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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RENATA LYNN GARDNER,

Plaintiff,

v.

CITY OF LAKEWOOD, a Washington
Municipal Corporation; and DAVID
BUTTS and JANE DOE BUTTS,
husband and wife; and JOHN DOE
ESTES and JANE DOE ESTES, husband
and wife,

Defendants.

CASE NO. 3:16-cv-05121-RJB

ORDER ON DEFENDANTS'
JOINT MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL OF
ALL CLAIMS WITH PREJUDICE

THIS MATTER comes before the Court on Defendants' Joint Motion for Summary Judgment of Dismissal of All Claims with Prejudice. Dkt. 17. The Court has considered the pleadings filed in support of and in opposition to the motion and the file herein. Dkts. 30, 31, 35.

BACKGROUND

A. Facts.

This case stems from the interaction of three Lakewood Police Department officers, Officer David Butts, Sergeant Andy Estes, and Sergeant Eakes, with Plaintiff, Mrs. Renata Gardner, after a traffic stop. The incident was video recorded by a patrol car dash cam belonging

1 to Officer Butts (Dkt. 19, Ex. A) and was partially audio recorded by Mrs. Gardner (*see* Dkt. 18,
2 Ex. B).

3 (1) Officer declarations.

4 Officer Butts narrates the following sequence of events, according to his declaration. ON
5 January 31, 2014, at approximately 10:50pm, Officer Butts initiated a speed stop for a vehicle
6 traveling 52mph in a 35mph zone. Dkt. 21 at ¶8. After pulling the vehicle over, Officer Butts
7 approached the driver’s side of the vehicle and initiated conversation with the driver of the
8 vehicle, identified as Jabliani Gardner. Mrs. Gardner, his wife, was sitting in the passenger seat.
9 *Id.* at ¶10. An administrative check of Mr. Gardner’s driving record, based on information
10 provided to Officer Butts by Mr. Gardner, revealed a suspended license and several prior
11 convictions for driving with a suspended license. *Id.* at ¶9. An administrative check of the
12 vehicle, based on the license plate and make of the car, revealed the vehicle owner to be Darius
13 Bargans. *Id.*

14 Officer Butts explained to Mr. Gardner and Mrs. Gardner that the car was going to be
15 impounded. Dkt. 21 at ¶10. The “basis” or authority for Officer Butts to impound the car, he
16 states, is the Lakewood Code, LWC 10.28.010 *et seq.* *Id.* Mrs. Gardner moved from the
17 passenger seat to the driver’s seat. *Id.* Another officer, Sergeant Estes, arrived at the scene about
18 the same time as a tow truck.

19 Officer Butts and Sergeant Estes “told [Mrs. Gardner] if she did not exit the car, she
20 would be arrested for obstruction,” but Mrs. Gardner refused to exit the vehicle. *Id.* at ¶¶12, 13.
21 The officers used “de-escalation tactics,” including repeated verbal requests and commands, to
22 persuade Mrs. Gardner to get of the vehicle. *Id.* With “no alternative to using physical force to
23 achieve our law enforcement purpose, impoundment of the vehicle,” Officer Butts and Sergeant
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1 Estes told Mrs. Gardner she was under arrest and took physical control of Mrs. Gardner’s arms.
2 *Id.* With the help of a third officer, non-party Sergeant Eakes, the three officers moved Mrs.
3 Gardner out of the car to the ground, where they placed her in the prone position and in
4 handcuffs. *Id.* ¶¶13-16. Officer Butts relied on his training to use the “escort hold” and “hair
5 hold” to wrest Mrs. Gardner from the car. *Id.* at ¶16. Mrs. Gardner physically resisted arrest. *Id.*

6 The declaration of Sergeant Estes parallels, and does not contradict, the narration offered
7 by the declaration of Officer Butts. *See* Dkt. 22.

8 (2) Declaration of Defendants’ Expert, Thomas Ovens.

9 According to the declaration of Defendants’ expert, Thomas Ovens, Officer Butts had
10 probable cause to arrest Mrs. Gardner for Obstructing. Dkt. 20 at ¶16. Mr. Ovens has analyzed
11 the officers’ use of force on Mrs. Gardner, including their use of control tactics, and he has
12 concluded that the officers used reasonable force under the circumstances. *Id.* at ¶¶20-24.

13 (3) Audio recording and in-car video.

14 The audio recorded, transcribed, reads as follows:

15 Officer 1: “Hop out of the car real quick so we can get this done. You have three police
16 officers here that don’t need to be here anymore.”

17 Mrs. Gardner: “The law states . . . that if it’s my car [it] don’t have to get towed . . . Give
18 me my car. Give me my car. It is my car. I need to get to work. It is my car.”

19 Officer 2: “Come on. We’re not going to solve this right now.”

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21 Officer 1: “Your name could be all over the car—it doesn’t matter. We can still take the
22 car now.”

23 Mrs. Gardner: No, the law states that if it’s my car . . . it’s in the law. I can pull up the
24 RCW. . . The car shouldn’t have to be taken if the owner of the car is here . . This is my
car.”

Officer 2: That’s not the law.

1 Mrs. Gardner: It is the law.

2 ...

3 See Dkt. 18, Ex. B.

4 The in-car video provides footage of the incident from the vantage point of Officer Butts’
5 patrol car. Dkt. 19, Ex. A. At timestamp 23:23:05 (26:28), the officers approach the vehicle, with
6 Mrs. Gardner in the passenger seat, and at timestamp 23:25:49 (29:13), the officers removed her
7 from the vehicle and placed her in handcuffs.

8 (4) Statements by Plaintiff.

9 Plaintiff’s Response (Dkt. 31) is notarized and signed by Plaintiff under penalty of
10 perjury, and it sets out facts known personally to Plaintiff under the subtitle, “Affidavit of Renata
11 Gardner,” so the Court construes the relevant factual portions of Plaintiff’s Response like a
12 factual declaration. See Fed. R. Civ. P. 56(c)(4). Throughout Plaintiff’s Response, Plaintiff
13 appears to refer to herself as “Beneficiary,” and it is obvious that portions of the brief were lifted
14 from an inapplicable case. See, e.g., Dkt. 31 at p. 3.

15 Nonetheless, the pleading sets out facts known personally to Plaintiff, such as the harm
16 suffered. Plaintiff declares that she “suffered a serious scalp injury’s [sic] as well as a broken
17 wrist and lower leg lacerations.” Dkt. 31 at 2. Beyond the initial injuries, Plaintiff represents that
18 she has suffered emotional distress, as well as “permanent hair loss and employment of wages.”

19 *Id.* According to Plaintiff’s pleadings, Resisting Arrest charges were later dismissed by
20 Lakewood Municipal Court. *Id.*

21 **B. Claims.**

22 The Complaint alleges a state law claim for false imprisonment and two constitutional
23 civil rights violations, for excessive force and racial profiling. The Court previously granted
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1 Plaintiff's Motion to Dismiss Racial Profiling Claim. Dkts. 32, 40.

2 SUMMARY JUDGMENT STANDARD

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

17 The determination of the existence of a material fact is often a close question. The court
18 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
19 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
20 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
21 of the nonmoving party only when the facts specifically attested by that party contradict facts
22 specifically attested by the moving party. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on
23 *Anderson, supra*). Conclusory, non-specific statements in affidavits are not sufficient, and
24

1 “missing facts” will not be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871,
2 888-89 (1990).

3 DISCUSSION

4 **A. False Imprisonment claim.**

5 Under Washington law, to establish a claim for false imprisonment a plaintiff must show
6 that the defendant intentionally confined the plaintiff without justification. *Bender v. City of*
7 *Seattle*, 99 Wn.2d 582 (1983). The existence of probable cause that a crime has been or is being
8 committed “is a complete defense” to an action for false imprisonment. *McBride v. Walla Walla*
9 *County*, 95 Wn.App. 33, 38 (1999), citing *Hanson v. Snohomish*, 121 Wn.2d 552, 558, 563
10 (1993). *See also, Dunn v. Hyra*, 676 F.Supp. 2d 1172, 1195–96 (W.D. Wash. 2009). Probable
11 cause is a “reasonableness test, considering the time, place, and circumstances” in light of the
12 officer’s training and experience. *Id.* However, “[u]nless the evidence conclusively and without
13 contradiction establishes the lawfulness of the arrest, it is a question of fact for the jury to
14 determine whether an arresting officer acted with probable cause.” *Id.*, quoting *Gurno v. Town of*
15 *LaConner*, 65 Wn.App. 218, 223 (1992).

16 According to Defendants, Mrs. Gardner’s behavior gave the officers probable cause to
17 arrest for Obstructing. Dkt. 17 at 8, 9. *See* RCW 9A.76.020(1). Defendants point to Mrs.
18 Gardner’s refusal to exit the vehicle under circumstances where the officers: (1) had authority to
19 tow the vehicle and communicated their intent to do so; (2) requested repeatedly that Mrs.
20 Gardner exit the vehicle; (3) warned her that the failure to exit the vehicle was hindering their
21 ability to tow the vehicle and would be grounds for her arrest. *Id.* at 4, 5, 8, 9. Defendants’
22 Reply also argues that officers had probable cause for Resisting Arrest, “as evidenced by the
23 dash cam video.” Dkt. 35 at 7.

1 Upon review of the record, the Court must conclude that officers had probable cause to
2 arrest Mrs. Gardner for Obstructing. Under RCW 9A.76.020(1), “[a] person is guilty of
3 obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law
4 enforcement officer in the discharge of his or her official powers or duties.” The evidence
5 conclusively and without contradiction shows that officers had reason to believe that Mr.
6 Gardner had been driving with a suspended license in the third degree (or greater), and officers
7 were authorized under LWC 19.28.010(A), (B), and (C) to tow the car, therefore, towing the car
8 fell within their “discharge of . . . official powers or duties.” When Mrs. Gardner verbally and
9 physically refused to exit the vehicle, even if she subjectively had good reasons not to comply
10 with the officers’ instructions, her actions reasonably could be considered to “hinder, delay, or
11 obstruct” the officers’ ability to tow the vehicle. Therefore, Mrs. Gardner’s conduct would at
12 least give a reasonable officer under the circumstances probable cause for the crime of
13 Obstructing. Because probable cause is a complete defense to a false imprisonment claim,
14 summary judgment in favor of Defendants should be granted.

15 As an aside, the Court notes that if the sole basis for probable cause to arrest had been
16 Resisting Arrest, the fact that Lakewood Municipal Court dismissed Resisting Arrest charges
17 against Plaintiff may have given rise to an issue of material fact for this claim, but the Court need
18 not reach the issue because the officers had probable cause to arrest for Obstructing.

19 **B. Excessive Force claim.**

20 1. Officer liability.

21 Plaintiff has alleged that Defendants, including Officer Butts and Sergeant Estes, violated
22 her civil rights by subjecting Plaintiff to excessive force. Dkt. 6 at ¶¶XII, XIII. Objectively
23 unreasonable force by law enforcement is an “unlawful seizure” for Fourth Amendment
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1 purposes, giving rise to civil liability under 42 U.S.C. § 1983. *Graham v. Connor*, 490 U.S. 386,
2 395 (1989). The objective reasonableness of an officer’s use of force is a fact-intensive inquiry
3 that balances the nature and quality of the intrusion against the government’s countervailing
4 interests, such as officer safety or investigation. *Graham*, at 396. Not every push or shove
5 violates the Fourth Amendment, but whether an officer used reasonable force “must be judged
6 from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of
7 hindsight,” because officers must often “make split-second judgments.” *Id.* The subjective
8 intent of the officer is inconsequential. *Id.*

9 Even where officers use excessive force in violation of the constitution, they are immune
10 from civil liability if their conduct does not also violate clearly established law. *See Pearson v.*
11 *Callahan*, 555 U.S. 223, 231 (2009). In analyzing a qualified immunity, courts determine
12 consider whether a right has been violated, and whether that right was “clearly established” at the
13 time of the incident. *Saucier v. Katz*, 533 U.S. 194 (2001). To be “clearly established,” the law
14 must be sufficiently clear that a reasonable official would understand that his or her action
15 violates that right. *Id.* at 201. While courts must look to standards and precedent to determine
16 this prong, it is not necessary that a previous case have been decided on exactly the same facts.
17 *See McCarthy v. Barrett*, 804 F. Supp. 2d 1126, 1143–44 (W.D. Wash. 2011).

18 Defendants argue that “[t]he officers could not have used less force than they did, as
19 demonstrated by the video and the (unrebutted) declaration of expert Ovens.” Dkt. 35 at 7. *See*
20 *also*, Dkt. 17 at 9. Applying the *Graham* excessive force factors, Defendants argue, shows that
21 the officers’ conduct was objectively reasonable, especially when the officers were forced to
22 make split-second decisions and should be accorded the legal authority to use physical force.
23 Dkt. 17 at 9-11; Dkt. 35 at 9. Considering the *Saucier* qualified immunity factors, Defendants
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1 argue that because the officers used the least force possible, they did not violate a constitutional
2 right, and even if they did violate a constitutional right, that right was not clearly established.
3 Dkt. 17 at 15-18; Dkt. 35 at 7.

4 In view of the record construed in favor of Plaintiff, the nonmoving party, the Court
5 concludes that there is an issue of fact as to whether the officers, Officer Butts and Sergeant
6 Estes, used objectively unreasonable force against Mrs. Gardner in violation of the Fourth
7 Amendment. Plaintiff represents that she suffered a serious scalp injury, permanent hair loss, a
8 broken wrist, and leg lacerations, which in the aggregate point to issues of fact as to whether the
9 force used was excessive. The head injuries, for example, could lead a reasonable jury to
10 conclude that the hair hold, as applied to Mrs. Gardner, was an inappropriate—or improperly
11 utilized—technique in violation of the Fourth Amendment, especially under circumstances
12 where the partial audio recording reveals that Mrs. Gardner may have been shortchanged in her
13 opportunity to explain the law she thought applied, and where she was distressed at the risk of
14 losing her car and employment. There is also no record that, prior to refusing instructions to exit
15 the car, Mrs. Gardner disobeyed any requests by the officers, attempted to flee, or posed a safety
16 risk. *See Lal v. California*, 746 F.3d 1112, 1117 (9th Cir. 2014) (“the most important [*Graham*]
17 factor is whether the suspect posed an immediate threat to the safety of the officers or of
18 others”). There is an issue of fact as to whether officers used excessive force in violation of
19 Plaintiff’s Fourth Amendment rights.

20 A finding that there is an issue of material fact resolves “the first prong of the *Saucier* test
21 for establishing qualified immunity[,] [which] mirrors the substantive summary judgment
22 decision on the merits.” *McCarthy*, 804 F.2d at 1144, quoting *Sorrels v. McKee*, 290 F.3d 965,
23 969 (9th Cir. 2002) (internal quotations omitted). Resolving whether the officers are entitled to
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1 qualified immunity in this case therefore turns on the second prong, which considers whether the
2 conduct violated clearly established law.

3 The Court also concludes that said conduct arguably violated clearly established law. In
4 the context of excessive force claims, when “there [is] no need for force, [defendants’] use of
5 force [is] objectively unreasonable.” *P.B. v. Koch*, 96 F.3d 1298, 1303 (9th Cir. 1996). From a
6 careful review of the in-car video and partial audio recording, it is not clear that *any* force was
7 necessary, e.g., if the officers had verbally reasoned with Mrs. Gardner for more than two
8 minutes. But even if force was reasonable and necessary to remove Mrs. Gardner from the
9 vehicle, contrary to Defendants’ urging, the in-car video does *not* clearly establish that the force
10 used was reasonable. If the force resulted in a broken wrist, leg lacerations and hair loss, that
11 evidence would indicate excessive force. Once outside of the vehicle, it is not clear that Mrs.
12 Gardner needed to be taken to the ground and handcuffed face-down in the prone position, when
13 she was not a flight risk and did pose a safety threat, and she had been standing, surrounded by
14 three officers, with her hands physically restrained by an officer on either side. The officers are
15 not entitled to qualified immunity.

16 Because there is a genuine issue of material fact as to the whether the officers used
17 excessive force, and qualified immunity is not warranted, summary judgment as to Officer Butts
18 and Sergeant Estes should be denied.

19 2. Municipal liability.

20 In order to set forth a claim against a municipality, the plaintiff must show that the
21 defendant’s employees or agents acted through an official custom, pattern or policy that permits
22 deliberate indifference to, or violates, the plaintiff’s civil rights; or that the entity ratified the
23 unlawful conduct. *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978); *Larez v.*

1 | *City of Los Angeles*, 946 F.2d 630, 646-47 (9th Cir. 1991).

2 | Defendants contend that “the only claims . . . are for respondent [*sic*] superior liability,”
3 | without *Monell* liability either pled or defended by Plaintiff. Dkt. 17 at 18; Dkt. 35 at 9. The
4 | Court concurs. Other than the allegation that “defendants Butts and Estes, as agents of Defendant
5 | City of Lakewood” used excessive force, Dkt. 6 at ¶XII, Plaintiff has offered no support for any
6 | theory of municipal liability, nor is any theory immediately obvious from the record submitted
7 | by the parties. Summary judgment in favor of Defendants should be granted as to Defendant City
8 | of Lakewood.

9 | * * *

10 | Therefore, it is HEREBY ORDERED that Defendants’ Joint Motion for Summary
11 | Judgment of Dismissal of All Claims with Prejudice (Dkt. 17) is GRANTED IN PART and
12 | DENIED IN PART as follows:

- 13 | ▪ State law claim for False Imprisonment: Granted as to all defendants. This claim
14 | is dismissed.
- 15 | ▪ Civil rights claim for excessive force: Granted as to Defendant City of Lakewood.
16 | Defendant City of Lakewood is dismissed. The motion is otherwise denied.

17 | IT IS SO ORDERED.

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

20 | Dated this 28th day of February, 2017.

21 | 

22 | ROBERT J. BRYAN
23 | United States District Judge