City of Winter Haven v. Cleveland Indians Baseball Company Limited Partnership Doc. 37

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

ALEX ZIVOJINOVICH,
JUSTIN ZIVOJINOVICH and
MICHELLE ZIVOJINOVICH,

Plaintiffs,

vs. Case No. 2:05-cv-263-FtM-29SPC
DISPOSITIVE MOTION

THE RITZ CARLTON HOTEL COMPANY, LLC
d/b/a THE RITZ CARLTON NAPLES,
FRANK BARNER, CHRISTOPHER KNOTT,
SCOTT RUSSELL, and AMY STANFORD,

Defendants.
_______________________________________/

PLAINTIFFS' ANSWER IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY AMY STANFORD AS TO COUNTS II and V of PLAINTIFFS' AMENDED COMPLAINT and INCORPORATED MEMORANDUM OF LAW

Plaintiffs, JUSTIN ZIVOJINOVICH, ALEX ZIVOJINOVICH and MICHELLE ZIVOJINOVICH, by and through their undersigned counsel, and pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 3.01(b) of the United States Court Middle District of Florida, oppose the relief requested by the Defendant Amy Stanford, and state the following as grounds thereof:

1. Stanford violated the constitutional rights of JUSTIN and ALEX by application of unreasonable and excessive force.

2. Plaintiffs' claims against Stanford are not barred by the Supreme Court's decision in *Heck v. Humphrey*.

Dockets.Justia.com

3. Stanford is not entitled to the defense of qualified immunity for her actions.

4. Because there are disputed issues of fact, summary judgment does not lie as to Stanford's Motion.

STATEMENT OF FACTS

The Plaintiffs, father(ALEX), son (JUSTIN) and daughter-in-law (MICHELLE), were in attendance at the Ritz Carlton for a $500 a plate, black tie New Year's Eve celebration. Guest tables were arranged around a dance floor. To one side, two small musical combos alternated playing light dance and background music on a slightly elevated riser. Due to the actions of Defendants, the night ended in chaos, confusion, violence and injury.

JUSTIN COMPLIES WITH REQUEST THAT HE NOT GET ON RISER

Plaintiff Justin was attempting to liven up what many guests felt was a rather droll event by dancing with other female guests. (JUSTIN Dep, P 74, L 16-18) A DVD video, taken by another guest, is attached hereto of Justin's dancing that evening, as well as his innocuous New Year's greeting from the riser. Justin was not impaired or intoxicated. (JUSTIN Dep, P 94, L 11 – P 100, L 23)

Justin then briefly stepped up on the riser to wish everyone a Happy New Year on the microphone. This thirteen (13) second event is also captured on the attached video. Justin stepped down and some time later briefly stepped up on the riser again, tapped the now silent microphone and returned to his seat. (JUSTIN Dep, P 88, L 21 – P 89, L 7) He was never asked to step down either time. (JUSTIN Dep,P 92, L 9-11)

After the second time, Justin was told by Defendant Barner, a security employee of the

Ritz, not to get up on the riser again or he would be removed from the property and charged with trespassing. (JUSTIN Dep, P 66, L 5-9) Justin said "What no fun?" (JUSTIN Dep, P 68, L 16) then complied with the request and returned to his table to complete the meal. (JUSTIN Dep, P 68, L 18) Justin never attempted to get back on the riser again. Justin was at no time ever asked to leave the premises by any representative of the Ritz. (Barner Dep, P 80, L 1-5)

The attached video demonstrates the harmless nature of Justin's activities that evening. Certainly the Ritz has a right to disapprove of his fun-loving antics, but the evidence establishes no right to have him manhandled off the property.

FIRST FALSE REPORT TO LAW ENFORCEMENT BY RITZ

Unknown to Justin, Barner and another Ritz employee called the sheriff's office and filed a false report concerning Justin's conduct. The transcript of the 911 call by Ritz employee Azure Sorrell reflects "We have some disorderly people at the Ritz Carlton that are out of control ... we can't contain control of them. ... They're basically tearing apart everything. .... just basically trashing the place. They were just jumping on furniture, ripping things apart. ... Our officers can't control them."

The transcript of the 911 call By Barner reflects: "I've got a couple of subjects being disorderly. ... He's screaming and yelling. ... there's a couple of them at a party that are getting out of hand. ... Tried to commandeer the bandstand. ...he started yelling profanities, screaming, yelling and carrying on.

According to the only dispatch transcript available, the dispatcher got it wrong as well by advising the officers that "There is an out of order guest up there" and "(Now) being advised two subjects involved both in their 30's, giving the band members a hard time yelling and

screaming." Doc 132, P 5 The truth of the matter is that Justin was calmly eating his meal and had fully complied with the request made by the Ritz. (JUSTIN Dep, P 68, L 18)

Justin went back to his table to begin to finish his dinner. Barner, then an unknown person to Justin, stood by with his arms folded watching Justin in a manner that made Justin uncomfortable. (JUSTIN Dep,P 69, L 1-4) Justin shook his head and silently mouthed the phrase "Why don't you just f***ing leave us alone." (JUSTIN Dep, P 69, L 11) There is no evidence that any other person saw or heard this silent exchange. Later, while he was peacefully eating his meal, Justin was approached by two uniformed sheriff's deputies who asked him to step outside the ballroom into a service alcove. (JUSTIN Dep, P 107, L 4) Justin readily complied. (JUSTIN Dep, P 108, L 10)

SECOND FALSE REPORT TO LAW ENFORCEMENT BY RITZ

The deputies were falsely advised by Defendant Barner that Justin was "out of control." (Testimony of Knott, Justin Trial Transcript, P 255, L 10-11)

Justin was then told to retrieve his personal items from the ballroom and he did so. At that that time, Justin was advised to sit and wait to be escorted from the premises and issued a trespass warning. Justin again complied fully with the deputy's instructions and was never asked to leave or given the opportunity to do so. (JUSTIN Dep, P 193, L 24 – P 194, L 10)

At this time Justin's family and friends, being concerned for his welfare, and extremely confused and uninformed about what was happening, attempted to inquire of the deputies what was going on. They were told not to interfere. (Knott Dep, P 73, L 10-11)

"ARREST" IN THE CONTEXT OF THIS CASE

The sequence of events shows that the deputies did not intend to formally arrest Justin

until the later stairwell incident. (Knott Dep, P 222, L 7-12) Yet he was "arrested" in fact early on because he was physically restrained (JUSTIN Dep, P 110, L 5) and manhandled by the deputies at the direction of Ritz and Barner. (Knott Dep, P 217, L 17-18) Justin was later formally arrested after he was taken down in the stairwell. This distinction becomes critical to an analysis of the subsequent "conviction" of Justin by virtue of his plea to the reduced charge of resisting without violence and the application of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

FIRST UNLAWFUL PHYSICAL RESTRAINT OF JUSTIN

Justin was then physically restrained by the Deputies even though he had not broken the law or resisted in any way. (JUSTIN Dep, P 125, L 8 – P 127, L 15) He was forced down a back hallway in a "pain compliance hold" and into a back stairwell which led to a service entrance at the rear of the hotel. (JUSTIN Dep, P 129, L 13 – P 130, L13)

As the following photograph shows, Justin was being manhandled down the service hallway by two of the Defendants, Knott and Stanford, with both his arms pressed up behind his back in a "pain compliance" hold. At this point in time, Justin had not violated a law, had not been accused of violating a law, had not been given a chance to voluntarily leave the hotel, had not refused to leave the hotel, was not under arrest and was otherwise compliant. There was no legal justification for placing Justin in involuntary physical custody.

Notwithstanding the fact that a guest entrance was only a short distance away, Justin was physically forced to leave via a service entrance and was to be left at the property line behind the hotel. Justin's father, Alex, and Justin's wife Michelle, concerned for Justin's welfare, followed behind as indicated in the video.

Never up until this time in the sequence of events, and in fact never during the evening, was Justin ever asked to leave the premises. (JUSTIN Dep, P 193, L 24 – P 194, L 10) Rather he was simply manhandled out even though he had broken no law, had not resisted the officers in any way and had not refused to leave when asked.

All evidence, direct and circumstantial, points to the conclusion that the officer's were "psyched up" for a difficult and unpleasant encounter as a result of Barner's false report to 911,

the inaccurate dispatch call and Barner's false statement to Deputy Knott that Justin was "out of control." The attached surveillance video of the officers entering shows what words cannot describe; the aggressive body language and facial expressions of the deputies entering the premises before encountering Justin. Simply because the officer's are now conveniently unsure of what they were told by dispatch is insufficient to ignore the fact that a jury may well find that the erroneous report contributed to the improper conduct of the officers.

Some of these factual issues are addressed with difficulty in a Summary Judgment context. It will be important for the jury to observe and hear the witnesses so they can understand and evaluate the tone and attitude displayed by various parties, witnesses and actors. Such analysis, especially of intent, is hardly complete simply by reading a transcript.

SECOND UNLAWFUL PHYSICAL RESTRAINT OF JUSTIN

As Justin entered the stairwell with both of his arms in the pain compliance hold by Deputies Knott and Stanford (See still security photo above), Justin attempted to adjust his arm to relieve the pain he was experiencing. (JUSTIN Dep, P 131, L 3 – P 132, L 20) Still, up to this point in the sequence of events, Justin had committed no violation of law and there was nothing to justify his being restrained, manhandled, subjected to pain or otherwise having his liberty curtailed. The deputies then took Justin to the ground, falling on the first landing of the stairwell. (JUSTIN Dep, P 135, L 8 - 12)

JUSTIN IS TASERED

After Justin was taken to the ground, he was ordered to place his hands behind his back. Justin was on his hands and knees (JUSTIN Dep, P 137, L 5-6) and would have fallen if he had lifted his hands from the ground. Justin then sat up with his back to the wall on the landing.

(JUSTIN Dep, P 139, L 23 - P 140, L 13) Justin attempted to gain some balance and was Tasered in the chest by Deputy Knott for the first time for "noncompliance." (JUSTIN Dep, P 142, L 13; Knott Dep, P 112, L 15-16, L 15-16) Stunned by the effects of the Taser, Justin fell over and found himself in a defensive position against the wall on the landing. (JUSTIN Dep, P 144, L 11) Justin yelled out "Why are you doing this?" (Dep of Justin P 144, L 16-17) Justin didn't know what people were saying at that time and he got to his knees (Dep of Justin P 146, L 9), was Tasered a second time for "noncompliance" (JUSTIN Dep, P 147, L 6; Knott Dep, P 112, L 15-16) and then handcuffed by the Ritz's security manager, Barner, with the permission of the deputies. (Knott Dep,P 217 , L 17-18)

Witness Cannivet, an employee of the Ritz observing from the top landing, states in his Dep that as Justin was backing away from a deputy, the officer got "agitated." (Cannivet Dep, P 66, L 3-5) Justin was Tased and went down face first. (Cannivet Dep, P 69, L 20-23) Justin was acting like he was having a severe seizure, twitching, laying face down on the ground. (Cannivet Dep, P 71, L 4-7)

ALEX GOES TO THE AID OF HIS SON AND IS BATTERED

Meanwhile, Alex was ahead of his son Justin down the stairwell when he saw his son on the ground twitching after being manhandled and Tasered by the deputies. Alex moved up the stairs to assist his son (Cannivet Dep, P 78, L 7-13) and attempted to squeeze past Defendant Stanford (Cannivet Dep, P 79, L 12-14) when he was struck in the nose by Defendant Russell. (Russell Dep, P 23, L10-13) Alex's nose was shattered and blood poured profusely from the wound. (ALEX Dep, P 281, L 6-8; P 282, L 23) In the melee, Defendant Stanford tried to push Alex and grabbed him by the throat (Cannivet Dep, P 82, L 21) and both of them fell to the

bottom of that section of stairs to the next landing. (Cannivet Dep, P 82, L 1-6) Cannnivet said he later saw a "huge" puddle of blood at the bottom of the stairwell. (Cannivet Dep, P 99, L 3-8)

ALEX IS TASERED

At this point Alex was lying on the floor at the bottom of the stairs on his stomach and forearms. (ALEX Dep, P 99, L 3-8) He was dazed, confused and could not determine who was saying what to whom. (ALEX Dep, P 284, L 6-18; P 283, L 3-7;) Alex, as he lay on the ground, was then Tasered for the first time. He was paralyzed and could barely breathe. (ALEX Dep, P 287, L 12-14) Alex was told to straighten his arms out but couldn't because of the effects of the Taser. (ALEX Dep, P 287, L 23-25) Alex was Tasered a second time while lying on the ground saying he was unable to move. (ALEX Dep, P 88, L 5)

Next, Alex was handcuffed and led out of the stairwell through a passageway to the service entrance. Alex's nose was so badly injured that he had to breathe through his mouth while blood continued to flow copiously into his mouth and down the front of his shirt. ALEX Dep, P 294, L 5-8) As Alex was led by Deputies Knott and Kaye Alex's difficulty in breathing caused some blood to be inadvertently sprayed from his mouth (ALEX Dep, P 294, L 5-8) onto Deputy Knott who demanded that Alex stop "spitting" the blood on him. Although Alex never had spit at the deputies (ALEX Dep, P 293, L 18-24), both deputies then "drive stunned" Alex.

MICHELLE IS ARRESTED

During the melee with Justin on the stairwell landing, Michelle, Justin's wife, was concerned about the injuries her husband appeared to be receiving at the hands of the deputies. Witness Cannivet says as to Michelle:

> A. What really sticks out in my mind is really
> sitting on those stairs and crying and looking at

Justin.

Q. And this is after Justin was tazed?

A. And she was sitting at the stairs somewhat
close by. And she was crying but she didn't move. She
was just was sitting there.
(Cannivet Dep, P 94, L 4-10)

Michelle complained of the brutality and was then arrested and handcuffed by Defendant Russell. (Russell Dep, P 24, L 11)

THE CRIMINAL CHARGES AND THEIR RESOLUTION

Alex, Justin and Michelle were all transported to jail and charged with various crimes. Formal charges were later brought by the State Attorney. Meanwhile, back at the Ritz, Barner was obtaining statements from witnesses on behalf of the deputies. (Cannivet Dep,P 104, L 21-P 105, L 1)

Prior to that time both Barner and Ritz employee Charles Shed had accompanied the deputies and assisted them in ejecting Justin and dealing with the overall situation. (Cannivet Dep, P 103, L 2-8)

Michelle went to trial and the court dismissed her misdemeanor charge after the conclusion of the state's cases. The charges were not "dropped" as asserted by Defendants.

Justin went to trial next where the court entered a directed verdict on the felony charge, finding that Justin had not resisted Deputies Knott or Stanford when he attempted to relieve the pain in his arm from the pain compliance hold. Justin then elected to plead no contest to resisting without violence as a convenience plea to avoid an unlikely, but possible conviction by the jury of the misdemeanor.

The state then reduced Alex's charge from felony level to misdemeanor resisting without violence and Alex entered a convenience plea of no contest to that charge to avoid an unlikely, but possible, conviction by a jury of the more serious felony charge originally brought against him.

MEMORANDUM OF LAW

Legal Standard for Motion for Summary Judgment

Summary judgment is only appropriate where the pleadings, depositions, answers to interrogatories, admissions, and other matters on file, show 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) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the burden of meeting this standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). In deciding whether the movant has met this burden, all factual inferences arising from the evidence must be viewed in a light most favorable to the non-moving party. *Supra.*

Once the moving party satisfies its burden, the adverse party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P 56(e). This must be done by affidavits, depositions, answers to interrogatories, and admissions. *Jeffrey v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593-594 (11th Cir. 1995) citing to *Celotex, supra.*

<u>*HECK v. HUMPHREY* DOES NOT BAR JUSTIN FROM BRINGING SUIT AGAINST STANFORD UNDER 42 U.S.C. §1983</u>

In *Heck v. Humphrey*, the Court found that a plaintiff could recover damages for an allegedly unconstitutional harm only if he could show that a judgment in his favor would not necessarily implicate the validity of his underlying conviction. *Heck v. Humphrey,* 512 U.S. 477,

487 (1994). Stanford has stated that JUSTIN'S complaint that Stanford used excessive force in escorting JUSTIN from the Ritz Carlton is barred under *Heck*. Doc 192, P 24. The first question before the Court is whether *Heck* bars JUSTIN from recovering damages for his claims that Stanford used excessive force in escorting JUSTIN from the premises.

Stanford has correctly stated in her Motion for Summary Judgment that JUSTIN pled no contest to a charge of Resisting Without Violence in the criminal matter that arose from this incident. Exh. A, JUSTIN Plea Agreement. However, JUSTIN was not charged with any crime as to Stanford. Where no conflict exists between the criminal conviction and the civil litigation, then the Section 1983 claim must be allowed to proceed. *Heck, supra.* As *Heck* only bars a collateral attack on an underlying criminal conviction and there was no criminal conviction of JUSTIN for any offense involving Stanford, JUSTIN'S claims should not be barred by *Heck.*

<u>*HECK v. HUMPHREY* DOES NOT BAR ALEX FROM BRINGING SUIT AGAINST STANFORD UNDER 42 U.S.C. §1983</u>

ALEX pled no contest to a charge of obstructing an official investigation or arrest by Stanford and or Knott, and Stanford did not arrest ALEX. Exh. B, ALEX Plea Agreement. Therefore, whether a *Heck* defense can be considered as to Stanford's illegal application of excessive force to ALEX, as he has claimed, depends on when Stanford decided she needed to investigate and actually began an investigation. Stanford states that when JUSTIN threw his paper hat, he obstructed the officers' investigation into the disturbance that had occurred. Stanford Dep, P84. L 10-14. In addition, JUSTIN denies that he ever threw a party hat. In explaining what she was investigating, Stanford stated:

Q: Now, I believe you testified that

Justin's throwing of the hat constituted an

obstruction to your investigation; do I have that right?

A. Yeah I, that is what I testified to.

Q. And that in your view was a violation of the law, throwing of the hat; is that right?

A. Yes.

Q. What do you mean by investigation?

A. We were there investigating the disturbance.

Q: What does investigation mean?

A. We were called there to investigate the disturbance. We have a duty, an obligation to do so --

Q. Right.

A. -- and de-escalate whatever the situation is. And until we remove the instigators of that disturbance properly and safely from that establishment, we are still conducting the investigation, until we actually leave the grounds.

Q. I am looking for, can you give me a definition of investigation, as you use the word?

(Stanford Dep, P 34, L 6-23)

Stanford does not mention her investigation again. As stated *supra*, JUSTIN was not charged with obstructing an investigation by Stanford. In order to prove up its case against

ALEX for resisting Stanford's investigation, it was the State's burden to prove that Stanford was engaged in the lawful execution of a legal duty, here according to the State's Information, conducting an official investigation, and that ALEX'S acts constituted obstruction or resistance to that lawful duty. *Wayne's World Inc. v. Town of Eatonville, FL*, 2006 U.S. App. LEXIS 27120 (11th Cir. 2006) There is no evidence cited by Stanford that she was even investigating ALEX and no evidence that ALEX obstructed that investigation. Indeed, Knott stated that Barner told him what he wanted him to do and that there was no need for an investigation. (Knott Dep, P 222, L 5-7)

Knott went on to say that if a crime had been alleged, then he would have needed to investigate, but as that was not the case, none of that was relevant and his efforts were just to have him [JUSTIN] leave the property. (Knott Dep, P 222, L 7-12).

When considering summary judgment, a dispute is genuine if the issue can be resolved in favor of either party and a fact is material if it might reasonably affect the outcome of the case. *Page v. Williams*, 2004 U.S. Dist. LEXIS 9002 (N.D. Tex. 2004) The ruling in *Heck* prevents litigation under the guise of a § 1983 civil rights action, that, in effect, challenges, or collaterally attacks. the validity of an underlying conviction, without first having the conviction or sentence invalidated. However, as has been shown here, and *supra*, there are genuine disputes as to material facts, not the least of which is whether Stanford conducted an investigation, despite her testimony that she did, and whether Stanford's investigation involved ALEX. The court should find, as a matter of law, that *Heck* does nor bar either JUSTIN'S or ALEX'S claims and that as there are disputed issues of fact, both §1983 causes of action can proceed.

STANFORD IS NOT ENTITLED TO RAISE THE DEFENSE OF QUALIFIED IMMUNITY

Knott states that he took JUSTIN to the ground because JUSTIN pulled his arm away from Stanford. (Knott Dep, P 88, L 24-25, and P 89, L 1-6) JUSTIN stated that he pulled his arm away from Stanford because she was hurting him.

Q. Was Deputy Stanford hurting your right arm, as she was holding it walking to the doorway that led to the stairwell?

A. Yes.

Q. And how was she doing that?

A. My right arm was pulled up so that my hand was almost up near my shoulder blades.

Q. Behind your back?

A. Behind my back, yes, between my shoulder blades and it started to hurt.

Q. Did you say anything?

A. I said, "You are hurting my arm."

Q. Now, had you done anything to resist at all up to that point in time?

A. No.

Q. Had you voiced any change of mind that you were no longer going to go willingly?

A. No, I did not.

Q. Anything that you did at all, that in your mind would explain why Deputy Stanford had your arm behind your back in that manner?

A. I hadn't said anything at all.

Q. So she just did it?

A. Yes.

Q. All right. And did you, you had testified earlier that you moved your arm, your right arm, and I guess Deputy Stanford lost her grip on your arm?

A. She, yes, lost her grip, yes, not completely though.

Q. Did that happen before you got to the door into the stairwell?

A. Yes.

Q. And what did you do, how did your arm come free?

A. Oh, I just, I sort of leaned. I was leaning forward, but I leaned up and I was able to sort of slide it down a bit, so it was more comfortable, down towards my waistline.

Q. Your wrist you mean?

A. My wrist, yes.

Q. Straightening your arm out, so to speak?

A. Correct.

Q. Did Deputy Stanford retain her hold on your arm while you did that?

A. She made it more uncomfortable for me.

(Stanford Dep, P 129, L 13-25, P 130, L 1-12, L 21-25, P 131, L 1-18)

Stanford has stated that she used only reasonable force upon both JUSTIN and ALEX. Doc. 191, P 22. As the Statement of Facts indicates, JUSTIN attempted to move the arm that Stanford was holding into less painful position and Knott took him to the ground. As a result, a simple case of escorting a compliant guest from the premises spiraled out of control.

A qualified immunity defense requires, in the first instance, that the public official prove that he or she was acting within the scope of his or her discretionary authority when the allegedly unconstitutional acts took place. *Chaney v. City of Orlando, Fla. and Cute*, 2005 U.S. Dist. LEXIS 30580 (M.D. Fla. 2005), citing to *Storck v. City of Coral Springs*, 354 F. 3d 1307, 1313-14 (11th Cir. 2003). Qualified immunity can provide a complete defense from suit and from liability for government officials who are sued in their individual capacities for the performance of their discretionary functions. *Storck, supra* at 1314. However, qualified immunity's protection exists only if the official's conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known. *Lassiter v. Ala. A & M Univ., Bd. of Trustees*, 28 F. 3d 1146, 1149 (11th Cir. 1994).

It is not disputed that Stanford was acting within the scope of her discretionary authority as she was pursuing a legitimate job-related function through means that were within her power to utilize. *Holloman ex rel. Holloman v. Harland*, 370 F. 3d 1252, 1265 (11th Cir. 2004). To determine if a defendant is entitled to qualified immunity, the court engages in a two-part inquiry. *Finsel v. Cruppenick*, 326 F.3d 903, 906 (7th Cir. 2003). The Court must determine whether, on the facts as alleged, and taken in a light most favorable to JUSTIN and ALEX, Stanford's conduct violated JUSTIN'S and ALEX'S constitutional rights. *Dalrymple v. Reno*, 334 F. 3d 991, 995 (11th Cir. 2003), citing to *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If a constitutional right was violated, the Court then determines whether it was clearly established at the time of the alleged violation. *Cruppenick*, at 326 F.3d 906.

Constitutional Violation

The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the right to be free from the use of excessive force in the course of an arrest. *Lee v. Ferraro*, 284 F. 3d 1188, 1197 (11th Cir. 2002). Claims of excessive force in the context of arrests should be analyzed under the Fourth Amendment's objective reasonableness standard. *Saucier*, 533 U.S. at 204. The Supreme Court stated in *Saucier*, that the merits of an excessive force claim require careful attention to the facts and circumstances of the particular case, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers, and whether the suspect is actively resisting, or attempting to evade arrest by flight. *Supra.*

The Eleventh Circuit has espoused additional factors that must be considered:

1) the need for the application of force,
2) the relationship between the need and the amount of force used,
3) the extent of injury inflicted, and
4) whether the force was applied in good faith.
-*Leslie v. Ingram*, 786 F. 2d 1533, 1536 (11th Cir. 1986).

The force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime, the danger to the officer, and the risk of flight. *Supra.* Here, the facts show that JUSTIN was arrested after law enforcement was called to escort a paying guest from the premises of a private hotel. It is undisputed that when Stanford arrived, JUSTIN and ALEX were sitting peacefully eating their dinner. It is undisputed that neither JUSTIN nor ALEX had broken any law nor did they pose any risk to law enforcement. Certainly ALEX posed no threat to Stanford as he was not even the object of the call from the Ritz. It is undisputed that JUSTIN was peacefully complying with Knott's request until Stanford applied force to his arm sufficient to cause JUSTIN pain and refused to change her grip. In fact, when JUSTIN complained of the pain,

Stanford caused the pain to increase. Stanford's conduct in gripping an unarmed and complaint JUSTIN, who had broken no law and posed no threat, was unreasonable by any application of the law.

Stanford stated that her whole purpose at the scene was officer safety. Stanford Dep, P 106, L 15-16. Certainly, resisting arrest can be a threat to officer safety, but that was not the case here where JUSTIN'S resistance was simply a response to Stanford's conduct which exceeded the scope of her authority, especially where no crime had been committed.

If officer safety became an issue at some point, it was because Knott and Stanford escorted JUSTIN in an unreasonable manner and refused to communicate with and consider the concerns of ALEX and JUSTIN'S family. Knott and Stanford recognized that JUSTIN broke no laws, but failed to treat him accordingly. Under the circumstances of this case, where no crime had been committed by JUSTIN, the force used by Knott and Stanford to escort him from the property, and the force ultimately applied to a confused ALEX can only be considered wholly unnecessary, disproportionate to the situation, clearly excessive and unreasonable under the circumstances.

The border between permissible and excessive force is a fact-intensive test. *Vinyard*, 311 F. 3d at 1349. Summary judgment in an excessive force claim is not appropriate where the need for the application of the force and the officer's good faith are not established. *Supra.* JUSTIN did not resist complying with the request to leave; he resisted the heavy-handed methods undertaken by Knott and Stanford to execute the request of the hotel. Knott and Stanford have failed to establish any reasonable justification for the excessive force that was used when they attempted to escort JUSTIN from the premises and failed to respond effectively to ALEX'S

inquiry. Their failure to respond to ALEX and address his understandable and legitimate concerns about where they were taking his son, and why, resulted in an unprecedented escalation violence that would not have occurred but for the officers' conduct. No officer has presented any evidence that there was any potential for violence or illegal activity or any threat to public safety exhibited by any conduct of ALEX or JUSTIN before law enforcement arrived at the Ritz. Clearly it could be found that neither Knott nor Stanford acted with the requisite good faith that would entitle them to qualified immunity.

The courts are in agreement that the application of *de minimus* force, without more, will not support a claim of excessive force in violation of the Fourth Amendment. *Nolin v. Isbell*, 207 F.3d 1253, 1257 (11th Cir. 2000). In several cases, the court found that while the use of a certain level of force may have been unnecessary, the actual force used and the injury inflicted were both minor. *Supra.* However, in every case considered by the Court, there was at least probable cause to think a crime had been committed. In this case, it has been clearly acknowledged that no crime had been committed – at all. Neither probable cause, nor arguable probable cause for an arrest, can exist where no crime has been committed. There is no defense for the application of excessive force based on probable cause where probable cause arises from the provocative and unreasonable acts of the law enforcement officers seeking to defend their conduct by reference to probable cause. This is particularly true, where as here; the application of that *de minmus* force becomes the justification for a continuing escalation in the level of force applied by law enforcement.

On these facts, even the *de minimus* force that was initially applied was excessive because it was unreasonable to apply any force at all where no laws had been broken and there

was absolutely no threat to officer or public safety. Further, the initial force used cannot be considered *de minimus* when viewed in the totality of the circumstances. JUSTIN was subjected to a painful hold as he was escorted from the premises by Stanford. Despite his complaints of pain, neither Knott nor Stanford released their grip but rather increased their control of JUSTIN, thereby increasing JUSTIN'S pain. *Supra.* When JUSTIN attempted to free his arm, he was taken to the ground, tased numerous times and ultimately arrested – all for breaking no law, and perhaps for expressing a desire to "sing to his wife." (Doc 193, P 18 stating that because JUSTIN indicated he was going to sing to his wife, he [Barner] believed JUSTIN was going to get back onstage and left to call the police) ALEX merely inquired as to where the officers were taking his son . It is unreasonable to defend the force used against ALEX when an answer to his question could have avoided any confrontation. Ultimately, of course, the force used against both ALEX and JUSTIN was both excessive and unreasonable. Given the fact that no laws had been broken and no threats of breaking any laws had been made, the force used by Stanford violated the constitutional rights of JUSTIN and ALEX.

<u>"Clearly Established" Law</u>

Where the court decides that a complaint alleges a violation of a constitutional right, then the court must determine if that right was clearly established at the time of the violation. *Supra.* 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. *Saucier*, 533 U.S. at 202. The Supreme Court stated that the salient question is whether, the state of the law gives the officers fair warning that their alleged treatment of the plaintiff was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730 (2002).

In *Hope*, the Supreme Court stated that fair warning can be given in various ways. *Supra.* In excessive force cases, the court can use an "obvious clarity standard" which involves conduct that is beyond the "hazy border" between excessive and acceptable force. *Priester v. City of Riviera Beach*, 208 F. 3d 919, 927 (11th Cir. 2000)(officer released police dog to attack plaintiff who was lying on the ground, did not pose a threat to officers, and was not attempting to flee or resist). The court can also look to the case law for broad statements of principle, not tied to particularized facts, that clearly establish law applicable to different sets of detailed facts. *Vineyard*, 311 F. 3d at 1351. Finally, the court can look at precedent that is tied to the facts.

In the absence of fact-specific case law, the plaintiff can overcome a qualified immunity defense when a general constitutional rule applies with obvious clarity to the specific conduct in question and it must have been obvious to a reasonable officer that the pertinent conduct, given the circumstances, was unconstitutional at the time. *United States v. Lanier*, 520 U.S. 259, 271 (1997). The Eleventh Circuit has said that some general statements of law are capable of giving fair and clear warning in some circumstances. *Vineyard*, 311 F. 3d at 1353. The relevant inquiry is whether the conduct lies so obviously at the very core of what the Fourth Amendment prohibits, that the unlawfulness of the conduct is readily apparent, notwithstanding the lack of fact-specific case law. *Supra* citing to *Lee*, 284 F. 3d at 1199.

A constitutional right is clearly established if controlling precedent has recognized the right in a concrete and factually defined context. *Akins v. Fulton County, Ga.*, 420 F. 3d 1293, 1305 (11th Cir. 2005). The question of whether a clearly established constitutional right was violated depends on what Stanford knew after she entered the ballroom. *Finsel*, 326 F.3d at 906. Stanford has already stated that she was not there because any law had been broken. In addition

to chasing criminals, courts have found that law enforcement officers have a "community caretaking" function. *Supra* at 907. The community caretaking function describes various community duties a law enforcement officer might have as peace officer not engaged in any activity related to a criminal statute. *Supra*, citing to *Cady v. Dombrowski*, 413 U.S. 433,441 (1973)

Community caretaking would certainly describe Stanford's duty on December 31 at the Ritz wherein she was asked to escort a guest from the premises. In *Finsel*, the police conduct at issue involved a hotel's request of law enforcement to have a guest removed for failure to park his trailer in an approved spot. After Finsel was removed from his room, he "taken to the ground" by the police and had a gun pointed at him before he was arrested for resisting. *Supra*. The court found that Finsel was not doing anything to disturb the public order and he had broken no laws. *Supra*. Instead, the court found that it was law enforcement that was far from peaceful. *Supra*.

The court went on to find that a reasonable officer should have known there were limits to what he can do in the name of caretaking. *Supra*. Caretaking is not a license to take outrageous steps just to get a truck removed. *Supra*. In citing to *Hope* and denying the law enforcement officer the defense of qualified immunity, the court found that even in novel situations officials can be on notice that their conduct violates clearly established law and found that was the case as it applied to the conduct at issue. *Supra*. *Finsel* provided the officers fair warning that their treatment of JUSTIN and ALEX was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730 (2002).

The same reasoning used in *Finsel* can be applied to the case at bar. Stanford should

have known there were limits to what she could do when she was simply a peace officer and not investigating a crime. Stanford chose to ignore those limits and allowed a peaceful situation to escalate into confusion, chaos and violence. There is no doubt that she exceeded the clearly established law of which a reasonable officer would have been aware.

Qualified immunity does not lie where it can be shown that a reasonable officer would conclude that the force used was unlawful. *Nolin,* 270 F. 3d 1253, 1255. No reasonable, experienced officer could state that the force used against JUSTIN and ALEX was necessary under the particular circumstances, or any circumstances. Clearly the conduct here was beyond the "hazy border" between excessive and acceptable force.

In *DeSalvo v. City of Collinsville, Ill.*, the Court considered whether it was reasonable to arrest someone who had asked a law enforcement officer why he was arresting someone that had done nothing illegal. *DeSalvo v. City of Collinsville, Ill.*, 2005 U. S. Dist LEXIS 23180 (S.D. Ill. 2005). In that case the officer's response was that if DeSalvo didn't leave the scene he would be arrested for obstructing. *Supra.* DeSalvo stated he had done nothing wrong, and thereupon arrested. *Supra.* DeSalvo continued to question the nature of the offense and was tased and placed in a patrol car. In deciding whether the officer was entitled to a defense of qualified immunity, the court said that every officer is aware of a citizen's right to be free from unreasonable seizures in the absence of probable cause. *Supra* at 12. The court found DeSalvo's questions altogether reasonable. *Supra* at 10.

It is clear from the circumstance of this case that Stanford violated the constitutional rights of JUSTIN and ALEX. It is also clear that she was on notice that the law was clearly established. The evaluation of the reasonableness on Stanford's actions is clearly a question of

fact that must be submitted to a jury to decide unless the court is convinced that the record as a whole could not lead a rational trier of fact to find for the Plaintiff. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). On the facts before the court, it is clear that a reasonable jury could find that Stanford's conduct was unreasonable as to both JUSTIN and ALEX.

WHEREFORE, JUSTIN and ALEX would ask that the court deny Stanford's motion for summary judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of February, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to the following:

Richard A. Giuffreda, Esq.
Purdy, Jolly, Giuffreda & Barranco, P.A.
2455 E. Sunrise Blvd., Suite 1216
Fort Lauderdale, FL 33304
Counsel for Defendants: Knott, Russell & Stanford

Judith M. Mercier, Esq.
Holland & Knight, LLP
200 South Orange Avenue, Suite 2600
Orlando, FL 32801
Counsel for Defendants HMC BN Ltd Partnership & Barner

Paul M. Weekley, Esquire
Burton, Shulte, Weekley, Hoeler
McLaughlin & Beytin
Post Office Box 1772
Tampa, FL 33601-1772
Attorneys for Counter-Defendant, Alex Zivojinovich

By: /s/ Colleen J. MacAlister
MICHAEL R.N. McDONNELL

Florida Bar No. 124032
COLLEEN J. MacALISTER
Florida Bar No. 0804711

McDONNELL TRIAL LAWYERS
5150 Tamiami Trail North
Suite 501, Newgate Tower
Naples, Florida 34103
(239) 434-7711 telephone
(877) 613-7485 facsimile
Attorney for Plaintiffs