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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRENT BECKWAY,

Plaintiff,

v.

DEPUTY PAUL DESHONG, et al.,

Defendants.

NO. C07-5072 TEH

ORDER GRANTING IN PART
AND DENYING IN PART
MOTIONS FOR SUMMARY
JUDGMENT

11 This matter came before the Court on April 4, 2011, on motions for summary
12 judgment filed by Defendant Deputy Paul DeShong (“DeShong”) and Defendants Deputy
13 Richard Ward (“Ward”), Sheriff Rodney Mitchell (“Mitchell”), the County of Lake, and the
14 County of Lake Sheriff’s Department (collectively, “Defendants”). For the reasons set forth
15 below, Defendants’ motions are GRANTED IN PART and DENIED IN PART.

16
17 **BACKGROUND**

18 This lawsuit arises from the October 27, 2006 arrest of Plaintiff Brent Beckway
19 (“Beckway” or “Plaintiff”) by defendants Ward and DeShong, deputies with the County of
20 Lake Sheriff’s Department.¹ Ward and DeShong went to Beckway’s home to investigate a
21 report of an altercation between Beckway and Beckway’s neighbor, Harold Keats (“Keats”).
22 The parties dispute the events of that evening. Beckway contends that he was talking to the
23 officers on his porch when one of the officers said that a witness had seen Beckway hit
24 Keats, and that the officers were going to have to place Beckway under arrest. Beckway
25 asked, “Why is that?” As soon as he uttered the words, Beckway says he was thrown down,

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27 ¹ Defendants submitted objections to some of Beckway’s evidence along with a
28 motion to strike this evidence from the record. The Court does not rely upon the challenged
evidence in deciding these motions, and it therefore does not rule on the objections or the
motion to strike.

1 face first with his arms pinned under his body. Beckway claims that he never resisted the
2 officers. While on the ground, he says he felt a heavy blow to the back of his left leg.
3 Beckway's left leg sustained an injury that later required surgery. Beckway Depo. 93-94. He
4 now has steel screws in his leg. *Id.* at 94:8.

5 Defendants offer evidence that Beckway did resist them when they attempted to arrest
6 him for assault. DeShong says that when he moved to take hold of one of Beckway's arms,
7 Beckway pulled away and turned slightly. DeShong says that he turned with Beckway, and
8 both men lost their balance, falling to the porch floor. DeShong denies using any force
9 against Beckway – he didn't push Beckway to the ground, he says, and he did not kick
10 Beckway after he had fallen. DeShong fell on top of Beckway after Beckway lost his
11 balance, according to the officer. When Beckway was helped to his feet, he complained of
12 pain in his leg.

13 On October 27, 2009, Beckway pleaded nolo contendere, or no contest, to a charge of
14 resisting an officer's lawful conduct under Cal. Pen. Code section 148(a)(1). Beckway
15 brought this lawsuit on October 2, 2007, alleging excessive use of force and false arrest
16 under 42 U.S.C. section 1983, as well as state law claims for battery, negligence, negligent
17 infliction of emotional distress, and intentional infliction of emotional distress.² He alleges
18 that Ward and DeShong applied excessive force and seriously injured his left knee.
19 Defendants moved for summary judgment on February 4, 2011, and February 7, 2011. In his
20 opposition papers, Beckway failed to cite evidence in the record. On March 8, 2011, the
21 Court granted Beckway additional time to point to evidence in the record in opposition to
22 Defendants' motions. Beckway responded on March 15, 2011, and the Court finds that the
23 document he filed complies with the Court's March 8, 2011 order.³

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25 ² The Court dismissed Beckway's false arrest claim in an order dated May 12, 2010.

26 ³ Beckway also filed a "Notice of Additional Authority" on March 4, 2011. The
27 document lists several cases, none of which appear to affect the Court's analysis. Because
28 these cases were not cited in Beckway's opposition brief or his supplemental brief, see
Collins v. City of San Diego, 841 F.2d 337, 339 (9th Cir. 1988), the Court will not consider
them.

1 **LEGAL STANDARD**

2 Summary judgment is appropriate when there is no genuine dispute as to material
3 facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
4 Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby,*
5 *Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if there is
6 sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The
7 Court may not weigh the evidence and must view the evidence in the light most favorable to
8 the nonmoving party. *Id.* at 255. The Court’s inquiry is “whether the evidence presents a
9 sufficient disagreement to require submission to a jury or whether it is so one-sided that one
10 party must prevail as a matter of law.” *Id.* at 251-52.

11 A party seeking summary judgment bears the initial burden of informing the Court of
12 the basis for its motion, and of identifying those portions of the pleadings and discovery
13 responses that “demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v.*
14 *Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at
15 trial, it must “affirmatively demonstrate that no reasonable trier of fact could find other than
16 for the moving party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).
17 However, on an issue for which its opponents will have the burden of proof at trial, the
18 moving party can prevail merely by “pointing out ... that there is an absence of evidence to
19 support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. If the moving party meets its
20 initial burden, the opposing party must “set out specific facts showing a genuine issue for
21 trial” to defeat the motion. Fed. R. Civ. P. 56(e)(2); *Anderson*, 477 U.S. at 256.

22
23 **DISCUSSION**

24 Defendants move for summary judgment on Beckway’s excessive force claim under
25 42 U.S.C. section 1983 (“section 1983”), arguing that success on that claim would
26 necessarily imply the invalidity of Beckway’s conviction under California Penal Code
27 section 148(a)(1), and this claim is therefore barred by *Heck v. Humphrey*, 512 U.S. 477
28 (1994). On the same ground, Defendants move for summary judgment on Beckway’s state

1 law claims for battery, negligence, negligent infliction of emotional distress, and intentional
2 infliction of emotional distress.

3 DeShong also argues that summary judgment should be granted as to Beckway’s
4 section 1983 claim for excessive force because no jury could find that the force he used was
5 unreasonable. Mitchell, the County of Lake, and the County of Lake Sheriff’s Department
6 also move for summary judgment on this claim.

7
8 **I. Whether Beckway’s Section 1983 Claim Is Barred by *Heck v. Humphrey***

9 In *Heck v. Humphrey*, the Supreme Court held that a plaintiff cannot bring a section
10 1983 action that calls into question the lawfulness of a criminal conviction. This Court has
11 twice issued orders finding that Beckway’s claims are not barred by *Heck*. Several of the
12 parties’ arguments re-hash those already considered by this Court. The only new question
13 before the Court is whether, in light of the evidence, Beckway’s section 1983 claim
14 necessarily calls into question the lawfulness of Beckway’s conviction for resisting arrest
15 under California Penal Code section 148(a)(1) (“section 148(a)(1)”).

16 Defendants cite *Hooper v. County of San Diego*, 629 F.3d 1127 (9th Cir. 2011), in
17 support of their argument that Beckway’s section 1983 claim is barred by *Heck*. In *Hooper*,
18 the Ninth Circuit held that the viability of a plaintiff’s section 1983 excessive force claim
19 does not depend upon the timing of a plaintiff’s resistance relative to her arrest. 629 F.3d at
20 1131-32. In other words, challenging an officer’s use of force during or after an arrest does
21 not necessarily imply that all of the actions taken by the officer to effectuate that arrest were
22 unlawful. If it did, that challenge would be incompatible with a section 148(a)(1) conviction,
23 which makes it illegal for a defendant to have “‘resist[ed], delay[ed], or obstruct[ed]’ a police
24 officer in the lawful exercise of his or her duties.” *Id.* at 1130 (citing Cal. Pen. Code §
25 148(a)(1)) (alteration in *Hooper*). The *Hooper* panel held that

26 [i]t is sufficient for a valid conviction under § 148(a)(1) that at
27 some time during a “continuous transaction” an individual
28 resisted, delayed, or obstructed an officer when the officer was
acting lawfully. It does not matter that the officer might also, at

1 some other time during that same “continuous transaction,” have
2 acted unlawfully.

3 *Id.* at 1132.

4 The plaintiff in *Hooper* pled guilty to resisting a peace officer under section 148(a)(1)
5 after struggling against officers attempting to arrest her for possession of methamphetamine.
6 629 F.3d at 1129. Once the plaintiff was on the ground and had her hands behind her back,
7 she stopped struggling. *Id.* Thereafter, one of the arresting officers summoned his German
8 Shepherd, and the dog attacked the plaintiff’s head. *Id.* The Ninth Circuit held that the
9 plaintiff in *Hooper* had a viable section 1983 claim even though the alleged excessive force
10 took place at the time of her arrest. *Id.* at 1134.

11 Defendants argue that the reasoning in *Hooper* requires the Court to find that
12 Beckway’s section 1983 claim is barred by *Heck*. The Court disagrees. Beckway contends
13 that the officers threw him down, face first, on his arms. Once he was on the ground, he says
14 that one of the officers stomped on the back of his leg. Just as the court in *Hooper* found that
15 it was possible for the plaintiff to challenge the dog attack as unreasonable in light of her
16 resistance, here it is possible for Beckway to challenge the force used against him as beyond
17 what was reasonable under the circumstances. DeShong would read into *Hooper* a temporal
18 analysis, arguing that the plaintiff’s resistance in *Hooper* amounted to “a series of
19 transactions which could have justified the plaintiff’s conviction” for resisting arrest.
20 DeShong Mot. At 7:20-21. However, *Hooper* specifically characterized the plaintiff’s
21 resistance as “one continuous transaction.” *Hooper*, 629 F.3d at 1133. DeShong’s attempt to
22 distinguish *Hooper* on the grounds that it involved a series of transactions is therefore
23 unavailing.

24 Defendants also argue that because Beckway contends that he never resisted the
25 officers, his section 1983 claim is barred by *Heck*. They cite language in *Hooper* stating that
26 “to ‘the extent that [a plaintiff’s section 1983 claim] alleges that he offered no resistance, that
27 he posed no reasonable threat of obstruction to the officers, and that the officers had no
28 justification to employ *any* force against him at the time he was shot,” the claim is barred by

1 *Heck*.⁴ *Hooper*, 629 F.3d at 1132 (citing *Yount v. City of Sacramento*, 43 Cal. 4th 885, 898,
2 76 Cal. Rptr. 3d 787, 183 P.3d 471) (emphasis in *Hooper*). The *Hooper* court pointed out that
3 the plaintiff there did “not dispute the lawfulness or her arrest, nor [did] she dispute that she
4 was arrested.” *Id.* at 1129. Here Beckway does aver, both in the General Allegations section
5 of the Complaint and in sworn testimony, that he offered no resistance to the deputies, and
6 that the deputies were not justified in their use of force against him. However, Defendants
7 ignore the fact that these allegations would not necessarily be proven if Beckway were to
8 prevail in his section 1983 claim for excessive force. What would necessarily be proven if
9 Beckway were to prevail in his section 1983 claim is that “some of the officer’s conduct was
10 unlawful” relative to the resistance proven in Beckway’s section 148(a)(1) conviction. *Id.* at
11 1131. A court has already found that Beckway resisted the officers.⁵ Beckway’s statements to
12 the contrary fail to challenge that finding, and do not necessarily form the basis for his
13 section 1983 claim. Beckway’s section 1983 claim rests upon whether, in light of the facts
14 established by his conviction, the officers used excessive force against him. Defendants have
15 failed to cite any authority that would conclusively establish that a kick to the back of the leg
16 of a person face down on the ground does not, as a matter of law, amount to excessive force.
17 Nor do they cite authority establishing that such force, if used, was reasonable in light of
18 Beckway’s resistance. Beckway’s conviction establishes that some aspect of the officers’
19 response to Beckway’s resistance was reasonable and lawful, but as the Court in *Hooper*
20 explained, an officer’s conduct can become unlawful during the “same ‘continuous
21 transaction.’” *Hooper*, 629 F.3d at 1132. The officers were authorized to use reasonable

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23 ⁴ Defendants also generally invoke *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir.
24 2005), in support of the rule that a Defendant must identify the resistance that forms the basis
25 for a resisting arrest conviction in order to proceed with a section 1983 claim for excessive
26 force. Defendants provide no citation to *Smith* that would support such a rule, and even if
Smith did support such a rule, that rule does not appear to survive the determination in
Hooper that *Smith* was based upon an incorrect understanding of section 148(a)(1). *See*
Hooper, 629 F.3d at 1131-32.

27 ⁵ These motions do not present evidence establishing the amount of resistance proven
28 by Beckway’s section 148(a)(1) conviction. Because Beckway’s section 1983 claim cannot
rest upon allegations that Beckway offered no resistance, the jury will have to be instructed
as to what has been proven regarding Beckway’s resistance to Ward and DeShong.

1 force, but the question here is whether some of the force they used was unreasonable. A
2 reasonable jury could conclude that the force used against Beckway was unreasonable in
3 light of the resistance that forms the basis for Beckway’s section 148(a)(1) conviction.
4 Therefore, Defendants’ motions for summary judgment as to Beckway’s section 1983 claim
5 are DENIED.

6
7 **II. Whether Beckway’s State Claims Are Also Barred by Beckway’s Conviction**

8 Defendants argue that Beckway’s second claim for battery, fourth claim for
9 negligence, fifth claim for intentional infliction of emotional distress, and sixth claim for
10 negligent infliction of emotional distress are barred by *Yount*. In *Yount*, the California
11 Supreme Court held that the rule of *Heck* bars state claims that necessarily call into question
12 the lawfulness of a plaintiff’s conviction. *Yount*, 43 Cal. 4th at 902.

13 A battery claim was at issue in *Yount*. The court noted that the plaintiff’s common law
14 battery claim, like his section 1983 claim, required proof that the officer used unreasonable
15 force. *Id.* DeShong, against whom Beckway’s battery claim is pleaded, argues that because
16 Beckway has stated that he never resisted, his battery claim is directly inconsistent with his
17 criminal conviction. DeShong ignores the fact that Beckway’s battery claim acknowledges
18 that DeShong and Ward were “arrest[ing], detain[ing] and/or *overcom[ing] resistance of*
19 *plaintiff when they grabbed plaintiff Beckway, forced him to the ground and jumped on the*
20 *back of plaintiff’s legs.”* Complaint ¶ 50. Thus by the terms of the battery claim, Beckway
21 appears to concede some resistance. Even if he had not, however, the question here is
22 whether, in light of the resistance proven by Beckway’s criminal conviction, a portion of the
23 force used by Defendants was unreasonable. Beckway’s subjective belief that he did not
24 resist the officers would not necessarily be proven if he were to prevail in his battery claim.
25 Therefore, DeShong’s motion for summary judgment with respect to Plaintiff’s battery claim
26 is DENIED.

27 Defendants rely upon the same argument – that Beckway denies resisting the officers
28 and thus *Heck* should bar his claims – in challenging Beckway’s negligence, intentional

1 infliction of emotional distress, and negligent infliction of emotional distress claims. Because
2 Defendants have not shown that these claims are inconsistent with the facts proven in
3 Beckway’s criminal conviction, Defendants’ motions for summary judgment as to these
4 claims are also DENIED.

6 **III. Whether a Jury Could Find that the Force Used Was Unreasonable**

7 DeShong argues that he is entitled to summary judgment because no jury could find
8 that the force he used against Beckway was unreasonable under the circumstances. The Court
9 disagrees.

10 The Fourth Amendment “guarantees citizens the right ‘to be secure in their persons . .
11 . against unreasonable . . . seizures’ of the person.” *Graham v. Connor*, 490 U.S. 386, 394,
12 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). “The ‘reasonableness’ of a particular use of force
13 must be judged from the perspective of a reasonable officer on the scene, rather than with the
14 20/20 vision of hindsight.” *Id.* at 396.

15 To do so, a court must pay “careful attention to the facts and
16 circumstances of each particular case, including [1] the severity
17 of the crime at issue, [2] whether the suspect poses an immediate
18 threat to the safety of the officers or others, and [3] whether he is
19 actively resisting arrest or attempting to evade arrest by flight.”
20 *Id.* We also consider, under the totality of the circumstances, the
21 “quantum of force” used, *Davis v. City of Las Vegas*, 478 F.3d
22 1048, 1055 (9th Cir. 2007), the availability of less severe
23 alternatives, *id.* at 1054, and the suspect's mental and emotional
24 state, see *Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9th Cir.
25 2001). All determinations of unreasonable force, however, “must
26 embody allowance for the fact that police officers are often
27 forced to make split-second judgments – in circumstances that are
28 tense, uncertain, and rapidly evolving – about the amount of force
that is necessary in a particular situation.” *Graham*, 490 U.S. at
396-97.

23 *Hayes v. Cnty. of San Diego*, --- F.3d ---- , 2011 WL 982472, at *7 (9th Cir. Mar. 22, 2011).

24 DeShong argues that his own statements that he used no force against Beckway
25 foreclose Beckway’s excessive force claim. He points to his deposition testimony in which
26 he states that he was not acting upon Beckway when Beckway fell, but that Beckway lost his
27 balance. He denies kicking Beckway in the leg.

1 Beckway tells a different story in his deposition. He says he “was thrown down” to
2 the ground. Beckway Depo. 74:4. At his deposition, Beckway could not remember if one
3 officer or two threw him to the porch, but this does not negate Beckway’s allegation that one
4 of them threw him. Furthermore, the fact that Beckway did not describe in detail the way in
5 which he was thrown, or the way in which he landed, does not discount the fact that
6 Beckway’s account raises a triable question of fact for the jury. Beckway states that someone
7 pushed him; DeShong that Beckway fell under his own weight. When viewed in the light
8 most favorable to Beckway, Beckway’s account raises an inference that he did not fall, but
9 that he was pushed. It also raises a triable issue of fact as to whether DeShong was the one
10 who pushed him.

11 While on the ground, Beckway says he “felt a heavy blow to the back of [his] leg.” *Id.*
12 at 75:15-16. He later characterized the blow as a “stomp.” *Id.* at 81:21. This raises a triable
13 issue of fact as to whether he did receive such a blow, and whether DeShong delivered it.
14 DeShong seems to argue that his testimony that he never applied force to Beckway
15 forecloses the question of whether Beckway was stomped. DeShong would have the Court
16 evaluate the probative value of Beckway’s statement in light of his own, but the Court’s
17 inquiry on summary judgment is limited to whether Beckway has offered enough evidence of
18 excessive force to raise a triable issue of fact for the jury at trial. He has done so.⁶
19 Accordingly, DeShong’s motion for summary judgment as to Beckway’s excessive force
20 claim is DENIED.

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22 **IV. Beckway’s Section 1983 Claim Against the County of Lake Sheriff’s Department**

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24 Defendants argue that the County of Lake Sheriff’s Department is not a proper
25 defendant in a section 1983 claim. Section 1983 imposes liability on “[e]very person” who
26 acts under the color of law to deprive another person of rights, privileges, or immunities

27 ⁶ Beckway cites to other portions of the record, but his account of the events of his
28 arrest are sufficient to withstand the motion for summary judgment.

1 secured by the Constitution and laws. 42 U.S.C. § 1983. Defendants argue that the County of
2 Lake Sheriff's Department is not a "person" under the statute, and therefore cannot be liable.
3 "The term 'persons' encompasses state and local officials sued in their individual capacities,
4 private individuals and entities which acted under color of state law, and local governmental
5 entities. *Vance v. Cnty. of Santa Clara*, 928 F. Supp. 993, 995-96 (N.D. Cal. 1996).
6 "However, the term 'persons' does not encompass municipal departments." *Id.* at 996.
7 Having been presented with no argument or authority from Beckway challenging the rule
8 that municipal departments are not proper defendants in section 1983 cases, the Court finds
9 no reason to disagree with the district court in *Vance*. Defendants' motion for summary
10 judgment as to Beckway's section 1983 claim against the County of Lake Sheriff's
11 Department is therefore GRANTED.

13 **V. Beckway's Section 1983 Claims Against the County of Lake and Sheriff Mitchell**

14 Based upon Plaintiff's representations to the Court that discovery is not complete
15 regarding the alleged conduct of the County of Lake and Sheriff Mitchell, the Court finds
16 that Defendants' summary judgment motions with respect to these issues are premature.
17 Even so, this case is progressing far too slowly. Accordingly, all discovery, except for
18 depositions of expert witnesses, shall be completed no later than sixty (60) days from the
19 date of this order. Unless otherwise ordered by the Court, all discovery matters are hereby
20 referred for assignment to a magistrate judge. Please call the Courtroom Deputy at (415) 522-
21 2047 to obtain a random assignment to a specific Magistrate Judge before filing any papers
22 relating to discovery.

23 If for any legitimate reason a party is unable to finish discovery by the deadline, that
24 party must include in its motion to extend the discovery cutoff a detailed explanation of the
25 actions it took, starting today, to complete discovery. If the Court finds that any party did not
26 immediately undertake efforts to complete discovery, the discovery sought by that party will
27 be waived.

28

1 **CONCLUSION**

2 For the reasons set forth above, Defendants' motions for summary judgment are
3 GRANTED IN PART and DENIED IN PART. Summary judgment is GRANTED as to
4 Beckway's section 1983 claim against the County of Lake Sheriff's Department. Summary
5 judgment is DENIED as to Beckway's state law claims and his section 1983 claim against
6 the County of Lake, Sheriff Mitchell, and Deputies DeShong and Ward.

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8 **IT IS SO ORDERED.**

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10 Dated: 4/7/11



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THELTON E. HENDERSON, JUDGE
12 UNITED STATES DISTRICT COURT
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