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

REPLY BRIEF OF APPELLANT, MATT ERNST

Vincent Valentino, #14288
Brandy R. Johnson, #23323
Nebraska Telephone Building
130 S. 13th Street
Suite 300
Lincoln, NE 68508
(402) 742-9240

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I. THIS COURT HAS JURISDICTION OVER THE APPEAL

In her brief on appeal, Kelsay contends that this Court lacks jurisdiction, citing a single case, Aaron v. Shelley, 624 F.3d 882 (8th Cir. 2010). The reason for dismissal in Aaron was that the appeal "did not pass muster" under Johnson v. Jones, 515 U.S. 304, 313-18 (1995). But Jones fully supports application of the collateral order doctrine as the jurisdictional basis for an interlocutory appeal of a denial of qualified immunity in a case like this one. Specifically, the Court in Jones recognized that appellate jurisdiction is appropriate for the purpose of "applying 'clearly established' law to a given (for appellate purposes, undisputed) set of facts." And the United States Supreme Court has clarified that Jones should not be read to preclude interlocutory appellate review of qualified immunity determinations, merely because material issues of fact remain. Behrens v. Pelletier, 516 U.S. 299, 116 S.Ct. 834 (1996).

Deputy Ernst raises one argument on appeal that an isolated particular finding of the District Court is blatantly contradicted by the record. However, Kelsay does not offer any law to suggest that this issue does not fall within the exception to the usual jurisdictional limitations for interlocutory appeals under the collateral order doctrine, as referenced in Wallace v. City of Alexander, Ark., 843 F.3d 763 (8th Cir. 2016).

Notably, Deputy Ernst's other arguments on appeal are not dependent on the outcome of his "blatant contradiction" argument, and for purposes of even this argument, he adopts Kelsay's own version of the facts.

Kelsay argues that the District Court's Order turns on genuine issues of material fact, rather than issues of law. But this is inaccurate - the District Court's denial of qualified immunity to Deputy Ernst was based on its legal determination that the general constitutional rule in Brown v. City of Golden Valley, 574 F.3d 491 (8th Cir. 2009) applied definitively to render Deputy Ernst's conduct objectively unreasonable. "[W]hether an officer acted reasonably under settled law in the circumstances is a question of law, and not itself a predicate fact." Pace v. City of Des Moines, 201 F.3d 1050, 1056 (8th Cir. 2000). Put simply, the instant appeal does not concern which facts the parties might be able to prove at trial, but instead a *de novo* review of whether the facts assumed in Kelsay's favor show any violation of "clearly established law" by Deputy Ernst. Manning v. Cotton, 862 F.3d 663 (8th Cir. 2017). Therefore, appellate jurisdiction exists under the collateral order doctrine.

II. KELSAY MISINTERPRETS, OR DOES NOT SQUARELY ADDRESS, DEPUTY ERNST'S ARGUMENTS ON APPEAL

As a fundamental matter, Kelsay misinterprets Deputy Ernst's argument concerning the appropriate standard of legal analysis for his assertion of qualified

immunity. Contrary to Kelsay's argument, Deputy Ernst does not assert that there is "some lesser standard for Summary Judgement (sic) in the context of Qualified Immunity." (Appellee brf, p. 34). Nor, as Kelsay contends, is Deputy Ernst "specifically asking this court to define the context of this case in favor of the moving party, rather than employing the appropriate standard." (Appellee brf, p. 35). Instead, Deputy Ernst assumes the accuracy of Kelsay's version of the predicate facts. He only points out that accepting Kelsay's version of the predicate facts, the qualified immunity standard *requires* that the assessment of the "reasonableness" of his alleged actions be made from the objective perspective of an officer at the scene, without consideration of Kelsay's subjective intentions or motives. This "objective perspective of a reasonable officer" standard is amply supported by Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865 (1989) and its progeny, and Kelsay cites no law to the contrary.

Instead, Kelsay merely argues, "There exist genuine issues of 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." (Appellee brf, p. 19). But in Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151 (2001), the United States Supreme Court expressly rejected the notion that qualified immunity does not require a separate a distinct analysis when the question of whether

an officer used excessive force is "intertwined" with the liability consideration. The Court in Saucier specifically articulated that when qualified immunity is raised, the "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. at 202. This separate and distinct qualified immunity inquiry can, and should, be made at the summary judgment stage after resolving all factual disputes in the arrestee's favor for purposes of that limited analysis.

Kelsay also argues that the testimony of all witnesses aside from herself who have "a stake in the litigation" must be categorically rejected in order to satisfy this Court's requirement to "view the facts in her favor" on appeal. (Appellee brf, p. 26). This is incorrect. This Circuit's precedent supports that "plaintiffs may not stave off summary judgment armed with only the hope that a jury might disbelieve witnesses' testimony." Thompson v. Hubbard, 257 F.3d 896, 899 (8th Cir. 2001). Those predicate facts otherwise established by Deputy Ernst's testimony, that Kelsay has not controverted and which are consistent with other evidence, are properly considered in this court's analysis on appeal of the qualified immunity question.

Kelsay relies on Moore v. Indehar, 514 F.3d 756 (8th Cir. 2008) for her apparent argument that the presence of disputed factual issues in the evidentiary record must always preclude qualified immunity. (Appellee brf, p. 37-38). While

Moore does stand for the proposition that certain factual disputes *may* preclude qualified immunity, and provides an illustration of a particularized factual scenario where qualified immunity was inappropriate, the Court in Moore does not go so far as to suggest that *any* dispute of fact *necessarily* precludes qualified immunity. The analysis in Moore involved contradicting evidence concerning whether an officer's intention in firing his service weapon was to shoot the particular arrestee who was ultimately struck by the bullet, or a different more dangerous arrestee in the same vicinity. Under the particular facts of that case, assuming the arrestee who had been struck with the bullet was the one targeted by the officer, the force used would be objectively unreasonable under clearly established law. In the instant case, the facts are vastly different, and there is no similar disputed fact about Deputy Ernst's intent that would turn the legal question of the objective reasonableness of his actions.

In addition to misinterpreting Deputy Ernst's arguments concerning the applicable legal standard, Kelsay makes no effort in her brief on appeal to distinguish any of the cases cited in Ernst's brief that demonstrate why the general principle identified in Brown v. City of Golden Valley, 574 F.3d 491, 499-500 (8th Cir. 2009), the lynchpin of the District Court's decision herein, does not "clearly establish" that Deputy Ernst's conduct was unreasonable, under Kelsay's version of the particularized facts. *See also*, Brosseau v. Haugen, 543 U.S. 194, 125 S.Ct. 596

(2004) (finding that general constitutional rules do not "clearly establish" the answer to an objective reasonableness inquiry except in the most "obvious" cases). Kelsay identifies no case law in her brief on appeal suggesting that it was "clearly established" as of 2014 that it constituted a Fourth Amendment violation for a Sheriff's Deputy to conduct a "bear hug takedown" of an arrestee onto the grass in circumstances substantially similar to those presented by Kelsay's version of events in this case. Those undisputed circumstances include that the officer first attempted to effectuate Kelsay's arrest by grabbing her arm and directing her to "get back here," but when he dropped her arm to grab his handcuffs, she began walking away from him and in the direction of a witness whom she believed was "talking shit" to her daughter.

Interestingly, Kelsay ignores Deputy Ernst's physical takedown in her appellate argument concerning the "clearly established" prong of the qualified immunity analysis. (Appellee brf, p. 43-45). Instead, she only argues that it was "clearly established" that Deputy Ernst's use of handcuffs on her *after* the takedown constituted excessive force, based on Howard v. Kansas City Police Dept., 570 F.3d 984 (8th Cir. 2009). But Howard involved different facts, where police pinned down an injured, unarmed man to hot asphalt on day where the temperature exceeded 100 degrees, and prevented his attempts to move his exposed skin off the asphalt, for

several minutes beyond the time that they had discovered that the man was the victim of a crime, who had done nothing wrong.

Here, unlike the victim in Howard, Kelsay was not solely a victim of a crime-she was also suspected of committing crimes, and was indeed later convicted of two misdemeanors for her conduct on the date in question. (Apdx. 37). At the scene, to the best of Deputy Ernst's knowledge at the time that he utilized force, Kelsay had earlier interfered in the arrest of Patrick Caslin, and she was eluding her own arrest for such conduct by walking away from his physical grasp of her arm and verbal command to "get back here." While, under Kelsay's version of the facts, she was "screaming" about arm or shoulder pain after the takedown and demanding to be taken to the hospital, there is no evidence in the record to suggest that Kelsay ever specifically asked Deputy Ernst to remove her handcuffs before, or during, her transport. Likewise, there is no evidence that Kelsay ever specifically told Deputy Ernst that the handcuffs were the cause of, or worsening, her shoulder pain. The District Court specifically granted summary judgment to Deputy Ernst on Kelsay's claim that he was "deliberately indifferent' to her serious medical needs, due to a "failure of proof" that the delay in treatment had any detrimental effect on Kelsay's later diagnosed collar bone fracture. (Apdx. 488-493).

Also, unlike the other cases cited by Kelsay in her Appellee brief involving arrestee injuries from "overly tight handcuffs," Deputy Ernst did not know that Kelsay had a fractured collar bone until she received x-rays to identify this injury at the hospital a short time after her arrest. The body of Fourth Amendment case law involving overly tight handcuffs could serve to inform an officer that he should defer to an arrestee's request that cuffs be loosened if they are causing obvious injury or complaints of pain due to tightness, where security considerations otherwise allow. However, put simply, this is not a case where Kelsay alleges her handcuffs were too tight. Kelsay does not cite any case that has held it is unreasonable under the Fourth Amendment to use handcuffs to secure an arrestee who complains of shoulder pain after being taken to the ground, when the nature and legitimacy of the reported pain has not yet been verified, and where the arrestee is not complaining about the handcuffs themselves being the source of the reported pain, nor requesting their removal, or that they be loosened.

Deputy Ernst did not violate any "clearly established" right of Kelsay to be free of excessive force when he used handcuffs to escort her into his car after she at least seemingly attempted to evade her lawful arrest, or by not stopping his vehicle during his brief solo transport of Kelsay to Beatrice in order to remove her handcuffs, while she complained of shoulder pain and demanded to go to the hospital. *See* Royster v.

Nichols, 698 F.3d 681, 691-92 (8th Cir. 2012) (affirming summary judgment for officer on an excessive force claim, when officer handcuffed subject behind his back despite subject's protestations about a preexisting shoulder injury that he claimed was exacerbated by the cuffs).

By avoiding any discussion of the issue of the reasonableness of Deputy Ernst's physical takedown prior to his use of handcuffs, Kelsay also entirely sidesteps Deputy Ernst's appeal argument that her action of walking away from his verbal directive constituted "resistance to arrest" as a matter of state and federal law. Kelsay likewise never squarely addresses Deputy Ernst's appeal argument that the evidence "blatantly contradicts" the District Court's finding that Kelsay was "not in a position to threaten witnesses" at the time that Deputy Ernst conducted his "bear hug" takedown maneuver.

Kelsay acknowledges in her "supplemental factual statement" in her brief on appeal that the takedown occurred after Deputy Ernst let go of her arm and she began to walk away from him. (Appellee brf, p. 14-15). Kelsay does not specifically dispute that Deputy Ernst directed her to "get back here" when he grabbed her arm, instead, Kelsay omits any reference at all in her supplemental factual statement to Deputy Ernst's verbal directive to her, stating only, "Defendant Ernst said nothing to her and let go of her arm." (Appellee brf, p. 14-15). But at page 43, lines 12 through 25 of

Kelsay's deposition testimony, the following exchange took place:

Q. Did you see him run up behind you?

A. No. I just felt him.

Q. Did - - what happened after he ran up behind you?

A. He grabbed my arm and he said to get back here. So I turned around. I stopped, turned around, and I told him, someone is talking shit to my kid, I want to know what's going on. And he didn't say anything. So I continued to walk toward my daughter.

Q. Did he say anything to you as he was running toward you?

A. The only thing he said was get back here, when he grabbed my arm.

(Apdx. 282).

This exchange demonstrates as a matter of law that Deputy Ernst's verbal directive to Kelsay is admitted by her in the evidentiary record, despite her omission of any mention of it in her brief on appeal, and her seeming effort to mislead the court by representing that Deputy Ernst said "nothing" to her in advance of the takedown.

When it comes to discussing the trial court's finding that she was "not in a position to threaten anyone," Kelsay does assert in her brief on appeal as a general subjective proposition that "she presented no threat to anyone." (Appellee brf, p. 42). But Kelsay points to nothing to refute the evidence showing that she was in a physical

position, and advancing in a direction, that permitted a reasonable officer in Deputy Ernst's position to believe that she presented a potential threat to the witnesses at the time he elected to conduct the "bear hug" takedown.

In her "supplemental statement of facts," and argument in her brief on appeal, Kelsay never disputes that Sedlacek and the other witnesses to the earlier domestic assault incident were physically located at the front pool doors near her daughter Madison. However, in her "supplemental factual statement," Kelsay twice describes her physical position just prior to being approached by Deputy Ernst as also being "by the pool doors." (Appellee brf, p. 13-14). This statement by her is puzzling. If Kelsay was physically located at the pool doors, she was in close physical proximity to where the witnesses were standing, and this would support, rather than refute, Deputy Ernst's argument that she was in a physical position to pose a threat to the witnesses. But Kelsay's assertion in her appeal brief regarding her physical position at the time force was used against her is even more puzzling in that it is unsupported by the evidence she cites, and contrary to logic when taken in the context of the remainder of her own description of the events that precipitated the takedown.

Specifically, in her "supplemental statement of facts," Kelsay contends, "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." (Appellee brf, p. 14). In

support of this statement, Kelsay cites to page 46 lines 19 through 22 of her deposition. It bears pointing out precisely what she said in this cited portion of her testimony. The exchange, in its totality, was as follows:

Q. And what were you doing during his entire time?

A. Just standing back here with Samantha.

Q. Were you talking to Samantha? (Apdx. 285).

Clearly, the above cited portion of Kelsay's testimony does not support that Kelsay and Samantha were standing "by the pool doors." In fact, the continuation of the exchange at her deposition, continuing with line 23 of page 46, through line 19 of page 47, is as follows:

A. No. We were just sitting there waiting for my husband to come.

Q. Were you talking to anybody else?

A. No.

Q. Where was your attention at that time?

A. At that time, I was just sitting there, you know, watching my child who was standing next to me and then watching Patrick.

Q. Were you paying any attention to your children that were at the front doors?

A. Not until I heard Madison yelling. (Apdx. 285-286).

Continuing at page 48 at lines 20 through 25 of her deposition testimony, Kelsay went on to describe the distance between she and her daughter Madison:

> A. I didn't realize there was a situation. I mean, I could hear something was wrong but, you know, I just - - - I heard my daughter. I said, what's wrong? I told her I was going to walk over and ask her what was going on because I couldn't hear her. (Apdx. 287).

Thus, Kelsay's own deposition testimony directly contradicts her seeming contention in her "supplemental factual statement" on appeal that she was physically located at or near the front pool doors.[1]

Kelsay specifically testified that when she "backed up" from the squad car, she moved in a direction further away from the front pool doors. Kelsay initially testified, and hand drew a map of the scene confirming that her own car was parked south of the front pool doors, and that the police cruisers were in a parking lot physically

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[1] Kelsay's sworn declaration likewise supplies no permissible inference that she was physically standing "by the pool doors" when Deputy Ernst used force against her. She cites to the following portion of her declaration:

> . . . Bornmeier was standing at the front of the patrol car at this point I walked away from the pool doors with Samantha Kelsay we walked over to the police car and I asked Patrick what I was suppose to do. Bornmeier at this point (only time he ever talked to me) told me that I better not get to close to the car. I said ok and backed away at least 15 feet if not more Patrick told me to call my husband Samantha still by my side. (Apdx. 117).

situated to the west of the front pool doors. (Apdx. 273, 397, Addendum to Appellant's Brief). She also offered testimony about where she was positioned after backing up from the police cruiser, when the Gage County officers arrived at the scene, as follows:

Q. Where were you when they showed up?

A. Just about 15 feet, like, from the car window back.

Q. 15 feet from the police cruiser back closer toward your car, where your car was parked?

A. Yes. (Apdx. 272).

Thus, the only reasonable inference that can be drawn from Kelsay's testimony regarding her physical position prior to Deputy Ernst's use of force, was that she was standing at least 15 feet south and to the west of the pool doors where her daughter Madison was located. Kelsay points to no evidence that would permit any different reasonable inference about her physical location, even to the extent that a contrary inference would be in her favor.

Kelsay also does not point to anything in the evidentiary record that would create a dispute of fact concerning her direction of movement as she moved away from Deputy Ernst's effort to arrest her - in particular, that she was advancing in the direction of where the witness Monica Sedlacek and her daughter Madison were

physically located. Kelsay quarrels with any characterization that she was advancing toward them "rapidly," but the precise speed of her advancement is immaterial when she admits she was walking away from Deputy Ernst and in the direction of witness Sedlacek when the "bear hug" takedown occurred. (Appellee brf, p. 14).

The District Court's finding that Kelsay was "not in a position to threaten witnesses" is blatantly contradicted by the evidence, and Kelsay fails to refute this on appeal. Where the uncontroverted evidence shows that Kelsay disregarded Deputy Ernst's directive and proceeded to advance in the direction of an argument between her daughter and a witness once he momentarily let go of her arm, it was objectively reasonable for him to believe that additional force was required to effectuate the arrest, even if his perception about Kelsay's intent (to threaten witnesses or elude arrest) was ultimately mistaken. *See* Dooley v. Tharp, 856 F.3d 1177 (8th Cir. 2017) (mistaken-perception actions, if objectively reasonable, do not violate the Fourth Amendment).

III. THE MOST RECENT CIRCUIT PRECEDENT SUPPORTS DEPUTY ERNST'S ENTITLEMENT TO QUALIFIED IMMUNITY

Since the filing of Deputy Ernst's Notice of Appeal herein, the Eighth Circuit Court has decided several §1983 excessive force cases. Kelsay conspicuously omits any mention of any of these in her brief on appeal. Each of them strongly supports

Deputy Ernst's entitlement to qualified immunity.

First, in June, the Court decided Brossart v. Janke, 859 F.3d 616 (8th Cir. 2017). In Brossart, a SWAT team was called upon to execute a search warrant to recover stolen cattle believed to be at a farm. The team was called after an incident the previous day when a subject, Thomas, and his two brothers, ordered police off the farm property while holding rifles. As the SWAT team began gathering the cattle, the three brothers came to the area, this time unarmed, and told the officers they were trespassing and needed to leave. The three brothers were promptly arrested and handcuffed for reason of their felony conduct the previous day, and were held on the ground at gunpoint by the SWAT team. Thomas refused officers' verbal command to walk to the squad car, so he was physically drug there by two officers and placed in the back seat. Thomas made no aggressive movements or verbal threats in the officers' presence. One of the officers then verbally commanded Thomas to "move over" in the back seat, in response to which Thomas moved over a "couple of inches." The officer then, allegedly without warning, deployed a taser on Thomas's leg while he was handcuffed and seated in the back seat of the patrol car. Thomas later brought suit under §1983 alleging that this use of force was excessive.

The Eighth Circuit Court panel affirmed a grant of qualified immunity to the officer with regard to the excessive force claim by Thomas. What is significant to the

instant case is the panel's consideration of what types of arrestee actions may constitute "resistance" in a Fourth Amendment analysis. The Court specifically reasoned that the arrestee, Thomas, "resisted lawful arrest by refusing to walk to the patrol car and then by refusing to comply with [an officer's] command that he move over . . ." Id. at 626. The majority of the panel properly refused to take into account Thomas's own testimony regarding his subjective reason for not moving over further in response to the officer's verbal command - which was that he honestly did not understand the officer's expectation for him to move over further than a couple of inches, because the officer never explained to him that the reason for his command was to allow sufficient room for his brothers to be placed next to him in the back seat.

The Brossart decision instructs that an arrestee's noncompliance with an officer's single verbal directive, even unaccompanied by any immediate danger, threat, or physical resistance, still constitutes "resistance" for purposes of the Graham balancing test in an excessive force case. Thus, Brossart supports that Kelsay's acts constituted resistance for Fourth Amendment purposes when she turned and walked away from Deputy Ernst after he grabbed her arm to arrest her, and gave her a verbal directive to "get back here." It is also notable that Deputy Ernst's use of force in response to such resistance by a mobile suspect, a "bear hug" takedown onto grass to stop Kelsay's advancement toward witnesses, was less forceful than the

deployment of a taser that occurred on the handcuffed subject in Brossart, who was immobile and seated in the back of a squad car.

Next, in July, this Court issued its opinion in Vester v. Hallock, 864 F.3d 884 (8th Cir. 2017). In Vester, the Court once again articulated that force may be objectively reasonable, particularly when it only involves a physical takedown, in response to an arrestee who "resists" through noncompliance with verbal commands of law enforcement. Specifically, the Court concluded that an "arm bar technique" used by an officer to bring a suspect to the ground categorically "fell short of the level of force required to constitute a constitutional violation," where the facts showed that the individual was lawfully subject to arrest.

Importantly, the panel in Vester also reaffirmed the Court's earlier holding in Ehlers v. City of Rapid City, 846 F.3d 1002 (8th Cir. 2017). The Vester panel observed that in Ehlers, an officer was entitled to qualified immunity when he conducted a physical takedown maneuver on an unarmed arrestee who "refused to comply with two commands to back away while his son was being taken into custody," because such actions by an arrestee were "reasonably interpreted as resistance" by an officer, despite the presence of two additional backup officers nearby. Id. at 888. Vester reinforces that Ehlers constitutes binding precedent requiring reversal of the denial of summary judgment to Deputy Ernst in the similar

factual circumstances of this case.

A third recent significant Eighth Circuit decision is Division of Employment Security v. Board of Police Commissioners, 864 F.3d 974 (8th Cir. 2017), decided at the end of July. In Division, the Court affirmed a denial of qualified immunity to two police officers on a §1983 excessive force claim. The evidence showed that the subject arrestee was found by officer at a burglary scene carrying a metal pipe. Although the arrestee was "compliant with the officers' demands at all times," one of the officers charged at the arrestee, and upon reaching him, holstered his weapon and punched the arrestee in the jaw without provocation. The officer then called for a taser, after which another officer came around a corner and shot the arrestee twice.

Clearly, the facts of the Division of Employment Security case are inapposite to those in the present case. But, the decision is nevertheless significant to the instant case because the factual distinctions between the two cases demonstrate why qualified immunity should have been granted to Deputy Ernst. Unlike the arrestee in the Division case, Kelsay was neither fully compliant nor docile. Under Kelsay's own account of the events, she was walking away from Deputy Ernst's attempt to arrest her for what he had been told by another officer was her earlier interference with the arrest of her "friend," Patrick Caslin. Kelsay walked away immediately after Deputy Ernst grabbed her arm and directed her to "get back here," taking advantage of the

moment that he dropped her arm to grab his handcuffs. Unlike the officers in Division, Deputy Ernst did not punch Kelsay, or draw or fire any weapon on her. Instead, Deputy Ernst made a split second decision to run up behind Kelsay and "bear hug" her from behind, pulling her to the ground, before she could reach the witnesses she was advancing toward. The potential threat posed by Kelsay's advancement toward the witnesses was an additional complicating factor bearing on the "reasonableness" analysis that was not present in the Division case. No other officer was close enough to physically intervene in Kelsay's path. In light of these important factual distinctions, the right at issue in the instant case is not "clearly established," as it was in the Division case, and Deputy Ernst is entitled to qualified immunity.

Fourth and lastly, this Court decided the case of Hosea v. City of St. Paul, — F.3d — 2017 WL 3469232 (8th Cir. 2017) in August. In Hosea, a grant of qualified immunity was affirmed for a plainclothes officer who, upon entering an arrestee's home, tackled him to the ground, causing the arrestee to incur a hand fracture that required surgery. At the time of the tackle, the arrestee, Hosea, had not overtly threatened anyone, and was partially compliant with the officer's verbal commands to "get down." The Court concluded that the officer objectively could have believed upon entering the home that the arrestee had committed or was committing domestic assault, as he appeared agitated and was standing a short distance from his girlfriend,

who was laying on a couch, crying. No criminal charges were ever ultimately brought against Hosea.

Most significantly as relates to the instant case, in Hosea, a unanimous panel of the Court found that the third Graham factor - "whether the subject was actively resisting" - weighed in favor of the officer when the arrestee did not initially comply with officers' two verbal commands to "get down." The evidence showed that the officers knew the arrestee did not initially realize he was in the presence of law enforcement. Still, the arrestee's noncompliance with the officer's two verbal commands was viewed by the court as the kind of resistance that would render a forcible physical takedown to the ground as reasonable, even when the result of such force was the arrestee incurring a fractured bone. The Court further concluded that, "Contrary to Hosea's assertion, the fact that the force was exerted after he began to comply does not necessarily render the force objectively reasonable." Id. at *6.

Here, Kelsay's actions, under her own version of the events, were even more easily construed by a reasonable officer in Deputy Ernst's shoes as "resistance" than those of the arrestee in the Hosea case. And similarly to Hosea, any argument by Kelsay that she partially complied with Deputy Ernst's verbal command does not render his later use of force unreasonable, when he could reasonably perceive her actions as resistance. Here, though Kelsay may have stopped or paused briefly in

response to Deputy Ernst's verbal command to "get back here" and his grab of her arm, Kelsay admits that she promptly turned and actively began moving away from Deputy Ernst. As such, Kelsay's conduct easily falls, at a minimum, within what the Hosea panel described as, "passively resistant," as would justify the use of additional force above the *de minimus* amount ordinarily necessary to effectuate an arrest. And here, the type of force used, a physical takedown, was strikingly similar to that approved in Hosea as reasonable in response to "passive resistance."

Finally, the Court in Hosea explained that, "Graham specifically contemplates that officers may consider the suspect's potential harm to others when deciding whether to use force in effecting an arrest." Id. at *6.This principle speaks directly to the additional undisputed factual circumstances in the instant case, where the evidence conclusively shows that at the moment Deputy Ernst used force, Kelsay was moving in the direction of a group of witnesses, one of whom she believed was yelling at her daughter and had earlier called 911 to report her friend. (Apdx. 279-280, 377). One of these witnesses testified that on reflection, she feared that Kelsay was coming toward her in order to harm or intimidate her. (Apdx. 452-453, 461). As such, the objectively reasonable concern for safety of the bystanders supplies another factor under the Graham balancing test that renders Deputy Ernst's use of force "objectively reasonable." This is particularly so, given the tense and "rapidly

evolving" circumstances that existed as Deputy Ernst looked up to see Kelsay ignoring his verbal directive to stop, and instead advancing in the direction of the witness that she had just alleged was yelling at her daughter. (Apdx. 282-283).

The latest Eighth Circuit precedent, including the Ehlers case previously discussed in Deputy Ernst's opening brief, followed by the Brossart, Vester, Division, and Hosea cases described above, collectively show why the instant case presents precisely the type of factual circumstances in which the courts should not "second-guess" the officer's use of force decision, but rather should have granted the protection of qualified immunity. These subsequent cases demonstrate that the question of whether Deputy Ernst's use of force was objectively unreasonable was not clearly established "beyond debate" at the time of the events at issue. In this context, Deputy Ernst was entitled to qualified immunity.

CONCLUSION

Kelsay's brief on appeal is largely unresponsive to the arguments raised by Deputy Ernst, and offers no sound rationale to justify the District Court's denial of qualified immunity here. Deputy Ernst therefore respectfully reiterates his requests that the May 19, 2017 decision of the District Court be reversed as relates to the excessive force claim asserted against him in his individual capacity, and that this matter be remanded with instructions to enter summary judgment in his favor based

on his entitlement to qualified immunity from this claim.

Dated this 6th day of September, 2017.

Respectfully submitted,

MATT ERNST, in his individual capacity,
Appellant.

BY: s/ Brandy R. Johnson, #23323
Brandy R. Johnson, #23323
Vincent Valentino, #14288
Nebraska Telephone Building
130 South 13th Street, Suite 300
Lincoln, NE 68508
(402) 742-9240
brandy@nrmainc.info
vince@nrmainc.info

CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,692 words, excluding parts of the brief exempted by Fed. R. App. P. 37(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X4 (14.0.0.677) word processing software in Times New Roman font size 14.

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 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.

BY: s/ Brandy R. Johnson, #23323
Brandy R. Johnson, #23323

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