IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-03112-RBJ-STV

SEAN SLATTON,

Plaintiff,

v.

TODD HOPKINS, in his individual capacity,
BRANDON BARNES, in his individual capacity,
JOHN HUTTO, in his individual capacity,
CITY OF FORT COLLINS, a municipality,

Defendants.

PLAINTIFF'S CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS [DOCS. 96 & 98]

Plaintiff, through counsel, David Lane and Helen Oh of KILLMER, LANE, NEWMAN, LLP, hereby submit the following Consolidated Response to Defendants' Motions to Dismiss [Docs. 96 & 98], and state as follows:

INTRODUCTION

This is a case of unlawful seizure and excessive force against a Plaintiff who was nonviolent, nonthreatening, and attempting to comply with the officer's orders. Plaintiff Sean Slatton was ordered to leave his girlfriend's sorority party after being falsely accused of bringing a flask. [Doc. 94 ¶¶ 19-20]. Fort Collins Police Services ("FCPS") Officer Todd Hopkins instructed Mr. Slatton to leave, and Mr. Slatton calmly and immediately complied. [*Id.*, ¶¶ 21, 22]. Mr. Slatton stood outside to order a ride service to drive him to his hotel. [*Id.*, ¶ 24]. Defendants Hopkins and Officer Brandon Barnes followed Mr. Slatton outside, and Hopkins remarked, "what was the property part you didn't understand." [*Id.*, ¶ 25]. Confused, Mr. Slatton stated that he was waiting

for his ride. *Id.* Hopkins again told Mr. Slatton to leave the property, to which he replied, "ok, I will," but before giving Mr. Slatton a chance to do so, demanded to see his identification. [*Id.*, ¶ 26]. When asked why, Hopkins stated that he was detaining him for trespassing. [*Id.*, ¶¶ 26, 27]. Mr. Slatton objected and walked away because he had not committed a crime and was complying with Hopkins' order to leave. [*Id.*, ¶ 28]. Upon reaching the sidewalk, Hopkins told Mr. Slatton he was under arrest, and without provocation, struck him in the leg with a baton and pepper sprayed him in the face. [*Id.*, ¶¶ 31-34, 37]. At no point in time did Barnes attempt to stop Hopkins from unlawfully asserting authority over Mr. Slatton. [*Id.*, ¶ 30].

Reasonably fearing for his safety, Mr. Slatton fled in response to being pepper sprayed. [*Id.*, ¶¶ 36-39]. Within minutes, he stopped running because he struggled to breathe and was in intense pain from the pepper spray. [*Id.*, ¶ 41]. He was then apprehended by FCPS officers. [*Id.*, ¶ 42]. Mr. Slatton was brought to jail on charges of third-degree criminal trespassing, obstructing a peace officer, and resisting arrest. [*Id.*, ¶ 46]. All charges were dismissed before trial. [*Id.*, ¶ 49].

Plaintiff's Fourth Amended Complaint ("FAC") brings three claims pursuant to 42 U.S.C. § 1983: (1) Fourth Amendment unlawful seizure against Hopkins and Barnes; (2) Fourth Amendment excessive force against Hopkins, Chief Hutto, and the City of Fort Collins ("Fort Collins"); and (3) Fourteenth Amendment excessive force against Hopkins, Hutto, and Fort Collins. [Doc. 94]. Defendants seek to dismiss all of Plaintiff's claims for relief. [Docs. 96 & 98]. For the reasons below, Defendants' motions are without merit and must be denied.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure allow a defendant to file a motion to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "There is a strong presumption *against* the dismissal of claims under this rule." *Blevins v. Reid*, 2008 U.S.

Dist. LEXIS 46168, at *9 (D. Colo. June 12, 2008) (citing *Cottrell, Ltd. v. Biotrol Intern., Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999)) (emphasis added). When a defendant files a motion to dismiss pursuant to Rule 12(b)(6), a court must accept as true "all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Kerber v. Qwest Group Life Ins. Plan*, 647 F.3d 950, 959 (10th Cir. 2011) (citation omitted).

Under Fed. R. Civ. P. 8(a)(2), the complaint "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Generally, in the post-*Twombly* and *Iqbal* era, a complaint will survive a Rule 12(b)(6) motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Plausible" does not mean "likely to be true," but is, instead, a nudge beyond "conceivable." *See Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). "The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." *Id.*; *see also Johnson v. City of Shelby*, 135 S.Ct. 346, 346 (2014) ("Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' . . . they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.").[1]

Matters Outside the Pleadings

While Plaintiff disagrees that the bodycam video attached to Defendant Hopkins' Motion to Dismiss is "central to his complaint," [Doc. 96], Plaintiff does not object to the Court considering the video in deciding the motions to dismiss. Plaintiff does, however, take issue with Exhibits B and C, the transcript and ruling from Mr. Slatton's suppression hearing from his

[1] In *Johnson*, the United States Supreme Court summarily reversed a dismissal of a § 1983 action, emphasizing that lower courts are not to apply such a heightened standard of pleading.

previous criminal case. Neither of these documents are central to his claims, nor does Mr. Slatton reference or rely on these documents whatsoever in his FAC. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (A document is central or integral to the complaint when "the complaint relies heavily upon its terms and effect."). Therefore, the court should not consider Hopkins' Exhibits B and C when ruling on this motion.

ARGUMENT

I. Defendants Hopkins and Barnes Unreasonably Seized Mr. Slatton in Violation of the Fourth Amendment.

The Supreme Court has held that a seizure requires submission to a show of authority or the application of physical force which brings termination of movement. In *Brower v. County of Inyo*, the Supreme Court found that a seizure occurred when the subject was killed by crashing into a police roadblock while fleeing from the police. 489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). The court reasoned:

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement …, nor even whenever there is a governmentally caused and … *desired* termination of an individual's freedom of movement …, **but only when there is a governmental termination of freedom of movement *through means intentionally applied***. . . . That is the reason there was no seizure in the hypothetical situation that concerned the Court of Appeals. The pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit; and though he was in fact stopped, he was stopped by a different means—his loss of control of his vehicle and his subsequent crash. If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.

Brower, 489 U.S. at 596-97.

In *California v. Hodari D.*, the Supreme Court considered whether there was a seizure under the Fourth Amendment when there was a mere show of authority without the use of physical force. 499 U.S. 621 (1991). The court held there was no seizure, and in reaching this conclusion

explained that a seizure under the Fourth Amendment encompasses the common-law definition of arrest, which "requires *either* the application of physical force . . . *or*, where that is absent, *submission* to the assertion of authority." *Id.* at 626 (emphasis in original).

Relying on *Brower* and *Hodari D.*, the Tenth Circuit holds that there is no seizure under the Fourth Amendment unless the force terminates the subject's movement through means intentionally applied. In *Brooks v. Gaenzle*, 614 F.3d 1213 (10th Cir. 2010), an officer shot a violent, fleeing suspect under suspicion of attempted burglary. *Id* at 1215. Despite being hit, the man continued his flight and evaded capture for three days. *Id.* The court held that when police shot the man, he was not seized, because a seizure under the Fourth Amendment requires "intentional acquisition of physical control, through termination of movement by physical force or submission to a show of authority." *Id.* at 1221. This occurs when a person is "stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.* (citing *Brower*, 489 U.S. at 595-96). The court explained, "what constitutes actual 'submission'. . . depends on 'the totality of the circumstances – the whole picture." *Id.* (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)). There was no seizure when Mr. Brooks was shot because "he continued climbing the fence and elud[ed] arrest for three days." *Id.* at 1224.

The Tenth Circuit reached a similar conclusion in *Farrell v. Montoya*, 878 F.3d 933 (10th Cir. 2017). The plaintiff was driving with her five children when she was pulled over for speeding. *Id.* at 935. Before the officer could cite the plaintiff, she drove away. *Id.* The officer returned to his car and followed the plaintiff with his sirens on, and the plaintiff stopped again shortly thereafter. *Id.* Two other officers arrived, and when the plaintiff drove away for the second time, an officer fired three shots, missing the vehicle completely. *Id.* The officers pursued the plaintiff, who surrendered four minutes later. *Id.* The court held that the plaintiff was not seized

when shots were fired because they did not cause her submission. *Id.* at 937. The court also rejected the plaintiff's argument that there was an ongoing seizure that began when the plaintiff first pulled over and lasted at least until she was shot at. *Id.* at 938. The court explained that it was unaware of any court finding the existence of an ongoing seizure, and that the authority Farrell cited to was not analogous to, or supportive of her argument, because they focused on the fruit of unlawful seizures. *Farrell*, 878 F.3d at 938-39.

While the Tenth Circuit has not confronted a case with facts as similar to Mr. Slatton's, other district courts have addressed this issue. In *Yelverton v. Vargo*, 386 F. Supp. 2d 1224, 1228 (M.D. Ala. 2005) the court found that the plaintiff was seized for purposes of the Fourth Amendment when he was pepper sprayed by an officer while driving recklessly, despite the plaintiff's ability to continue driving away. Due to the pepper spray, the plaintiff soon thereafter crashed his vehicle and walked on foot for a mile before being apprehended. The court followed *Hodari D.* and reasoned that because the pepper spray was used to seize the plaintiff and caused him to crash his vehicle which led to his apprehension, the officer's pepper spraying of the plaintiff constituted a seizure.

In *Griffin v. Runyon*, No. 5:04-CV-348 (DF), 2006 U.S. Dist. LEXIS 29688 (M.D. Ga. May 16, 2006) the plaintiff, a subcontractor, was surveying plots of land and arguing with nearby landowners about his right to be there. Police were called, and the plaintiff and officer argued about the same. Eventually, the officer grabbed the plaintiff by the arm and demanded he come with the officer. *Id.* at 13-14. The plaintiff ignored the officer's commands, so the officer pepper sprayed him in the face. *Id.* at 14. In response, the plaintiff turned around and walked thirty feet to his car, only to be sprayed again. *Id.* at 15. Undeterred, he entered his car and drove to a nearby water spigot to wash off the pepper spray, where he was stopped by other officers. *Id.* 16. The

court found that the plaintiff was seized when he was pepper sprayed because it was "a calculated effort to prevent [the plaintiff's] flight and bring him into compliance with [the officer's] verbal commands to halt." *Id.* at 20. These actions were "means intentionally applied to terminate [the plaintiff's] freedom of movement" which resulted in the plaintiff's submission. *Id.*

A. Hopkins' Use of Force Against Mr. Slatton Terminated His Movement and Caused His Submission to Authority.

When Hopkins pepper sprayed Mr. Slatton for the purpose of seizing him, and the pepper spray caused his termination of movement and subsequent apprehension, Mr. Slatton was seized for purposes of the Fourth Amendment. [Doc. 94 ¶¶ 37, 41, 42, 88]. Inherent in the holdings of *Brower, Brooks*, and their progeny is an analysis of causation between the use of force and a subject's submission. Three days in *Brooks* was a sufficient length of time to sever causation between the officer's use of force and the plaintiff's apprehension. Separate seizures and an unsuccessful use of force were sufficient to sever causation in *Farrell.*

Unlike the *Brooks* and *Farrell* plaintiffs who were shot, but continued to evade police for days, whereby they were not "stopped by the very instrumentality set in motion or put in place in order to achieve that result," *Brooks*, 614 F.3d at 1221, Mr. Slatton was stopped and apprehended solely because he was struggling to breathe and in pain from the pepper spray. [Doc 94, ¶¶ 41, 42]. In other words, Hopkins' pepper spray of Plaintiff was a "governmental termination of freedom of movement through means intentionally applied." *Brooks*, 614 F.3d at 1220 (quoting *Brower*, 489 U.S. at 1596-97). Furthermore, Hopkins' intended use of force on Mr. Slatton was indeed successfully applied to him, directly causing his submission, even if four minutes later, unlike the intended target in *Farrell.* The language of *Brower* and its progeny make clear that when Hopkins pepper sprayed Mr. Slatton and this very force terminated Mr. Slatton's movement, leading to his apprehension, Mr. Slatton was seized under the Fourth Amendment.

Mr. Slatton does not necessarily claim the existence of an ongoing seizure,[2] but *Farrell* is nonetheless clearly distinguishable. Farrell's argument of ongoing seizure was particularly weak because Farrell submitted to authority each time she pulled over, and she was not stopped by the officer's missed bullets. Thus, each seizure was pursuant to the officer's show of authority (sirens and flashing lights) which created separate seizures, rather than one ongoing seizure. *See id.* Moreover, the court emphasized that the officer's missed shots were not the instrumentality that caused Farrell's submission to authority, which is starkly different from Mr. Slatton's seizure, which was caused and effectuated by Hopkins' use of pepper spray.

The question then becomes, at what point does a seizure begin and end when the use of force terminates a subject's movement, but not immediately? The *Yelverton* and *Griffin* analyses are instructive. There, the courts found that a seizure occurred when the officers used force, which ultimately, though not immediately, stopped the plaintiffs. The fact that the force failed to *immediately* terminate the plaintiffs' movement was not dispositive. As is the case for Mr. Slatton, because the force was used with the intention of seizing the plaintiffs and it directly caused the plaintiffs' submission soon thereafter (within minutes), this demonstrates a firm link between the termination of movement through means intentionally applied. In each case, the plaintiffs were seized when the officers used force because the use of force caused their submission shortly thereafter. This result comports with *Brower, Brooks*, and their progeny. Plaintiff's factual allegations accepted as true demonstrate that Mr. Slatton was seized when he was pepper sprayed in

[2] Plaintiff does not necessarily claim that his seizure was one continuous seizure or two seizures. The dispositive inquiry is whether there was an intentional acquisition of physical control through means intentionally applied, further supported by considerations that evince direct causation, such as length of time the subject was in flight, and the whether the force successfully hit the plaintiff.

the face, because the use of force was intended to seize him, it caused his termination of movement just minutes later, and it directly brought about his apprehension.[3]

B. Officers Hopkins and Barnes Unlawfully Seized Mr. Slatton When They Caused Him to Be Seized Without Probable Cause or Reasonable Suspicion.

"In evaluating whether the events leading up to an arrest amount to probable cause, the Tenth Circuit asks whether an objectively reasonable officer could conclude that the historical facts at the time of the arrest amount to probable cause." *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007). Probable cause is "based on the totality of the circumstances, and requires reasonably trustworthy information that would lead a reasonable officer to believe that the person about to be arrested has committed or is about to commit a crime." *Id.*

i. Hopkins and Barnes Lacked Probable Cause to Seize Plaintiff for Third Degree Trespass.

[3] Defendants argue, through *Brooks* and its progeny, that a Fourth Amendment excessive force claim is barred from constitutional inquiry if the force used does not result in the subject's immediate apprehension, no matter how excessive the force. This result contravenes *Hodari D.* and is inconsistent with Fourth Amendment jurisprudence that requires seizures be "reasonable." *See Scott v. Harris*, 550 U.S. 372, 383 (2007). A rigid application of this approach ultimately leaves a large swath of bodily intrusions by police officers – be it by pepper spray, tasers, or bullets – unconstrained under the Fourth Amendment if the subject is able to flee.

The Supreme Court recently granted certiorari on this very issue. *See Torres v. Madrid*, 769 Fed. Appx. 654 (10th Cir. 2019), cert. granted, 2019 U.S. LEXIS 7619 (U.S., Dec. 18, 2019). In the Third, Sixth, Eighth, and Eleventh Circuits, "[a] seizure occurs when there is either (a) a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful, or (b) submission to a show of authority." *United States v. Brown*, 448 F.3d 239, 245 (3d Cir. 2006) (internal quotations omitted); *see Slusher v. Carson*, 540 F.3d 449, 454 (6th Cir. 2008); *see also Atkinson v. City of Mt. View*, 709 F.3d 1201 (8th Cir. 2013); *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003).

Although in disagreement with the Tenth Circuit rule and its inherent tension with Fourth Amendment jurisprudence, Plaintiff's seizure is readily distinguishable from the plaintiffs in *Brooks* and its progeny, and his FAC nonetheless demonstrates why Plaintiff was seized within the meaning of the Fourth Amendment.

Colorado's third-degree criminal trespass statute states, "[a] person commits the crime of third degree trespass if such person unlawfully enters or remains in or upon premises of another." C.R.S. § 18-4-504(1). The Restatement explains, "one who enters land pursuant to the possessor's consent and finds himself on the land at the time of the unexpected termination of such consent, does not become a trespasser . . . if he thereafter leaves the land in a reasonable manner and within a reasonable time." Restatement § 176 cmt. c. In determining what is a reasonable amount of time, "the surrounding circumstances, including 'whether he has continued on the land for some time before learning of the termination" should be taken into account. *Martin v. Union Pac. R.R. Co.*, 186 P.3d 61 (Colo. App. 2007) (rev'd on other grounds). In *Martin*, the court found that the plaintiff had consent to drive her car over railroad tracks. *Id.* at 69. Within moments, the railroad's warning lights began to flash and the gate came down. *Id.* at 70. "Even assuming that [the railroad's] consent was thereby revoked, under the Restatement … [plaintiff] had a reasonable time within which to leave [the railroad's] property before becoming a trespasser."). *Id.* The court rejected defendant's assertion that plaintiff was a trespasser because a reasonable amount of time was not afforded to plaintiff to leave when the train appeared twenty seconds later.

Plaintiff's FAC demonstrates Hopkins and Barnes' lack of probable cause for Plaintiff's seizure. [Doc. 94 ¶¶ 26-30, 46, 47, 86-89, 92]. As stated in the FAC:

- Hopkins and Barnes knew Plaintiff was an invitee/licensee whose consent to be at the event was later revoked. Upon revocation, they saw Plaintiff calmly and immediately exit the building in an effort to comply with the order to leave. [*Id.*, ¶¶ 21, 22].
- Hopkins and Barnes followed Plaintiff outside and Hopkins immediately asked Plaintiff, "what was the property part you didn't understand." [*Id.*, ¶ 25]. Plaintiff responded that he was waiting for his ride. *Id.*
- Hopkins demanded Plaintiff leave the property, but before giving him a chance to do so, confusingly demanded to see his identification. [*Id.*, ¶ 26]. Perplexed, Plaintiff asked why. *Id.* Hopkins stated that he was detaining Plaintiff. *Id.*

- Mr. Slatton replied, "I'm not trespassing, I'm leaving right now," and walked away. Hopkins then informed him that he was under arrest. [*Id.*, ¶ 28].
- This brief encounter lasted no longer than thirty seconds. [*Id.*, ¶ 29].

Hopkins and Barnes knew that Mr. Slatton had consent to be on the property, and when his consent was revoked, they witnessed him comply and leave the building. They then should have afforded him a reasonable amount of time and manner in which to leave. *Martin*, 186 P.3d at 70. Despite learning that Mr. Slatton was waiting for a ride, Hopkins and Barnes nonetheless afforded him a mere thirty seconds to comply before telling him he was under arrest. This was not a reasonable amount of time to comply under the circumstances, especially after giving him conflicting commands to leave the property and then to produce his identification. Because Hopkins and Barnes did not afford Mr. Slatton a reasonable amount of time nor manner in which to leave the premises, despite their knowledge that Mr. Slatton's permission to remain on the premises was just revoked, they lacked probable cause to seize him for trespassing.

Hopkins and Barnes lacked even reasonable suspicion to detain Mr. Slatton. An officer has reasonable suspicion to stop an individual when the officer has reason to believe that a person is committing or is about to commit a crime. *Terry v. Ohio*, 392 U.S. 1, 28 (1968); *Harman v. Pollock*, 568 F.3d 1254, 1261 (10th Cir. 2009). Upon watching Mr. Slatton exit the building after being told to leave, and learning that he was waiting for his means of transportation for that very purpose, Hopkins and Barnes should have ended their inquiry. [Doc. 94 ¶¶ 26, 30, 87].

ii. Hopkins and Barnes Unlawfully Seized Plaintiff for Obstruction.

Under C.R.S. § 18-8-104(1)(a), a person obstructs 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." An "obstacle" or "physical

interference" requires "conduct that is of sufficient magnitude to 'obstruct, impair or hinder' enforcement of the officers' duty." *Dempsey v. People*, 117 P.3d 800, 810 (Colo. 2005). The obstacle "may not be merely verbal opposition." *Id.* at 810-11 (citing *Norwell v. Cincinnati*, 414 U.S. 14, 38 (1973)) (holding that "one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer.").

Mr. Slatton believed he was complying with Hopkins' order to leave the property and that he was not committing a crime. [Doc. 94, ¶¶ 27, 28, 86, 87]. As such, Mr. Slatton lawfully refused to produce his identification when Hopkins demanded it. *Romero v. Story*, 672 F.3d 880, 888 (10th Cir. 2012) ("A citizen has the constitutional right to walk away from a law enforcement officer who lacks probable cause or reasonable suspicion to detain or seize him or her.") (citing *Kentucky v. King*, 563 U.S. 452, 469-70 (2011)). Furthermore, Mr. Slatton's flight in self-defense was not sufficient to constitute probable cause or reasonable suspicion for obstruction. Critically, Mr. Slatton fled *after* Hopkins pepper sprayed him. [*Id.*, ¶ 39]. The Colorado Supreme Court has acknowledged the affirmative defense of self-defense against the crime of obstruction. *See People v. Fuller*, 781 P.2d 647, 650 (Colo. 1989) (citing C.R.S. § 18-1-704(1) which "permits a person to defend himself when he reasonably believes that unreasonable or excessive force . . . is being used by law enforcement officers or that its use is imminent."). After being hit with a baton and pepper sprayed by Hopkins, Mr. Slatton reasonably believed that Hopkins' continued use of excessive force was imminent, so he fled in self-defense. [*Id.*, ¶ 34-37, 39]. When an officer's excessive force causes a subject to flee in self-defense, the subject's flight is not sufficient to constitute probable cause or reasonable suspicion for obstruction. *See Henson v. United States*, 55 A.3d 859, 869 (D.C. 2012) (noting circumstances where an individual fleeing from police would

not be sufficient to constitute reasonable suspicion or probable cause, such as when an individual flees from an officer who is using excessive force).

Lastly, Hopkins caused Mr. Slatton to be seized by knowingly or recklessly furnishing false information to another officer that was clearly contradicted by the facts of the incident, such as his statement that "after he struck Mr. Slatton with the baton, Mr. Slatton reacted by taking 'an aggressive stance.'" [Doc. 94 ¶ 46]. Barnes also made no attempt to correct the information Hopkins provided to the officer to prevent Mr. Slatton from being unlawfully seized. [*Id.*, ¶ 47]. Viewed in the light most favorably to Plaintiff, these allegations sufficiently depict Hopkins and Barnes' lack of probable cause or reasonable suspicion to seize Plaintiff.

iii. Mr. Slatton Sufficiently Alleged Defendant Barnes' Failure to Intervene in Violation of Mr. Slatton's Fourth Amendment rights.

To allege a failure to intervene in a § 1983 action, a plaintiff must show that an officer "observed or had reason to know of a constitutional violation and ha[d] a realistic opportunity to intervene." *Jones v. Norton*, 809 F.3d 564, 576 (10th Cir. 2015). It is "not necessary that a police officer actually participate in the use of excessive force in order to be held liable under section 1983. Rather, an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force, can be held liable for his nonfeasance." *Walton v. Gomez*, 745 F.3d 405 (10th Cir. 2014).

Plaintiff incorporates his previous arguments that there was indeed a seizure under the Fourth Amendment. Plaintiff's FAC clearly alleged that Barnes was with Hopkins during the entirety of Hopkins' encounter with Mr. Slatton and witnessed their conversation and Hopkins' use of force. [*Id.*, ¶¶ 21, 23, 25]. Despite the lack of probable cause or reasonable suspicion to believe that Mr. Slatton had committed or was about to commit a crime, Barnes made no attempt to stop Hopkins from unlawfully and unreasonably seizing Mr. Slatton. [*Id.*, ¶¶ 30, 47, 86-89, 91-

93]. Barnes also made no attempt to correct the information Hopkins provided to the other FCPS officer in order to prevent Mr. Slatton from being unlawfully seized. [*Id.*, ¶ 47]. *See Fogarty*, 523 F.3d at 1164 (Plaintiff's failure to intervene claim survived motion to dismiss because plaintiff alleged that defendant stood by as another officer used force against plaintiff and that defendants used or permitted physical force in the course of the arrest). When viewed in the light most favorably to Plaintiff, Barnes' motion to dismiss based on the failure to intervene must be denied.

iv. Mr. Slatton's Right to Be Free From Unreasonable Seizures Was Clearly Established.

In the qualified immunity analysis, a plaintiff must show that "(1) the defendant violated a constitutional right, and (2) the constitutional right was clearly established." *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009). A right is clearly established when "the contours of [a] right [are] sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Harte v. Bd. Of Comm'rs*, 864 F.3d 1154, 1173 (10th Cir. 2017) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (1987)) (internal quotations omitted). There need not be a case on-point or even cases that are "fundamentally similar." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The inquiry is whether officers had "fair warning that their alleged treatment [of plaintiff] was unconstitutional." *Id.* The Supreme Court has warned that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *A.M. v. Holmes*, 830 F.3d 1123, 1135 (10th Cir. 2016).

Where there is a claim of unlawful seizure, the analysis is straightforward, "for '[t]he law was and is unambiguous: a government official must have probable cause to arrest an individual.'" *Fogarty v. Gallegos*, 523 F.3d 1147, 1164 (10th Cir. 2008). In other words, it was clearly established that an individual cannot be detained against his will when officers lack probable cause or reasonable suspicion that they committed or are going to commit a crime.

Romero, 672 F.3d at 888 (10th Cir. 2012). The Supreme Court has also consistently held that "a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida v. Bostick*, 501 U.S. 429, 437 (1991). It was also clearly established that an officer cannot arrest an individual for failing to identify himself when they lack reasonable suspicion. *Brown v. Texas*, 443 U.S. 47, 52-53 (1979). Furthermore, it was clearly established that Mr. Slatton was within his rights to question why he was being detained. *See Florida*, 501 U.S. at 437 (finding that any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure"). Lastly, it was clearly established that in creating a warrantless arrest affidavit, there must be "a truthful showing of facts to support probable cause." *Harte v. Bd. Of Comm'rs*, 864 F.3d 1154, 1162 (10th Cir. 2017). An affiant who knowingly or recklessly submits "deliberate falsehood(s) or reckless disregard for the truth," or "omits information from an affidavit that would have negated probable cause," violates an individual's right to be free of unreasonable seizures. *Id.* Accordingly, Hopkins and Barnes were on notice that their conduct would violate the Fourth Amendment right to be free from unreasonable seizures and are therefore not entitled to qualified immunity.

V. Issue Preclusion Does Not Bar Litigation of Mr. Slatton's Unlawful Seizure Claim.

In Colorado, an issue is barred from re-litigation when:

> (1) The issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding; (2) the party against whom estoppel was sought was a party to or was in privity with a party to the prior proceeding; (3) there was a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior proceeding.

McNichols v. Elk Dance Colo., LLC, 139 P.3d 660 (Colo. 2006).

Hopkins' claim of issue preclusion fails to meet prongs three and four. The decision of the county court at the conclusion of Mr. Slatton's suppression hearing was not a final judgment on the merits because it was unappealable at that time. While the prosecution is entitled to an interlocutory appeal after the court grants a motion to suppress evidence, the defendant is not. *See Colo. Crim. P. 37.1*; *see also Neuhaus v. People*, 289 P.3d 19 (Colo. 2012). Instead, the defendant must proceed to trial, and, if found guilty, appeal the denial of the suppression along with other issues in the direct appeal. Plaintiff never had an opportunity to do so because the case was dismissed. Therefore, there was no "opportunity for review." *See Rantz v. Kaufman*, 109 P.3d 132, 141 (Colo. 2005). The Tenth Circuit has also held that "[a] judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel," and the "same is true . . . of a judgment vacated by a trial court." *United States v. Lacey*, 982 F.2d 410, 412 (10th Cir. 1992). The outcome of Plaintiff's suppression hearing does not constitute a final judgment on the merits and his wrongful seizure claim is not barred by issue preclusion.

Additionally, Mr. Slatton did not have a full and fair opportunity to litigate the issue of probable cause in his suppression hearing. In analyzing this factor, the court considers: "[1] whether the remedies and procedures in the first proceeding are substantially different from the proceeding in which collateral estoppel is asserted, [2] whether the party in privity in the first proceeding has sufficient incentive to vigorously assert or defend the position of the party against which collateral estoppel is asserted, and [3] the extent to which the issues are identical." *McNichols*, 139 P.3d at 669. Mr. Slatton's suppression hearing in county court is substantially different from a full trial before the Colorado District Court. The Colorado District Court has held that the comparative length of procedures is significant in determining similarity. *Murphy-Sims v. Owners Ins. Co.*, 2017 U.S. Dist. LEXIS 106958, at *17 (D. Colo. March 17, 2017) (finding that because the previous

arbitration hearing only lasted one day, it was substantially different from the summary judgment motion). Mr. Slatton's probable cause issue was raised among others in a motions hearing that took less than an hour, in state county court rather than federal court. Additionally, Mr. Slatton's civil complaint alleging Fourth and Fourteenth Amendment claims is far from identical to his suppression hearing challenging probable cause for his charges. *See Kadingo v. Johnson*, 304 F. Supp. 3d 1003, 1016 (D. Colo. 2017) (finding that despite some overlap, because Plaintiff's claims were much broader in her second case which alleged violations of federal law, the first case which determined whether the administrative law judge properly adjudicated the case under applicable regulations did not bar litigation of her claims). For these reasons, Plaintiff's wrongful seizure claim is not barred by issue preclusion.

II. Hopkins, Hutto, and Fort Collins Violated Mr. Slatton's Fourth Amendment Right to be Free of Unreasonable Seizures By Use of Excessive Force.

To recover for an excessive force claim, a plaintiff must show "(1) that the officers used greater force than would have been reasonably necessary to effect a lawful seizure, and (2) some actual injury caused by the unreasonable seizure that is not de minimis, be it physical or emotional." *Cortez v. McCauley*, 478 F.3d 1108 n. 25 (10th Cir. 2007). Assessing the reasonableness of police use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 2020 vision of hindsight." *Id.* at 396. The relevant inquiry is whether "the officers' actions are objectively reasonable in light of the facts and circumstances confronting them." *Id.* at 397. The totality of the circumstances must be taken into account, and the Supreme Court has delineated three, non-exclusive factors relevant to the inquiry: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009).

A. Plaintiff Sufficiently Plead a Fourth Amendment Excessive Force Claim Against Hopkins, Hutto, and Fort Collins.

Under the circumstances, Hopkins used excessive force when he struck Plaintiff with his baton and pepper sprayed him in the face. Pepper spray has a "variety of incapacitating and painful effects" and therefore "constitutes a significant degree of force" which "should not be used lightly or gratuitously against an arrestee who is complying with police commands or otherwise poses no immediate threat to the arresting officer." *Tracy v. Freshwater*, 623 F.3d 90, 98 (2d Cir. 2010). It was clearly established that "[t]he use of disproportionate force to arrest an individual who has not committed a serious crime and who poses no threat to herself or others constitutes excessive force." *Davis v. Clifford*, 825 F.3d 1131, 1137 (10th Cir. 2016).

Defendants do not challenge the first two factors under *Graham*, so Plaintiff does not address them here. Nonetheless, it bears emphasizing that when Hopkins used force, Plaintiff was neither committing a serious crime, nor being violent or threatening. [Doc. 94 ¶¶ 27, 30, 34]. Thus, the first two factors weigh strongly in Mr. Slatton's favor.[4]

The third *Graham* factor – actively resisting arrest or attempting to flee – also does not justify the force used by Hopkins. When Hopkins struck Mr. Slatton with a baton, Mr. Slatton was neither fleeing nor resisting arrest—rather, he had been asserting his legal right to walk away from an officer's unlawful order. [*Id.*, ¶¶ 27, 28, 31]. Considering the purported crime for which he was being stopped and the complete absence of danger he posed, Hopkins' baton strike in

[4] Even assuming, *arguendo*, that Defendants had probable cause for Plaintiff's trespass, third-degree criminal trespass is a class 1 petty offense, and obstruction is a class two misdemeanor. C.R.S. §§ 18-4-504(2) and 18-8-104(1)(a); *see Casey v. City of Fed. Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007) (finding that a Class One misdemeanor, more severe than a Class Two, was not a severe crime). These "minor offense[s]—at most—support the use of minimal force." *Davis v. Clifford*, 825 F.3d 1131 (10th Cir. 2016). Additionally, Mr. Slatton posed no immediate threat to the safety of the officers or others. [Doc. 94 ¶ 34]. Defendants also concede as much.

response to Mr. Slatton's assertion of his right to walk away was clearly unreasonable. *See Morris v. Noe*, 672 F.3d 1185, 1198 (10th Cir. 2012) (where only one *Graham* factor marginally supported using force and the other two weighed heavily against it, a reasonable officer would have known that pushing a nonviolent and compliant plaintiff into bushes during the course of his arrest was not justified). After hitting Mr. Slatton completely unprovoked, Hopkins then pepper sprayed him in the face without warning. [Doc. 94 ¶ 37]. Using a baton and pepper spray on Mr. Slatton – a nonviolent and nonthreatening individual who possibly committed a minor offense – was highly unreasonable and excessive under the circumstances. *See Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007) (finding excessive force where the officer tackled and tased plaintiff, a nonviolent misdemeanant who was neither dangerous nor fleeing). Defendants' motions to dismiss Plaintiff's Fourth Amendment excessive force claim must be denied.

B. Fort Collins Has a Custom, Policy, and Practice of Using Excessive Force in Violation of the Fourth and Fourteenth Amendments.

Municipalities are considered "persons" subject to suit under 42 U.S.C. § 1983 for civil rights violations. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). A municipality is liable for constitutional torts if the alleged unconstitutional acts implicate a policy, ordinance, or custom of the local government. *Id*. at 690-94; *Garcia v. Salt Lake Cnty.*, 768 F.2d 303, 308 n.4 (10th Cir. 1985). An entity defendant is responsible under § 1983 when the execution of a policy or custom actually caused an injury of constitutional dimensions. *Monell*, 436 U.S. at 694; *D.T. v. Indep. Sch. Dist.*, 894 F.2d 1176, 1187 (10th Cir. 1990). To prevail on his claims against Hutto and Fort Collins, Plaintiff must establish "(1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation." *See Myers v. Okla. Cnty. Bd. of Cnty. Commr's*, 151 F.3d 1313, 1316 (10th Cir. 1998). A policy or custom can be established in many ways, including the

existence of "an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; . . . or [] the failure to adequately train or supervise employees." *Bryson v. Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010) (citation and quotations omitted). For claims of municipal liability, courts have rejected a heightened pleading standard that goes beyond the "short and plain" statement normally required pursuant to Fed. R. Civ. P. 8(a). As Judge Ebel explained in *Walker v. Zepeda*:

> The reasons for not requiring heightened fact pleading in a § 1983 municipal liability complaint remain even in the wake of *Twombly* and *Iqbal*: a plaintiff, as an outsider to municipal government, is not expected to have information about a city's official policies, practices, or training programs at the pleading stage.

Walker v. Zepeda, 2012 U.S. Dist. LEXIS 74386, at *14 (D. Colo. May 29, 2012). Rather, a well-pleaded claim of municipal liability is one that simply "provide[s] fair notice to the defendant, [which] requires more than generically restating the elements of municipal liability." *Taylor v. RED Dev., LLC*, 2011 U.S. Dist. LEXIS 97985, at *9 (D. Kan. Aug. 31, 2011). Thus, a complaint sufficiently alleges municipal liability where "it contain[s] not only 'a boilerplate recitation of the grounds for municipal liability,'" but also makes "*some additional allegation to put the municipality on fair notice* of the grounds for which it [is] being sued." *Walker*, 2012 U.S. Dist. LEXIS 74386, at *14 (quoting *Taylor*, 2011 U.S. Dist. LEXIS 97985, at *4) (emphasis in original). "To require more could foreclose legitimate § 1983 claims that, after appropriate discovery, turn out to have evidentiary support." *Id.* at *15-16 (citing *Wilson v. City of Chicago*, 2009 U.S. Dist. LEXIS 93912, at *3 (N.D. Ill. Oct. 7, 2009) ("[A] plaintiff should be given the opportunity to develop an evidentiary record to determine whether he can provide support for his claims.")).

C. Hutto and Fort Collins Have Illegal Customs and Practices of Excessive Force, Including Inadequate Training and Supervision of its Law Enforcement Officers.

As an initial matter, Plaintiff has sufficiently alleged that Hopkins and Barnes violated Plaintiff's constitutional rights. *See Myers*, 151 F.3d at 1316. The allegations in Plaintiff's FAC also illustrate Fort Collins' widespread custom and practice of using excessive force, and their failure to adequately train or supervise employees.

Hutto and Fort Collins' assertion that Plaintiff has not provided specific allegations entirely ignores paragraphs 51-76 of the FAC. [Doc. 94]. The FAC explains that Hutto and Fort Collins maintained a custom and practice of condoning the use of excessive force by FCPS officers. [*Id.*, ¶¶ 52, 61, 63-68]. It further highlights six other cases involving the use of excessive force by Fort Collins police officers, with one including an egregious use of force by Defendant Hopkins himself. [*Id.* ¶¶ 53-60]. Additionally, the sergeant who reviewed Hopkins' conduct toward Mr. Slatton concluded that his use of force was within the law and FCPS' policy, explicitly demonstrating that the excessive force used by Hopkins was consistent with FCPS' policies. [*Id.* ¶ 66]. These allegations are more than sufficient to put Fort Collins on notice of the basis of the municipal liability claim. Furthermore, these facts are sufficient to allege that there was a custom and practice "so permanent and well settled as to constitute a custom or usage with the force of law. *See Bryson*, 627 F.3d at 788. The pleadings aptly permit an inference that there is a widespread practice, policy, or custom of deliberate indifference.

Plaintiff's excessive force claims against Defendant Hutto are also properly alleged under the failure to train and supervise theory of *Monell* liability. Plaintiff's FAC thoroughly describes Hutto's responsibility in overseeing, training, and supervising FCPS Officers, setting FCPS policy, and ensuring all FCPS officers comply with the law. [Doc. 94 ¶ 51]. In this role, Hutto ratified and condoned the use of excessive force by FCPS officers and it became customary among officers to use excessive force because Hutto and Fort Collins "communicated to FCPS

officers that such force was authorized and, indeed, expected." [*Id.*, ¶¶ 52, 62]. He further "created and tolerated a custom of deliberate indifference and continuously failed … to adequately train and supervise FCPS officers in these areas." [*Id.*, ¶¶ 63, 64]. Plaintiff's FAC clearly alleged that Hutto "set in motion a series of events that [he and Fort Collins] knew or reasonably should have known would cause others to deprive the plaintiff of [his] constitutional rights." *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 768 (10th Cir. 2013). This includes Hutto's engenderment of a "policy of inaction in the face of knowledge that FCPS officers were routinely violating specific constitutional rights." [Doc. 94 ¶ 64].

Nonetheless, even a single incident involving excessive force may evidence a failure to train where the legal consequences of failing to train are "patently obvious." *Connick v. Thompson*, 563 U.S. 51, 64 (2011); *see also Allen v. Muskogee*, 119 F.3d 837, 842 (10th Cir. 1997); *Estate of Walter v. Corr. Healthcare Cos.*, 232 F. Supp. 3d 1157, 1165 (D. Colo. 2017) (finding allegations of single incident sufficient to survive motion to dismiss because "jails and prisons routinely house mentally ill inmates" and failure to train on appropriate treatment was therefore likely to result in constitutional violations). When all plausible inferences are drawn in Plaintiff's favor, the need to train FCPS officers on reasonable use of force was obvious.

Finally, the Court should be leery of dismissing this claim against the City so early in the case; dismissal at this early stage unduly risks "foreclos[ing] legitimate § 1983 claims that, after appropriate discovery, turn out to have evidentiary support." *Walker*, 2012 U.S. Dist. LEXIS 74386, at *15-16 (citing *Wilson*, 2009 U.S. Dist. LEXIS 93912, at *3). Because Plaintiff has sufficiently alleged the underlying constitutional violations by Hopkins and Barnes, as well as municipal custom or practice that was the moving force behind the constitutional deprivations,

Hutto is not entitled to qualified immunity, and the Court should deny Defendants' Motion to Dismiss with respect to the claims against Hutto and Fort Collins.

III. Hopkins, Hutto, and Fort Collins Violated Mr. Slatton's Fourteenth Amendment Substantive Due Process Rights.

Mr. Slatton's excessive force claim may, if not covered under the Fourth Amendment, be analyzed under the Fourteenth Amendment. *See Clark v. Edmunds*, 513 F.3d 1219 (10th Cir. 2008); *Ellis v. City of Lindsay*, No. 98-6153, 1998 U.S. App. LEXIS 31517, at *3 (10th Cir. Dec. 17, 1998); *see generally County of Sacramento v. Lewis*, 523 U.S. 833, 842-43 (1998). For a Fourteenth Amendment substantive due process claim, the court considers: "(1) the relationship between the amount of force used and the need presented; (2) the extent of the injury inflicted; and (3) the motives of the . . . officer." *Latta v. Keryte*, 118 F.3d 693, 702 (10th Cir. 1997). Use of force "inspired by malice or by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience" is actionable under the Fourteenth Amendment. *Id.* The Supreme Court has adopted a "less rigid and more fluid" review of substantive due process claims. *Id.* "Rules of due process are not … subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another." *Lewis*, 523 U.S. at 850. In analyzing conscience-shocking behavior, "[t]he intent-to-harm standard most clearly applies in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation." *Green v. Post*, 574 F.3d 1294, 1306 (10th Cir. 2009) (citing to *Perez v. Unified Gov't of Wyandotte Cty./Kansas City*, 432 F.3d 1163 (10th Cir. 2005) where firefighter responding to an emergency collided with a car in a busy intersection as the "paradigmatic example" of a decision made in haste where the intent to harm standard properly applied).

The Tenth Circuit analyzed a substantive due process claim in *Ellis*, No. 98-6153, 1998 U.S. App. LEXIS 31517. There, a faction of a church indicated to the plaintiff, who was the pastor of the

church, that he was relieved of his duties as pastor. *Id.* at *3. The plaintiff and dozens of supporting church members gathered outside the church, where the opposing faction was also present. *Id.* Police were called, but when they arrived, there was no actual disturbance. The Tenth Circuit found that despite the fact that the plaintiff had not committed a crime and was fully compliant and nonviolent, his claims that the officer pushed him with his forearm and lightly bruised the plaintiff's ribs were insufficient to shock the conscience. *Id.* at 17-18. The court found that the force used was not substantial, nor was there evidence of malice, as the officer's conduct was reasonable under the circumstances. *Id.*

Jarrett v. Schubert, Civ. Action No. 97-2628-GTV, 1998 U.S. Dist. LEXIS 12056, at *2 (D. Kan. July 31, 1998) is highly instructive. There, the plaintiff went to a police station to check on her daughter who was recently arrested. *Id.* at 3. Upon arrival, the defendant officer exited the same door as the plaintiff, and according to plaintiff, "'rammed' his elbow and firearm into her chest and 'slammed and pinned her against the wall of the building, causing her to sustain bruising on her chest." *Id.* at 4. When asked why he struck her, the defendant smirked and explained that he only bumped into her. *Id.* The plaintiff survived a motion for summary judgment on her Fourteenth Amendment claim because the evidence suggested that the defendant "assaulted her without provocation" and that her bruising was more than de minimus. *Id.* at 20. The defendant was also not "confronted with a 'tense, uncertain, and rapidly evolving' environment at the time of the assault, such that his conduct might be justified by emergency circumstances." *Id.* Lastly, the court denied qualified immunity because "it was settled that 'force inspired by malice or by unwise, excessive zeal amount to an abuse of official power that shocks the conscience . . . may be redressed under [the Fourteenth Amendment]." *Id.* at 21 (citing to *Latta*, 118 F.3d at 702).

Defendants dispute only the third prong of the *Latta* analysis, however, Plaintiff will discuss each prong in turn because the Tenth Circuit generally examines an officer's motive in combination with the other two *Latta* factors. *Walton v. Gomez*, 745 F.3d 405, 426 (10th Cir. 2014). Thus, the court does not discard a substantive due process excessive force claim "based entirely on the 'motive' factor when disproportionate force and serious injury are present." *Id.*

Hopkins violated clearly established law when he pepper sprayed Mr. Slatton and hit him with his baton under the circumstances. [Doc. 94 ¶ 137-38]. It was "clearly established law that the use of disproportionate force to arrest an individual who has not committed a serious crime and who poses no threat to herself or others constitutes excessive force." *Davis*, 825 F.3d at 1137; *see also Fogarty*, 523 F.3d at 1161. Moreover, using pepper spray and a baton on a suspect detained for minor infractions who clearly poses no threat to the safety of the officers or others also violates clearly established law. *Young v. Cty. Of L.A.*, 655 F.3d 1156, 1161 (9th Cir. 2011) ("[B]oth [pepper spray and baton use] are regarded as 'intermediate force' that, while less severe than deadly force, nonetheless present a significant intrusion upon an individual's liberty interests."). Considering that Mr. Slatton had, at the very worst, committed a minor infraction and was nonviolent and nonthreatening, Hopkins' pepper spray and baton use were highly unreasonable and excessive under the circumstances. [Doc. 94 ¶¶ 27, 34, 123-128].

Second, Mr. Slatton sustained serious injuries because of Hopkins' use of force. "Both pepper spray and baton blows are forms of force capable of inflicting significant pain and causing serious injury." *Young*, 655 F.3d at 1161. Pepper spray "is designed to cause intense pain and inflicts a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx, as well as disorientation, anxiety, and panic." *Id.* at 1162. Unlike the *Ellis* plaintiff whose injuries were de minimus, Mr.

Slatton was in intense pain from the pepper spray which caused difficulty breathing, irritation, and discomfort for days. [Doc 94 ¶¶ 77, 78]. His eyes were irritated and remained red for roughly a year, causing him to feel extremely self-conscious about his appearance. [*Id.*, ¶ 78]. Mr. Slatton suffered significant emotional distress as well, "leading him to lose weight, have problems sleeping and issues in his relationships …, and ultimately stop attending his college classes." [*Id.*, ¶ 80]. The FAC fulsomely alleges the serious injuries Plaintiff suffered because of Hopkins' use of force.

Lastly, Hopkins was motivated by malice, excessive zeal, or deliberate indifference to Mr. Slatton, amounting to an abuse of power that shocks the conscience. [*Id.*, ¶¶ 82, 129-131, 140]. Unlike the firefighter in *Perez*, Hopkins was not in an emergent, tense, or dangerous situation at the time he used force, so the intent-to-harm standard should not be applied. "When actual deliberation is practical, we will employ a deliberate indifference standard." *Green*, 574 F.3d at 1301 (internal quotations omitted). Plaintiff's FAC demonstrates an inference of Hopkins' excessive zeal or deliberate indifference which motivated his behavior: primarily, his unprovoked baton strike to Plaintiff's leg as Plaintiff walked away onto the sidewalk, and his deliberate decision to pepper spray Plaintiff without warning. While perhaps not egregious in other more dangerous and rapidly evolving circumstances, here, Hopkins had time to deliberate, and his attack of Mr. Slatton under the circumstances was arbitrary and conscience-shocking. [*Id.*, ¶¶ 129-31]. The utter unreasonableness of his actions strongly imply that he used force in retaliation against Plaintiff for asserting his right to walk away or to cause harm unrelated to seizing him. *Id. See Smith v. Delamaid*, 842 F. Supp. 453, 460 (D. Kan. 1994) (finding that even without evidence of any particular animus toward the plaintiff, many of the defendants' motivations for the alleged facts could not be explained, and that most of the force came after the plaintiff caused property damage, "creating the inference of a motive of retribution," and denying defendants' motion for summary

judgment). Taken in the light most favorable to Plaintiff, Hopkins' behavior was, under the circumstances, sufficient to shock the judicial conscience. Because it was settled that "force inspired by malice or … excessive zeal amount to an abuse of official power that shocks the conscience", Hopkins and Hutto are not entitled to qualified immunity, and all of the Defendants' motions to dismiss Plaintiff's substantive due process claim must be denied in its entirety.

CONCLUSION

For the reasons above, the Defendants' Motions to Dismiss must be denied in their entirety.

DATED this 2nd day of March 2020.

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