. On October 29, 2019, the District Court for Larimer County ruled on Plaintiff’s appeal, affirming her criminal convictions in the “Order Affirming County Court Convictions,” attached hereto as *Exhibit A*.²

¹ The Motion also argues the Plaintiff’s claim against the City of Fort Collins must be dismissed because there is no underlying Constitutional violation and the Complaint fails to sufficiently allege municipal liability. (ECF 23, pp. 8-11; ECF 34, pp. 6-10.)

² Generally, a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b) must be determined on the four-corners of the Complaint. *SEC v. Goldstone*, 952 F.Supp.2d 1060, 1191 (N.M.Dist.2013) referring to *Casanova v. Ulibarri*, 595 F.3d 1120, 1125 (10th Cir.2010). Exceptions to this requirement include documents referred to in the complaint if the documents are central to the plaintiff’s claim...and matters of which a court may take judicial notice, including public records. *Goldstone*, 952 F.Supp.2d at 1191, referring to *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Materials outside the complaint can be considered under these exceptions, without converting the Motion to Dismiss to a Motion for Summary Judgment. See *McWhinney Holding Co., LLP v. Poag*, No. 17-cv-2853-RBJ, 2018 U.S. Dist. LEXIS 167852, *50-51 (D. Colo. Sept. 28, 2018) (taking judicial notice of Colorado Court of Appeals opinion from parallel state court case without converting motion to dismiss to motion for summary judgment); *Bacchus v. Denver Dist. Court*, No. 11-cv-3406-RBJ, 2013 U.S. Dist. LEXIS 117037, *4, fn. 1 (D. Colo. Aug. 19, 2013).

5. The Court's Order affirming Plaintiff's convictions is directly relevant to Defendant's argument that a civil judgment in Plaintiff's favor in this case would create an inconsistency with the underlying criminal convictions, which have now been upheld by the appropriate appellate court. *Heck v. Humphrey*, 512 U.S. 477, 489 (1994).

6. While the issues addressed in the Order Affirming County Court Convictions (Ex. A) mainly relate to issues of expert testimony and admissibility of evidence of an alleged domestic violence history by Ms. Surat, there are several references within the Order which demonstrate Plaintiff's reliance on the self-defense affirmative defense in her underlying criminal matter.³ Defendants' Motion identified numerous opinions from this District which have applied a *Heck* bar to excessive force claims where jurors in a criminal trial considered self-defense arguments and jury instructions which were focused on the behavior of the arrestee, and not merely upon the

³ For example:

- Ex. A, p. 15: "See Transcript 8.20.2018, p. 7:17-19 ([Ms. Surat's] Defense counsel: "It's relevant to the jury because the – the People are putting a motive on what she did. I'm saying it was self-defense. I'm saying when a cop uses unlawful force you can defend yourself.")"
- Ex. A, p. 15: "Contesting the knowledge prongs of these offenses and raising the affirmative defense of self-defense directs the jury to consider two seemingly different theories of the case. Defense counsel raised the affirmative defense of self-defense while making arguments during both opening and closing arguments that the Defendant was attempting to "flee" or "get away" from Officer Klamser. It is of course possible to act in self-defense while fleeing, just as it is possible to act in self-defense while maintaining one's position and not fleeing. Yet in either case, the affirmative defense serves to 'justify, excuse, or mitigate the commission of the offense.'"
- Ex. A, p. 17: "The Court observes that, as a colloquial matter, self-defense can be described as 'fighting back,' and Defendant did argue for the affirmative defense of self-defense, resulting in at least a mild implication that Defendant did some 'fighting.'" (Emphasis added.)

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, 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).

7. Even if this Court declines to take judicial notice of the contents of the Order Affirming County Court Convictions (Ex. A), this Court should take judicial notice of the occurrence of the affirmance of the jury's determinations, and preclude a collateral attack on Plaintiff's convictions through a re-litigation of her unsuccessful self-defense affirmative defense in this case. *Heck v. Humphrey*, 512 U.S. 477, 489 (1994).

8. The Court's Practice Standards allow for the supplementation of a brief or reply with leave of Court granted for good cause shown. (*See* Judge William J. Martinez's Practice Standards III(K).) Because the "Order Affirming County Court Convictions," which is a portion of the Plaintiff's underlying criminal proceedings, was only recently issued by the Larimer County District Court, Defendants could not have previously raised it. Further, because the Order is a newly-filed public record upon which this Court may take judicial notice as a basis for its determination on the applicability of a *Heck* bar, and not merely relevant authority upon which an argument in Defendants' Motion was based, Defendants have filed this Motion rather than merely filing a notice of supplemental authority, in an attempt to comply with the Court's Practice Standards.

9. The Defendants request leave to supplement the Motion to Dismiss with the Order Affirming County Court Convictions (*Exhibit A*), along with the arguments set forth in this brief, as a supplement to Defendants' Motion to Dismiss.

WHEREFORE, Defendants, for the foregoing reasons, respectfully request the Court accept as a supplement to Defendants' Motion to Dismiss, *Exhibit A*, and the arguments set forth above.

Dated this 18th day of November, 2019.

HALL & EVANS, L.L.C.

/s/Christina S. Gunn

Christina S. Gunn

Mark S. Ratner

1001 17th Street, Suite 300

Denver, CO 80202

Telephone: (303) 628-3300

Facsimile: (303) 382-4325

Email: gunnc@hallevans.com

ratnerm@hallevans.com

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 18th day of November, 2019, I electronically filed the foregoing **DEFENDANTS' MOTION TO SUPPLEMENT THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT (ECF NO'S 23 and 34)** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

David Lane, Esq.
Tania Valdez, Esq.
Andy McNulty, Esq.
Killmer, Lane & Newman, LLP
1543 Champa St, Suite 400
Denver, CO 80202
303-571-1000 Phone
303-571-1001 Fax
dlane@kln-law.com
tvaldez@kln-law.com
amcnulty@kln-law.com
Attorney for Plaintiff

s/ Nicole Marion, Legal Assistant to
Christina S. Gunn, Esq. of
Hall & Evans, L.L.C.