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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 MORGAN WEIMER,

9 Plaintiff,

10 v.

11 THE CITY OF SEQUIM,

12 Defendant.

CASE NO. 3:14-CV-05713-RJB

ORDER ON MOTION FOR
SUMMARY JUDGMENT AND
MOTION TO STRIKE

13 This matter comes before the Court on Defendant's Motion for Summary Judgment (Dkt.
14 14) and Plaintiff's Motion to Strike (Dkt. 23). The Court has considered the pleadings filed in
15 support of and in opposition to the motions and the file herein.

16 PROCEDURAL HISTORY

17 This case stems from an incident of alleged excessive force by law enforcement for the
18 City of Sequim, Defendant, against Morgan Weimer, Plaintiff. Dkt. 1. Plaintiff makes federal
19 claims against the City for violation of his Fourth Amendment rights pursuant to 42 U.S.C. §
20 1983 under *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) and state claims for
21 assault and battery. *Id.*

22 RELEVANT FACTS

23 Although much of the incident central to this case was captured on video, the parties'
24 characterizations of the events differ. According to Defendant, City of Sequim officers Dennis,

1 Turner, and Larson responded to a report of disturbance at the Oasis Bar and Grill. Defendant
2 alleges that the officers observed Plaintiff strike another person with his elbow, after which
3 Officers Larsen and Dennis escorted Plaintiff out of the bar. Defendant claims Plaintiff resisted
4 the arrest, and as he passed through the exit door, Plaintiff's momentum carried him onto a
5 planter box directly outside. Defendant contends that in spite of verbal commands, Plaintiff
6 continued to resist, so Officer Larsen utilized three "impact strikes" to coerce Plaintiff's
7 compliance with attempts to handcuff him, after which he ceased resistance and was taken into
8 custody. Dkt. 14, at 2, 3.

9 Plaintiff recites the facts differently. According to Plaintiff, officers observed Plaintiff
10 moving his elbow to distance himself from other patrons, who had taunted and bumped up
11 against Plaintiff and a friend. Officer Dennis approached Plaintiff and asked him to come outside
12 and talk, a request that Plaintiff contends he responded with, "No problem, officer." Plaintiff
13 states that when Plaintiff started walking towards the exit, Officer Dennis pushed Plaintiff out
14 the door and into a planter box, after which Officer Dennis punched Plaintiff three times in his
15 lower back. Plaintiff maintains Plaintiff did not physically resist officers. Dkt. 23, at 3, 4.

16 Plaintiff also alleges that, following the incident, City Attorney for the City of Sequim,
17 Craig Ritchie, spoke to media about the case, declaring that "From what I've seen, it fits our
18 training, it fits standard practice, it fits our policies." Additionally, According to Plaintiff, the
19 Chief of Police, Bill Dickinson, reviewed an investigation of the incident, and in a letter to
20 Plaintiff, acknowledged that "the event did occur, but [] the officer's actions . . . were consistent
21 with their training, the Department's policies, and the Laws of the State of Washington." Dkt. 23,
22 at 10-12.

23 SUMMARY JUDGMENT STANDARD

1 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
2 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
3 movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is
4 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
5 showing on an essential element of a claim in the case on which the nonmoving party has the
6 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
7 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
8 for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
9 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some
10 metaphysical doubt.”). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a
11 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
12 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*
13 *Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
14 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

15 The determination of the existence of a material fact is often a close question. The court
16 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
17 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
18 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
19 of the nonmoving party only when the facts specifically attested by that party contradict facts
20 specifically attested by the moving party. The nonmoving party may not merely state that it will
21 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
22 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
23 Conclusory, non specific statements in affidavits are not sufficient, and “missing facts” will not
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1 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

2 DISCUSSION

3 **1. Claims Under 42 U.S.C. § 1983**

4 In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that the conduct
5 complained of was committed by a person acting under color of state law, and that the conduct
6 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the
7 United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels*
8 *v. Williams*, 474 U.S. 327 (1986); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985),
9 *cert. denied*, 478 U.S. 1020 (1986). A person is “seized” in violation of the Fourth Amendment
10 if he or she is the victim of unlawful, objectively unreasonable force by law enforcement.

11 *Graham v. Connor*, 490 U.S. 386, 395 (1989). In this case, the parties do not dispute that the
12 officers acted under color of law, but they dispute (a) whether Officer Dennis’ use of force was
13 objectively unreasonable, and (b) whether the City of Sequim “ratified” Officer Dennis’ actions,
14 incurring municipal liability under *Monell*.

15 *a. Use of Force*

16 According to Defendant, the Court should grant summary judgment against Plaintiff
17 because Officer Dennis utilized constitutionally acceptable force. Dkt. 14, at 4-7. Defendant
18 argues that facts show that Officer Dennis’ use of force was necessary for Officer Dennis to
19 defend himself from Plaintiff’s resisting and escalating behavior. *Id.*, at 6. Furthermore,
20 Defendant’s expert witness, Thomas Ovens, Sergeant with Seattle Police Department, also
21 concluded that Officer Dennis used reasonable force, an opinion that, Defendant contends,
22 Plaintiff has not rebutted. *Id.*, at 5.

23 Whether use of force by law enforcement is constitutionally-permissible depends on
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1 whether it is objectively reasonable, a fact-intensive inquiry that balances the nature and quality
2 of the intrusion against the government’s countervailing interests, such as officer safety or
3 investigation. *Graham*, at 396. Not every push or shove violates the Fourth Amendment. *Id.*
4 Instead, whether an officer used reasonable force “must be judged from the perspective of a
5 reasonable officer on the scene, rather than with 20/20 vision of hindsight,” because officers
6 must often “make split-second judgments.” *Id.* The subjective intent of the officer is
7 inconsequential, so the key question is whether the officer’s actions are objectively reasonable
8 “in light of the facts and circumstances confronting them, without regard to their underlying
9 intent or motivation.” *Id.*, at 397.

10 In this case, the Court cannot find that there is no issue of material fact as to Officer
11 Dennis’ use of force. While both sides embellish what the cell phone and surveillance videos
12 actually show, it is clear that reasonable minds may differ as to the reasonableness of Officer
13 Dennis’ actions. The Court’s caution in determining whether Officer Dennis used excessive
14 force is especially warranted on the facts in this case, because the Ninth Circuit has “often held
15 that in police misconduct cases, summary judgment should only be granted ‘sparingly’ because
16 such cases often turn on credibility determinations by a jury. *Espinosa v. City & Cnty. of San*
17 *Francisco*, 598 F.3d 528, 537 (9th Cir. 2010). While the videos will no doubt assist the jury’s
18 credibility determination, the videos are limited evidence; they lack sound, color, and
19 perspective. They are not entirely conclusive, as the parties suggest. Defendant’s motion on
20 these grounds should be denied.

21 *b. Municipal Liability under Monell*

22 In order to set forth a claim against a municipality under 42 U.S.C. § 1983, a plaintiff
23 must show that the defendant’s employees or agents acted through an official custom, pattern or
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1 | policy that permits deliberate indifference to, or violates, the plaintiff’s civil rights; or that the
2 | entity ratified the unlawful conduct. *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-
3 | 91 (1978); *Larez v. City of Los Angeles*, 946 F.2d 630, 646-47 (9th Cir. 1991)). “Official
4 | municipal policy includes the decisions of a government's lawmakers, the acts of its
5 | policymaking officials, and practices so persistent and widespread as to practically have the force
6 | of law.” *Connick v. Thompson*, 131 S.Ct. 1350, 1359 (2011).

7 | “A single constitutional deprivation ordinarily is insufficient to establish a longstanding
8 | practice or custom.” *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999). A local government
9 | may be held liable under § 1983 for a single incident “when the individual who committed the
10 | constitutional tort was an official with final policy-making authority or such an official ratified a
11 | subordinate's unconstitutional decision or action and the basis for it.” *Clouthier v. Cnty. of*
12 | *Contra Costa*, 591 F.3d 1232, 1250 (9th Cir. 2010) (*internal quotation marks and citations*
13 | *omitted*).

14 | Defendant’s motion for summary judgment on the federal constitutional claim for
15 | violation of Plaintiff’s Fourth Amendment rights, brought pursuant to 42 U.S.C. § 1983 and
16 | under *Monell* (Dkt. 14) should be denied. There is sufficient evidence to show that Chief
17 | Dickinson is a policymaker and there are issues of fact on whether he ratified the officer’s
18 | conduct.

19 | i. Chief Dickinson as a Policymaker

20 | “Whether an official has final policymaking authority is a question for the court to decide
21 | based on state law.” *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999).

22 | The City argues that it is a “council-manager, non charter code, city” and all “legislative
23 | authority is vested in the City Council.” Dkt. 14, at 8 (*citing* RCW 35A.13.230). It argues that
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1 under RCW 35A.13.080, the City Manager has general supervision over the administrative
2 affairs of the City. *Id.* It argues, accordingly, that Police Chief Dickinson is not a “policy
3 maker.” *Id.*

4 “Authority to make municipal policy may be delegated by an official who possesses such
5 authority” however. *Christie* at 1236. In deciding whether the official in question possess final
6 authority to establish municipal policy with respect to the challenged action, “courts consider
7 whether the official’s discretionary decision is constrained by policies not of that official's
8 making and whether the official’s decision is subject to review by the municipality's authorized
9 policymakers.” *Id.*, at 1236-37.

10 Chief Dickinson testified that when it comes to police use-of-force polices, he “puts them
11 into operation, . . . determine[s] whether the ones sent to [them] are appropriate for [them] and
12 [he] place[s] them out as a directive for the officers to follow.” Dkt. 22-1, at 5. Chief Dickinson
13 states that neither the City Council nor the City Manager writes or approves police policies. *Id.*
14 Based on that testimony, it appears that his decisions on use-of-force are not “constrained by
15 polices” made by others. *Christie* at 1236. The City points out that Chief Dickinson also
16 testified that his decisions are subject to review. Dkt. 24. Chief Dickinson testified that
17 generally, “anything I do can get reviewed by the City Manager; so if they appeal any of my
18 decisions that’s where it goes.” Dkt. 22-1, at 4. He agreed that he is the “policy-maker on police
19 matters” generally, “recognizing that [he] can be overridden.” Dkt. 25, at 6. However, he also
20 testified that he ultimately decides whether or not to hire an officer, what training is appropriate,
21 and whether an officer will receive counseling. Dkt. 22-1, at 5. When asked specifically if his
22 decisions have been overridden, he stated, “[n]ot on an operational matter, but they will do things
23 like reduce my budget and take staffing away and decide which programs we will or will not
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1 operate within the Department.” Dkt. 25, at 6. Chief Dickinson testified that the City Council
2 determines “what kinds of activities we can or cannot carry out for them or for the community,”
3 like, for example, “[w]hether we have a police officer working in schools and whether we do or
4 do not do traffic enforcement.” *Id.* Though a close question, under the second prong of the test,
5 then, his decision on use-of-force issues are not “subject to review by the municipality’s
6 authorized policymakers,” *Christie* at 1237, and so the second prong is met. There is at least an
7 issue of fact as to whether Chief Dickinson is a policymaker for purposes of *Monell* liability here
8 regarding the use-of-force.

9 ii. Ratification

10 There are issues of fact as to whether Chief Dickinson “ratified” the conduct of the
11 officer in a manner required for liability under *Monell*.

12 If an authorized policymaker approves “a subordinate's decision and the basis for it, their
13 ratification would be chargeable to the municipality because their decision is final.” *Clouthier*,
14 at 1250. (*internal quotation marks and citations omitted*). “A local government can be held
15 liable under § 1983 only where a deliberate choice to follow a course of action is made from
16 among various alternatives by the official or officials responsible for establishing final policy
17 with respect to the subject matter in question.” *Id.* (*internal quotation marks and citations*
18 *omitted*). Accordingly, there must “be evidence of a conscious, affirmative choice on the part of
19 the authorized policymaker.” *Id.*

20 Chief Dickinson wrote a letter which acknowledged that “the event did occur, but [] the
21 officer’s actions . . . were consistent with their training, the Department’s policies, and the Laws
22 of the State of Washington.” Dkt. 23, at 10-12. (The Court notes that the precise training,
23 polices, and laws were not fully provided and /or identified for the record). A “rational juror
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1 | could infer that [the policymaker’s] acts showed affirmative agreement with the [officer’s]
2 | actions,” here so there are at least issues of fact with respect to ratification. *Christie*, at 1240.

3 | The City maintains that Chief Dickinson would have to be aware that the conduct was
4 | unconstitutional in order to be said to have ratified it, the City fails to point to any authority that
5 | supports that proposition. It cannot reasonably be said that Chief Dickinson was unaware that he
6 | was reviewing the incident to determine whether the officer’s violated Plaintiff’s Fourth
7 | Amendment rights regarding use of force. Further, the City argues in its Reply that there must
8 | be a showing that Chief Dickinson acted with deliberate indifference to the officer’s alleged
9 | constitutional violations. Dkt. 24. The City appears to conflate the deliberate indifference basis
10 | for *Monell* liability with the ratification basis for *Monell* liability, which is asserted here. In a
11 | deliberate indifference basis for *Monell* liability, the policymaker’s deliberate indifference causes
12 | or leads to the subordinate’s violation of constitutional rights. *Christie*, at 1240. Plaintiff is
13 | asserting a claim for ratification after the violation.

14 | Defendant’s motion for summary judgment on the federal constitutional claim for violation
15 | of Plaintiff’s Fourth Amendment rights, brought pursuant to 42 U.S.C. § 1983 and under *Monell*
16 | (Dkt. 14) should be denied.

17 | **2. State Law Claims**

18 | According to Defendant, Plaintiff’s state law claims of Assault and Battery should be
19 | dismissed because officers were privileged to use force against Plaintiff. Dkt. 14, at 10, 11. In
20 | raising the defense of privilege, Defendant cites to RCW 10.21.050, which provides that “If after
21 | notice of an intention to arrest [a person], he or she either flees or forcibly resists, the officer may
22 | use all necessary force to effect the arrest[.]” Defendant correctly points out that liability
23 | attaches at the point where an officer exceeds the force objectively reasonable under the
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1 | circumstances. *Id.* at 11. However, the precise moment, if any, that Officer Dennis' use of force
2 | was objectively unreasonable is an issue of material fact to be resolved a jury. Moreover, the
3 | same issue of fact is at issue in Plaintiff's § 1983 claim, including whether Plaintiff resisted
4 | arrest. Defendant's motion for summary judgment on Plaintiff's state law claims should be
5 | denied.

6 | **3. Admissibility of Sergeant Ovens' Expert Testimony**

7 | Plaintiff moves to strike Sergeant Ovens' testimony, arguing that it draws inferences in favor
8 | of the police. Dkt. 23. For purposes of this motion, that motion should be denied. Plaintiff's
9 | testimony raises issues of fact countering Sergeant Ovens' opinions. Nothing in the denial of
10 | this motion, however, shall preclude the Plaintiff, if he so wishes, from renewing the motion at a
11 | later date. The denial of this motion to strike should not be read as a finding that Sergeant
12 | Ovens' opinions are admissible at trial.

13 | **ORDER**

14 | Therefore, it is hereby **ORDERED** that:

- 15 | • Defendant's Motion for Summary Judgment (Dkt. 14) is **DENIED**, and
16 | • Plaintiff's Motion to Strike (Dkt. 23) is **DENIED**.

17 | The Clerk is directed to send uncertified copies of this Order to all counsel of record and
18 | to any party appearing *pro se* at said party's last known address.

19 | Dated this 12th day of August, 2015.

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21 | **ROBERT J. BRYAN**
22 | United States District Judge