Case No. 17-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MELANIE KELSAY,

Plaintiff-Appellee,

vs.

MATT ERNST, in his individual capacity,

Defendant-Appellant,

JAY WELCH, individually and in his official capacity; CITY OF WYMORE, NEBRASKA, RUSSELL KIRKPATRICK, individually and in his official capacity, MATTHEW BORNMEIER, individually and in his official capacity,

Defendants.

Appeal from the United States District Court
for the District of Nebraska - Lincoln (4:15-cv-3077)
Honorable John M. Gerrard, United States District Judge

BRIEF OF APPELLANT, MATT ERNST

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SUMMARY OF THE CASE

Deputy Matt Ernst in his individual capacity is the only remaining Defendant in this matter, and he stands accused of Melanie Kelsay's only remaining claim, a Fourth Amendment excessive force claim.

On May 29, 2014 a 911 caller at the swimming pool in Wymore, Nebraska reported a domestic assault. Deputy Ernst arrived late to the scene and was advised by a fellow officer that Kelsay had earlier interfered with police as they tried to arrest Caslin, the man who allegedly assaulted her. According to Kelsay's version of events, she was standing to the west and slightly south of the front pool doors. One of her daughters and at least two witnesses to the earlier reported assault were arguing just outside the front pool doors, and she began to walk toward them. Deputy Ernst verbally directed Kelsay to "get back here" and grabbed her arm in an attempt to effectuate her arrest. When Deputy Ernst released her arm to grab his handcuffs, Kelsay continued advancing. Deputy Ernst ran up and grabbed Kelsay in a bear hug, and they both went to the ground.

The District Court found that the unconstitutionality of Deputy Ernst's use of force was "apparent," such that he was not entitled to qualified immunity, a decision which prompted this interlocutory appeal. Deputy Ernst requests 15 minutes of oral argument to explain why the law requires reversal.

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JURISDICTIONAL STATEMENT

The District Court for the District of Nebraska had federal question jurisdiction over the subject matter of this action under 28 U.S.C. §1331. Kelsay's Amended Complaint asserted civil rights claims under 42 U.S.C. §1983. One such claim, and the only one at issue in the present appeal, is that Deputy Ernst in his individual capacity violated Kelsay's Fourth Amendment right to be free from excessive force during an arrest.

This Court has jurisdiction over this interlocutory appeal challenging the District Court's denial of Deputy Ernst's motion for summary judgment based on his assertion of entitlement to qualified immunity. Mallak v. City of Baxter, 823 F.3d 441, 445 (8th Cir. 2016). The basis for the exercise of jurisdiction is the collateral order doctrine, an exception permitting appeal of this particular type of non-final judgment under 28 U.S.C. §1291. More specifically, appellate jurisdiction lies over this interlocutory appeal because the District Court's order turns on abstract issues of law, rather than issues of fact.

The District Court's order denying qualified immunity was entered on May 19, 2017. Deputy Ernst's Notice of Appeal to this Court was timely filed within 30 days thereof, on May 26, 2017.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court should have granted Deputy Ernst the protection of qualified immunity from suit in his individual capacity on Kelsay's excessive force claim, based on one or more of the following:

   A. In its qualified immunity analysis, the District Court made a material factual assumption or finding that was blatantly contradicted by the record - specifically, that Kelsay was "not in a position to threaten witnesses" when Deputy Ernst effectuated her arrest.

   Scott v. Harris, 550 U.S. 372, 380, 127 S.Ct. 1769 (2007)

   Reed v. City of St. Charles, Mo., 561 F.3d 788 (8th Cir. 2009)

   B. The District Court utilized an incorrect standard by relying on subjective factors in its qualified immunity analysis, instead of properly analyzing the material undisputed and properly assumed facts objectively from the perspective of a reasonable officer in the shoes of Deputy Ernst, without the benefit of hindsight.

   Ehlers v. City of Rapid City, 846 F.3d 1002 (8th Cir. 2017)

   Boude v. City of Raymore, 855 F.3d 930 (8th Cir. 2017)

   Carpenter v. Gage, 686 F.3d 644 (8th Cir. 2012)

   C. The District Court defined the right in question at too high of a level of

generality, and relied on cases with insufficiently comparable facts in its analysis of the "clearly established" prong of the qualified immunity inquiry.

Hope v. Pelzer, 536 U.S. 730, 122 S.Ct. 2508 (2002)

Blazek v. City of Iowa City, 761 F.3d 920 (8th Cir. 2014)

Hollingsworth v. City of St. Ann, 800 F.3d 985 (8th Cir. 2015)

Tatum v. Robinson, 858 F.3d 544 (8th Cir. 2017)

D. Accepting Kelsay's version of any disputed material facts, and considering those material facts shown by the evidence that are undisputed, it was not "clearly established," "apparent," or "beyond debate" under existing law that Ernst's alleged conduct violated Kelsay's constitutional right to be free of excessive force.

Ehlers v. City of Rapid City, 846 F.3d 1002 (8th Cir. 2017)

Blazek v. City of Iowa City, 761 F.3d 920 (8th Cir. 2014)

Carpenter v. Gage, 686 F.3d 644 (8th Cir. 2012)

E. Under existing law in May of 2014, a reasonable officer in the shoes of Deputy Ernst could have interpreted Kelsay's admitted action of walking away from an officer immediately following that officer's attempt to arrest her, as an attempt to evade arrest by flight, or as active

resistance to arrest.

Ehlers v. City of Rapid City, 846 F.3d 1002 (8th Cir. 2017)

Boude v. City of Raymore, 855 F.3d 930 (8th Cir. 2017)

State v. Ellingson, 13 Neb. App. 931, 703 N.W.2d 273 (2005)

Neb. Rev. Stat. §28-904

STATEMENT OF THE CASE

I. Facts Relevant to the Issues Submitted for Review

On May 29, 2014, dispatch reported a 911 call to area law enforcement officers, including Deputy Ernst, calling for a response to a domestic disturbance in progress at the swimming pool in Wymore, Nebraska. (Appdx. 0055, 0023, 0025, 218, 258). Plaintiff Kelsay was at the swimming pool in Wymore, Nebraska, accompanied by an adult male, Patrick Caslin, her two daughters Samantha and Madison, and her son. (Appdx. 249-251). Kelsay identifies Caslin as a friend who resides with her family. (Appdx. 115, 118, 250). Three eyewitnesses at the pool gave statements to police or otherwise testified that they observed Caslin behaving violently toward Kelsay inside the pool area. (Appdx. 404-407, 448). The pool manager called 911 regarding Caslin's actions toward Kelsay. (Appdx. 404-407). Kelsay maintains that Caslin was "just playing around," but she did hear one of the eyewitnesses, Monica Sedlacek, yell at Caslin, "get your fucking hands off her."

(Appdx. 116, 280-281, 448). Kelsay assumed Sedlacek had called police. (Appdx. 280). Kelsay, Caslin, and the children decided to leave the pool. (Appdx. 116, 280-281, 256-257).

Upon exiting the front doors of the pool building, Caslin and Kelsay were confronted by Wymore Police Chief Kirkpatrick and Wymore Officer Bornmeier, who were the first responders to the 911 call. (Appdx. 0055, 116, 259, 267-268). Caslin was arrested outside the pool, and was later convicted of domestic assault in the third degree and resisting arrest. (Appdx. 0064, 0067, 0085, 268-270). Kelsay admits she "was mad" about Caslin's arrest, but denies interfering with his arrest. (Appdx. 269-270). At that time, Gage County Sheriff's Department Sergeant Jay Welch and Deputy Matt Ernst were still in route toward the swimming pool in their respective squad vehicles. (Appdx. 205-206, 215-216, 218). When Wymore Chief Kirkpatrick radioed for immediate officer assistance during the process of Caslin's arrest due to his resistance, Deputy Ernst activated his lights and siren as he continued to the pool scene. (Appdx. 218).

Kelsay testified that as one exits the front pool doors, the employee parking lot is adjacent to the pool building to the right (west), while straight ahead (south) is a walkway or sidewalk across a large lawn that leads to the street and a patron parking lot. (Appdx. 264-273, 397). At her deposition in this case, Kelsay hand-drew a map

of the scene outside the pool, depicting the physical location of the landmarks and persons at the scene. (Appdx. 264-273, 397); (Addendum).

The Wymore police cruiser was parked in the employee parking lot. (Appdx. 264, 267-268, 397, 450). After Caslin was arrested, Kelsay went to the window of the Wymore police cruiser and spoke with Caslin. (Appdx. 270). Officer Bornmeier directed her to back up. (Appdx. 270). Kelsay testified that she then "backed away" from the car window "at least 15 feet if not more" onto a grassy area of the lawn in the southern direction of the patron parking lot. (Appdx. 117, 270, 272-273, 397). From there, Kelsay testified she stood with one of her daughters (Samantha) and began using her cell phone to make several calls, eventually speaking to one of her neighbors by phone. (Appdx. 271, 275-276). Kelsay testified that Wymore Chief Kirkpatrick "had went to go talk to the witnesses." (Appdx. 270).

One of those witnesses to the earlier reported domestic dispute, Monica Sedlacek, testified that after exiting the front doors of the pool, she and another witness, Cheri Lytle, stood in front of the pool building doors talking. (Appdx. 450). Kelsay also testified that the witnesses to Caslin's behavior in the pool area, including Sedlacek, were standing at the front doors of the pool building. (Appdx. 270, 277, 279).

By the time Sgt. Welch and Deputy Ernst arrived at the scene, Caslin was

already secured in the Wymore police cruiser, though he was still agitated. (Appdx. 216, 218, 271-272, 284). Kelsay testified that Ernst and Welch each parked "a little further back" and "further to the west" behind the Wymore squad car in the employee parking lot. (Appdx. 272-273, 397). As she was using her cell phone, Kelsay testified that she observed Chief Kirkpatrick walking back over to Deputy Ernst and Sgt. Welch in the employee parking lot, at which time she and Kirkpatrick yelled back and forth about the fact that she was calling her husband. (Appdx. 271, 285).

Kelsay observed Chief Kirkpatrick talking with Sgt. Welch and Deputy Ernst for "a few minutes," but she was unable to hear what they were saying. (Appdx. 285). During this conversation, Chief Kirkpatrick told Sgt. Welch and Deputy Ernst that prior to their arrival at the scene, Kelsay had interfered with Caslin's arrest. (Appdx. 0025, 216, 219). Chief Kirkpatrick advised Sgt. Welch and Deputy Ernst of his decision to arrest Kelsay for the offense of Resisting Arrest for reason of her earlier interference. (Appdx. 025, 0060, 216, 219).

Kelsay testified that after Deputy Ernst and Sgt. Welch had been at the scene "for a little bit," and after she finished speaking with her neighbor by phone, she noticed that one of her daughters, Madison, was upset. (Appdx. 273, 288). Kelsay testified that Madison and her son were "still at the [front] doors." (Appdx. 276-277). Kelsay characterized the position of her daughter Madison at the front doors of the

pool as "maybe 20, 25, or 30 feet" from where she was "still standing in the same spot." (Appdx. 117, 274-275, 276-277). Kelsay observed that Madison was arguing with and "yelling at" a person unknown to her at the time, but who she later found out was witness Monica Sedlacek. (Appdx. 277-280, 288-289).

Kelsay testified that she began to walk toward her daughter Madison. (Appdx. 276-277). Kelsay's direction of travel, according to her own description and hand-drawn map of the scene, was in an easterly or northeasterly direction toward the front pool doors, where both her daughter Madison and the witnesses Sedlacek and Lytle were standing. (Appdx. 275-279, 397, Addendum). Kelsay testified that as she walked in this direction, Deputy Ernst "came up to her" from the location of his cruiser in the employee parking lot. (Appdx. 275-277). Kelsay said she was looking at Madison, and did not see Deputy Ernst approaching her, but she assumed he ran to her because he "got there quick," and she "felt him" grab her arm, and heard him say "get back here." (Appdx. 117, 275-282). Kelsay stopped, turned around and told him, "some bitch is talking shit to my kid and I want to know what she's saying." (Appdx. 117, 282, 287). Kelsay testified that Deputy Ernst did not respond to her explanation and "let go" of her arm once she stopped, so she "turned to continue" and "proceeded to walk to my daughter." (Appdx. 117, 282, 286). Deputy Ernst testified that when Kelsay proceeded away from his grasp, he was trying to retrieve his

handcuffs. (Appdx. 026, 220).

Kelsay testified that, "basically as soon as I had started walking away," when she had covered "only a few feet" further toward her daughter at the front doors, Deputy Ernst "ran up behind me and he grabbed me and slammed me to the ground." (Appdx. 117, 290). Kelsay and others testified that what Deputy Ernst did was "kind of a bear hug," and that he picked her up off the ground before she struck the ground. (Appdx. 221, 337-338, 378-379, 460). Deputy Ernst went to the ground with Kelsay, and Kelsay's left shoulder hit the earth first. (Appdx. 026, 217, 220).

Defendants' expert witness, a retired police officer, testified that police are generally aware of the "dynamics of domestic situations" wherein a victim may engage in "counter intuitive" behaviors intended to "aid . . . her attacker." (Appdx. 189). Defendants' expert also testified that, in the law enforcement field, "taking suspects to the ground is not intended to cause injury, and it generally does not," instead, takedown maneuvers generally minimize the risk of injuries posed by an unsecured and uncontrolled subject of an arrest. (Appdx. 190).

Contrary to the account of all four officers and the eyewitnesses at the scene, Kelsay denies yelling, hitting, or kicking at Deputy Ernst prior to his "bear hug" maneuver, and denies the allegation that she "resisted" Deputy Ernst at any time. (Appdx. 117, 378). Kelsay denied yelling at Monica Sedlacek or the other witnesses,

and denied any intention to speak to or fight the witnesses. (Appdx. 289-290, 377-378). Kelsay testified that her intention in walking away from Deputy Ernst was only to go speak to her daughter Madison. (Appdx. 117, 289-290).

When Kelsay and Deputy Ernst went to the ground, Sgt. Welch, Officer Bornmeier, and Chief Kirkpatrick were still approximately 50-75 feet away with Caslin in the employee parking lot. (Appdx. 216-217, 226, 292-294). Upon observing Kelsay and Deputy Ernst go to the ground, Chief Kirkpatrick ran to them, and assisted in handcuffing Kelsay. (Appdx. 056, 221). Kelsay claims that upon impacting the ground, she "blacked out," and next remembers being pulled up from the ground in handcuffs. (Appdx. 117, 291-292).

Witness Monica Sedlacek testified that when Deputy Ernst first made contact with Kelsay, she "guessed" that they were about 50 feet from her. (Appdx. 452). When Deputy Ernst took Kelsay to the ground, Sedlacek testified that Kelsay was "coming toward" her at the front pool doors. (Appdx. 450, 452, 457). Sedlacek testified that "it happened really fast," and although she was not in fear at the moment that Kelsay advanced toward her, when she later reflected on the incident, she felt that Kelsay's advancement in her direction was threatening. (Appdx. 452-453). Sedlacek testified that Kelsay, "was coming towards me to hurt me or yell at me or whatever she was planning on doing, I don't know." (Appdx. 453). Sedlacek testified that after

the incident she was in "shock," and wanted to leave the pool, but did not feel she could do so until everyone else had left, because Kelsay was "coming toward me. She was going to do harm to me." (Appdx. 458-460). Sedlacek testified to her own observation that it was reasonable for an officer in Deputy Ernst's position to think that Kelsay's movement toward her posed a threat to her safety. (Appdx. 453).

Once Kelsay was handcuffed, Deputy Ernst escorted her in walking to his squad car. (Appdx. 296, 380-381). Deputy Ernst drove Kelsay to Beatrice, Nebraska, a community where both the nearest hospital and the Gage County Detention Center are located. (Appdx. 298-303). After a brief stop at the Detention Center, where Kelsay continued to complain of shoulder pain, she was taken to the hospital in accordance with jail policy. (Appdx. 117, 137, 174, 177-178, 301-309, 468). At the hospital, Kelsay reported shoulder pain, and her medical records state "negative for . . . loss of consciousness." (Appdx. 311, 381, 416-417). An x-ray revealed a fracture to her collar bone. (Appdx. 315, 418). She was given a "figure eight" brace, and her physician provided medical clearance with instructions to the jail. (Appdx. 139, 316, 418).

Kelsay was ultimately convicted of two criminal offenses, disturbing the peace and attempted obstruction of government operations, in connection with her conduct at the Wymore swimming pool that day. (Appdx. 0036-0041).

II. Relevant Procedural History

In June of 2015, Kelsay initiated her civil rights action against Deputy Ernst, Sgt. Welch, Chief Kirkpatrick, and Officer Bornmeier in their individual capacities. (Appdx. 1-8). Also included were official capacity claims against the officers' respective employers, the County of Gage, Nebraska, and the City of Wymore, Nebraska. (Appdx. 1-8).

In her original complaint, Kelsay asserted civil rights claims under 42 U.S.C. §1983. (Appdx. 1-8). She contended that she had been unlawfully arrested, and that the named officers used excessive force, in violation of her rights under the Fourth and Fourteenth Amendments to the United States Constitution. (Appdx. 1-8). In response to a preliminary motion to dismiss by Sergeant Welch, Kelsay filed an Amended Complaint to add more factual allegations against him. (Appdx. 9-17).

On an initial motion for summary judgment by Defendants Welch and Ernst, the District Court dismissed Kelsay's unlawful arrest claim as barred under the rule in Heck v. Humphrey. (Appdx. 129-132). The District Court found that Kelsay was precluded from contending that her arrest was unlawful, as this would constitute a collateral attack on her subsequent criminal convictions for disturbing the peace and obstructing government operations. (Appdx. 129-135). In the same order, the District Court concluded, at Kelsay's urging, that she had adequately pled a separate claim of

deliberate indifference to her serious medical needs. (Appdx. 133-134). However, on later motions for summary judgment, the claim of deliberate indifference to medical needs was also dismissed as to all Defendants, for insufficiency of any supporting evidence. (Appdx. 488-493, 510).

The final motions for summary judgment in the District Court by Defendants targeted the only remaining claim - the excessive force claim. (Appdx. 0184-185, 494). The District Court ruled on these motions in a single order, granting the motions as to all named Defendants, except Deputy Ernst in his individual capacity. (Appdx. 494-515). The District Court concluded that Deputy Ernst was not entitled to qualified immunity, reasoning that under Kelsay's version of the events, she was within a category of "nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." (Appdx. 499-505). Deputy Ernst timely filed his notice of interlocutory appeal of this denial of qualified immunity. (Appdx. 516-517).

SUMMARY OF THE ARGUMENT

Melanie Kelsay's version of facts in her written declaration and deposition testimony dictates as a matter of law that Deputy Ernst is entitled to qualified immunity, if the proper purely objective standard is utilized. Kelsay admits she walked away from Deputy Ernst immediately after he exercised physical control over

her, which constituted an arrest under Nebraska law. As Kelsay proceeded away from Deputy Ernst's earlier grasp of her arm, she admits she was advancing in the direction where witnesses were standing - one of whom she had just verbally characterized to Deputy Ernst as a "bitch" who she thought was "talking shit" to her daughter. Thus, the District Court's interpretation that Kelsay "was not in a position to threaten witnesses" was blatantly contradicted by the record, and need not be accepted on appellate review. Kelsay's testimony about her subjective innocent intent in her movement cannot properly be considered in the qualified immunity inquiry, and instead the focus should have remained on a reasonable officer's perspective.

The law permitted an objectively reasonable officer in Deputy Ernst's position to interpret Kelsay's physical act of walking away from his attempt to arrest and toward witnesses as active resistance, an attempt to flee, or at a minimum a potential threat to others' peace or security. The presence of these factors render Deputy Ernst's use of force - a split second decision to conduct a "bear hug" takedown - objectively reasonable under the circumstances, particularly when his choice carried a low risk of injury.

The decisional case law and "general rule" relied upon the District Court are inapposite to Kelsay's version of the facts, or they do not apply to those facts with sufficient clarity. Those cases involved significant circumstances not present in this

case, such as officers who had no probable cause to arrest, who did not first attempt any verbal directive, or who used a far more serious form of force than that used by Deputy Ernst herein. Alternatively or additionally, some involved the highly distinguishable circumstances of a subject who was immobile, exhibited no appearance of resistance, or who presented no risk of flight or to the security of others, from the objective perspective of the officer.

In contrast, the instant case involved, under Kelsay's version of events, circumstances where ample probable cause existed to arrest her. Deputy Ernst only escalated his use of force after his initial attempt to handcuff Kelsay was unsuccessful. When Kelsay disregarded Deputy Ernst's verbal directive and kept walking, she gave at least the appearance of resistance or an effort to flee or evade her arrest. Deputy Ernst had to make a split second decision to prevent a further disturbance of the peace and potential risk to the security of the witnesses toward whom Kelsay was actively advancing. The question of the constitutionality of Deputy Ernst's use of force in these circumstances is not "beyond debate" under the law, and he therefore should have been afforded the protection of qualified immunity from Kelsay's excessive force claim.

ARGUMENT

Standard of Review

This Court reviews a district court's denial of qualified immunity de novo. The issue is purely a legal one - whether Kelsay's version of the facts and the uncontested evidence demonstrates a violation of clearly established law, from the purely objective perspective of a reasonable officer. New v. Denver, 787 F.3d 895 (8th Cir. 2015). While this Court is required to make all reasonable inferences as to disputed material facts in the light most favorable to Kelsay as the non-moving party, it need not afford a presumption of truth to factual interpretations that are so blatantly contradicted by the record that no reasonable jury could believe them. Walton v. Dawson, 752 F.3d 1109 (8th Cir. 2016).

I. THE DISTRICT COURT DID NOT ANALYZE DEPUTY ERNST'S QUALIFIED IMMUNITY ASSERTION UNDER THE CORRECT PURELY OBJECTIVE STANDARD

Under the Fourth Amendment, the reasonableness of a particular use of force must be judged from the objective perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865 (1989). The District Court cited this basic principle in its order, but failed to heed it, by allowing its analysis to be skewed by subjective considerations. The District Court's analysis in this case is inconsistent with several recent Eighth

Circuit decisions. These decisions repeatedly emphasize that a proper qualified immunity analysis must *not* turn on the subjective motives of the arrestee or the officer, which are outside a purely objective perspective of the officer at the scene.

In Boude v. City of Raymore, 855 F.3d 930 (8th Cir. 2017), at issue was a reach near a gearshift by an arrestee who was seated in her vehicle, that prompted an officer to pull the arrestee out of the vehicle and take her to the ground. The arrestee testified that she was innocently trying to put the vehicle in park before complying with the officer's verbal directive to her to turn the vehicle off. The Court pointed out that the arrestee's subjective innocent internal motive of her reaching movement was irrelevant - instead, the salient consideration to the officer's entitlement to qualified immunity was what objectively reasonable beliefs an officer could draw from the type of movement the arrestee made. The Court found that a reasonable officer confronting these circumstances, knowing that the arrestee had been "huffing" aerosol the previous day, could have believed that her reach for the gearshift was an attempt to shift the car in drive to flee. Thereby, the Court affirmed a grant of qualified immunity to the officer.

In support of its refusal to consider the subjective intent of the arrestee in her movements in a qualified immunity inquiry, the Court in Boude pointed to Carpenter v. Gage, 686 F.3d 644, 650 (8th Cir. 2012). In Carpenter, a woman called 911 seeking

medical aide for her boyfriend at his home, whom she suspected had suffered a stroke. Deputies responded to the home based on information from dispatch that Carpenter had threatened first responders with a baseball bat, insisting he did not need medical help and demanding that they leave. When the Deputies entered the home, Carpenter refused their verbal orders to stop moving about his home, so the Deputies forcibly took him to the ground.

Once taken to the ground, Carpenter huddled with his arms beneath him. Deputies ordered several times, "give us your hands," and warned him that he would be tased if he did not comply. Carpenter did not offer his hands, but admitted that he reached for the nearby couch, later testifying that he did this in an effort to lift himself from the floor. An officer then tased him and got on top of him. Carpenter made a "bucking" motion, which he later testified was an attempt to breathe, but he did not immediately offer his hands, and the officers proceeded to tase him a second time.

Carpenter filed suit, alleging excessive force was used against him by the officers. The district court granted the officers qualified immunity, and the Eighth Circuit affirmed. This Court noted that when Carpenter refused to stop moving about his home, the officers could reasonably interpret his motions to mean that he might be looking for a weapon, which justified the takedown. The Court also emphasized that, "Even if Carpenter's motive [in reaching for the couch and in his bucking

motion] was innocent, the deputies on the scene reasonably could have interpreted Carpenter's actions as resistance and responded with an amount of force that was reasonable to effect the arrest."

The case of Ehlers v. City of Rapid City, 846 F.3d 1002 (8th Cir. 2017) provides yet another example of the need to exclude subjective considerations from the purely objective qualified immunity analysis. In Ehlers, an officer was called to the scene of a reported altercation outside an arena hosting a professional hockey game. A fellow officer at the scene directed him to arrest a subject who was at that time walking away from the officers toward the arena. The officer twice verbally directed the subject to put his hands behind his back. When the subject did not comply with the officer's directive and continued walking toward the arena, the officer conducted a "spin takedown" of the subject. Finding that the officer was entitled to qualified immunity, the Court focused on the objective perspective of the officer at the scene to conclude that the subject "at least appeared to be resisting." The Court pointed out that this conclusion was not undermined by the arrestee's contention that he never heard the officer give him any verbal directive, because, "an arrestee's subjective motive does not bear on how an officer would have reasonably interpreted his behavior." Ehlers, 846 F.3d at 1011.

In the instant case, rather than employing the purely objective analysis

espoused by the above cases, the District Court focused on subjective considerations. Kelsay testified that her subjective intention in advancing in the direction of the witnesses was innocent, in that she was only trying to reach and talk to her daughter. Kelsay denied saying anything to the witness who she believed was "talking shit to" her daughter, and denied any intention to fight the witness(es). In the District Court's order herein, it observed, in summary:

> Ernst argues he is entitled to qualified immunity because . . . Plaintiff Kelsay . . . was perceived by all officers and objective witnesses present to be aggressive, resisting, and noncompliant. Ernst also contends that the use of force was justified by Kelsay's 'seeming effort to verbally berate and to even potentially fight certain witnesses' and that Kelsay actively resisted . . . and started to kick and physically resist . . . And Kelsay denies the conduct relied upon by Ernst to justify his use of force.
>
> (Appdx. 501).

A proper objective qualified immunity analysis does not turn on which specific behaviors by Kelsay constituted Deputy Ernst's own internal subjective justification for using force, so long as Kelsay's admitted conduct demonstrates that a reasonably competent officer could find that the force used by Deputy Ernst was reasonable. The correct objective inquiry should not consider whether Kelsay subjectively realized that Deputy Ernst was arresting her. Nor should it consider Kelsay's testimony that her subjective intention or motivation in her movement away from Deputy Ernst was to innocently go to her daughter, or that she had no subjective intention of threatening

or fighting the witnesses if she had reached them.

Under the proper purely objective standard, the inquiry instead is whether a reasonable officer from Deputy Ernst's perspective could have believed that Kelsay's movements, to the extent admitted by her, constituted resistance to an attempt to arrest, an attempt to flee, or whether her admitted actions otherwise justified the type of force Ernst used under existing law. Entirely accepting Kelsay's version of the facts, but viewing them from the perspective of a reasonable officer in the shoes of Deputy Ernst, his actions were reasonable under existing law, as explained below.

II. ACCEPTING KELSAY'S VERSION OF THE FACTS, THE LAW DOES NOT "CLEARLY ESTABLISH" THAT DEPUTY ERNST'S ALLEGED CONDUCT WAS UNCONSTITUTIONAL EXCESSIVE FORCE

This Court has recognized that the most recent United States Supreme Court cases espouse a "more robust version" of the qualified immunity doctrine. Blazek v. City of Iowa City, 761 F.3d 920 (8th Cir. 2014). With regard to the "clearly established" prong of the qualified immunity analysis - Kelsay must demonstrate that, under her version of the facts capable of perception by Ernst, "that every reasonable officer would have understood that what he is doing violates a constitutional right," and that the contours of the constitutional question confronted by the officer are "beyond debate." Kingsley v. Hendrickson, 135 S.Ct. 2466, 2474 (2015); Tatum v. Robinson, 858 F.3d 544 (8th Cir. 2017); Plumhoff v. Rikard, 134 S.Ct. 2012 (2014).

Kelsay did not and cannot do this, under the evidentiary record presented to the District Court.

A. THE EVIDENTIARY RECORD BLATANTLY CONTRADICTS THE DISTRICT COURT'S FINDING THAT KELSAY WAS "NOT IN A POSITION TO THREATEN WITNESSES."

As a narrow exception to the appellate court's lack of jurisdiction to review issues of fact on an interlocutory appeal from an order denying a public official qualified immunity, an appellate court may reject the district court's factual findings or interpretation of the factual record, to the extent they are "blatantly contradicted by the record." Wallace v. City of Alexander, Arkansas, 843 F.3d 763 (8th Cir. 2016) (*citing* Scott v. Harris, 550 U.S. 372, 380, 127 S.Ct. 1769 (2007)). The evidence in the record need not be video footage to be "conclusive" enough for the rule from Scott to apply, but the burden is a heavy one. Wallace, *supra*, 843 F.3d 763; Reed v. City of St. Charles, Mo., 561 F.3d 788 (8th Cir. 2009).

Here, the District Court found that when Deputy Ernst conducted the takedown, Kelsay was "not in a position to threaten witnesses" and "posed no danger to anyone." (Appdx. 501-502). This interpretation of the evidence is blatantly contradicted by virtually all of the objective evidence in the record.

Kelsay admits, and all witnesses consistently described, her physical position and direction of movement, and that of the others at the scene. Kelsay indisputably

started from a position south of the employee parking lot, and necessarily moved in a east/northeasterly direction toward the front pool doors. Kelsay agrees that the physical location of both her daughter and witnesses to the earlier domestic assault, including Monica Sedlacek, were standing outside the front pool doors. (Appdx. 117, 270-282, 397). Kelsay admits she was "mad" about Caslin's arrest. Thus, Kelsay's mere direction of movement toward them could have been threatening from the witnesses' perspective.

Further, by Kelsay's own estimate of her location as she advanced, she was near enough in physical proximity to the witnesses (20-30 feet, or less) to spontaneously direct verbal threats to them if she chose to do so. (Appdx. 274-275, 276-277, 397). Kelsay targeted witness Sedlacek with her words by admittedly calling her a "bitch" who was "talking shit" to her daughter, and stating that she "wanted to find out what was going on," at least suggesting a threat. (Appdx. 117). Kelsay's active movement forward put her in a position to physically harm the witnesses, if she was not stopped.

Indeed, witness Monica Sedlacek specifically testified that she felt Kelsay's physical movement toward her was threatening. Witness Sedlacek explained that while it happened so quickly that she did not perceive fear in the actual moment that Kelsay began to advance toward her, when she later thought about the events at the

pool, she felt that the manner of Kelsay's movement was threatening to her. Sedlacek explained that, "she [Kelsay] was coming towards me to hurt me or yell at me or whatever she was planning on doing. . .," and stated that she felt unable to safely leave the pool like she wanted to until everyone had gone, because she believed Kelsay was going to "harm" her. (Appdx. 452-460).

The District Court's mistaken interpretation of the evidence, namely that Kelsay was "not in a position to threaten witnesses," necessarily prevented it from properly analyzing the totality of the circumstances presented in a manner consistent with Graham. Kelsay's potential threat toward witnesses impacts at least two of the Graham factors - namely, the "need for application of force," and whether the officer may have used force in a "good faith effort to maintain and restore discipline." Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865 (1989). The potential threat to witnesses also impacts a third Graham consideration of the officer's need to make a "split second judgment in circumstances that were tense, uncertain, and rapidly evolving." Because the District Court erroneously concluded that Kelsay was "not in a position to threaten witnesses," the District Court clearly did not appreciate the need of Deputy Ernst to act quickly to choose a tactic that would effectively prevent Kelsay's active movement forward from actually reaching the witnesses.

Because there is no contrary evidence on this issue within the objective

perspective of an officer in Deputy Ernst's position, this Court should not accept the District Court's blatantly contradicted interpretation of the facts. It should instead recognize what the evidence shows, which is that, at the critical moment, Kelsay was indeed "in a position to threaten witnesses" from an objective officer's perspective. Therefore, Deputy Ernst faced exactly the type of need to make a split second decision that the Graham court instructs should not be second-guessed by the courts in this civil action.

B. KELSAY'S ACTION OF WALKING AWAY FROM DEPUTY'S ERNST'S INITIAL LAWFUL ARREST, TOWARD WITNESSES, IS REASONABLY INTERPRETED AS ACTIVE RESISTANCE, AN ATTEMPT TO FLEE, OR A RISK TO THE SECURITY OF OTHERS

Kelsay affirmatively testified that she "did not fight Deputy Ernst," and generally denied that she "resisted" Ernst. Kelsay denied the specific allegations of several witnesses present at the scene that she was "hitting or kicking" Deputy Ernst. Kelsay also denied that she was "screaming" at the nearby witnesses as she moved toward them.

But despite these specific denials, Kelsay fully admitted other material facts. She admitted that Deputy Ernst told her to "get back here," and that he then grabbed her arm. (Appdx. 116-117, 275-282). Kelsay submitted a written declaration stating that after Deputy Ernst grabbed her arm, she turned and told him, "some bitch is

talking shit to my kid and I want to know what she's saying." (Appdx. 117). Kelsay also admitted that when Deputy Ernst (by her account), "let go" of her arm, she started walking away from him and in the direction of a verbal argument then occurring between her daughter and witness Sedlacek, all of whom were situated just outside the front doors of the pool. (Appdx. 116-117, 275-282, 397). Other material undisputed facts are that Deputy Ernst was responding to an earlier reported domestic disturbance between Caslin and Kelsay, that he had been informed by a fellow officer that Kelsay was to be placed under arrest for her earlier interference with Caslin's arrest prior to his arrival at the scene, and that when Kelsay moved away from him, Deputy Ernst was attempting to grab his handcuffs. (Appdx. 218-221).

The District Court improperly permitted Ernst's entitlement to qualified immunity to turn primarily on Kelsay's general denials that she resisted Ernst or intended to harm witnesses, without analyzing those above described remaining facts which were admitted by Kelsay or were undisputed, from the objective perspective of an officer. That is, whether Kelsay's factual admissions - that she walked away from Deputy Ernst and toward witnesses after he told her to stop and grabbed her arm - could have been interpreted by an objectively reasonable officer as justifying the additional type of force used by Ernst to effectuate her arrest, under existing applicable law, taking into account the other undisputed circumstances. *See*

Carpenter, *supra* 686 F.3d at 649 (arrestee's denial of swinging at officer, which was officer's subjective reason for arrest, did not matter where probable cause to arrest could be gleaned from remaining uncontested facts). These actions by Kelsay could have reasonably been interpreted by a competent officer as resistance, evading, or a risk to the safety of others, under applicable law.

As noted above, in Ehlers v. City of Rapid City, 846 F.3d 1002 (8th Cir. 2017), an officer was entitled to qualified immunity from an excessive force claim in part because he reasonably interpreted an arrestee's action of walking away him while ignoring his verbal orders as active resistance to arrest. In the later case of Tatum v. Robinson, 858 F.3d 544 (8th Cir. 2017), this Court reaffirmed that while mere arguing and noncompliance with an officer's verbal orders does not always constitute "resistance," when those actions are coupled with walking away from the arresting officer as in Ehlers, it is reasonable for an officer to conclude that the arrestee is resisting.

It is important that, under Nebraska state law, Deputy Ernst's undisputed actions toward Kelsay *prior to* the takedown, constituted an arrest, or, at a minimum, an attempt to arrest. To effect an arrest under Nebraska law, it is not necessary for an officer to verbally announce that a subject is under arrest. Instead, an officer under real or pretended legal authority must only "begin to take actions to effectuate

physical control over a subject," such that an "actual or constructive seizure or detention of the person" takes place. *See* State v. Ellingson, 13 Neb. App. 931, 703 N.W.2d 273 (2005) (construing the "attempt to arrest" element of the offense of fleeing in a motor vehicle). Here, by directing Kelsay to "get back here" while grabbing her arm and stopping her forward movement, Deputy Ernst could reasonably believe that Kelsay knew she was then under arrest and not free to keep moving away, even if he momentarily released her arm to retrieve his handcuffs.

Under Neb. Rev. Stat. §28-904(1)(c), a person commits the offense of resisting arrest if, "while intentionally preventing or attempting to prevent a peace officer, acting under color of his or her official authority, from effecting an arrest of the actor," he or she "employs means requiring substantial force to overcome resistance to effecting the arrest." Here, by intentionally walking away from Deputy Ernst after he first exercised physical control over her using a low level of force (grabbing her arm and verbally directing her to stop), Kelsay put Deputy Ernst in a position where a higher level of force, even a substantial amount, could be reasonably perceived by him as necessary to successfully effectuate her arrest. By her words and actions, Kelsay indicated she did not intend to submit to arrest willingly, at least until she could "see what was going on" between her daughter and witness Sedlacek. *See* State v. Heath, 21 Neb. App. 141, 838 N.W.2d 4 (2013) (noting that resistance to arrest can

occur prior to any verbal advisement of by an officer to the subject of the attempt to arrest). Unlike his first attempt to secure Kelsay, Deputy Ernst's second effort, the physical takedown, was the level of force necessary to effectuate her arrest, as it effectively stopped Kelsay's advancement toward the witnesses, and permitted her to be secured and taken into custody.

There is no question that when Deputy Ernst encountered Kelsay, he had probable cause to arrest her, because he had just been so advised by a fellow officer. *See* Ehlers, *supra,* 846 F.3d at 1010 (officers are permitted to rely upon the probable cause determination of a fellow officer); Perry v. Wolfe, 858 F.3d 1141, n. 2 (8th Cir. 2017). Under Nebraska law, an officer in Deputy Ernst's shoes could have also reasonably interpreted Kelsay's admitted conduct as a commission of the separate crime of obstruction of a peace officer under Neb. Rev. Stat. §28-906(1). The obstruction statute is violated by "an affirmative physical act" that interposes a "physical obstacle," whenever such action "obstructs, impairs, or hinders" the officers' efforts to enforce the law or preserve the peace. An officer may be engaged in preserving the peace, irrespective of what brought him to the scene in the first instance, and even where there is no probable cause to arrest any person at the scene. *See* In re Interest of Richter, 226 Neb. 874, 415 N.W.2d 476 (1987) (finding Nebraska's obstruction statute was violated by the defendant's physical act of running

away from an officer).

Here, Kelsay admits she began walking away from Deputy Ernst, taking a physical action that placed increasing distance between she and Deputy Ernst. She did this after Deputy Ernst attempted to arrest her, and at a time when he had probable cause to arrest her, thereby her action of walking away clearly obstructed, or at a minimum hindered or impaired, Deputy Ernst's effort to enforce the law. Additionally, according to Kelsay, she was walking toward a verbal altercation between her daughter and a witness to the earlier reported domestic assault. The record contains expert witness testimony that a law enforcement officer such as Deputy Ernst would have an awareness of the common dynamics on a domestic disturbance call whereby a reported victim may take actions to "aid her attacker," which in this instance could include physical or verbal confrontation with the witness who Kelsay presumed had called 911 about Caslin's violence. (Appdx. 189). Thus, Kelsay's advancement could reasonably be interpreted as hindering or obstructing Deputy Ernst's efforts to keep the peace, maintain the security of the public, and prevent the verbal altercation from escalating at the swimming pool, where children were present.

Alternatively, Deputy Ernst could have reasonably believed that Kelsay's action of walking away from him under the circumstances was an attempt to flee or

evade arrest. Under Neb. Rev. Stat. §28-912(1), a person commits the crime of escape "if he or she unlawfully removes himself or herself from official detention," which may include an arrest. In State v. Hicks, 225 Neb. 322, 404 N.W.2d 923 (1987), the Nebraska Supreme Court concluded that for purposes of Nebraska's escape statute, a defendant who drove away in a vehicle after a police officer directed him to stop was not yet under "official detention," but distinguished the defendant from a person who had been "actually seized" by some form of physical restraint by an officer. Id. (*Citing* State v. White, 209 Neb. 218, 306 N.W.2d 906 (1981)) (finding that "constructive arrest" occurred for purposes of escape statute despite absence of any act of physical restraint by the officer). Here, when Deputy Ernst grabbed Kelsay's arm and told her to stop, she was actually seized by physical restraint, such that by walking away and removing herself from the Deputy, she could be viewed as attempting to escape an arrest under state law. *See* Boude, *supra,* 855 F.3d at 933 (viewing reach to gearshift as possible attempt to flee that justified use of force).

An objectively reasonable officer in the shoes of Deputy Ernst, under Kelsay's version of the facts, could have reasonably interpreted Kelsay's action of walking rapidly away from the attempted arrest as an effort to disturb the peace and security of others, to escape/flee from arrest, and/or as an act of resistance to arrest. A difference in any of these factors shifts the Graham analysis, and should have resulted

in a grant of qualified immunity to Deputy Ernst.

C. THE CONSTITUTIONAL QUESTION CONFRONTED BY DEPUTY ERNST IS NOT "BEYOND DEBATE" UNDER EXISTING LAW

Fully accepting Kelsay's own version of all disputed facts, existing law did not "clearly establish" that Deputy Ernst's alleged actions constituted excessive force under the applicable standards set forth above. Although decisional case law need not involve "fundamentally" or "materially similar" facts, the earlier cases must give officials "fair and clear warning" that their alleged treatment of the plaintiff was unconstitutional. Meloy v. Bachmeier, 302 F.3d 845, 848 (8th Cir. 2002). Officials can still be "on notice" that their conduct violates established law in novel factual circumstances, but the pre-existing law must make it "apparent" that the conduct of the officer violated constitutional rights. *See* Ehlers, *supra*, Blazek, *supra*, 761 F.3d at 923-924 (finding law was not "clearly established" as to officers' pre-handcuffing use of force).

If a "general constitutional rule" is said to give the required "fair warning," that general rule must apply with "obvious clarity to the specific conduct in question." *See* Hope v. Pelzer, 536 U.S. 730, 741, 122 S.Ct. 2508, 2516 (2002) (handcuffing inmate to a hitching post without justification for an extended time was an obvious Eighth Amendment violation even in the absence of any past case with comparable facts,

based on the general rule that it is unconstitutional for a jailer to "inflict gratuitous pain on an inmate outside of what is necessary to enforce on-the-spot discipline").

The District Court's analysis herein defined the so-called "clearly established law" at too high of a level of generality for it to control the particularized circumstances present in this case. In its memorandum order denying qualified immunity to Deputy Ernst, the District Court relied heavily on a general constitutional rule that it paraphrased as follows: "force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public. . . even if that person is interfering with the police or behaving disrespectfully." This "general rule" stems from the case of Brown v. City of Golden Valley, 574 F.3d 491 (8th Cir. 2009).

But recent cases have narrowed applicability of this "general rule" from Brown. In Tatum, *supra*, this Court cautioned, "just because force is 'least justified' against a suspect like" the one in Brown, "does not mean it is never justified." The Court went on to find that Brown's general rule did not apply with sufficient definiteness where an officer "immediately used significant force," such that the officer was entitled to qualified immunity despite the existence of a constitutional violation. *See* Tatum, 858 F.3d at 550 (noting that before using pepper spray, officer did not first try a less serious method to secure compliance, such as grabbing the arrestee's hand).

And in Ehlers v. City of Rapid City, 846 F.3d 1002 (8th Cir. 2017), this Court specifically explained that the general rule from Brown is wholly "inapplicable" when an arrestee at least *appears to be* resisting. As discussed above, the "appearance of resistance" at issue in Ehlers was strikingly similar to that involved in this case - an arrestee who walked away from an officer after failing to comply the officer's verbal order to stop. Clearly, Tatum and Ehlers demonstrate that the general rule in Brown simply does not apply to Deputy Ernst's conduct.

At a bare minimum, the general rule in Brown does not apply with the required "obvious clarity" to the different factual circumstances of this particular case. Brown differs from the instant case in several key respects, including what the suspect was doing at the time force was used, the potential consequences of what the suspect was doing, and in the type or level of force used.

In Brown, at the time of the use of force by an officer, the suspect was immobile, quietly seated in a vehicle utilizing her phone. Contrastingly, in the present case, at the time force was used by Deputy Ernst, the suspect Kelsay was not only mobile, she was moving away from the officer and toward witnesses to an earlier reported criminal incident. According to Kelsay's own version of the events, she was walking away from the officer just after he grabbed her arm and told her to "get back here." (Appdx. 116-117).

Further, the suspect in Brown only disobeyed an officer's verbal directive to terminate her phone call to 911. The consequence of such disobedience, at worst, were delay and the unnecessary occupation of the time of a 911 dispatcher. Quite different is Kelsay's disobedience of Deputy Ernst's verbal directive to stop. Kelsay admits that she was walking toward a yelling match between her daughter and a witness to the earlier reported domestic dispute between Kelsay and her male "friend." (Appdx. 116-117, 275-282). The consequence of Kelsay's disobedience involved a potential escalation of a disturbance of the peace or a potential threat to the security of members of the general public.

Also significant is that Brown involved use of a Taser on the immobile suspect who posed no prospective threat to anyone.[1] In the present case, according to Kelsay's version of the events, even though Kelsay was mobile, Deputy Ernst chose a less severe type or amount of force option, and he did this only after his first attempt to secure the arrest by grabbing Kelsay's arm was ineffectual. According to Kelsay, Deputy Ernst "ran up and sort of bear hugged" her from behind once she began actively walking away from him, after he had tried to stop her by taking her arm

[1] The Taser is a unique and potentially lethal weapon outside the common person's experience, that necessarily causes tremendous pain, and has caused such serious long term harm as impotence, incontinence, nerve damage, and indeed, even death. McKenney v. Harrison, 635 F.3d 354 (8th Cir. 2011) (Murphy, concurring) (collecting and describing various cases).

accompanied by a verbal directive. Both Kelsay and the officer then went to the ground together. (Appdx. 116-117, 275-282, 337-338, 378-379, 460).

The ground surface was earth and grass, not pavement, and there is no evidence of any objects near to where they landed. The unrefuted expert witness testimony was that Deputy Ernst's choice of type of force was not one where significant injury would normally be expected. (Appdx. 190). As a practical matter, Deputy Ernst's action was reasonably as likely to injure him, as it was to injure Kelsay. *See* Blazek, *supra* (noting that qualified immunity in excessive force cases should not turn on whether a reviewing judge later concludes that an "unacceptable level of injury" happens to result from a relatively common use of force).

The Eighth Circuit opinion in Brown itself even recognizes that the general rule it announced was focused on "the level of physical coercion necessary to execute the otherwise lawful seizure." The Court in Brown fully acknowledged another essential general constitutional rule, that where probable cause for arrest of the suspect exists, there is justification for some use of force. *See also* Tatum, *supra*, at 850 ("the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion . . . to effect it."). The salient question in Brown was whether the *choice of method* of use of force under the underlying circumstances - tasering an immobile suspect - was an obviously unnecessary level of force, without

engaging in any impermissible second guessing the officer's choice with the 20/20 vision of hindsight. The general rule in Brown does not apply with "obvious clarity" to a situation like the one in the instant case involving a different and lower level type of force, against a suspect who was mobile, and who would reach witnesses to an earlier reported criminal incident if not immediately stopped, particularly where the use of force at issue herein occurred only after a less intrusive effort to arrest was unsuccessful.

In addition to Brown, the District Court's memorandum order in the instant case also cited six other cases with so-called "comparable circumstances" that it found supplied the necessary "fair warning" to an officer in the shoes of Deputy Ernst that the unlawfulness of his actions were "apparent." (Appdx. 504-505). But these cases are also distinguishable in key respects, such that they could not supply the required "fair and clear warning" to an officer in the different factual circumstances faced by Deputy Ernst here.

For instance, Shekleton v. Eichenberger, 677 F.3d 361 (8th Cir. 2012), like Brown, involved the entirely different and more serious method of force of a Taser, on an immobile suspect who had already fallen to the ground. Moreover, significantly, the Court in Shekleton emphasized that because the officer lacked probable cause to arrest the suspect for any crime, he could not draw any justification

for his use of force from the general rule that probable cause to arrest a suspect necessarily entails some level of force.

Just as in Shekleton, the case of Shannon v. Koehler, 616 F.3d 855 (8th Cir. 2010), involved a situation where the officer possessed no probable cause to arrest. Further, in Shannon, the subject bar owner was standing stationary in front of an officer, merely verbally demanding that the officer leave his bar, when the officer moved directly to the use of physical force against him, without first giving any verbal command to the bar owner to do anything different, or to stop what he was already doing. In contrast, Kelsay was advancing away from the officer just after he directed her to stop, and just after he attempted to arrest her using lesser force. Kelsay was also advancing in the direction of witnesses to an earlier reported criminal incident, and toward a purported verbal argument between her daughter and one of those witnesses, constituting an additional justification for force not present in Shannon.

As this court specifically explained in its subsequent opinion in Hollingsworth v. City of St. Ann, 800 F.3d 985 (8th Cir. 2015), the officer's lack of probable cause to arrest in the Shannon case, coupled with the lack of any physical resistance by the bar owner and lack of any threat to the safety of anyone else present at the scene, resulted in a lack of justification for the involved officer to use *any* force. As further

expressly observed in Hollingsworth, the Shannon case is necessarily "inapposite" to, and does not control different facts like those in the present case, where a subject is lawfully under arrest, but nevertheless behaves recalcitrantly, by refusing to obey an officer's verbal order to stop an activity that might jeopardize the peace or safety of others at the scene. Hollingsworth, 800 F.3d at 990.

The case of Kukla v. Hulm, 310 F.3d 1046 (8th Cir. 2002), like Shekleton and Shannon discussed above, is also readily distinguishable from the facts of Kelsay's situation. The officer in Kukla lacked probable cause to arrest the subject, and no other circumstances were present that could have justified the use of *any* force by the officer. The subject of the use of force in Kukla was a trucker who was merely standing with the officer at a truck stop, verbally challenging the officer's decision to issue him a log book violation ticket. Thus, unlike Kelsay, the trucker in Kukla was not mobile or advancing away from the officer. In Kukla, there was no evidence of any risk to the safety of anyone else at the scene, yet the involved officer immediately jumped to the use of physical force, without first issuing any verbal directives or warning to the trucker to stop his activity. Again, this is unlike the facts of this case, where Deputy Ernst's takedown did not occur until after Kelsay ignored a verbal directive and re-commenced walking toward witnesses.

The case of Montoya v. City of Flandreau, 669 F.3d 867 (8th Cir. 2012)

involved a subject who was lawfully under arrest, but, significantly, who was not mobile or actively advancing away from law enforcement. Instead, the arrestee in Montoya was standing with one of the officers at the scene, at least partially already immobilized by a handcuff that had been placed on her left wrist by that officer, who was working to secure the subject's right arm for handcuffing. It was only then that a second officer spontaneously stepped in to employ a leg sweep takedown aimed to throw the subject face first onto the pavement. The Court found the second officer's choice of maneuver would be especially likely to cause injury to the subject, as it caused the first officer to fall directly on top of her. Further, there was no concern for the safety of the other person at the scene in Montoya. Clearly, these facts differ from those at issue here, where Kelsay was mobile and actively moving away, only Deputy Ernst was close enough to stop her forward advancement toward witnesses, and the type of force used would not ordinarily cause injury.

Likewise, in Johnson v. Carroll, 658 F.3d 819 (8th Cir. 2011) a mother tried to protect her son from arrest by officers in a non-violent manner by repeatedly covering her son with her own body. Unlike Kelsay, the subject in Johnson was never given any verbal commands to stop her activity prior to the officers' escalation to physical force. Instead, the officers removed the mother from her son, threw her to the ground, and then deployed pepper spray or mace in her face, before they ever attempted to

handcuff her. Unlike Deputy Ernst, the officers in Johnson went above and beyond a physical takedown of the subject in the severity of the method of force used, by deploying mace after the subject was immobile. The activity of the subject in Johnson did not pose any threat or potential risk to the safety of others, and had no potential consequence except to delay the arrest of her son, unlike Kelsay's conduct that posed at least a potential risk to the security of others.

The last case relied upon by the District Court in its analysis of the "clearly established" prong of the qualified immunity analysis, Lollie v. Johnson, 159 F.Supp.3d 945 (D. Minn. 2016) was decided after the events involved in this case. But reliance on this case by the District Court was improper, because only *existing* cases as of time of the events in question may render the law "clearly established" for qualified immunity purposes. *E.g.* Plumhoff, *supra*, 134 S.Ct. 2012 (2014).

In summary, each of the seven cases relied upon by the District Court in its analysis of the "clearly established" prong of the qualified immunity analysis are distinguishable from those in the instant case for such significant reasons, that they could not have supplied "fair warning" to a reasonable officer that Deputy Ernst's alleged actions were unconstitutional. They involved either a lack of probable cause to arrest, a more serious type of force, and/or a suspect who was immobile, had not first been given verbal directives, or otherwise presented no risk to the security of

others present. Deputy Ernst faced different circumstances not addressed in those cases - namely, a subject, Kelsay, who was mobile and advancing away from him after his initial less forceful but unsuccessful attempt to arrest her, who was noncompliant to an earlier verbal directive to stop, and who was actively advancing toward witnesses arguing with her daughter after calling one of them a "bitch." Deputy Ernst chose a "bear hug takedown" onto the grass, rather than more severe options such as mace or tasering, that would be more likely to cause injury.

Other, more factually comparable cases demonstrate that a reasonable officer in the shoes of Deputy Ernst, under the circumstances of this case admitted by Kelsay, would have believed that his alleged actions were entirely lawful.

The factual similarities of the recent cases of Ehlers, *supra* (involving a physical takedown of a suspect who continued to walk away despite two verbal directives to stop), Boude, *supra* (involving a takedown of an arrestee who made a movement interpreted by the officer as a possible effort to flee), Carpenter, *supra* 686 F.3d at 649, and others, are discussed above. Additionally, in Edwards v. Giles, 51 F.3d 155 (8th Cir. 1995), officers were entitled to qualified immunity on an excessive force claim for a physical takedown of non-violent, unarmed, non-intoxicated suspect of a prior vehicular pursuit, who ran and hid from police, but who stopped and put his hands on his head when blocked by another officer just before the takedown. *See*

also, Blazek v. City of Iowa City, 761 F.3d 920 (8th Cir. 2014) (explaining that greater levels of force may be justified prior to the time that a subject is subdued or restrained, than after a suspect is handcuffed or otherwise immobile).

These Eighth Circuit cases involving probable cause to arrest, and actually or potentially mobile suspects who were noncompliant with verbal directives, are far more factually similar to Kelsay's version of events in the instant case than any of the cases relied upon by the District Court in its summary judgment order as pertains to Deputy Ernst's assertion of qualified immunity from suit.

The same is true of many cases in other jurisdictions involving excessive force claims that would have instructed a reasonable officer in Deputy Ernst's shoes that his actions were lawful.

For instance, in Findlay v. Lendermon, 722 F.3d 895, 899-900 (7th Cir. 2013), an officer was entitled to qualified immunity for physically tackling a non-violent suspect from behind as he bent down to pick up a piece of evidence that he had dropped after inviting the officer into his home. Likewise, in Dawson v. Brown, 803 F.3d 829 (7th Cir. 2015), the 72-year old father of a suspect who was actively resisting arrest approached the officer conducting the arrest, showing his hands and saying "please don't kill him." The officer kicked the 72-year old father in the torso, sending him backward six or seven feet. Within seconds a second officer ran at and tackled

the 72-year father onto pavement, causing injuries that required treatment in the emergency room. The Seventh Circuit affirmed the lower court's decision that both officers had qualified immunity.

In Hedgpeth v. Rahim, 213 F.Supp.3d 211 (D.C. 2016) an officer was granted qualified immunity on an excessive force claim when he used a takedown maneuver to arrest a loud and seemingly drunk subject who did not comply with verbal orders to place his arms behind his back, after being told by a fellow officer that the subject could be "hard to handle." During the takedown, the arrestee's head slammed into the window of a building, knocking him unconscious.

In Hargraves v. Dist. of Columbia, 134 F.Supp.3d 68 (D.C. 2015), officers were conducting a Terry stop of a subject. When the subject "suspiciously" moved away from the officers, they conducted a physical takedown, using a baton for two leg strikes to bring the subject to the ground. The Court found the officers were entitled to qualified immunity, citing several pre-2014 cases involving stops of individuals who were "noncompliant with commands and appearing to be resisting arrest," where use of handcuffs, batons, and tactical takedowns were approved as non-excessive tactics to lower an arrestee or suspect to the ground.

In Anderson v. City of Tampa, 555 F.Supp.2d 1268 (M.D. Fla. 2008), an officer was arresting a 65-year old male subject for driving while impaired.

According to the subject, he tried to put his arms behind his back as verbally directed by the officer, but told the officer he was having trouble doing so because he had a "bad shoulder," and explained he was "not trying to fight him." In response, the officer effectuated the arrest by a physical takedown maneuver in which the officer pulled the subject's arms outward, while kicking his legs out from underneath him. The subject suffered bleeding scrapes on his knees and face, but the officer was found to be entitled to qualified immunity. *See also*, Bozung v. Rawson, 439 Fed. Appx. 513, 520-21 (6th Cir. 2011) (approving use of straight-arm-bar takedown of misdemeanant who was drinking and failed to comply with officer's verbal directive, although the subject was neither verbally or physically confrontational); Boothe v. Wheeling Police Officer Sherman (Star #155), 190 F.Supp.3d 788 (N.D. Ill. 2016) (officer entitled to qualified immunity for a straight arm takedown of a student who appeared to be resisting, despite denials).

Where the use of force at issue "likely resides on the hazy border between excessive and acceptable force," the court cannot conclude as a matter of law that "only a plainly incompetent officer would have believed that the force used . . . was constitutionally reasonable." Blazek, *supra*, 761 F.3d at 923-25. The above described comparable cases demonstrate that, at a minimum, the question of the reasonableness of Deputy Ernst's use of force in the circumstances he confronted is not "apparent"

or "beyond debate" under existing law. The cases relied upon by the District Court in its decision on Deputy Ernst's summary judgment motion did not supply "clear and fair notice" to an objective officer in his position that his actions in the different circumstances he confronted were unconstitutionally excessive. The "clearly established" prong of the qualified immunity analysis is not met under the evidentiary record interpreted in Kelsay's favor, and therefore Deputy Ernst is entitled to summary judgment.

CONCLUSION

For all of the foregoing reasons, Deputy Ernst in his individual capacity respectfully requests that the May 19, 2017 decision of the District Court be reversed as relates only to the excessive force claim asserted against him, and that the matter be remanded with instructions to enter summary judgment in his favor based on his entitlement to qualified immunity from this claim.

Dated this 10th day of July, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,303 words, excluding parts of the brief exempted by Fed. R. App. P. 37(a)(7)(B)(iii).

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I hereby certify that on July 10, 2017, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit at Thomas F. Eagleton Courthouse, Rm 24.329, 111 South 10th Street, St. Louis, MO 63102, by electronic filing with the CM/ECF system.

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