

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 19-cv-00901-NRN

MICHAELLA LYNN SURAT,

Plaintiff,

v.

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

Defendants.

---

**RESPONSE TO DEFENDANTS' MOTION TO SUPPLEMENT THEIR MOTION TO  
DISMISS PLAINTIFF'S COMPLAINT [DOC. #55]**

---

Plaintiff, by and through undersigned counsel, hereby submits this Response to Defendants' Motion To Supplement Their Motion To Dismiss Plaintiff's Complaint, [Doc. #55], and states in support as follows:

1. Defendants wish to introduce evidence outside of the four corners of the Complaint. The Court's consideration of this evidence is improper on a Fed. R. Civ. P. 12(b)(6). *See Macarthur v. San Juan Cty.*, 309 F.3d 1216, 1221 (10th Cir. 2002) (stating that a court typically should not look beyond the pleadings on a Rule 12(b)(6) motion).

2. Nonetheless, Plaintiff recognizes that the Court has discretion to consider documents that are public record on such a motion without converting it to a motion for summary judgment. *See Shifrin v. Colorado*, No. 09-cv-03040-REB-MEH, 2010 U.S. Dist. LEXIS 86594, at \*9 (D. Colo. July 22, 2010) (“[T]he Court ‘has discretion in deciding whether to convert a motion to dismiss into a motion for summary judgment by accepting or rejecting the attached documents.’”). However, the documents (and information contained therein)

Defendants ask this Court to consider are irrelevant to the issues this Court must address in deciding Defendants' Motion to Dismiss.

3. Plaintiff is not challenging the validity of her resisting arrest and obstruction convictions in this matter. She is not arguing that the arrest was unlawful. Rather, Plaintiff is alleging that her lawful arrest was conducted in an unlawful manner because the amount of force that Defendant Klamser used to arrest her was unreasonable. *See* [Doc. #1], ¶¶ 61-63. Even where a person fails to follow an officer's orders, the officers are not entitled to employ anything more than reasonable force to make an arrest. *See Martinez v. City of Albuquerque*, 184 F.3d 1123, 1127 (10th Cir. 1999) ("[F]ailing to heed the arresting officers' instructions and closing his vehicle's window on the arm of one of the arresting officers . . . might justify the officers' use of reasonable force to effectuate Martinez' arrest, but would not authorize the officers to employ excessive or unreasonable force in violation of Martinez' Fourth Amendment rights."). In *Martinez*, the Tenth Circuit considered whether a plaintiff's excessive force claim was barred by *Heck*, where the plaintiff had been convicted of resisting arrest under the following circumstances (which are analogous to the facts alleged in the Complaint in this matter):

According to the state criminal complaint, on January 20, 1994, Martinez, while in his vehicle, solicited an undercover female police officer for sex. When surveillance officers from the Albuquerque Police Department approached his vehicle, [the plaintiff] "attempted to flee through a dirt lot." A brief chase ensued. A few seconds later, [the plaintiff] stopped his vehicle, locked the doors, and rolled down the window. With his hands gripping the steering wheel, [the plaintiff] claimed he had done nothing wrong. When [the plaintiff] refused to exit his vehicle, one of the arresting officers reached in the window to unlock the door. [The plaintiff] rolled up the window on the officer's arm. Another officer struck [the plaintiff] in the face and unlocked the vehicle. The officers then arrested [the plaintiff]. The entire incident lasted only two to three minutes.

Subsequently, the Metropolitan Court for Bernalillo County found [the plaintiff] guilty of resisting arrest in violation of N.M. Stat. Ann. § 30-22-1 (Michie 1978). The court acquitted [the plaintiff] on the remaining charges. [The plaintiff] appealed and after much pretrial wrangling over discovery, the state district court

held a de novo bench trial in which it sustained the metropolitan court's judgment. The district court sentenced [the plaintiff] to eight months supervised probation. Review of [the plaintiff]'s state court conviction currently is pending before the New Mexico Court of Appeals.

The plaintiff in *Martinez* then filed a Section 1983 action alleging excessive force. The district court granted the police officers' motion to dismiss based on *Heck*. The Tenth Circuit reversed. In doing so, the Tenth Circuit reasoned "whether [the plaintiff] resisted arrest by initially fleeing the scene is a question separate and distinct from whether the police officers exercised excessive or unreasonable force in effectuating his arrest." *Id.* at 1126). The Court also noted that "whether [the plaintiff] resisted arrest by failing to heed instructions and closing his vehicle's window on the officer's arm is likewise a question separate and distinct from whether the police officers exercised excessive or unreasonable force in effectuating his arrest." *Id.* at 1127. Here, by comparison, whether Plaintiff resisted arrest by asking the officer not to touch or grab her or attempting to free her arm from the officer's grasp is a question separate and distinct from the whether Defendant Klasmer exercised excessive force in effectuating her arrest.

4. Additionally, a case relied on heavily in *Martinez* is instructive. In *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997), the plaintiff filed a Section 1983 excessive force claim against officers who had arrested him. The plaintiff had previously been convicted of resisting arrest in state court. The Third Circuit held that *Heck* did not bar the plaintiff from bringing his claims in federal court. In doing so, the Third Circuit explained that in footnote six of *Heck*, the Supreme Court intended to demonstrate that a civil suit for an unreasonable seizure predicated on a false arrest would be barred so long as a conviction for resisting the same arrest remained unimpaired because the lawfulness of the arrest is a necessary element of the criminal offense of resisting arrest. *Id.* at 145. Thus, the Third Circuit reasoned, since a plaintiff would not necessarily have to negate the element of the arrest's lawfulness to prevail in an excessive force

claim to prevail, a state court conviction for resisting arrest did not prohibit him from pursuing his Section 1983 excessive force claim against the arresting officer. *Id.* at 145-46. Therefore, because the plaintiff in *Nelson* had not claimed that the police officer in his case falsely arrested him, but rather claimed that the officer “effectuated a lawful arrest in an unlawful manner,” the plaintiff’s claims were not barred by *Heck*. *Id.* Similarly here, careful comparison between *Heck* and the facts of this case demonstrates that to the extent Plaintiff’s federal suit does not challenge the lawfulness of her arrest and conviction (a challenge *Heck* would prohibit at this point), *Heck* does not bar her from pursuing her excessive force claims in federal court.

5. Finally, all of the district court cases cited by Defendants do not support a likelihood of dismissal of Plaintiff’s claims under *Heck*. [Doc. #55], pp. 3-4.<sup>1</sup> In *Agyemang*, *Kennedy*, *Johnson*, *Dye*, and *Oates*, the District Court dismissed excessive force claims under *Heck* when the plaintiff had been convicted of resisting arrest and his excessive force claim was based on pre-arrest excessive force. Clearly, those cases are distinguishable from the case-at-bar, where Plaintiff alleges that Defendant Klasmer’s post-arrest excessive force forms the basis for her claims.

6. Therefore, not only should this Court not consider the proposed documents because they are outside the four corners of the Complaint, but they are also irrelevant to the issues this Court must decide on Defendants’ Motion to Dismiss.

---

<sup>1</sup> Citing *Agyemang v. City of Aurora Mun. Court*, Civil Action No. 15-cv-00734-LTB, 2015 U.S. Dist. LEXIS 60628 (D. Colo. May 8, 2015); *Kennedy v. Golden*, Civil Action No. 13-cv-00920-REB-KLM, 2014 U.S. Dist. LEXIS 106409 (D. Colo. Mar. 4, 2014); *Johnson v. Heinis*, Civil Action No. 11-cv-03135-WJM-KLM, 2013 U.S. Dist. LEXIS 62342 (D. Colo. Mar. 28, 2013); *Dye v. Colo. Dep’t of Corr.*, Civil Action No. 12-cv-02061-PAB-KLM, 2013 U.S. Dist. LEXIS 42453 (D. Colo. Mar. 26, 2013); *Oates v. Patella*, Civil Action No. 11-cv-01871-REB-KLM, 2012 U.S. Dist. LEXIS 22715 (D. Colo. Feb. 1, 2012)

WHEREFORE, Plaintiff respectfully requests that this Court deny Defendants Motion To Supplement Their Motion To Dismiss Plaintiff's Complaint, [Doc. #55].

DATED this 19th day of November 2019.

KILLMER, LANE & NEWMAN, LLP

*/s/ Andy McNulty*

---

David Lane  
Andy McNulty  
1543 Champa St., Ste. 400  
Denver, CO 80202  
Phone: (303) 571-1000  
Facsimile: (303) 571-1001  
[dlane@kln-law.com](mailto:dlane@kln-law.com)  
[amcnulty@kln-law.com](mailto:amcnulty@kln-law.com)

ATTORNEYS FOR PLAINTIFF

**CERTIFICATE OF SERVICE**

I certify that on this 19<sup>th</sup> day of November, 2019 I filed a true and correct copy of the foregoing via CM/ECF which will generate emailed notice to the following:

Mark Ratner  
Christina Gunn  
Hall & Evans, LLC  
1001 Seventeenth Street, Ste 300  
Denver, CO 80202  
303-628-3492  
ratnerm@hallevans.com  
gunnc@hallevans.com  
*Counsel for Defendants*

*s/ Jamie Akard*

---

Paralegal