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

| | | |
|--|---|-----------------------------|
| Emily Johnson and Estelle Davis, | : | |
| | : | Docket No. KS 723582 |
| Plaintiffs, | : | |
| | : | |
| v. | : | Judge Bradley |
| | : | |
| Jill Williams and John Papaspanos | : | |
| | : | |
| Defendants. | : | |

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

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INTRODUCTION

Much of what transpired on the evening of March 18, 2011 remains uncertain and is hotly contested among the parties in this case. What is certain is that two women – 27-year-old Emily Johnson and her grandmother, 74-year-old Estelle Davis – suffered physical and emotional trauma at the hands of two Kansas City Police Officers who were called to protect them. Ms. Davis had dialed 911 for protection when her granddaughter was attacked and threatened with a knife because she was afraid for her safety.

Ms. Johnson’s assailant had fled by the time police arrived, and she invited them into her home to explain what had happened. While she spoke with one of the officers about whether the press charges, the other stepped away to run her name through dispatch. The tone of the encounter quickly turned hostile after the defendants learned there was an outstanding misdemeanor warrant on Ms. Johnson for petty shoplifting from several years earlier. In their zeal to execute the non-violent misdemeanor warrant, the defendants brutally attacked the two women, slamming Ms. Johnson’s head against the ground and pinning Ms. Davis to the wall with a baton. The encounter sent Ms. Johnson to the emergency room with injuries to her head and face, and left Ms. Davis with a shoulder injury and psychological trauma that persists to this day.

The plaintiffs in this case are entitled to a trial. Our system of justice does not rely on courts to make determinations of credibility and fact; rather, it relies on the collective wisdom of a jury. Emily Johnson and Estelle Davis urge the court not to extinguish their right to have issues of fact decided by a jury by denying the defendants’ motion for summary judgment.

STATEMENT OF MATERIAL FACTS

On March 18, 2011, a 27-year-old woman named Emily Johnson was a victim of domestic violence. (Johnson Dep. at 6:1-15, Apr. 26, 2013, attached as Exhibit A; Davis Dep. at

4:9-19, Apr. 22, 2013, attached as Exhibit B). With her face bloodied and swollen, she was transported to the University of Kansas Medical Center for evaluation and treatment. (Johnson Dep. at 16:1-2; Johnson Emer. Room R. 1, Mar. 18, 2011, attached as Exhibit C). But the injuries sustained were not inflicted by her ex-boyfriend – they were inflicted by officers of the Kansas City Police Department, whom her grandmother had called to protect her. (Johnson Dep. at 14:20-22; Davis Dep. at 4:16-20).

Earlier that evening, Emily was spending time with her 4-year-old daughter H.J. and her 74-year-old grandmother Estelle Davis when her boyfriend Dave Brown came over to watch television. (Johnson Dep. at 5:5-6). After Emily returned from taking a phone call in the kitchen, Dave became agitated and accused her of infidelity. (Johnson Dep. at 5:8-20). An argument ensued, and after Emily asked Dave to leave, it escalated to a physical confrontation. (Johnson Dep. at 6:1-7). He shoved her, and she attempted to defend herself. (Johnson Dep. at 6:6-12). When Dave began threatening Emily with a knife, Estelle called the police. (Davis Dep. at 4:17-20). She told them her granddaughter was being attacked, and a knife may have been present. (Davis Dep. at 5:5-7).

The dispatch sent officers to 1950 Key Lane to respond to a “DV assault on granddaughter” where there was a “knife present.” (Incident R., March 18, 2011, attached as Exhibit D). By the time police arrived, the disturbance had ended and Dave was gone. (Johnson Dep. at 8:18-9:2). The two officers – one male and one female – knocked loudly and Emily answered the door wearing only a robe and slippers. (Johnson Dep. at 9:6-16; 12:18-22). Unaware Estelle had called the police, she asked why they had come. (Johnson Dep. at 7:19-20; 9:17-18). They said they were responding to a domestic disturbance, and Emily let them inside. (Johnson Dep. at 10:1-11).

Emily was happy to see the officers because she was still shaken up from being attacked and having her life threatened. (Johnson Dep. at 6:12-13; 10:8-9). She began telling the male officer, John Papaspanos, about how Dave had attacked her and how it was part of a pattern of domestic violence. (Johnson Dep. at 10:15-11:8). While she was considering whether to press charges the female officer, Jill Williams, interrupted rudely and demanded to see identification. (Johnson Dep. at 11:7-12). Despite Officer Papaspanos's stated concern that "domestic violence situations can be particularly dangerous," he did not object when his partner stepped away to run Emily's identification. (Papaspanos Dep. at 10:16-19; 6:11-12). A short time later, Officer Williams pulled Officer Papaspanos to the side and informed him that Emily had an outstanding warrant for misdemeanor theft. (Papaspanos Dep. at 6:16-26).

The tone changed quickly as Officer Papaspanos – who was apparently "ready to act" at a moment's notice, despite being engaged in normal conversation with Emily only moments earlier, because of the threat posed in the wake of the domestic assault – began yelling at Emily that she was being arrested. (Papaspanos Dep. at 10:23-24; Johnson Dep. at 11:14-21). They refused to tell her why she was being arrested, and they didn't allow her to change clothes or comfort her daughter H.J. (Johnson Dep. at 12:3-6; 12:15-22). The officers never gave Emily precise instructions on what to do in order to affect the arrest. (Johnson Dep. at 12:3-6). Emily became frightened, and began backing away from the officers. (Johnson Dep. at 13:12-13). As she turned, Officer Papaspanos began thinking "where's that knife," and despite never actually seeing one, grabbed her firmly by the wrist. (Johnson Dep. at 13:14; Papaspanos Dep. at 7:26-8:1).

Emily thought she was about to be attacked, so she pulled away, accidentally contacting Officer Papaspanos's face with her free hand in the process. (Johnson Dep. at 13:15-20; 14:12-

15). As she did so, he completed the takedown. (Johnson Dep. at 13:21-22). After she was on the ground, Officer Papaspanos jumped on top of her. (Johnson Dep. at 13:21-22). He slammed her head against the ground, causing injuries to her face and head which required treatment at the emergency room. (Johnson Dep. at 13:21-14:2). Emily pleaded with Officer Papaspanos that he was hurting her, but he continued screaming in her face and twisting her arm before handcuffing her and marching her outside without shoes or a coat. (Johnson Dep. at 14:6-10).

Estelle saw blood running down Emily's face and was afraid Officer Papaspanos was going to seriously injure or kill her granddaughter. (Davis Dep. at 7:9-8:19). She came further into the room and began asking what was going on. (Davis at Dep. at 8:2-9). Officer Williams alleges that Estelle was "going crazy" and, believing it was her job to "make sure no bystanders get in the way of making the arrest," she pinned the 74-year-old woman firmly to the wall, either with her baton or with her free hand; she encountered no resistance. (Davis Dep. at 8:9-11; Williams Dep. at 8:17-22; 9:23-26; 11:3-17, Apr. 28, 2013, attached as Exhibit E). The force used by Officer Williams caused injury to Estelle's left arm and shoulder for which she sought treatment at an urgent care facility. (Davis Dep. at 10:7-16). Ever since the incident, Estelle has experienced nightmares and vivid flashbacks in which she relives the traumatic experience, but she lacks the financial means to seek psychiatric care. (Davis Dep. at 13:1-15).

Officers transported Emily to the hospital emergency room where she received evaluation and treatment for injuries to her head and face including six stitches near her left eye. (Johnson Dep. at 16:1-2; Johnson Emer. Room R. 1). Emily pleaded guilty to misdemeanor theft and the charges for resisting arrest were dismissed. (Johnson Dep. at 15:13-18). Estelle was not arrested or charged with a crime, nor did she receive any police citation for her actions. (Williams Dep. at 11:20-27).

ARGUMENT

I. LEGAL STANDARDS

A. Standard for Summary Judgment

A motion for summary judgment must be denied unless the moving party provides clear and convincing evidence that a jury could not reasonably find in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). The moving party bears the initial responsibility of identifying those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any” which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

When faced with a motion for summary judgment, a court’s role is not to weigh evidence, but rather to determine whether a genuine issue of material facts exists. See Anderson, 477 U.S. at 249. The court must resolve all reasonable inferences and construe all evidence in the light most favorable to the non-moving party, and may not decide any issues of credibility. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Anderson, 477 U.S. at 255. A court may only grant summary judgment if the moving party demonstrates (1) the absence of a genuine dispute of any material fact; and (2) they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In the Tenth Circuit, “only when there are no disputed questions of historical fact does the court make the excessive force determination on its own.” Cavanaugh v. Woods Cross City, 718 F.3d 1244, 1254 (10th Cir. 2013).

B. Standard for Excessive Force Claims

An excessive force claim survives summary judgment if the court finds a reasonable jury could conclude (1) there was a seizure, and (2) the seizure was unreasonable in light of (a) the severity of the suspected crime, (b) the immediate threat posed to officers, and (c) whether the

plaintiff was attempting to flee or resist arrest. Graham v. Connor, 490 U.S. 386, 396 (1989); Childress v. City of Arapaho, 210 F.3d 1154, 1156 (10th Cir. 2000). These factors are analyzed not in hindsight, but from the perspective of an objectively reasonable officer at the scene, with an examination of what information was possessed by the officers. Cavanaugh, 718 F.3d at 1248; Weigel v. Broad, 544 F.3d 1143, 1151-52 (10th Cir. 2008).

Deciding whether a particular application of force is 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, 490 U.S. at 396. An officer’s use of force is unreasonable if, given the totality of the circumstances, an objectively reasonable officer would have believed the force was unjustified. Cavanaugh, 718 F.3d at 1251.

II. EMILY JOHNSON’S EXCESSIVE FORCE CLAIM SHOULD SURVIVE SUMMARY JUDGMENT BECAUSE A REASONABLE JUROR COULD CONCLUDE OFFICER PAPANOS USED EXCESSIVE FORCE WHEN HE SLAMMED HER HEAD AGAINST THE GROUND.

Emily Johnson’s excessive force claim should survive summary judgment because a jury could conclude Officer Papanos used unreasonable force. The proper application of the test for reasonableness under the Fourth Amendment requires an examination of the specific facts of each case, including (1) the severity of the crime, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to flee. Graham, 490 U.S. at 396.

If the suspected crime is a non-violent misdemeanor, the level of force should be reduced accordingly. Morris v. Noe, 672 F.3d 1185, 1195 (10th Cir. 2012); Casey v. City of Fed. Heights, 509 F.3d 1278, 1281 (10th Cir. 2007). The reasonableness of a particular application of force when there is a genuine dispute as to the immediate threat to officers is a decision for the

jury. See Cavanaugh v. Woods Cross City, 625 F.3d 661, 666 (10th Cir. 2010) (holding a jury could find an objectively reasonable officer would not have perceived an immediate threat because no knife was present when they arrived, despite knowledge the plaintiff had a knife when police were summoned). Even if there was a threat to officers, if the need to use force was created by their reckless or deliberate conduct, a jury could find such use of force unreasonable. See Sevier v. City of Lawrence, Kan., 60 F.3d 695, 699 (10th Cir. 1995). Whether an individual was resisting arrest should be submitted to a jury if there is genuine possibility that they reacted reflexively to being seized. See Becker v. Bateman, 709 F.3d 1019, 1026 (10th Cir. 2013) (holding that a person who reacts reflexively to being grabbed by an officer is not resisting arrest).

Construing all of the evidence in the light most favorable to Emily Johnson, a reasonable jury could conclude in her favor on all three factors. First, she was being arrested for a non-violent misdemeanor, which reduces the level of force that may reasonably be applied. Second, a jury could conclude a reasonable officer would not have perceived an immediate threat because they were summoned to the home on Emily's behalf, she was wearing only a robe and slippers which made it unlikely she was concealing a weapon, she allowed the officers into her home, and she was engaged in ordinary conversation prior to the incident. Finally, a jury could conclude that Emily was not resisting arrest because she may have been reacting reflexively when she pulled away from Officer Papaspanos. There are genuine issues of material fact which must be decided by a jury; therefore, summary judgment must be denied.

A. The force used by Officer Papaspanos was excessive because it was disproportionate to the suspected crime of misdemeanor theft.

The defendant used excessive force when he slammed Emily Johnson's head against the ground because the outstanding warrant was for a non-violent misdemeanor. If the suspected

crime is a non-violent misdemeanor, the level of force should be reduced accordingly. Morris, 672 F.3d at 1195; Casey, 509 F.3d at 1281. The Tenth Circuit held in Morris that a forceful takedown was not justified against a nonviolent misdemeanant who was not actively resisting. 672 F.3d at 1197-98. In Casey, the court found the defendant officer had used excessive force when he “jumped on” a nonviolent misdemeanant. 509 F.3d at 1280. Like the plaintiffs in Morris and Casey, who were taken forcefully to the ground by officers despite the minor nature of their crimes, Emily Johnson was a nonviolent misdemeanant whose head was slammed against the ground after being violently taken down and “jumped on” by Officer Papaspanos. The question of whether Officer Papaspanos used excessive force must be submitted to a jury in light of the minor nature of the crime for which Emily was being arrested.

B. An objectively reasonable officer would not have perceived an immediate threat because Ms. Johnson was dressed in a robe and slippers, cooperating with their investigation, and there was no evidence that a weapon was present.

A jury could conclude there was no immediate threat because Emily Johnson was the victim whom they had been summoned to help, she invited the officers into her home wearing only a robe and slippers, and was cooperating fully. The absence of an immediate threat to anyone’s physical safety favors the conclusion that the application of force by police is unreasonable. Cavanaugh, 625 F.3d at 665. While a domestic disturbance at a residence gives officers cause for concern, whether there was an immediate threat is a jury question. Berry v. City of Phillipsburg, Kan., 796 F. Supp. 1400, 1405 (D. Kan. 1992). If an individual is cooperating and dressed in clothing that would make it difficult to conceal a weapon, they are less likely to pose an immediate threat. See Cortez v. McCauley, 478 F.3d 1108, 1128 (10th Cir. 2007) (finding plaintiff posed no threat to officers because he was dressed only in his shorts, was unarmed, and was cooperating). An individual who backs away in an attempt to deescalate a situation poses little threat to officer or bystander safety. Morris, 672 F.3d at 1196.

“The reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.” Allen v. Muskogee, Okl., 119 F.3d 837, 840 (10th Cir. 1997). An officer's conduct prior to the suspect's threat of force is relevant if the conduct is “immediately connected” to the suspect's threat of force. Id. at 841.

In Cavanaugh, police were called to assist in locating the plaintiff following a domestic dispute which had ended with her leaving her home carrying a kitchen knife after having consumed alcohol and pain medication. 625 F.3d at 665-66. When the plaintiff returned, a nearby witness observed she did not possess a knife. Id. As the plaintiff cut across the lawn toward her front door, the defendant withdrew his Taser and discharged it into her back; the plaintiff fell to the ground and hit her head, causing a traumatic brain injury. Id. The Tenth Circuit held that because the plaintiff's clearly visible hands contained no knife or other weapon and she did not act aggressively toward the defendant, a reasonable jury could conclude that she did not pose an immediate threat. Id.

If the question of immediate threat favored the plaintiff in Cavanaugh, where officers had been dispatched to locate an intoxicated woman whom they were told was carrying a knife, it should strongly favor Emily Johnson because although a knife was mentioned in the emergency call and the dispatch, it was unclear who, if anyone, had a knife; it was clear Emily was the victim; and nothing in the record suggests Emily was intoxicated. Furthermore, like the plaintiff in Morris, who did not pose a threat because he was backing away in an effort to deescalate the situation, Emily was not a threat when she backed away from Officer Papaspanos.

In Berry, the defendant officer applied excessive force when he took the plaintiff to the ground in the course of apprehending her for littering after she discarded four tickets issued by police in her front yard. 796 F. Supp. at 1403. The defendant contended that a prior domestic disturbance in which a shotgun had been discharged created an immediate threat and justified the application of force. Id. at 1405. However, the court held that while a domestic disturbance may give rise to a concern of violence, the immediacy of the threat is appropriately assessed by a jury. Id.

Officer Papaspanos stated “domestic violence situations can be particularly dangerous,” and that when they told Emily she was under arrest he started thinking “where’s that knife?” (Papaspanos Dep. at 7:27-8:1; 10:15-18). The implication is that even though they believed Emily was the victim, the prior disturbance and the possibility of a knife being present created an immediate threat and justified the application of force despite the fact neither officer actually saw a knife. He said “I’d be ready to act, that’s all I meant,” implying that he would be ready to act at a moment’s notice if a threat presented itself. (Papaspanos Dep. at 10:23). However, his actions belie a different state of mind because he acted in the absence of any threat; there was no evidence that Emily had a knife, and when she turned away, he attacked her. Just like the defendant in Berry, who attempted to justify the application of force by pointing to a prior domestic disturbance as evidence of an immediate threat, Officer Papaspanos believed that earlier domestic violence – of which Emily was the victim – contributed to an immediate threat which made it reasonable for him to slam her head against the ground. In Berry, the court held the immediacy of the threat was a question for a jury, and the outcome should be the same here.

In Cortez, defendants were accused of applying excessive force when they apprehended the plaintiff in the course of investigating a violent felony. 478 F.3d at 1128. Although the court

ultimately held the defendants did not use excessive force because of the seriousness of the crime being investigated and the absence of a physical or emotional injury, they found the plaintiff did not pose an immediate threat because he was cooperating fully and was dressed only in shorts. Id. Like the plaintiff in Cortez, who was less of a threat because he was dressed in minimal clothing, Emily Johnson was dressed in only a robe and slippers, which made her less of a threat because it would have been difficult to conceal a weapon.

In Allen, the plaintiff left his home in his vehicle with several firearms following an altercation with his wife. Although officers were aware that he was armed, suicidal, and emotionally disturbed they deliberately and rapidly escalated the situation when they arrived, which ultimately led to his death. Allen, 119 F.3d at 839. The court held that a reasonable jury could conclude the officers' actions were reckless and precipitated the need to use force. Allen, 119 F.3d 841.

The plaintiff in Allen was in a fragile emotional state following a domestic altercation, just like Ms. Johnson, who was a recent victim of domestic violence. (Johnson Dep. at 10:8-9). Once Officers Papaspanos and Williams found out about the warrant, they quickly escalated the situation without considering her mental state. (Johnson Dep. at 11:14). They began yelling at her that she was being arrested, and she had no idea what was happening or why. (Johnson Dep. at 11:14-21). Although it may have been possible for the officers to deescalate the situation by explaining to her what was going on and allowing her to change clothes, they record mentions no attempt to do so. While it is possible the defendants perceived a threat when Ms. Johnson's hand contacted Officer Papaspanos's face, it is also possible a reasonable jury could find they had recklessly created the need to use force – just like the officers in Allen did when they

deliberately escalated a confrontation with an emotionally fragile individual – by verbally abusing and seizing Emily, a recent victim of domestic violence.

Resolving all inferences in favor of the plaintiff, a jury could conclude an objectively reasonable officer would not have perceived an immediate threat when Emily Johnson turned away from Officer Papaspanos because they had been called to the house on her behalf, she invited them inside and cooperated with their inquiry, there was no evidence she possessed a weapon, and she was dressed only in a robe and slippers. Even if it was reasonable to perceive a threat, viewing the facts in the light most favorable to the plaintiff, it is possible that a jury could conclude that Officers recklessly created the need to use force by physically and verbally abusing a recent victim of domestic violence. Although it is appropriate for officers to use caution when entering domestic violence situations, prior cases suggest the question of the immediacy of the threat in such situations should be submitted to a jury, and that is the proper result here.

C. A reasonable juror could conclude that Ms. Johnson was not resisting arrest because she reacted reflexively when she was seized by Officer Papaspanos.

A reasonable jury might conclude the force applied by Officer Papaspanos was inappropriate because Ms. Johnson was not actively resisting arrest, and even if she was, the type and amount of force may have been excessive. If a plaintiff did not resist arrest, it “tilts the scale in the direction of unreasonable force.” Fogarty v. Gallegos, 523 F.3d 1147, 1160 (10th Cir. 2008). An individual who reacts reflexively to being seized by police or who asks what is going on and pleads not to be arrested is not resisting arrest. Becker, 709 F.3d at 1026. If an individual resists arrest, it provides support for the notion officers were justified in applying force, but does not end the inquiry with respect to the type and amount of force applied. White v. Martin, 425 F. App'x 736, 743 (10th Cir. 2011).

In Becker, the defendant officer pulled the plaintiff over for driving with a cracked windshield, and subsequently placed him under arrest for driving under the influence of alcohol. 709 F.3d at 1021. The plaintiff repeatedly asked why he had been pulled over, and when the defendant officer grabbed his arm, he pulled away reflexively. Id. The officer took the plaintiff to the ground, causing a traumatic brain injury. Id. The District Court granted summary judgment in favor of the defendants, and although the officer’s grant of qualified immunity was affirmed, the Tenth Circuit reversed with respect to the City, id. at 1027, holding “reasonable jurors could infer Becker’s statement of ‘no’ was not a verbal indication of intent to resist arrest but a simple plea not to be arrested,” and that his reflexive withdrawal from the officer supported the conclusion the officer had applied excessive force. Id. at 1026.

In the case of Ms. Johnson – consistent with the Tenth Circuit’s holding in Becker that a reasonable juror could conclude the plaintiff’s inquiries about why he had been pulled over was not resistance, and the reflexive withdrawal of his hand did not justify the force applied – a reasonable juror could infer that Emily’s inquiries about why she was being arrested did not amount to resistance, and that a recent victim of domestic violence might react reflexively by pulling away and accidentally slapping her assailant in the process, which would support the conclusion Officer Papaspanos applied excessive force.

In White, defendants arrested the plaintiff for misdemeanor obstruction of justice. 425 F. App’x at 742. The plaintiff did not attempt to flee, but did resist arrest by deliberately shoving the officer and struggling to get free. Id. at 739. Nevertheless, the court found there was a “genuine issue of material fact regarding the appropriateness of the type and amount of force used.” Id. at 743. Even if a jury concludes Ms. Johnson resisted arrest, just like in White, where the plaintiff’s excessive force claim survived summary judgment despite his deliberate resistance

because there was a genuine issue of material fact concerning the type and amount of force applied, Ms. Johnson's excessive force claim should survive summary judgment because there is a genuine issue of material fact regarding the reasonableness of the type and amount of force employed by Officer Papaspanos when he slammed Emily's head against the ground.

Emily Johnson's claim that Officer Papaspanos applied excessive force should survive summary judgment because a reasonable juror could conclude in her favor on the basis that she did not resist arrest when she asked Officer Papaspanos why she was being arrested, and that she reacted reflexively to being seized. Even if the jury concludes that Emily did resist, they still might conclude the type and amount of force applied by Officer Papaspanos was unreasonable because slamming her head against the ground was unnecessary to affect the arrest.

III. ESTELLE DAVIS'S EXCESSIVE FORCE CLAIM SHOULD SURVIVE SUMMARY JUDGMENT BECAUSE A REASONABLE JURY COULD CONCLUDE OFFICER WILLIAMS USED EXCESSIVE FORCE WHEN SHE PINNED HER TO THE WALL WITH A BATON GIVEN THAT SHE WAS AN INNOCENT BYSTANDER NOT SUSPECTED OF A CRIME.

Estelle Davis's excessive force claim should survive summary judgment because a jury could conclude Officer Williams used unreasonable force. The proper application of the test for reasonableness under the Fourth Amendment requires an examination of the specific facts of each case, including (1) the severity of the crime, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to flee. Graham, 490 U.S. at 396.

Police use of force in seizing and detaining a bystander not suspected of any wrongdoing violates the Fourth Amendment if not justified under the circumstances. Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179, 1196 (10th Cir. 2001). A person who carries no weapon, makes no overt threats, and is not within arms-reach is not a threat. Morris, 672 F.3d at 1196. If a plaintiff does not actively resist seizure and cooperates fully, it supports a finding of

excessive force. Morris, 672 F.3d at 1196; Cortez, 478 F.3d at 1128. If a plaintiff has established under their version of the facts they were not being arrested, were not belligerent, and made no aggressive movement toward officers, but were nevertheless subjected to the use of force, their excessive force claim has likely presented sufficient evidence to survive summary judgment. See Payton v. City of Florence, Ala., 413 F. App'x 126, 133 (11th Cir. 2011). Finally, the Fourth Amendment protects against more than just physical injuries, it protects against injuries to a person's "sense of security and individual dignity" as well. Holland, 268 F.3d at 1195.

Considering all of the evidence in the light most favorable to Estelle Davis, a reasonable jury is likely to conclude in her favor on all three factors. First, Ms. Davis was an innocent bystander, who was not suspected of any crime. If she was guilty of anything, it was misdemeanor obstruction, but she was neither charged with that crime nor issued a citation. Second, Estelle Davis is a 74-year-old woman who was carrying no weapon, made no threats, and never got within arms-reach of the arresting officer. It is undisputed that Estelle offered no resistance when Officer Williams pinned her to the wall. Finally, Ms. Davis is suffering long term psychological effects from the events, including nightmares and vivid flashbacks in which she relives the traumatic experience, which are compensable under the Fourth Amendment.

A. The force used by Officer Williams was excessive because Estelle Davis was an innocent bystander who committed no crime.

A reasonable jury could find Officer Williams employed excessive force when she pinned Estelle Davis to the wall because Ms. Davis was an innocent bystander who had committed no crime. Police use of force in seizing and detaining a bystander not suspected of any wrongdoing violates the Fourth Amendment if not justified under the circumstances. Holland, 268 F.3d at 1196. Being a police officer does not confer a right to "shove, push, or

otherwise assault innocent citizens without any provocation whatsoever.” Jacobs v. City of Chicago, 215 F.3d 758, 774 (7th Cir. 2000).

In Holland, members of a SWAT team seized several bystanders in the course of executing a misdemeanor warrant. Holland, 268 F.3d at 1183-84. The court held the seizure constituted excessive force, although no physical injury occurred. Id. at 1195, 97. Like the bystanders in Holland, whose proximity to the execution of a misdemeanor warrant resulted in their seizure by police, Estelle Davis was seized simply because she was a bystander to the execution of a misdemeanor warrant in her own home. Her claim should survive summary judgment because there is a dispute of material fact as to whether she was “going crazy” as alleged by Officer Williams, or whether she was simply asking what was going on. (Williams Dep. at 8:17-22; Davis Dep. at 8:8-9). Officer Williams states in her deposition, “my job is to make sure no bystanders get in the way of making the arrest,” (Williams Dep. at 9:23-24), but the fact that Ms. Davis was neither charged with a crime nor issued a citation for her behavior suggests she did not impede the arrest; moreover, the second Graham factor evaluates the immediate threat to the safety of the officers, which Officer Williams does not mention as a reason for pinning Estelle to the wall. Estelle Davis’s excessive force claim against Officer Williams should survive summary judgment because she was an innocent bystander and there is a genuine dispute of material fact concerning both the nature of her behavior leading up to her seizure, and the method used by Officer Williams to affect the seizure.

B. An objectively reasonable officer would not have perceived an immediate threat from an unarmed 74-year-old woman who made no threats and did not get within four feet of the officer arresting her daughter.

A jury could conclude an objectively reasonable officer would not have perceived an immediate threat because Estelle Davis was an unarmed 74-year-old woman who made no overt threats and did not get within reach of the officer arresting her daughter. Although walking

toward an officer may present some threat, a person who carries no weapon, makes no overt threats, and is not within reach is not a threat. Morris, 672 F.3d at 1196. An unarmed individual who happens to pass near an officer while walking toward another objective without making any threats or acting aggressively does not pose an immediate threat. Cavanaugh, 625 F.3d at 665.

In Morris, the plaintiff – who weighed 250 pounds and was six feet, four inches tall – walked toward officers who were mediating a domestic disturbance and asked them “why was you talkin to Mama that way?” 672 F.3d at 1189-90. Despite the plaintiff being unarmed and making no overt threats, defendants threw him to the ground, knelt on top of him and handcuffed him. Id. at 1190. The Tenth Circuit held that the threat factor weighed heavily in favor of the plaintiff, despite the fact that walking towards officers might present some threat, because he was unarmed, made no overt threats, and did not get within reach. Id. at 1196.

Like the plaintiff in Morris who approached the defendants to inquire what was going on but nevertheless posed a minimal threat because he was unarmed and made no overt threats, Ms. Davis also posed only a minor threat when she approached the officers because she was unarmed and made no overt threats. She moved closer to find out what was going on, and resolving facts and inferences in the light most favorable to the plaintiff, she was never within reach of either officer. This is unclear from the facts because it is possible that Officer Williams used the two foot baton to hold her out of reach. Even if she did get within reach of Officer Williams, like the plaintiff in Cavanaugh, who was not a threat to the defendant because she was unarmed and made no aggressive movements when she passed near him, Estelle Davis was unarmed and did not act aggressively toward Officer Williams when she moved within reach.

Nothing in the record indicates Officer Williams perceived an immediate threat. Furthermore, unlike the incident in Morris, which involved a very large man, the plaintiff here is

a 74-year-old woman, which further reduces the potential threat. A reasonable jury could conclude Estelle Davis was simply trying to get a better vantage point to figure out what was happening and did not pose an immediate threat because she was unarmed, made no overt threats, did not get within reach of Officer Papaspanos, and even if she did get within reach of Officer Williams – which is unclear – she did not act aggressively as she attempted to pass by.

C. A reasonable juror could conclude that Officer Williams applied excessive force given that Estelle Davis offered no resistance to being seized.

A reasonable jury could find Officer Williams used excessive force because Estelle Davis provided no resistance before or after being seized. If a plaintiff does not actively resist seizure and cooperates fully, it supports a finding of excessive force. Morris, 672 F.3d at 1196; Fogarty, 523 F.3d at 1160. In Morris, the plaintiff was seized without warning and did not resist or struggle either before or after defendants took him to the ground, which supported a finding of excessive force. 672 F.3d at 1196. In Fogarty, the plaintiff was seized without warning by officers while engaged in peaceful protest. 523 F.3d at 1151-52. There was no indication, even by the defendants' retelling of events, that the plaintiff resisted arrest at any time. Id. at 1160. The Tenth Circuit held the lack of resistance tilted the scale in the direction of unreasonable force. Id.

Like the plaintiffs in Morris and Fogarty who provided no resistance whatsoever after being seized without warning, Estelle Davis was seized without warning and did not resist, even by the defendant's retelling of events. The fact that Ms. Davis provided no resistance when she was suddenly seized by Officer Williams tilts the scale in the direction of unreasonable force. The Tenth Circuit has consistently found a plaintiff's lack of resistance to be a strong indication a reasonable jury could find officers employed excessive force.

CONCLUSION

Emily Johnson and Estelle Davis urge the court to deny the defendants' motion for summary judgment because there are genuine disputes of material facts that could lead a jury to conclude the defendants used excessive force. Ms. Johnson was taken down and had her head slammed against the ground over a warrant for petty theft from years earlier. Whether she posed a threat to officers is unclear from the record because the parties disagree about the sequence of events leading up to her seizure. A jury must be queried to determine the immediacy of the threat presented and whether the officers acted recklessly in creating the need to use force. Finally, a jury could conclude she was not resisting arrest because she reacted reflexively when she pulled away from the defendant; even if they do conclude she was resisting, they still might conclude the defendant applied excessive force when he slammed her head against the ground.

Estelle Davis was an innocent bystander whose only "crime" was to ask police why they were brutally attacking her granddaughter in her own living room. The unarmed 74-year-old woman posed but a minor threat as she attempted to move to a better vantage point to see what was going on. She did not make overt threats, and it is unclear whether she was ever within reach of either of the officers. Once she was pinned to the wall, she made no attempt to resist. All of these facts support the conclusion the defendant applied excessive force, and a jury must have the opportunity to make a fair determination. For the foregoing reasons, the plaintiffs implore the court to deny the defendants' motion for summary judgment.

SIGNATURE PAGE

Respectfully Submitted,

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Dated: February 28, 2014

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, was served this day via email, to counsel for Defendants at the following address:

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