

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.

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**MOTION FOR SUMMARY JUDGMENT  
PURSUANT TO FED. R. CIV. P. 56**

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Defendants RANDALL KLAMSER, in his individual capacity, and the CITY OF FORT COLLINS, a municipality, by and through its attorneys, Mark S. Ratner, Hall & Evans, L.L.C., and John R. Duval, Fort Collins City Attorney's Office, hereby submit the following Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56, as follows:

**I. INTRODUCTION AND PROCEDURAL HISTORY**

Plaintiff filed her initial Complaint and Jury Demand (the "Initial Complaint") in this matter on March 26, 2019, naming as Defendants the City of Fort Collins (the "City") and City of Fort Collins Police Officer Randall Klamser, in his individual capacity, in general alleging a violation of her Fourth Amendment rights arising out of her arrest by Officer Klamser [ECF 1]. As set forth in more detail below, Plaintiff alleges an excessive force claim against Officer Klamser for using a takedown maneuver during her arrest, and a claim against the City for unconstitutional custom, practices and/or policies which purportedly were the proximate cause of the use of

excessive force. On June 7, 2019, Defendants filed a Motion to Dismiss (the “2019 Motion to Dismiss”) arguing Plaintiff’s excessive force claim was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), and in addition arguing her claim against the City was barred due to the lack of an underlying constitutional violation and a failure to plead a municipal custom or policy that caused any alleged violation [ECF 23].

On February 24, 2020, following briefing on the 2019 Motion to Dismiss [ECF 28, 34], this Court issued its Order granting in part and denying in part the 2019 Motion to Dismiss, and denying Defendants’ Motion to Supplement [ECF 84]. With respect to the excessive force claim, the Court held any such claim arising prior to Officer Klamser’s takedown of Plaintiff was barred by *Heck* and, as a result, Plaintiff’s claim is limited to the question of whether Officer Klamser used greater force than reasonably necessary to overcome Plaintiff’s resistance during the takedown [ECF 84 at 10-13 (“In this light, the Court deems Surat to confess Defendants’ *Heck* argument as to everything before the takedown, and Defendants’ motion will be granted with prejudice as to any claim of excessive force based on Klamser’s alleged pre-takedown actions”). The Court, however, cautioned Plaintiff that she faces a “formidable burden” under *Heck*, which burden would be even more formidable if Officer Klamser raised the defense of qualified immunity (which was not raised in the 2019 Motion to Dismiss). [*Id.* at 14-15]. With respect to the claim against the City, the Court granted the 2019 Motion to Dismiss on the basis Plaintiff’s municipal liability allegations were “not tailored to the burden she faces in this case,” in light of the limitations created by *Heck* [ECF 84 at 16-17]. Although the Court expressed skepticism Plaintiff could amend to state a viable claim, it nevertheless dismissed the claim without prejudice [*Id.* at 17].

On March 12, 2020, Plaintiff sought leave to file a First Amended Complaint, which sought to add allegations supporting municipal liability against the City [ECF 96]. The Defendants ultimately did not object to the motion to amend, but instead reserved their right to file a second motion to dismiss addressing the municipal liability claim and asserting an argument of qualified immunity for the excessive force claim against Officer Klamser [ECF 97]. On August 11, 2020, the Court granted Plaintiff's unopposed Motion for Leave [ECF 106]. Plaintiff filed her First Amended Complaint on August 24, 2020 (the "First Amended Complaint") [ECF 107]. On September 14, 2020, the Defendants filed a Motion to Dismiss the First Amended Complaint (the "2020 Motion to Dismiss") pursuant to Fed. R. Civ. P. 12(b)(6) [ECF 108]. The 2020 Motion to Dismiss, which is still pending before the Court, seeks dismissal of all claims against the City on the basis Plaintiff still fails to properly identify any unconstitutional custom, practice, policy or procedure, as well as dismissal of all claims against Officer Klamser on the basis he is entitled to qualified immunity. Plaintiff's response to the 2020 Motion to Dismiss is due by October 26, 2020 [ECF 117]. Given the timing of the applicable Case Management Order, Defendants filed this Motion for Summary Judgment even though the 2020 Motion to Dismiss is still pending before the Court. This Motion for Summary Judgment, however, is not intended to supersede any request for relief set forth in the 2020 Motion to Dismiss. The arguments set forth in the 2020 Motion to Dismiss are, therefore, incorporated herein.

Officer Klamser and the City now seek summary judgment in their favor on all claims set forth in the First Amended Complaint [ECF 107]. Considering the Court's prior ruling and the limitations imposed by *Heck*, Plaintiff cannot prove that Officer Klamser used excessive force in taking her down to the ground after being found guilty of obstructing a peace officer and resisting

arrest. Furthermore, even if Plaintiff could demonstrate a constitutional violation, there is no clearly established law demonstrating Officer Klamser's actions were unconstitutional. Thus, Plaintiff's excessive force claim should be dismissed with prejudice as a matter of law.

In addition, Plaintiff cannot establish any unconstitutional custom, practice, policy, or procedure of the City or any causal nexus that might support any such constitutional violation. Any claim against the City should also be dismissed with prejudice as a matter of law.

## **II. MOVANT'S STATEMENT OF MATERIAL FACTS**

1. On April 6, 2017, at approximately 11:12 p.m., City of Fort Collins police officers, including Officer Klamser, were dispatched to a disturbance at a bar in downtown Fort Collins [Fort Collins Police Services, Report No. 17-5701, *Exhibit A*, at 4].

2. The disturbance was at Bondi Beach Bar, in an area identified as "District 1" and "Old Town" [*Exhibit G*, August 21, 2018 Criminal Trial Transcript, testimony of Officer Randall Klamser, 30:7; 15-22 & 25; 31:1-2].

3. Officer Klamser and Fort Collins Officer Garrett Pastor responded to the call and were informed by dispatch that one half of the disturbance was outside the bar and the other half was inside. [*Ex. A*, at 4].

4. When Officers Klamser and Pastor arrived at Bondi Beach Bar, they contacted an employee and were informed the male who had been removed from the bar, was standing outside [*Ex. G*, at 33:3-6].

5. At a call such as the one for Bondi Beach Bar, Fort Collins police officers take different roles identified as contact and cover [*Ex. G*, at 33:19-23].

6. A contact officer's primary responsibility is to conduct an interview and allow the other officer to focus 100% of their attention on the surroundings [*Ex. G*, at 34:1-9].

7. A cover officer's primary responsibility is to pay attention to the surroundings, respond if something in the surroundings changes, and preserve the peace [*Ex. G*, at 34:4-6; 47:17-18].

8. A cover officer allows the contact officer to focus on what he or she is doing [*Ex. G*, at 7-9].

9. When Officers Klamser and Pastor arrived at Bondi Beach Bar, there was a crowd consisting of 30-40 people waiting in line outside the establishment [*Exhibit B*, Officer Randall Klamser's body camera video, at 00:18 to 00:34<sup>1</sup>; *Ex. G*, at 18-21; *Exhibit I*, Officer Garrett Pastor's body camera video, at 00:50 to 01:02].

10. Upon arrival at the bar, uniformed bar staff pointed out a male who was waiting outside the bar. Officer Pastor contacted the male, who was identified as Mitchell Waltz. While Officer Pastor was talking to Mr. Waltz, Plaintiff was yelling at him from inside the bar's fenced in patio [*Ex. A*, at 3; *Ex. B*, at 00:36 to 00:48; *Ex. I*, at 01:01 to 01:07].

11. Officer Klamser spoke to witness Cory Esslinger, a uniformed bouncer at the bar who was working security at the time of the disturbance. Mr. Esslinger started to tell Officer Klamser what happened but they were interrupted when Plaintiff walked out of the bar and physically bumped into both Mr. Esslinger and Officer Klamser. Officer Klamser said "excuse me" and Plaintiff yelled back "excuse you" as she walked by [*Ex. A*, at 3-5; *Ex. B*, at 00:45-00:55;

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<sup>1</sup> Officer Klamser and Officer Pastor's body-cam videos were conventionally submitted to the Court.

**Exhibit H**, Fort Collins Police Services Internal Affairs Interview of Cory Esslinger, at 04:00 to 05:50; **Ex. I**, at 01:11 to 01:17]<sup>2</sup>.

12. Mr. Esslinger informed Officer Klamser that Mr. Waltz had been involved in a disturbance with another bar patron and a bouncer who tried to confront it, and Officer Klamser yelled to Officer Pastor that Mr. Waltz was not free to go [**Ex. A** at 3-5; **Ex. B** at 00:50-1:00].

13. Plaintiff walked towards Officer Pastor and grabbed Mr. Waltz by the arm, trying to pull him away from Officer Pastor. [**Ex. A** at 3-5; Fort Collins Police Services, Report No. 17-5701, Supp. No. 5, **Exhibit C**, at 3; **Ex. B**, at 00:50-1:00; **Ex. I**, at 01:17 to 01:20].

14. Officer Klamser had to break his contact with Mr. Esslinger [**Ex. G**, at 38:14-17; **Ex. I**, at 01:17 to 01:20].

15. Officer Klamser walked towards Plaintiff to assist in severing her from Mr. Waltz [**Ex. B**, at 00:50 to 1:00; **Ex. G**, at 45:4-7; **Ex. I**, at 01:20 to 01:25].

16. Michael Findlay was a witness to the incident between Officer Klamser and Plaintiff [**Exhibit D**, Deposition Transcript of Michael Findlay 7:19-24]

17. Mr. Findlay observed Officer Klamser attempt to put himself between Plaintiff and Officer Pastor and Mr. Waltz [**Ex. D**, at 12:14-16].

18. At the same time, the crowd outside Bondi Beach Bar was starting to react to what was occurring, including an interaction by an individual who walked up to Officer Pastor and asked, “What are you guys doing?” [**Exhibit F**, Deposition Transcript of Cory Bain Esslinger, at 29:24-25; 30:1-6; 14-18; 31:2-12; 32:1-4; **Ex. I**, at 01:29 to 01:33].

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<sup>2</sup> The Internal Affairs video interview of Mr. Esslinger, was also conventionally submitted to the Court.

19. As Plaintiff tried to walk away with Mr. Waltz. Officer Pastor grabbed Mr. Waltz by the arm and pulled him back, and Plaintiff continued walking until she realized Mr. Waltz was not with her. [*Ex. A*, at 3-5; *Ex. B*, at 00:50 to 1:00; *Ex. C*, at 2; *Ex. I*, at 01:20 to 01:23].

20. Mr. Waltz walked a few feet away with Officer Pastor, and Plaintiff started to walk back towards them. Officer Klamser told Plaintiff that Mr. Waltz was not free to go but that she could keep walking. [*Ex. A*, at 3-4; *Ex. B*, at 00:55 to 1:05; *Ex. C*, at 2; *Ex. I*, at 01:22 to 01:26].

21. Plaintiff said “no, I’m going to stay here” to Officer’s Klamser’s direction to keep walking, and instead continued to “walk through” him, towards Officer Pastor and Mr. Waltz [*Ex. B*, at 00:57 to 01:01; *Ex. D*, at 10:19-25; 11:1-13; 12:17-18; *Ex. G*, at 45:19-21; 46:4-5; *Ex. I*, at 01:24 to 01:27].

22. Officer Klamser used verbal commands, he put his left hand up to try and block Ms. Surat from going where Officer Pastor was attempting to interview Mr. Waltz, told Ms. Surat “no,” and also pointed away from where Officer Pastor was interviewing Mr. Waltz, none of which worked to stop Plaintiff [*Ex. A*, at 4-5; *Ex. B*, at 00:55 to 1:05; *Ex. D*, at 12:18-21;15:6-11; *Ex. G*, at 46:6-19; 48:6-8; *Ex. I*, at 01:27 to 01:37].

23. Plaintiff was being belligerent and abusive towards Officer Klamser [*Ex. B*, at 00:58 to 01:30; *Ex. D*, at 12:22-25; 13:1-21; *Ex. I*, at 01:37 to 01:55].

24. Plaintiff continued to try to walk through Officer Klamser, and she started slapping and hitting him, and repeating “you don’t need to fucking touch me” [*Ex. A*, at 4-5; *Ex. B*, at 1:01-1:10; *Ex. D*, at 14:5-6; *Ex. G*, at 47:21-25; 48:2-4; 48:14-16].

25. As Plaintiff continued to try and walk through Officer Klamser, she grabbed his throat [*Ex. G*, at 48:10-12].

26. Officer Klamser repeatedly told Plaintiff to put her hand on her head and she was under arrest [*Ex. B*, at 01:09 to 01:17; *Ex. I*, at 01:34 to 01:52].

27. At the point Officer Klamser told Plaintiff she was under arrest, he could no longer fulfill his duties as a cover officer to Officer Pastor, because 100% of his concentration was directed at Plaintiff [*Ex. G*, at 50:11-12].

28. Officer Klamser attempted to grab Ms. Surat's left hand and place her in a control hold. He told her to place her other hand on her head, and as he was placing her in a rear wrist control hold, she was trying to spin around and break free. [*Ex. A*, at 4-5; *Ex. B*, at 01:00 to 01:17; *Ex. C*, at 2; *Ex. G*, at 48:17-25].

29. Officer Klamser was unable to place Plaintiff in an escort hold and, therefore, he attempted to transition to a wrist control hold, which was also ineffective because Plaintiff was assaulting and hitting Officer Klamser and not being cooperative [*Ex. G*, at 49:3-13].

30. Officer Klamser again told Plaintiff to put her hand on her head and that she was under arrest, but she said "no, explain to me why you are touching me" as she continued to spin around and try to pry his hands off her arm. [*Ex. A*, at 4-5; *Ex. B*, at 01:10 to 01:20; *Ex. C*, at 2; *Ex. G*, at 53:1-5; *Ex. I*, at 01:24 to 01:52].

31. As Plaintiff refused to listen to Officer Klamser, he told Plaintiff: "I don't want to throw you to the ground, please don't do that, please don't do that." Plaintiff responded by trying to pry his fingers off her arm again. She said she would put her hand behind her head but instead continued to paw at his arms, saying "what the fuck did I do." [*Ex. A*, at 4; *Ex. B*, at 01:15 to 01:30; *Ex. G*, at 50:3-5; 53:1-5; *Ex. I*, at 01:24 to 01:52].

32. There was no affirmative or physical indication to Officer Klamser that Plaintiff would cooperate, despite Officer Klamser's repeated requests for compliance [*Ex. G*, at 50:20-24; 51:18-23; 52:16-22].

33. Given Plaintiff's level of resistance and anger, and because Officer Klamser expected Plaintiff to try and hit him again, he used a rowing arm takedown to take Plaintiff down to the ground and place her under arrest. [*Ex. A*, at 4-5; *Ex. B*, at 1:25 to 1:30; *Ex. C* at 2;].

34. Officer Klamser determined the rowing arm take down was the only thing he had left to use, because he did not want to use any impact weapons or tools [*Ex. G*, at 53:7-9].

35. The purpose of a rowing arm take down maneuver is to break the person's tunnel vision and concentration which was occupying whatever he or she was just doing and comply with the commands being given [*Ex. G*, at 54:5-8].

36. Prior to executing the rowing arm takedown maneuver, Plaintiff either struck or attempted to strike Officer Klamser multiple times [*Ex. D*, at 25:10-20].

37. After Plaintiff landed on the ground, she immediately started trying to twist and spin to break free from Officer Pastor and Officer Klamser. [*Ex. A*, at 4; *Ex. B*, at 1:25-1:40; *Ex. C*, at 2].

38. The officers were able to handcuff Plaintiff's wrists and walk her away from the scene as she continued to yell and scream, asking people to help her, saying "I was trying to get my boyfriend are you fucking kidding me" and "I didn't do anything wrong." She then fell to the ground and refused to get up unless Officer Klamser let her go, saying "report me, bitch," and "I can feel you shaking you little pussy, fuck you." [*Ex. A*, at p.4; *Ex. B*, at 1:35-3:30; *Ex. G*, at 57:2-11].

39. Officer Klamser turned Plaintiff over to Officer Erin Mast who had arrived in a patrol car. Officer Klamser asked Plaintiff if she needed medical attention and she responded, “fuck you!” and continued to proclaim she did not do anything wrong. [*Ex. A*, at 4; *Ex. B*, at 3:30-4:30].

40. Officer Klamser was approached by witness Michael Findlay, who said he had witnessed the entire incident and wanted to provide a statement. He stated that Officer Klamser was “in the right” and that he saw Plaintiff hit Officer Klamser three times before he took her down. He stated that Officer Klamser was being very reasonable with Plaintiff even though she was being so verbally abusive, and it looked like she was about to hit him a fourth time when he took her to the ground. [*Ex. A*, at 4; *Ex. B*, at 4:40-6:35; *Ex. D*, at 17:4-17].

41. Officer Mast tried to pat Plaintiff down prior to placing her in the patrol car, and Plaintiff cursed at her and tried to turn away from Officer Mast multiple times. Officer Mast told Plaintiff to stop moving and face the vehicle, and Plaintiff continued to curse at her. Plaintiff had bloodshot, watery eyes and smelled strongly of alcohol. [Fort Collins Police Services, Report No. 17-5701, Supp. No. 4, *Exhibit E*, at 2].

42. At the hospital, Plaintiff continued to be uncooperative with hospital staff and officers. She told Officer Mast that she remembered saying “fuck you” to Officer Klamser multiple times but she did not do anything else wrong. [*Ex. E*, at p.1].

43. Plaintiff was charged with Resisting Arrest and Obstruction of a Peace Officer and tried on these charges by a jury over five days in August of 2018 in Larimer County Court. [ECF 1 at ¶37].

44. At the conclusion of the trial, Plaintiff was found guilty of both charges, and the convictions were affirmed on appeal. [*See* Order Affirming County Court Convictions, Larimer County Court Case No. 2017M965, 10/29/2019, previously submitted at ECF 55-1].

45. During his encounter with Plaintiff, Officer Klamser constantly evaluates which level of control he is going to need and what level of resistance is being offered in order to make tactical decisions which will allow him to arrest the individual [*Ex. G*, at 52:6-13].

46. The goal of his interactions with an individual is to gain compliance, including arrest, so he can do his job as a police officer [*Ex. G*, at 43:21;24-25;44:1-2].

### **III. ARGUMENT**

#### **A. Plaintiff's Excessive Force Claim is Barred by Qualified Immunity**

##### **i. Qualified Immunity Factors**

Officer Klamser is entitled to summary judgment in his favor on the basis of qualified immunity. “Determining whether the force used to effect a particular seizure is objectively reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citations and internal quotations omitted). The Supreme Court “has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 22-27 (1968)). “Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue,

whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* (citing *Terry*, 392 U.S. at 20-22.) “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.” *Id.* at 396-97; *see also Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005) (recognizing that officers have to make split-second judgments in uncertain and dangerous circumstances). The question is an objective one: “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Graham*, 490 U.S. at 397 (citing *Scott v. United States*, 436 U.S. 128, 137-39 (1978)).

Qualified immunity is immunity from suit, as well as a defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The doctrine permits the resolution of claims against government officials before subjecting them “‘either to the costs of trial or to the burdens of broad-reaching discovery’ in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.” *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982)). A “heavy” two-part burden applies when a defendant asserts qualified immunity. *Mick v. Brewer*, 76 F.3d 1127, 1134 (10<sup>th</sup> Cir. 1996). First, a court assesses whether the state actor’s conduct violated a constitutional right, with contours sufficient for a reasonable state actor to

understand his conduct was unlawful. *Saucier v. Katz*, 533 U.S. 194, 201-01 (2001). Second, even if a violation occurred, a court assesses whether the law was clearly established such that the state actor is not entitled to immunity. *Id.* at 207-09. The reviewing court may consider these prongs in any order. *Pearson v. Callahan*, 555 U.S. 223, 226 (2009).

## ii. No Constitutional Violation

In ruling on the 2019 Motion to Dismiss, this Court noted that “*Heck* nonetheless imposes a formidable burden on Surat, even before taking the jury’s rejection of her self-defense argument into account.” [ECF 84 at 14]. After describing the standard for an excessive force claim, the Court noted:

In this light, it is highly significant that the jury convicted Surat of:

- ‘[u]sing or threatening to use physical force or violence against the peace officer or another; or \*\*\* [u]sing any other means which creates a substantial risk of causing bodily injury to the peace officer or another,’ Colo. Rev. Stat. § 18-8-103(1); and
- ‘using or threatening to use violence, force, physical interference, or an obstacle’ to ‘knowingly obstruct[], impair[], or hinder[] 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,’ *id.* §18-8-104(1)(a).

To avoid implying the invalidity of these convictions, Surat must prove that Klamser’s takedown was objectively unreasonable under all the circumstances *while taking as given* that he was attempting to effect an arrest and, in the process, the arrestee’s actions were subjecting him to, or threatening him with, physical force or violence, or putting him at substantial risk of bodily injury. *Cf. Martinez*, 184 F.3d at 1127 (‘the [district] court [on remand] must instruct the jury that Martinez’ state arrest was lawful per se’).

Moreover, if one accounts for the failure of the self-defense argument, Surat must prove that Klamser’s takedown was objectively unreasonable while taking as given all of the foregoing *and* the fact that Klamser had first attempted to subdue Surat through *lawful lesser force*.

[ECF 84 at pp.14-15 (emphasis in original)].

The evidentiary record established through discovery in this matter, makes Plaintiff's formidable burden insurmountable. Officer Klamser responded to a call for service at the Bondi Beach Bar [MSUMF 1-4]<sup>3</sup>. Upon arrival, Officer Klamser and Officer Pastor had distinct tactical positions as contact and cover officers [MSUMF 5-8]. Part of the division between tactical positions is to allow officers to be cognizant of their surroundings [MSUMF 6-8]. Here, surrounding the Bondi Beach Bar was a crowd of 30 to 40 people [MSUMF 9]. Officer Klamser undertook his duties, and began speaking with the Bondi bouncer, Cory Esslinger, about Plaintiff's boyfriend Mitchell Waltz [MSUMF 10-11]. Plaintiff decided to interject herself into the evolving investigation by leaving the bar, bumping into both Mr. Esslinger and Officer Klamser, and attempting to lead her boyfriend away from the scene [MSUMF 11-13 & 19]. As a result, Officer Klamser was forced to leave his interview with Mr. Esslinger in order to change his tactical position, and focus solely on Ms. Surat [MSUMF 14-15]. Officer Klamser attempted to intervene between Plaintiff and Mr. Waltz, so Officer Pastor could continue with his interview [MSUMF 15-17]. Plaintiff was clearly instructed that she could "keep on walking" [MSUMF 20], but instead of complying, chose to ignore Officer Klamser's clear directive and continue "walking through" him, to where Officer Pastor and Mr. Waltz were standing [MSUMF 21]. Plaintiff was, indisputably, belligerent and abusive towards Officer Klamser [MSUMF 23]. Contemporaneously, the 30 to 40-person crowd was reacting to the situation [MSUMF 18]. To prevent Plaintiff from engaging any further with Officer Pastor and Mr. Waltz, Officer Klamser attempted verbal directions and hand gestures to the Plaintiff [MSUMF 22]. The Plaintiff,

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<sup>3</sup> MSUMF is a reference to Movant's Statement of Undisputed Material Facts.

however, persisted in her course [MSUMF 22] and even escalated her attempts by slapping and hitting Officer Klamser [MSUMF 24], and grabbing his throat [MSUMF 25]. Plaintiff's obstinance and frame of mind is characterized not only by her physical actions, but by her verbal assault of Officer Klamser as well [MSUMF 24].

Officer Klamser was no longer able to fulfill his duties as a cover officer to Officer Pastor (meaning he lost focus on the crowd behind the officers), as one-hundred percent of his concentration was now directed at Plaintiff [MSUMF 27]. In order to quickly and safely control the rapidly evolving situation and extricate himself and Plaintiff from the scene, Officer Klamser informed Plaintiff she was under arrest [MSUMF 26]. He attempted to place her in a control position, but Plaintiff's resistive and assaultive efforts made Officer Klamser's actions ineffective [MSUMF 28-30]. Plaintiff refused to cooperate with Officer Klamser's lawful and repeated commands, instead demanding the proclamation of a reason for her arrest while at the same time attempting to avoid being controlled [MSUMF 30-32]. Due to Plaintiff's level of resistance and anger, and because Officer Klamser reasonably believed Plaintiff was going to strike again, Officer Klamser utilized a rowing arm takedown in order to place her under arrest [MSUMF 33]. It was Officer Klamser's reasonable belief the rowing arm takedown was the only method he had left to bring Plaintiff under control quickly [MSUMF 34 & 36], and to break Plaintiff's combative and belligerent behavior [MSUMF 35]. Plaintiff's efforts to avoid custody are also evident after the takedown, as she persisted in her efforts to spin and break free from Officer Klamser and Officer Pastor [MSUMF 37]. Undeterred, Plaintiff continued her tirade even after she was in handcuffs, solidifying the notion the actions of Officer Klamser both prior to and after the takedown were a reasonable reaction [MSUMF 38-40; 41-42; 43-46]. The reasonableness of Officer Klamser's

actions was subsequently determined by a criminal jury, when they rejected Plaintiff's defense of self-defense based on the notion Officer Klamser used unreasonable force in arresting her [MSUMF 43-44], and convicted her of obstruction and resisting arrest [MSUMF 40].

As previously noted by this Court, taking into consideration the undisputed facts in this matter, and the notion Officer Klamser was "attempting to effect an arrest and, in the process, the arrestee's actions were subjecting him to, or threatening him with, physical force or violence, or putting him at substantial risk of bodily injury" [ECF 84 at 15, [referring to *Martinez v. City of Albuquerque*, 184 F.3d 1121, 1127 (10th Cir. 1999)]], the use of a rowing arm takedown in this situation, was objectively reasonable. Furthermore, the reasonableness of Officer Klamser's actions are evident when the failure of Plaintiff's self-defense argument at the criminal trial is taken into account, [ECF 84 at 15], with the undisputed fact he attempted to subdue Plaintiff through "lawful lessor force" which were ultimately unsuccessful [ECF 84 at 15] [MSUMF 20-22; 26-31].

Considering the reaction of the large crowd, the safety of the Officers, and the totality of the circumstances, Plaintiff cannot through 20/20 hindsight establish Officer Klamser's decision to take her to the ground using a rowing arm takedown was objectively unreasonable.

**iii. No Clearly Established Law Demonstrates that Officer Klamser's Actions Were Unreasonable**

Plaintiff's claim of excessive force should also be dismissed as the Constitutional right at issue was not clearly established.

For the law to be "clearly established," generally there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains. *Medina v. City & Cnty. of Denver*, 960 F.2d

1493, 1498 (10<sup>th</sup> Cir. 1992). “Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.” *Brosseau v. Haugen*, 543 U. S. 194, 198, (2004) (per curiam). Although the Supreme Court does not require a case directly on point, existing precedent must have placed the constitutional question beyond debate. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). “In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.” *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (citation and internal quotation marks omitted).

The Supreme Court has repeatedly told courts not to define clearly established law at a high level of generality. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (citations omitted). “The dispositive question is whether the violative nature of *particular* conduct is clearly established,” in light of the specific context of the case, and not as a broad general proposition. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citations and internal quotations omitted) (emphasis in original). “Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.” *Id.* (citations and internal quotations omitted). “Use of excessive force is an area of the law ‘in which the result depends very much on the facts of each case,’ and thus police officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.” *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix*, 136 S. Ct. at 309). “Precedent involving similar facts can help move a case beyond the otherwise ‘hazy border between excessive and acceptable force’ and thereby provide an officer notice that a specific use of force is unlawful.” *Id.* (quoting *Mullenix*, 136 S. Ct. at 312).

Here, Officer Klamser is unaware of any Supreme Court or Tenth Circuit case establishing that as of April 6, 2017, it was a constitutional violation to use a rowing arm takedown on a belligerent, uncooperative, and intoxicated arrestee who interfered with an officer's interview of a suspect, refused his directions to stay away, struck him multiple times, subjected him to physical force or violence and put him at substantial risk of bodily injury. [See ECF 84 at 15 (“Finally, if Klamser ever asserts qualified immunity ... then Surat’s burden is even more formidable. She must prove that it was clearly established as of April 6, 2017, that a police officer attempting to effect an arrest and being subjected to or threatened with physical force or violence, or facing a substantial risk of bodily injury, and who has already tried lawful lesser force to subdue the arrestee, cannot use a takedown maneuver used in this case to eliminate that actual or threatened force or risk of injury.”)]. As a result, Officer Klamser is protected by qualified immunity and the claim against him should be dismissed as a matter of law.

**B. The Claim Against the City of Fort Collins Must Be Dismissed as the Complaint Fails to Sufficiently Allege Municipal Liability.**

To establish liability of a public entity under 42 U.S.C. §1983, “a plaintiff must show (1) the existence of a municipal custom or policy and (2) a direct and causal link between the custom or policy and the violation alleged.” *Jenkins v. Wood*, 81 F.3d 988, 993 (10<sup>th</sup> Cir. 1996), (citing *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)). The Supreme Court described the requirements a plaintiff must meet to impose public entity liability as follows: “It is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the ‘moving force’ behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link

between the municipal action and the deprivation of federal rights.” *Bd. Of Cnty. Comm’rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404 (1998).

Under these standards, municipal liability may arise only out of official customs or policies, or for the actions of a final policymaker to any extent that such policies, customs, or policymakers can be shown to be responsible for a constitutional violation. *See Brown*, 520 U.S. at 403-404. Municipal liability only attaches where “a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986); *Myers v. Oklahoma Cnty. Bd. Of Cnty. Comm’rs*, 151 F.3d 1313, 1319 (10<sup>th</sup> Cir. 1998).

Here, Plaintiff attempts in her First Amended Complaint to set forth a claim against the City entitled “Excessive Force – Unconstitutional Policies, Customs, and Practices” [ECF 107 at 18-19, ¶¶ 92-99]. As with her Initial Complaint, Plaintiff attempts to support these allegations by reference to an internal affairs investigation involving Officer Klamser, and other “allegedly similar use-of force incidents... in the timeframe between 2013 and 2018...” in an attempt to demonstrate an “excessive force pattern among Fort Collins police officers [ECF 84 at 16 referring to ECF 1 at ¶¶ 50-56; Cf. ECF 107 at ¶ 51 & ¶¶ 56-63.] The referenced “similar incidents” in the First Amended Complaint are not substantively different than those presented in the Initial Complaint. (*Id.*)

As previously discussed by this Court, based on Surat’s convictions and in order to avoid violating *Heck*, “it must be taken as given that Klamser was attempting to effect Surat’s arrest through a lawful use of lesser force, and that Surat’s resistance amounted to physical force or violence against Klamser and/or threatened him with substantial bodily harm.” [ECF 84 at 16-17.]

It is within this framework that Surat must properly allege the existence of unconstitutional policies within the City of Fort Collins. The allegations set forth in this claim, however, do not rise to a level satisfying Federal pleading standards. None of the incidents or purported failure to train described in Plaintiff's Complaint are factually similar to the scenario involving Surat and Officer Klamser. *Connick v. Thompson*, 563 U.S. 51, 62-63 (2011). Furthermore, the Plaintiff offers no allegations supporting any notion the City maintained any custom or policy relevant to the Plaintiff's 42 U.S.C. §1983 claim, or that anyone followed any specific custom or policy regarding the interaction between the Plaintiff and the City. Nothing in the Complaint suggests that any specific policy or custom was implicated, deliberately followed, or how any such custom, practice or policy harmed the Plaintiff. Rather, the Plaintiff sets forth only conclusory allegations, which are insufficient to overcome this Motion for Summary Judgment (*See e.g.* ECF 107 at ¶ 93; Cf. ECF 1 at ¶ 68, (“Defendant Fort Collins established policies, customs and/or practices in violation of the Constitution”); (“Defendant Fort Collins developed and maintained law enforcement-related policies, customs, and/or practices exhibiting or resulting in a deliberate indifference to the Fourth and Fourteenth Amendment protected constitutional rights...”)) (ECF 107 at ¶ 94; Cf. ECF 1 at ¶ 69); (“Defendant Fort Collins’ policies, customs, or practices in failing to train and supervise its employees were the proximate cause of, and moving force behind, the violation of Ms. Surat’s constitutional rights...”)) (ECF 107 at ¶ 99. Cf ECF 1, ¶ 74)). Because the Complaint is devoid of any mention of a specific municipal custom or policy, any effort to state a claim against the City here fails as a matter of law.

Further, the First Amended Complaint contains no hint that any deliberate choice to follow a specific course of action was made by anyone responsible for establishing any final policy with

respect to the Plaintiff. *Connick, supra*. Absent some basis for thinking the City undertook *deliberate conduct* that could be said to constitute the “moving force” behind any injury, or that there is any direct causal link between any action by the City claimed to have deprived the Plaintiff of her Federal rights, there could be no claim against the City.

Likewise, the Plaintiff fails to provide any specific allegations respecting a failure to train or supervise. Instead, the Complaint merely contains the generic allegation that “(t)he inadequate training and supervision provided by Defendant Fort Collins resulted from a conscious or deliberate choice...Defendant Fort Collins could have and should have pursued reasonable methods for the training and supervising of such employees, yet failed to do so. [ECF 107 at ¶ 98.] Such allegations are insufficient. *Connick, supra*. Plaintiff’s efforts do not establish a custom, practice or policy with respect to training, sufficient to overcome this Motion for Summary Judgment. Furthermore, Plaintiff cannot properly allege any custom, practice or policy based on the factual scenario presented in this matter in a way which avoids application of *Heck*.

#### **IV. CONCLUSION**

For all of the foregoing reasons, Defendants Randall Klamser and the City of Fort Collins respectfully request this Court dismiss Plaintiff’s claims against them in their entirety, with prejudice, and enter all such additional relief as this Court deems proper.

Dated: October 13, 2020

Respectfully submitted,

*s/ Mark S. Ratner*

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**ATTORNEYS FOR DEFENDANTS**

**CERTIFICATE OF SERVICE (CM/ECF)**

I HEREBY CERTIFY that on the 13<sup>th</sup> day of October, 2020, 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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