No.: 17-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MELANIE KELSAY,

Plaintiff-Appellee,

vs.

MATT ERNST, et al.,

Defendant-Appellant

APPEAL FROM THE DISTRICT OF NEBRASKA
TRIAL COURT JUDGE: HONORABLE JOHN M. GERRARD

BRIEF OF PLAINTIFF-APPELLEE

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Summary of the Case and Request For Oral Argument

In his "summary of the case," Appellant Ernst's assertions are incorrect, incomplete, and/or controverted by evidence. The District Court correctly denied summary judgment to the Appellant as there were material issues of fact that precluded a finding of qualified immunity against Ernst.

The evidence is in dispute regarding the testimony of witnesses, the sequence of events, and ultimately the injury and treatment of those injuries to the Appellee by the Appellant stemming from a May 29, 2014 arrest of the Appellee related to an incident at the Wymore, Nebraska city pool. Deputy Ernst was called to respond to a 911 call in which the Appellee was the alleged victim. The dispatch to Ernst was called off, but he responded anyway. Without provocation, Ernst aggressively detained Kelsay with an unreasonable force, causing her significant injury to her shoulder. Ernst then, knowing of Kelsay's need for medical attention refused her the medical care necessary for her injury, and delayed treatment of the necessary medical attention.

The District Court found that there were material issues of fact that precluded summary judgment on the issue of qualified immunity against Ernst. The correctness of these holdings can be discerned from the record. If oral argument is necessary, 10 minutes per side is sufficient.

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Jurisdictional Statement

The Appellee does not dispute that the District Court had jurisdiction over the matter before us[1], but the Appellee does dispute the contention that this Court has jurisdiction to hear this interlocutory appeal. The Appellant contends that there is jurisdiction to hear this appeal "because the District Court's order turns on abstract issues of law, rather than issues of fact." The Appellee disagrees that the District Court was concerned with abstract issues of law, rather than finding that there were disputes as to material fact. That contention is also contrary to the Appellant's arguments raised in the body of his brief.

Each assignment of error raised by the Appellant requests and requires this Court to make factual applications, not to resolve legal questions. The only path to success for the Appellant is to ask this Court to misconstrue the summary judgment standard or to ignore it altogether in the name of "qualified immunity".

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[1] The Appellee disagrees with the District Court granting summary judgment against the other defendants in this action, and reserves the right to later contest the appropriateness of the District Court's review as it relates to those named Defendants.

Statement of the Issues

Whether this court has jurisdiction to hear the interlocutory appeal given the arguments raised by the Appellant.

Aaron v. Shelley, 624 F.3d 882, 883-84 (8th Cir. 2010).

Whether the Trial Court Erred in finding there were material issues of fact sufficient to preclude summary judgment in this matter?

Rothmeier v. Investment Advisors, Inc. 85 F 3d 1382 (8th Cir. 1996).

Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Quick v. Donaldson Co., Inc., 90 F.3d 1372 (8th Cir. 1996).

Widoe v. District No. 111 Otoe County Sch., 147 F.3d 726 (8th Cir. 1998).

Whether the Trial Court erred in viewing the facts in light of the non-moving party.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000).

White v. Smith, 808 F. Supp. 2d 1174 (D. Neb. 2011).

Whether the Trial Court erred in applying the appropriate standard of law applicable to qualified immunity doctrine and summary judgement standards.

Tolan v. Cotton, 134 S.Ct. 1861, ___ U.S. ___, 188 L.Ed.2d 895, 82 U.S.L.W. 4358, (2014).

Graham v. Connor, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989).

Moore v. Indehar, 514 F.3d 756 (8th Cir. 2008).

Howard v. Kan. City Police Dep't, 570 F.3d 984, 991 (8th Cir. 2009)

Statement of the Case

Appellee does not disagree with the Appellant's recitation of the Relevant Procedural History as noted on pp. 12-13 of their brief to the extent that it appropriately notes the filings and orders of the District Court. The Appellee would disagree with some of the characterizations by the Appellant regarding the procedural history however the record speaks for itself, and the disagreements are not appropriately before this court on Appeal by the Appellant. The Appellee is precluded from contesting the decisions of the District Court pending a final order on all matters.

The Appellee does disagree with the factual recitation by the Appellant and would provide the following supplemental factual statement.

Appellee Melanie Kelsay is a resident of Gage County, Nebraska, and was present at the Wymore City Public Pool on May 29, 2014, with her three children

and her friend Patrick Caslin. (App. 0001, ¶1; App. 0003, ¶ 12). (App. 0249, 10:7-11:20).

Monica Sedlacek, a supervisor at a preschool, (App. 0447, 7:14-15), witnessed an exchange between Kelsay and Caslin that led to the events of this case. Sedlacek testified that "it appeared to me and the other gals that were with us that the gentleman with her had her pushed up against the wall and kind of had his hands around her throat, like, it appeared that he was hurting her."… "Q. Did -- when you saw that, did you say anything to anybody? A. Not at first. We kind of just talked about it amongst the three of us, the adults. Because at first we were, like, are they playing, are they not playing, and -- yeah." (App. 0448, 10:8-11:18). Caslin never slapped Kelsay in the face nor did he choke her.

According to Caslin and Kelsay, Monica Sedlacek saw Patrick Caslin pretending to throw Kelsay in the pool while Kelsay was standing at the edge taking a picture of her kids and her daughters friend, Kimberly. Sedlacek yelled at Patrick "Get your fucking hands off her". Both Kelsay and Caslin told Sedlacek they were just playing around, at this point Kelsay told her kids it was time to dry off since the pool closed at 8 so they all got ready to go. (App. 0116, ¶5. 2; App. 0125).

The City of Wymore Police Department, Defendant Police Chief Russell

Kirkpatrick and Defendant Officer Matthew Bornemeier, were the first responders to the emergency call. And it should be noted that Kelsay would have been the alleged victim of the alleged Domestic disturbance call. The responding officers did not "request to talk to" Caslin "about what had transpired", rather they insisted and demanded that he needed to go to the police car with them. (App. 0004, ¶16; App. 0116, ¶5.3; App. 0125, ¶2.3). Caslin was not "advised that an investigation was being conducted into his conduct at the pool or that his statement was requested." Instead, Kirkpatrick was cussing at Caslin telling him he need to come over to the cop car and "tell the fucking truth" that "it wasn't a game" and that he "needed to stop fucking lying". (App. 0116, ¶5.4; App. 0125, ¶2.4).

Kelsay observed Kirkpatrick had Caslin against the car and saw them both fall backwards; Kirkpatrick hit the ground and Caslin, already in handcuffs, fell on top of him. Kirkpatrick immediately got up and picked Caslin up placing him in the car (App. 0116, ¶5.5; App. 0125, ¶2.5).

Chief Kirkpatrick then radioed that the male subject was in custody, allowing Ernst to disregard his call for urgent assistance. (App. 0215, Interrog. No. 13). Caslin was already in the patrol car by the time Welch and Ernst arrived. (App. 0215, Interrog. No. 13).

Kirkpatrick then complains of Kelsay's actions that occurred prior to

Defendant Welch and Defendant Ernst's arrival. (App. 0215, Interrog. No. 13). Kelsay testified that she had no encounters with the police until after Caslin was arrested and in the cruiser at which time she approached the cruiser to ask Caslin what she should do through the open window. (App. 270, 31:3-31:20). As she approached the cruiser, she was told by Bornemeier that she had better get back so she did back up 15 feet or so. (App. 0270, 31:3-31:20). Kirkpatrick asked if she was calling her husband, and when she said she was he replied "good". (App. 0271, 32:5-13). It took some time and more calls to reach him and it was about that time that Defendant Welch and Defendant Ernst arrived. (App. 0271, 32:5-13).

During this time, Bornemeier never left the front of the patrol car. App. 0116, ¶5.6; App. 0125, ¶2.5). Kelsay was still standing with her children and Kimberly by the pool doors. (App. 0116, ¶5.6; App. 0125, ¶2.5).

Defendant Bornemeier's report says "Chief Kirkpatrick then placed Caslin inside the patrol unit at approximately 2000." "At approximately 2006 hrs, Sergeant Welch and Deputy Ernst, from the Gage County Sheriffs Office, arrived on scene." (App. 0055). Kelsay had been outside the pool doors approximately 10 minutes when the county officers arrived at the scene. (App. 0284, 45:17-25).

At that time, Kirkpatrick was over talking to the Sedlacek. (App. 0285, 46:15-16). When he was done talking with the witness, Kirkpatrick walked over to

the other officers and then a few minutes after that Defendant Ernst approached Kelsay. (App. 0285, 46:15-18). During the time prior to being approached by Ernst, Kelsay was just standing back by the pool doors with her 9-year old daughter Samantha. (App. 0285, 46:19-22; App. 0246, 7:3-5). They were sitting there waiting for Kelsay's husband to come. (App. 0285, 46:21-23). Kelsay was not talking to anybody else. (App. 0285, 46:24-47:1). As Kelsay was standing there she heard her daughter yelling and believed someone in the group of persons was "talking shit" to her daughter. (App. 0286-0289, 47:2-50:18; App. 0290, 51:9-13).

Kelsay was walking towards her children to see what her 13-year-old daughter Madison was saying. (App. 0275, 36:19-40:13). Sedlacek did not feel threatened by Kelsay at the time. (App. 0452, 27:18-22). Kelsay was not yelling and rapidly advancing toward the group of pool patrons or employees, Defendant Bornemeier's repost reflects that she was walking toward Sedlacek. (App. 0055). Kelsay had no idea that the officers were discussing her arrest, as they were far enough away that she could not hear them and no one mentioned that she was being arrested. (App. 0285, 46:2-18).

Deputy Matt Ernst ran up behind Kelsay as she was walking toward her daughter and grabbed her arm. Kelsay stopped and explained what she was doing,

that she was going to check on her daughter and he had let go. (App. 0286, 47:20-47:1). After she explained what she was doing, she turned to continue going to check on her daughter. (App. 0286, 47:20-47:1). Defendant Ernst said nothing to her and let go of her arm. (App. 0290, 51:9-24).

Defendant Ernst then ran and tackled Kelsay from behind. (App. 0290-0293, 51:9-54:12). At no time, did he "direct her to stop and place her hands behind her back", he said nothing to her. (App. 0290-0293, 51:9-54:12). Ernst simply grabbed Kelsay and slammed her to the ground in front of her children. (App. 0290-0293, 51:9-54:12). Ernst had run over and tackled her from the same area that the officers were standing at that time.

Defendant Welch gestured to Deputy Ernst to take Kelsay into custody, and said to Defendant Ernst, "make her [Kelsay] 10-15" (meaning take her into custody). (App. 0215, Interrog. No. 13-14; App. 0226, Welch Interrog. Ans. to No. 18; App. 0227, Interrog. No. 21).

Deputy Ernst transported Kelsay from the scene in Wymore to the Gage County Detention Center in Beatrice, an approximately 15 minute drive, while Wymore officers Kirkpatrick and Bornmeier were separately transporting Caslin to the same location, and they and arrived there at approximately 8:15 p.m. to 8:30 p.m. (App. 0215, Interrog. No. 13-14); (App. 0299-0307, 60:7- 68:9; App. 0382,

143:24-144:8).

Throughout the time Kelsay was being transported, she was in excruciating pain and continually requesting to go to the hospital. (App 0298,. 59:1- 20). Defendant Ernst said that he would take her to the hospital but then did not. (App. 0298, 59:1- 20). Kelsay said the pain was so intense that it felt like it was cutting the skin from the inside from having her arm handcuffed behind her and the bone moving. (App. 0384, 145:3-7).

As or just after he left the swimming pool, Defendant Ernst advised Defendant Welch that Kelsay had told him that her arm hurt and she wanted to go to the hospital, and he wanted to know what he should do. (App. 0215-0222, Welch Interrog. Ans. to No. 13-14). Ernst transported Kelsay to the jail instead of the hospital.

Upon arrival at the jail, the Jailers were trying to ask Kelsay what size clothes she needed and she was telling them they broke my shoulder, I can't change. “You guys don't understand, it's broken, I can't move my arm.” So the jail then declined her lodging until she was treated. (App. 0306, 67:10-68:4).

Kelsay was then transported to the hospital. Due to the injury caused by Ernst, Kelsay had to undergo shoulder surgery including a metal plate and six screws because they couldn't stabilize the fracture. (App. 0385, 146:4-15). Kelsay

had to be treated before she was given Medical clearance for the jail. (App. 0315-0317, 76:3-78:6); (App. 0464-0467, 5:14-18:7).

Kelsay was complaining of pain at the scene and the entire time that Defendant Ernst was transporting her to jail. Defendant Ernst told her he would take her to the hospital, but then elected not to. (App. 0298, 59:1- 20) Defendant Ernst inquired of Defendant Welch what to do in response to her cries of pain and did not promptly have him get her medical treatment or even remove her handcuffs. (App. 0215-0222, Welch Interrog. Ans. to No. 13-14)

The municipal Defendant's had a use of force policy in place, which in total states:

> Understanding the limitation -the use of force by a deputy is an extremely sensitive issue and requires careful study and understanding by every deputy. This is especially true since the definitions of the use of force by deputies are based on the determination of reasonableness under the circumstances. While clear boundaries of reasonableness can be defined for certain police situations, others must be interpreted for the particular set of circumstances involved. The purpose of this section is to provide each deputy with policy guidance and direction with respect to the use of force in carrying out his/ her duties.

REASONABLE FORCE: Any deputy who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to affect the arrest, to prevent his/ her escape, or to overcome resistance.

No specific rule fits all cases as to how much force and means may be used in an arrest and each case must be determined in the light of its own facts and circumstances. The person making an arrest is acting lawfully if the force and means used are such as would be considered necessary by the ordinary reasonable person placed in the same position and if from the standpoint of such a reasonable person, the force and means used was apparently necessary, the person making the arrest if justified even though in the light of the actual facts later discovered such a degree of force or means was not actually necessary.

Willful inhumanity or oppression toward a prisoner or unlawfully assaulting or beating a prisoner is punishable as a crime but if the assault is aggravated by its violence, it may amount to a felony and if death ensues, it might amount to murder.

Deputies shall not use unnecessary force or violence in making an arrest or in dealing with a prisoner or any person.

The use of a deadly weapon is the most extreme use of force and therefore is allowed only in extreme situations. (App. 0139)

Said policy gives little guidance to the officer and does not even describe the use of force continuum.

Summary of the Argument

This appeal should be dismissed as the issues raised by the Appellant are not ones of law, but of fact. The district court's decision to deny summary judgment to Appellant on the basis of qualified immunity should be affirmed. The Supreme Court has made clear that excessive use of force is not to be tolerated. There exist genuine issues of material fact regarding the elements of this case, and therefore summary judgment is improper as the questions of qualified immunity are intertwined with the liability on the claims of the Appellee.

The district court properly addressed the Appellant's claims of qualified immunity finding both that there exists at a minimum a genuine issue of material fact as to whether the Appellee suffered a constitutional injury, and finding that the constitutional injury was well established. The district court also appropriately found that there are conflicts in evidence sufficient to withstand summary judgment. There is much controverted evidence in this case that is to be determined by a fact finder thus summary judgment is inappropriate at this

juncture.

Argument and Applicable Standard of Review

This matter comes on for appeal of the denial of Appelant's motion for summary judgment on the issue of qualified immunity. The Eighth Circuit reviews the grant of Summary Judgment De Novo, applying the same summary judgment standards of the District Court. *Rothmeier v. Investment Advisors, Inc.* 85 F 3d 1382 (8th Cir. 1996).

More specifically, denial of a motion for summary judgment on grounds of qualified immunity is reviewed de novo on the record. *Pagels v. Morrison*, 335 F.3d 736, 739 (8th Cir. 2003), *Kahle v. Leonard*, 477 F.3d 544, 550 (8th Cir. 2007) With regard to summary judgment on the issue of qualified immunity, "[t]he nonmoving party is given the benefit of all relevant inferences at the summary judgment stage, and if a "genuine dispute exists concerning predicate facts material to the qualified immunity issue, the defendant is not entitled to summary judgment on that ground." Pace v. City of Des Moines, 201 F.3d 1050, 1056 (8th Cir. 2000)." *Smithson v. Aldrich*, 235 F.3d 1058, 1061 (8th Cir. 2000).

I. This Court lacks jurisdiction to hear this appeal as the issues raised by the Appellant are ones of fact, not of law.

The Appellant specifically suggests that the factual analysis required for "Entirely accepting Kelsay's version of the facts, but viewing them from the perspective of a reasonable officer in the shoes of Deputy Ernst" is not appropriately left to the fact finder. (Brief of Appellant at 21). The Appellant quibbles with the Court's assessment of fact, in light of the non-moving party. The Appellant then spends the next ten plus pages of his brief making factual arguments sometimes under the guise of legal analysis and sometimes outright as factual arguments before even addressing another "legal principle."

It is clear that the conflicting facts, which create a genuine issue, precluded summary judgment on all issues, including that of qualified immunity, therefore, the Court of Appeals has no jurisdiction to hear this appeal. "If the order turns on issues of fact, rather than an 'abstract issue of law,' we lack jurisdiction over the appeal because the decision is not a final order immediately appealable under the collateral order doctrine." *Aaron v. Shelley*, 624 F.3d 882, 883-84 (8th Cir. 2010) (citing Johnson, 515 U.S. at 313-18). This appeal is not based on an abstract issue of law, rather the argument routinely raised by the Appellant is one of fact, which to the extent that the summary judgment standard is concerned, is rebutted by the extensive record in this case. The District Court

applied the appropriate standards and provided a thorough analysis in its most recent memorandum and opinion which should be upheld and this appeal dismissed.

II. The Trial Court applied the appropriate summary judgment standard.

The question before the district court was whether the record, when viewed in the light most favorable to the non-moving party, showed that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); see, e.g. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Summary judgment is an extreme and treacherous device, which should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy, and unless the other party is not entitled to recover under any discernible circumstances. *Vette Co. v. Aetna Cas. & Sur. Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980) (Disapproved on other grounds). In ruling on a motion for summary judgment, the district court must view the facts in the light most favorable to the party opposing the motion and give that party the benefit of all reasonable inferences to be drawn from the record. *Id. Widoe v. District No. 111 Otoe County Sch.*, 147 F.3d 726, 728 (8th Cir. 1998); *Ghane v. West*, 148 F.3d 979, 981 (8th Cir. 1998). Even if the district court is convinced

that the moving party may be entitled to judgment, the exercise of sound judicial discretion may dictate that the motion should be denied, so the case may be fully developed at trial. *Franklin v. Lockhart*, 769 F.2d 509, 510 (8th Cir. 1985). Clearly in the case at hand, the district court could not find that the moving party was entitled to judgment and appropriately provided Kelsay the benefit of the inferences that could be drawn from the significant disputes in evidence.

Essentially, the test is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 251-52. The court's role is simply to determine whether the evidence in the case presents a sufficient dispute to place before the jury, and in the present instance, the Court determined it did.

"At the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. Rather, the court's function is to determine whether a dispute about a material fact is genuine. If reasonable minds could differ as to the import of the evidence, summary judgment is inappropriate." *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996) (internal citations omitted). See also *Bell v. Conopco, Inc.*, 186 F.3d 1099, 1101 (8th Cir. 1999) (court's function is not to weigh the evidence

to determine truth of any factual issue. It was appropriate to deny summary judgment because the Appellee produced sufficient evidence to allow a rational jury to find in her favor. *Ridout v. JBS USA, LLC*, 2013 U.S. App. LEXIS 12003, 7 (8th Cir. Iowa June 14, 2013) (internal citations omitted). In this case, a reasonable jury could find in the Appellee's favor, therefore summary judgment was improper and should be reversed.

III. The Trial Court appropriately viewed the facts in light of the non-moving party.

As addressed above, the Court must view the evidence in light of the non-moving party. *See Celotex and Liberty Lobby, Inc., Supra.*

In *Tolan v. Cotton*¸ the Supreme Court reversed a grant of Summary Judgment based on qualified immunity in a similar Fourth Amendment case. In doing so, the Court cautioned that in that case:

> [T]he opinion below [upholding summary judgment] reflects a clear misapprehension of summary judgment standards in light of our precedents. Cf. Brosseau, 543 U.S., at 197-198, 125 S.Ct. 596, 160 L.Ed.2d 583 (summarily reversing decision in a Fourth Amendment excessive force case "to correct a clear misapprehension of the qualified immunity standard")

…

> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

Tolan v. Cotton, 134 S.Ct. 1861, ___ U.S. ___, 188 L.Ed.2d 895, 82 U.S.L.W. 4358, (2014).

In *Reeves v. Sanderson Plumbing*, the court further outlined what is required of a trial court when evaluating evidence within that standard:

> In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-555, 108 L. Ed. 2d 504, 110 S. Ct. 1331 (1990);Liberty Lobby, Inc., supra, at 254;Continental Ore Co. v. Union

> Carbide & Carbon Corp., 370 U.S. 690, 696, n. 6, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Liberty Lobby, supra, at 255. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." Id. at 300.

Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150-151 (U.S. 2000). There was considerable evidence which contradicted the Appellant's factual assertions and assertions made by the witnesses who certainly had a stake in the outcome of this litigation, this evidence was appropriately reviewed by the District Court in denying Ernst's motion.

Moreover, the Nebraska Local Rules impose the burden of contradicting the moving party's assertions of fact into the local rule:

> Nebraska Civil Rule 56.1(b). This local rule provides that "[t]he party

> opposing a summary judgment motion should include in its brief a concise response to the moving party's statement of material facts. The response should address each numbered paragraph in the movant's statement and, in the case of any disagreement, contain pinpoint references to affidavits, pleadings, discovery responses, deposition testimony (by page and line), or other materials upon which the opposing party relies. Properly referenced material facts in the movant's statement are considered admitted unless controverted in the opposing party's response." NECivR 56.1(b)(1) (emphasis in original).

LOL Fin. Co. v. Paul Johnson & Sons Cattle Co., 758 F. Supp. 2d 871, 877-878 (D. Neb. 2010). The Appellee complied with the local rule, controverting or supplementing the statements of fact by the Appellant with specific references to the record to support a dispute as to material fact. In instances where there was a dispute as to the inference that could be drawn from evidence, either by a controverted fact, or through a fact established by the Appellee, it was appropriately viewed in the Appellee's favor as it relates to the claims against the Appellant.

As the Appellee presented substantial evidentiary materials to rebut the claims of the Appellant, and to produce a fuller record for summary judgment.

Further, the trial court appropriately recognized that there were disputes as to material fact.

> A "material" fact is one that "might affect the outcome of the suit under the governing law," and a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). See also Haigh v. Gelita USA, Inc., 632 F.3d 464, 468 (8th Cir. 2011). In determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the nonmoving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); Haigh, 632 F.3d at 468. See also Scott v. Harris, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (explaining that on summary judgment, "courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" (alteration in original); Anderson, 477 U.S. at 255 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

White v. Smith, 808 F. Supp. 2d 1174, 1222-1223 (D. Neb. 2011). In the

present case, the Trial Court appropriately recognized that the controverted facts, when viewed in light of the Appellee, would support a finding by a reasonable juror that the Appellee could succeed on her claims against Ernst.

Accordingly, summary judgment was improper and the court's decision should be upheld.

IV. The Trial Court applied the appropriate standard of law applicable to qualified immunity doctrine and summary judgement standards.

The United States Supreme Court, in 2014 took up the issue of qualified immunity related to summary judgment, specifically related to a claim of violation of the Fourth Amendment due to unreasonable use of force.

> In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry. The first asks whether the facts, "[t]aken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a [federal] right[.]" Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures. Graham v. Connor, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The inquiry into whether this right was

violated requires a balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" Tennessee v. Garner, 471 U.S. 1, 8, 105 S.Ct. 1694, [134 S.Ct. 1866] 85 L.Ed.2d 1 (1985); see Graham, supra, at 396, 109 S.Ct. 1865, 104 L.Ed.2d 443.

The second prong of the qualified-immunity analysis asks whether the right in question was "clearly established" at the time of the violation. Hope v. Pelzer, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). Governmental actors are "shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" Ibid. "[T]he salient question .. is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional." Id., at 741, 122 S.Ct. 2508, 153 L.Ed.2d 666.

Courts have discretion to decide the order in which to engage these two prongs. Pearson v. Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). But under either prong, courts may not

resolve genuine disputes of fact in favor of the party seeking summary judgment. See Brosseau v. Haugen, 543 U.S. 194, 195, n. 2, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam); Saucier, supra, at 201, 121 S.Ct. 2151, 150 L.Ed.2d 272; Hope, supra, at 733, n. 1, 122 S.Ct. 2508, 153 L.Ed.2d 666. This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S., at 249, 106 S.Ct. 2505, 91 L.Ed.2d 202. Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); see also Anderson, supra, at 255, 106 S.Ct. 2505, 91 L.Ed.2d 202.

Tolan v. Cotton, 134 S.Ct. 1861, ___ U.S. ___, 188 L.Ed.2d 895, 82 U.S.L.W. 4358, (2014).

According to this Court, a plaintiff must make out three different factors in order to overcome a motion for summary judgement on qualified immunity. First, the plaintiff must assert a violation of a constitutional right. *Smithson v. Aldrich*, 235 F.3d 1058 (8th Cir. 2000). Second, she must demonstrate that the alleged right is clearly established. *Id.* Finally, she must raise "a genuine issue of fact as to whether the official would have known that his alleged conduct would have violated the plaintiffs' clearly established right". *Id.* (citing *Goff v. Bise*, 173 F.3d 1068, 1072 (8th Cir. 1999) (quoting *Habiger v. City of Fargo*, 80 F.3d 289, 295 (8th Cir.), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 407 (1996)).

The Supreme Court in *Saucier v. Katz*, had previously clarified the manner in which a court should analyze a summary judgment motion on the basis of qualified immunity in the context of an excessive force claim. *Saucier v. Katz*, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). The original test set forth in *Saucier* required the court to analyze these issues in that particular order, however, *Pearson v. Callahan* overruled that requirement and stated that:

> while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the

> qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

Pearson v. Callahan, 555 U.S. 223, 236 (2009). The Supreme Court did however caution that although "the *Saucier* protocol should not be regarded as mandatory in all cases, we continue to recognize that it is often beneficial". *Id.* Thus, a court can determine whether to analyze either issue first, however this argument follows the *Saucier* analysis for clarity.

With those factors in mind throughout this analysis, it is important that there is also an overarching notion guiding a trial court's decision on summary judgement grounds regarding qualified immunity. Namely, although qualified immunity is "an immunity from suit rather than a mere defense to liability", *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991) (per curiam), "the nonmoving party is given the benefit of all relevant inferences at the summary judgment stage, and **if a genuine dispute exists concerning predicate facts material to the qualified immunity issue, the defendant is not entitled to summary judgment on that ground.** *Aldrich*, 235 F.3d 1058 (citing *Pace v. City of Des Moines*, 201 F.3d 1050, 1056 (8th Cir. 2000))(emphasis added). Thus, a trial court must still be deferential to a plaintiffs' disputed material facts even in the context of qualified immunity.

Further, *Tolan* established that a "judge's function at summary judgment is *not* to weigh the evidence and determine the truth of the matter *but to determine whether there is a genuine issue for trial*". *Tolan*. 134 S. Ct. 1861, 1866 (citing *Anderson v. Liberty Lobby, Inc*., 477 U. S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)) (emphasis added). Although the Appellant seems to assert that there is some lesser standard for Summary Judgement in the context of Qualified Immunity, that is simply not the case.

The Supreme Court very clearly indicated in *Tolan* that the standards of Summary Judgement are the same pursuant to the Federal Rules of Civil Procedure § 56(a) and stated that "a court must view the evidence in the light most favorable to the opposing party". Thus, a Plaintiff only needs to show that there is a genuine dispute of fact in order to prevail on a Summary Judgement motion by a defendant in the context of qualified immunity.

The Supreme Court in Tolan further articulated caution, "[C]ourts must take care not to define a case's "context" in a manner that imports genuinely disputed factual propositions. See Brosseau, supra, at 195, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (inquiring as to whether conduct violated clearly established law "'in light of the specific context of the case'" and construing "facts .. in a light most favorable to" the nonmovant)."

Tolan v. Cotton, 134 S.Ct. 1861, ___ U.S. ___, 188 L.Ed.2d 895, 82 U.S.L.W. 4358, (2014). The Appellant is specifically asking this court to define the context of this case in favor of the moving party, rather than employing the appropriate standard.

i. When assessing the facts in a light most favorable to the Appellee, the facts alleged show that Ernst conduct violated the Appellee's constitutional rights.

To establish a violation of the Fourth Amendment, "the claimant must 1). demonstrate a seizure occurred and 2). the seizure was unreasonable." *Moore v. Indehar*, 514 F.3d 756, 759 (8th Cir. 2008) (quoting *McCoy v. City of Monticello*, 342 F.3d 842, 846 (8th Cir. 2003)). According to the 8th Circuit, "a seizure occurs whenever an officer restrains an individual's liberty through physical force or a show of authority". *Id*. In this case a Fourth Amendment seizure did take place.

The facts show that the Appellee had just completed an evening of swimming at the community pool and was clothed in her swimming suit and coverup. She was accompanied by her children age 7, 9, and 13 as well as a family friend who had been restrained and placed in a police car for approximately 10 minutes before her seizure took place. She is a woman of slight build, approximately 5 foot tall and 125 pounds.

Although courts have interpreted the Fourth Amendment to allow for some degree of physical force in order to effectuate an arrest, see *Williams v. Com.*, 147 S.W.3d 1 (Ky. 2004), cert. denied, 544 U.S. 986, 125 S. Ct. 1859, 161 L. Ed. 2d 745 (2005), a violation of an individual's Fourth Amendment rights occurs if a police officer's actions are "excessive under objective standards of reasonableness". *Graham v. Connor*, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989).

The Supreme Court in *Graham v. Connor* has set out a list of factors to determine the reasonableness of force used by law enforcement. In determining whether officers' use of force was reasonable, the strength of governmental interests is balanced against the nature and quality of an intrusion on a Plaintiff's Fourth Amendment interests, which depends on the "severity of crime at issue, whether [the] suspect poses immediate threat to safety of officers or others, and whether he is actively resisting arrest". *Id.* Additionally, the district courts have offered further factors in this analysis, including the duration of the officer's action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time, as well as the extent of a suspect's injuries and standard police procedures. *Clark v. Ware*, 873 F. Supp. 2d 1117 (E.D. Mo. 2012), appeal dismissed, 8th Circuit (12-2349) (Aug. 30, 2012). Overall a court must look to the

"totality of the circumstances" in making the determination whether there was unreasonable force used. See *Montoya v. City of Flandreau*, 669 F.3d 867 (8th Cir. 2012).

In *Moore v. Indehar*, this Court considered a case where the officers were coming to a scene much more dangerous than the Wymore pool:

> Officer Indehar arrived on a scene where gun shots had been fired, Moore began fleeing; that Officer Indehar aimed his gun and fired with his handgun pointed at Moore; that Officer Indehar's bullet hit Moore; and that after the shooting, Officer Indehar secured by handcuffing four other males who remained in the parking lot-rebuts Officer Indehar's deposition testimony that he was aiming at Loyd and did not intend to shoot Moore, thus presenting a genuine issue as to Officer Indehar's intent when he fired his weapon. The most notable of these facts, of course, is that Officer Indehar's bullet struck Moore. Cf. Mercado v. City of Orlando, 407 F.3d 1152, 1155, 1158 (11th Cir.2005) (holding that, despite the officer's claim that he was aiming for the victim's shoulder, for summary judgment purposes the court "must assume that [the officer] was aiming for [the victim's] head based on the evidence that [the officer] was trained to use the ["less-lethal," baton-launching]

> weapon, that the weapon accurately hit targets from distances up to five yards, and that [the victim] suffered injuries to his head."). A genuine dispute of fact remains as to whether Officer Indehar intended to seize Moore, or Loyd, or both Moore and Loyd, when Officer Indehar fired his weapon. Furthermore, Officer Indehar clearly intended, as demonstrated by his handcuffing of the four males who remained in the area, to detain, at least temporarily, all individuals in the area, evincing a reasonable inference that Officer Indehar was seeking to seize Moore when Officer Indehar shot Moore. In light of these facts, a reasonable jury could find that Officer Indehar intentionally shot Moore in an effort to effect his apprehension.

Moore v. Indehar, 514 F.3d 756, 764 (8th Cir. 2008). In reversing the granting of a motion for summary judgment, the finding was that there *was* a dispute as to material fact leaving the issue to be determined by a jury, despite the officers insistence that he was not trying to shoot the Plaintiff, however was aiming for a separate person who apparently presented a danger to the officer.

This Court also has recognized that a careful look at all the circumstances is necessary to determine whether the action of the police was reasonable in the circumstances:

> "Determining whether the force used to effect a particular seizure 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 v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (internal quotation marks omitted). In assessing the reasonableness of the Officers' conduct, we look at the totality of the circumstances and focus on factors such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." Id. We may also consider the result of the force. Littrell v. Franklin, 388 F.3d 578, 583 (8th Cir.2004).

Howard v. Kansas City Police Dept., 570 F.3d 984 (8th cir. 2009).

In *Howard*, this Court upheld the denial of summary judgment on a case where the Plaintiff had flagged the police down because he had been shot. The police being understandably fearful of the situation caused further injury to the Plaintiff by pinning him to the hot asphalt despite his protestations to the pain and injury it was causing him:

It was the Officers' actions after forcing Howard to the ground, however, that were objectively unreasonable. Once Howard was on the ground, it was apparent to the Officers that he was a victim of an attack and not a suspect, that he was unarmed, and that he was not attempting to flee, resist, or harm the Officers. While the Officers initially acted reasonably in administering first aid, Howard soon thereafter began complaining that the asphalt was burning his exposed skin. Howard asked to await an ambulance while leaning on a police cruiser or while lying on a nearby patch of grass; the Officers denied both requests. In spite of Howard's constant complaints, it took the Officers four to six minutes before they responded and ordered someone to retrieve a blanket, which they then placed underneath him. Moreover, not only did the Officers fail to act in response to Howard's complaints, they affirmatively resisted his attempts to move his exposed skin off the asphalt. The Officers were aware of the damage the asphalt was inflicting on Howard when he began to complain and move to free himself, and, instead of remedying the situation with reasonable dispatch, the Officers did nothing while Howard's injuries worsened. As a result, Howard received severe second-degree burns.

> Given Howard's persistent, specific complaints about the exposure of his exposed skin to hot asphalt on a day when the temperature exceeded 100 degrees, a reasonable officer should have recognized the danger to Howard and responded appropriately. Instead, Officers Bronner and Sartain did nothing for four to six minutes except pin Howard's arms and legs to the ground in spite of his attempts to move his exposed skin off the asphalt. On this version of the facts, we conclude the Officers' actions were not objectively reasonable.
>
> Although the Officers did eventually respond to the danger by directing another officer to retrieve a blanket and placing the blanket underneath Howard, it was not reasonable for the Officers to wait seven to eight minutes after he was on the ground (four to six minutes after he began complaining) to do so. The blanket was available immediately, and there is no evidence the Officers were prevented from ordering another officer to retrieve it because of external factors or other responsibilities. Absent a good reason for waiting so long to remedy the situation while Howard's injuries worsened, the Officers' actions were unreasonable.

Howard v. Kansas City Police Dept., 570 F.3d 984(8th cir. 2009).

Reviewing the specific elements in this case:

The severity of the crime at issue –

Kelsay ultimately pleaded no contest to a couple of misdemeanor charges. She was never charged with serious crimes and the crimes which she was ultimately convicted upon her plea of no contest were minor misdemeanors for which she was given a fine. She did ultimately set out the fine in jail in lieu of payment, but was not sentenced to jail. It is submitted that the charges did not really merit her detention, and certainly the severity of the crime militates in her favor.

Whether the suspect poses an immediate threat
to the safety of the officers or others –

Kelsay is a small woman, 5 foot, 125 pounds. She was accompanied by her three children. She had just gotten out of a pool and was clothed in her pool attire. She presented no threat to anyone.

Whether the suspect is actively resisting arrest or
attempting to evade arrest by flight –

Kelsay was awaiting her husband to come to the pool and had stood waiting for 10 minutes after Caslin was placed in a cruiser.

The result of the force –

> The result of the force was a serious injury to Kelsay resulting in surgery to insert a plate and several screws, and causing her to feel like the broken bones were cutting her skin and tissue. At a minimum, once they broke her shoulder, the Defendants were aware of the damage the handcuffs were inflicting on Kelsay when she began to complain and move to free himself, and, instead of remedying the situation with reasonable dispatch, the Officers did nothing while Kelsay's injuries worsened.

The application of these elements, especially when the evidence viewed in light of the non-moving Appellee require the denial of summary judgment against Ernst.

ii. The Plaintiff's constitutional right to be free from excessive force during an arrest is clearly established.

The Supreme Court has emphasized that a right must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right". *Saucier*, 533 U.S. 194, 202. It is clearly established "that an arrestee [has] a right to be free from the use of excessive force". See, e.g., *Kukla v. Hulm*, 310 F.3d 1046, 1050 (8th Cir. 2002). However, a right "must be defined at the appropriate level of specificity before a court can determine whether it was clearly established."

Craighead v. Lee, 399 F.3d 954, 961 (8th Cir.), cert. denied, 126 S. Ct. 472, 163 L. Ed. 2d 359 (2005).

It has been done so by this Court. In *Howard v. Kansas City Police Department*, the Plaintiff was held down to the hot asphalt by police officers despite his repeated complaints of pain. This Court found that "as of 2002, it was clearly established that the Fourth Amendment was violated if an officer unreasonably ignored the complaints of a seized person that the force applied by the officer was causing more than minor injury." *Howard v. Kan. City Police Dep't*, 570 F.3d 984, 991 (8th Cir. 2009). This Court explained that "this proposition was established, for example, in a series of cases involving failure to respond to complaints of overly-tight handcuffs". *Id*. See *Kopec v. Tate*, 361 F.3d 772, 778 (3d Cir. 2004) (discussing clearly established law as of 2000); *Heitschmidt v. City of Houston*, 161 F.3d 834, 839-40 (5th Cir. 1998); *Martin v. Heideman*, 106 F.3d 1308, 1312 (6th Cir. 1997); *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1322-23 (9th Cir. 1995); *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993); *Hanig v. Lee*, 415 F.3d 822, 824 (8th Cir. 2005) (discussing excessive force claim arising in 2000).

There is no question that Ernst used undue force in effectuating the arrest as set out above. Certainly once the Ernst and the other Defendants suspected Kelsay was injured Ernst should have immediately removed Kelsay's cuffs, perhaps called

an ambulance to the scene, but most assuredly should have taken her to the hospital immediately instead of to the jail. Kelsay was only provided medical attention when the jail would not house her without medical clearance.

The evidence demonstrates a dispute as to material fact that the force used by the officers was reasonable and necessary because Kelsay was simply walking toward her daughter to find out why she was upset when she was suddenly and without warning taken down from behind without warning and with such force as to break her collarbone and knock her unconscious. She was thereafter handcuffed and subjected to excruciating pain and taken directly to jail on misdemeanor charges. (App. 0115). Taking down a woman dressed in swimwear who is 5 foot tall and weighing 120 pounds by taking her feet out from under and putting her shoulder first into the ground is reasonably likely to cause injury which occurred here. (App. 0115).

The actions of Ernst in taking down Kelsay, and his neglect of her medical issues, despite her protestations and pleas was firmly beyond what is constitutionally acceptable, and has been clearly defined by this Court. Accordingly, the denial of summary judgment against Ernst was appropriate and this appeal should be dismissed and the matter remanded to the District Court for further proceedings before a jury.

Conclusion

The Appellee presented substantial evidence that there were genuine issues of material fact as to her claims claims and therefore summary judgment against the Appellant was inappropriate as the District Court decided. There was no misapplication of the legal standard as set which has been refined both by the United States Supreme court and this Court. Accordingly, the Appellee respectfully requests that this Court remand the matter to the district court for trial on the issues.

Respectfully Submitted

/s/ Abby Osborn

Abby Osborn, Attorney for Appellant

Certificate of Compliance

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation provided in Rule 32(a)(7)(B)(I). The document was prepared using Microsoft Word 2007 and, relying on the word processor word count feature, contains 9,547 words.

Dated this 23rd day of August, 2017.

/s/ Abby Osborn
Abby Osborn, Attorney for Appellants

Certificate of Service

I hereby certify that on this 23rd day of August, 2017, I electronically filed the foregoing Brief with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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