APPENDIX A

Filed: May 2, 2019

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROXANNE TORRES,

Plaintiff - Appellant,

v.

JANICE MADRID;
RICHARD WILLIAMSON,

Defendants - Appellees.

No. 18-2134
(D.C. No. 1:16-CV-01163-LF-KK)
(D. N.M.)

ORDER AND JUDGMENT[1]

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[1] After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its

Before **BRISCOE, McKAY**, and **LUCERO**, Circuit Judges.

In this excessive-force case, Roxanne Torres appeals from a district court order that granted the defendants' motion for summary judgment on the basis of qualified immunity. Exercising jurisdiction under 28 U.S.C. §1291, we affirm.

BACKGROUND

Early in the morning on July 15, 2014, New Mexico State Police officers went to an apartment complex in Albuquerque to arrest a woman, Kayenta Jackson, who was "involved with an organized crime ring." Aplt. App. at 120. The officers saw two individuals standing in front of the woman's apartment next to a Toyota FJ Cruiser. The Cruiser was backed into a parking spot, with cars parked on both sides of it. The officers, who were wearing tactical vests with police markings, decided to make contact with the two individuals in case one was the subject of their arrest warrant.

As the officers approached the Cruiser, one of the individuals ran into the apartment, while the other individual, Torres, got inside the Cruiser and started the engine. At the time, Torres was "trip[ping] … out"

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persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

from having used meth "[f]or a couple of days." *Id.* at 108.

Officer Richard Williamson approached the Cruiser's closed driver-side window and told Torres several times, "Show me your hands," as he perceived Torres was making "furtive movements … that [he] couldn't really see because of the [Cruiser's] tint[ed]" windows. *Id.* at 124 (internal quotation marks omitted). Officer Janice Madrid took up a position near the Cruiser's driver-side front tire. She could not see who the driver was, but she perceived the driver was making "aggressive movements inside the vehicle." *Id.* at 115.

According to Torres, she did not know that Williamson and Madrid were police officers, and she could not hear anything they said. But when she "heard the flicker of the car door" handle, she "freak[ed] out" and "put the car into drive," thinking she was being carjacked. *Id.* at 205.

When Torres put the car in drive, Officer Williamson brandished his firearm. At some point, Officer Madrid drew her firearm as well. Torres testified that she "stepped on the gas … to get away," and the officers "shot as soon as the [Cruiser] creeped a little inch or two." *Id.* at 206. Officer Madrid testified that the Cruiser "drove at [her]" and she fired "at the driver through the windshield" "to stop the driver from running [her] over." *Id.* at 114. Officer Williamson testified that he shot at the driver because he feared being "crush[ed]" between the Cruiser and the neighboring

car, as well as "to stop the action of [the Cruiser] going towards [Officer] Madrid." *Id*. at 125.

Two bullets struck Torres. She continued forward, however, driving over a curb, through some landscaping, and onto a street. After colliding with another vehicle, she stopped in a parking lot, exited the Cruiser, laid down on the ground, and attempted to "surrender" to the "carjackers" (who she believed might be in pursuit). *Id*. at 208.

Torres "was [still] tripping out bad." *Id*. She asked a bystander to call police, but she did not want to wait around because she had an outstanding arrest warrant. So, she stole a Kia Soul that was left running while its driver loaded material into the trunk. Torres drove approximately 75 miles to Grants, New Mexico, and went to a hospital, where she identified herself as "Johannarae C. Olguin." *Id*. at 255. She was airlifted to a hospital in Albuquerque, properly identified, and arrested by police on July 16, 2014. She ultimately pled no contest to three crimes: (1) aggravated fleeing from a law-enforcement officer (Officer Williamson); (2) assault upon a police officer (Officer Madrid); and (3) unlawfully taking a motor vehicle.

In October 2016, Torres filed a civil-rights complaint in federal court against Officers Williamson and Madrid. She asserted one excessive-force claim against each officer, alleging that the "intentional discharge of a fire arm [sic] … exceeded the degree of force which a reasonable, prudent law enforcement officer would have applied." *Id*. at 15, 16. She also asserted a claim against each officer for conspiracy to

engage in excessive force, alleging that the officers had "formed a single plan through non-verbal communication … to use excessive force." *Id*. at 15, 16.

The district court construed Torres's complaint as asserting the excessive-force claims under the Fourth Amendment, and the court concluded that the officers were entitled to qualified immunity. It reasoned that the officers had not seized Torres at the time of the shooting, and without a seizure, there could be no Fourth Amendment violation.

DISCUSSION

I. Standards of Review

"We review the district court's summary judgment decision de novo, applying the same standards as the district court." *Punt v. Kelly Servs*., 862 F.3d 1040, 1046 (10th Cir. 2017). Summary judgment is required when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Ordinarily, once the moving party meets its initial burden of demonstrating the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine triable issue. *See Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013). But where, as here, a defendant seeks summary judgment on the basis of qualified immunity, our review is somewhat different.

"When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff, who must clear two hurdles in order to defeat the defendant's motion." *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009). First, "[t]he plaintiff must demonstrate on the facts alleged … that the defendant violated [her] constitutional or statutory rights." *Id*. While "we ordinarily accept the plaintiff's version of the facts," we do not do so if that version "is blatantly contradicted by the record, so that no reasonable jury could believe it." *Halley v. Huckaby*, 902 F.3d 1136, 1144 (10th Cir. 2018) (internal quotation marks omitted), *cert. denied*, 2019 WL 358389 (U.S. March 18, 2019) (No. 18-986). Second, the plaintiff must show "that the right was clearly established at the time of the alleged unlawful activity." *Riggins*, 572 F.3d at 1107. "If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment—showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law." *Nelson v. McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000) (internal quotation marks omitted).

As explained below, Torres's claims fail under the first prong of the qualified-immunity analysis.

II. Excessive Force

"We treat claims of excessive force as seizures subject to the Fourth Amendment's objective requirement for reasonableness." *Lindsey v. Hyler*, 918 F.3d 1109, 1113 (10th Cir. 2019) (internal quotation marks

omitted). Thus, "[t]o establish [her] claim, [Torres] … must show both that a seizure occurred and that the seizure was unreasonable." *Farrell v. Montoya*, 878 F.3d 933, 937 (10th Cir. 2017) (internal quotation marks omitted). Consequently, "[w]ithout a seizure, there can be no claim for excessive use of force" under the Fourth Amendment. *Id*. (internal quotation marks omitted).

We agree with the district court that Torres failed to show she was seized by the officers' use of force. Specifically, the officers fired their guns in response to Torres's movement of her vehicle. Despite being shot, Torres did not stop or otherwise submit to the officers' authority. Although she exited her vehicle in a parking lot some distance away and attempted to surrender, her intent was to give herself up to "car-jackers." Indeed, she testified that she did not want to wait around for police to arrive because she had an outstanding warrant for her arrest. She then stole a car and resumed her flight. She was not taken into custody until after she was airlifted back to a hospital in Albuquerque and identified by police.

These circumstances are governed by *Brooks v. Gaenzle*, 614 F.3d 1213, 1223-24 (10th Cir. 2010), where this court held that a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim. This is so, because "a seizure requires restraint of one's freedom of movement." *Id*. at 1219 (internal quotation marks omitted). Thus, an officer's intentional shooting of a suspect does not effect a seizure unless the "gunshot … terminate[s] [the suspect's] movement or otherwise

cause[s] the government to have physical control over him." *Id*. at 1224.

Here, the officers' use of deadly force against Torres failed to "control [her] ability to evade capture or control." *Id*. at 1223 (internal quotation marks omitted). Because Torres managed to elude police for at least a full day after being shot, there is no genuine issue of material fact as to whether she was seized when Officers Williamson and Madrid fired their weapons into her vehicle. *See id*. (rejecting plaintiff's contention that "his shooting alone constitute[d] a seizure," given that "he continued to flee without the deputies' acquisition of physical control" and "remained at large for days"); *see also Farrell*, 878 F.3d at 939 (concluding that plaintiffs were not seized when an officer fired his gun at them, because they continued fleeing for several minutes). Without a seizure, Torres's excessive-force claims (and the derivative conspiracy claims) fail as a matter of law.[2]

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[2] Torres argues that Officers Williamson and Madrid cannot dispute whether she was seized because they did not plead lack of seizure as an affirmative defense. But seizure is not an affirmative defense, it is an element of a Fourth Amendment excessive-force claim. *See Farrell*, 878 F.3d at 937.

Torres also complains that the officers did not argue lack of seizure until their reply brief in support of summary judgment. But in the seven months between the filing of the officers' reply brief and the district court's grant of summary judgment, Torres neither sought to file a supplemental opposition to address the officers' legal argument nor requested leave to marshal "facts essential to justify [her] opposition," Fed. R. Civ. P. 56(d).

We, therefore, determine that the district court properly entered summary judgment in favor of Officers Williamson and Madrid on the basis of qualified immunity.

CONCLUSION

The judgment of the district court is affirmed.

Entered for the Court

Monroe G. McKay Circuit Judge

Finally, to the extent Torres summarily asserts that a seizure occurred because her "vehicle was shot up and rendered undrivable," Aplt. Opening Br. at 22, we do "not consider issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation," *Armstrong v. Arcanum Grp., Inc.*, 897 F.3d 1283, 1291 (10th Cir. 2018) (ellipsis and internal quotation marks omitted).

APPENDIX B

Filed August 30, 2018

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ROXANNE TORRES,

Plaintiff,

v. 1:16-cv-01163-LF-KK

JANICE MADRID et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on defendants Janice Madrid and Richard Williamson's Amended Motion for Summary Judgment on the Basis of Qualified Immunity and Other Grounds. Doc. 65. Plaintiff Roxanne Torres opposes the motion. Doc. 76. For the following reasons, the Court GRANTS defendants' motion.

I. Undisputed Material Facts

On Tuesday morning, July 15, 2014, New Mexico State Police officers went to an apartment complex in Albuquerque to serve an arrest warrant on a person named Kayenta Jackson. The officers believed Ms. Jackson was a resident of apartment number 22. The arrest warrant for Ms. Jackson was for white collar

crimes, but she also was suspected of having been involved in drug trafficking, murder, and other violent crimes. Defendants Janice Madrid and Richard Williamson were two of the police officers involved.

Officer Madrid and Officer Williamson parked their unmarked patrol vehicle near a 2010 black and white Toyota FJ Cruiser. Plaintiff Roxanne Torres was in the Toyota FJ Cruiser with her motor running. She had backed into her parking spot, and there were cars on either side of her. Officers Madrid and Williamson were wearing tactical vests and dark clothing. Their clothing clearly identified them as police officers, but Ms. Torres testified that she is unable to read and write because of a learning disability.

Officers Madrid and Williamson attempted to open the locked door of the Toyota FJ Cruiser in which Ms. Torres was sitting. Ms. Torres saw one person standing at her driver's side window, and another at the front tire of her car. Although the officers repeatedly shouted, "Open the door!," Ms. Torres claimed she could not hear them because her windows were rolled up. Ms. Torres thought she was the victim of an attempted car-jacking, so she drove forward. Both officers testified that they believed Ms. Torres was going to hit them with her car, and that they were in fear for their lives. Ms. Torres claims that neither officer was in harm's way. Both officers fired their duty weapons at Ms. Torres. Ms. Torres did not stop.

Instead, Ms. Torres continued to drive forward, over a curb and landscaping, and she then left the area. She drove to a commercial area, lost control of

her car, and stole a different car that had been left running in a parking lot. She then drove to Grants, New Mexico. Ms. Torres first noticed that she had been shot when she got to Grants, and she went to the hospital for treatment. She stayed in the hospital one day.

The following day, on July 16, 2014, Ms. Torres was charged by criminal complaint with two counts of aggravated assault with a deadly weapon upon a peace officer, and one count of the unlawful taking of a motor vehicle. Doc. 65-5. She was taken into custody the same day. Doc. 65-6 at 3. She was indicted on these charges two weeks later, on July 30, 2014. Doc. 65-6. Count 1 of the indictment identified Officer Williamson as the victim, and count 2 of the indictment identified Officer Madrid as the victim. *Id*. On March 31, 2015, Ms. Torres pled no contest to aggravated fleeing from a law enforcement officer, in violation of N.M. STAT. ANN. § 30-22-1.1, a lesser included offense of count 1 of the indictment. Doc. 65-7 at 1. She also pled no contest to assault upon a peace officer, in violation of N.M. STAT. ANN. § 30-22-21, a lesser included offense of count 2 of the indictment. *Id*. In addition, she pled no contest to count 3 of the indictment, which was the unlawful taking of a vehicle charge. *Id*.

II. The Complaint

In counts I and III of her complaint, Ms. Torres alleges that Officer Madrid and Officer Williamson, respectively, through the intentional discharge of their weapons, "exceeded the degree of force which a

reasonable, prudent law enforcement officer would have applied under these same circumstances." Doc. 1 ¶¶ 14, 21. In counts II and IV,[1] Ms. Torres alleges that Officers Madrid and Williamson conspired together to use excessive force against her. *Id.* ¶¶ 17, 24. In other words, all of Ms. Torres's claims are excessive force claims under the Fourth Amendment.

III. Discussion

The defendants argue that they are entitled to qualified immunity on all of Ms. Torres's excessive force claims not only because the officers' use of deadly force was reasonable under the circumstances, but also because Ms. Torres's claims are barred under the *Heck*[2] doctrine. Doc. 65 at 9-18. They further contend that her excessive force claims fail because she was never seized, and without a seizure, there can be no Fourth Amendment excessive force claim. Doc. 82 at 10-11. Because I agree that the undisputed material facts show that Ms. Torres was never seized, she cannot prevail on her claims that the officers' used

[1] The complaint mistakenly identifies count IV as count II. Doc. 1 at 5.

[2] In *Heck v. Humphrey*, the Supreme Court held that a plaintiff cannot bring a § 1983 civil rights claim based on actions whose unlawfulness would render an existing criminal conviction invalid. 512 U.S. 477, 486-87 (1994). If, on the other hand, a court determines that a plaintiff's civil rights claim, even if successful, would not necessarily demonstrate the invalidity of a criminal conviction, the action may proceed absent some other bar to the suit. *Id.* at 487.

excessive force in effecting a seizure. I therefore grant defendants' motion.

A. Legal Standard for Summary Judgment Motions

Summary judgment will be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party" on the issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*.

The movant bears the initial burden of establishing that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). "[T]he movant need not negate the non-movant's claim, but need only point to an absence of evidence to support the non-movant's claim." *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010) (quoting *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1125 (10th Cir. 2000)). If this burden is met, the non-movant must come forward with specific facts, supported by admissible evidence, which demonstrate the presence of a genuine issue for trial. *Celotex*, 477 U.S. at 324. The non-moving party cannot rely upon conclusory allegations or contentions of counsel to defeat summary judgment. *See Pueblo*

Neighborhood Health Ctrs., Inc. v. Losavio, 847 F.2d 642, 649 (10th Cir. 1988). Rather, the non-movant has a responsibility to "go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to [his] case in order to survive summary judgment." *Johnson v. Mullin,* 422 F.3d 1184, 1187 (10th Cir. 2005) (alteration in original) (internal quotation marks omitted).

At the summary judgment stage, the Court must view the facts and draw all reasonable inferences in the light most favorable to the non-movant. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The Court's function "is not … to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. There is no issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id*. Summary judgment may be granted where "the evidence is merely colorable, or is not significantly probative." *Id*. at 249-50 (internal citations omitted).

B. Section 1983 Claims and Qualified Immunity Generally

Section 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. To establish a claim under § 1983, a plaintiff must prove that a defendant acted under color of state law to deprive the plaintiff of a right, privilege, or immunity secured by the Constitution or the laws of the United States. *West v. Atkins*, 487 U.S. 42, 48 (1988).

Qualified immunity shields government officials performing discretionary functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would be aware. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under the Tenth Circuit's two-part test for evaluating qualified immunity, the plaintiff must show (1) that the defendant's conduct violated a constitutional or statutory right, and (2) that the law governing the conduct was clearly established when the alleged violation occurred. *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1255 (10th Cir. 1998); *accord Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 516 (10th Cir. 1998). For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Unless both prongs are satisfied, the defendant will not be required to "engage in expensive and time consuming preparation to defend the suit on its merits." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

C. Section 1983 Excessive Force Claims

Claims of excessive force under § 1983 fall within the Fourth Amendment. *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008) (An excessive force claim is treated as a seizure subject to the Fourth Amendment's reasonableness requirement.). The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …." U.S. CONST. amend. IV. "The Fourth Amendment covers only 'searches and seizures.'" *City of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). Ms. Torres makes no allegation that APD officers searched her. Thus, the issue in this case is whether APD officers seized Ms. Torres within the meaning of the Fourth Amendment.

To prove an excessive force claim under the Fourth Amendment, Ms. Torres must prove that the force used to effect a seizure was objectively unreasonable under the totality of the circumstances. *Estate of Larsen*, 511 F.3d at 1259. To prevail, Ms. Torres first "must show … that a 'seizure' occurred …." *Childress v. City of Arapaho*, 210 F.3d 1154, 1156 (10th Cir. 2000). A seizure requires the "intentional acquisition of physical control" of the person being seized. *Id*. "[W]ithout a seizure, there can be no claim for excessive use of force." *Jones v. Norton*, 809 F.3d 564, 575 (10th Cir. 2015).

The Tenth Circuit's decision in *Farrell v. Montoya*, 878 F.3d 933 (10th Cir. 2017) controls the outcome of this case. In that case, Ms. Farrell was driving

a minivan with her five children inside when a New Mexico state police officer pulled her over for speeding near Taos, New Mexico. *Id.* at 934. The officer explained to Ms. Farrell that she could either pay a fine or go to court within 30 days, but that she needed to decide which route she wanted to take. *Id.* at 935. Ms. Farrell refused to make a decision, and as the officer walked back to his car to inform the dispatcher what was happening, Ms. Farrell drove away. *Id.* The officer followed Ms. Farrell with his sirens on, and Ms. Farrell once again pulled over. *Id.* The officer went to the minivan, opened the door, and ordered Ms. Farrell to get out. *Id.* The children started screaming, and a child got out of the minivan. *Id.* The officer drew his Taser and pointed it at the child. *Id.* Ms. Farrell thought the Taser was a gun. *Id.* The child got back in the minivan, but Ms. Farrell refused to comply with the officer's order to get out of the van because she was worried that the officer would not be peaceful. *Id.* The officer called for backup and continued to try to get Ms. Farrell to comply with his orders. *Id.* At one point, Ms. Farrell got out of the minivan to speak to the officer, but she again got back in, and again refused to comply with the officer's commands. *Id.* As two other officers responded to the scene, the situation became more chaotic. *See id.* at 935-36. The original officer pointed his Taser inside the van and at one of the children, and eventually pulled out his baton and yelled, "Get them out!" *Id.* A second officer drew his gun and shouted, "Open the fucking door!" *Id.* The third officer also drew his gun, and the officer with the baton smashed the rear passenger window as the officers attempted to get the Farrells to comply with their commands. *Id.* at 936.

Eventually, Ms. Farrell again drove away, and one of the officers fired three shots toward the minivan. *Id*. No bullet hit either the minivan or its occupants; the officer testified that he was aiming at the left rear tire. *Id*. The van neither slowed nor stopped, and each of the three officers returned to their cars and chased the minivan at high speeds. *Id*. The Farrells claimed that they called 911 during the chase and tried to find a police station to pull into because they were afraid that the three officers chasing them would harm or kill them. *Id*. After about five minutes, the Farrells drove into a hotel parking lot and surrendered. *Id*.

The Farrells filed suit and claimed that the officer who fired shots at the minivan violated their Fourth Amendment rights by using excessive force against them. *Id*. The Tenth Circuit held that because the shots did not result in a seizure, there could be no excessive force claim. *Id*. at 937. The court explained:

> In short, when [the officer] fired at the van, the Farrells were fleeing. Though they had been seized moments before, that seizure ended when they no longer submitted to the officers' authority. And [the officer]'s shots themselves did not effect a seizure because the van continued its departure. The Farrells' alleged intent to submit when they could reach a police station was irrelevant because their conduct—the flight from the officers—did not manifest submission. As there was no seizure, there could be no unreasonable seizure, even if [the officer] was using deadly

> force. The Farrells' claims against [the officer] fail for lack of any violation of the Fourth Amendment.

Id. at 939. The court held that the officer was entitled to summary judgment in his favor on the Farrells' excessive force claims. *Id*.

Here, there is no dispute that Ms. Torres did not stop when the officers fired their guns at her. In fact, she never stopped in response to police action. She drove to Grants—approximately 75 miles from Albuquerque—before she stopped. And she stopped then only because she noticed that she had been shot and needed medical treatment. Because the officers did not stop Ms. Torres by shooting at her, there was no seizure, and she cannot prevail on her claims of excessive force. Because there was no seizure, there was no violation of Ms. Torres' Fourth Amendment rights. Defendants are entitled to summary judgment in their favor on all four of Ms. Torres' excessive force claims against them.

IV. Conclusion

For the foregoing reasons, the Court GRANTS Defendants' Amended Motion for Summary Judgment on the Basis of Qualified Immunity and Other Grounds (Doc. 65). The Court dismisses this case with prejudice.

IT IS SO ORDERED.

/s/ Laura Fashing
Laura Fashing
United States Magistrate Judge

APPENDIX C

Filed: September 22, 2017

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ROXANNE TORRES,

Plaintiff,

v. 1:16-cv-01163-LF-KK

JANICE MADRID et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on defendants Janice Madrid and Richard Williamson's Motion to Dismiss or Motion for Judgment on the Pleadings, which was fully briefed on May 30, 2017. Docs. 32, 34, 36, 37. Defendants' motion is based on qualified immunity and the doctrine announced in *Heck v. Humphrey*, 512 U.S. 477 (1994), which held that a plaintiff cannot bring a § 1983 civil rights claim based on actions whose unlawfulness would render an existing criminal conviction invalid. *Id.* at 486-87. Because the information contained in the complaint—even when combined with the information in the plea and disposition agreement attached to defendants' motion—is insufficient to conclude that defendants are entitled to qualified immunity, or that the *Heck*

doctrine bars plaintiff Roxanne Torres's claims, the Court DENIES defendants' motion.

I. Relevant Facts

This case arises out of an incident that occurred in July, 2014. The facts are taken from the allegations in Ms. Torres's complaint, which the Court assumes are true for the purpose of this motion. On the morning of Tuesday, July 15, 2014, New Mexico State Police officers went to an apartment complex in Albuquerque to serve an arrest warrant on a person named Kayenta Jackson.

Doc. 1 ¶ 5. Defendants Janice Madrid and Richard Williamson[1] were two of the police officers involved. *See id.* ¶¶ 2, 3, 6, 7, 8, 10.

Officer Madrid and another officer parked their unmarked patrol vehicle in front of a 2010 black and white Toyota FJ Cruiser. *Id.* ¶ 6. Officers Madrid and Williamson were in tactical vests and dark clothing, which made it impossible for Ms. Torres to identify them as police officers. *See id.* ¶ 7.

Officers Madrid and Williamson attempted to open the locked door of the car in which Ms. Torres

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[1] Although the complaint does not specifically state that Officer Williamson was at the apartment complex, the complaint refers to "defendants" in paragraphs 7, 8 and 10. Because the only two defendants named in the complaint are Officers Madrid and Williamson, the Court assumes that all references to "defendants" in the complaint are to both Officer Madrid and Officer Williamson.

had been sleeping. *Id.* ¶ 8. (Although it is not clear from the complaint whether this car is the Toyota FJ Cruiser, the Court assumes it was based on the background information contained in the defendants' motion. *See* Doc. 32 at 2.) Ms. Torres thought she was the victim of an attempted car-jacking, so she attempted to leave the parking lot in her car (presumably the FJ Cruiser). Doc. 1 ¶ 8. Ms. Torres was not armed, and she did nothing to suggest she was armed or had any type of weapon. *Id.* ¶ 9. When Ms. Torres attempted to exit the parking lot, both Officer Madrid and Officer Williamson were standing beside her car, not in front of it. *Id.* Nonetheless, both officers drew their duty weapons and shot at Ms. Torres. *Id.* ¶ 10. Ms. Torres was hit twice in her back. *Id.* Her vehicle also was struck multiple times. *Id.* Ms. Torres managed to get to a hospital where she was treated for gunshot wounds to her back in addition to other injuries. *Id.* ¶ 11. These injuries caused Ms. Torres pain, suffering, disfiguration, and scarring, and will result in future medical expenses. *Id.* ¶ 10.

According to the plea and disposition agreement attached to defendants' motion (hereafter "plea agreement"), in March 2015, Ms. Torres pled no contest to aggravated fleeing from a law enforcement officer, in violation of N.M. STAT. ANN. § 30-22-1.1, and also to assault upon a peace officer, in violation of N.M. STAT. ANN. § 30-22-21. Doc. 32-1 at 1. The events that gave rise to these two charges took place "on or about the 15th day of July, 2014." *Id.* Neither the law enforcement officer nor the peace officer involved in either offense is identified in the plea agreement. *See id.*

II. The Complaint

In counts I and III of the complaint, Ms. Torres alleges that Officer Madrid and Officer Williamson, respectively, through the intentional discharge of their weapons, "exceeded the degree of force which a reasonable, prudent law enforcement officer would have applied under these same circumstances." *Id.* ¶¶ 14, 21. In counts II and IV,[2] Ms. Torres alleges that Officers Madrid and Williamson conspired together to use excessive force against her. *Id.* ¶¶ 17, 24.

III. Discussion

The defendants argue they are entitled to qualified immunity on all of Ms. Torres's excessive force claims under the *Heck* doctrine. Doc. 32 at 5-9. They contend that her March 2015 convictions for assault on a peace officer and aggravated fleeing bar her § 1983 claims because her claims, if successful, would render her convictions invalid. *Id.* Ms. Torres counters that the Court should not consider Ms. Torres's no-contest pleas, but even if it does, her convictions are not necessarily inconsistent with her excessive force claims. *See* Doc. 34 at 7-8, 13-15. Because I agree that Ms. Torres's convictions are not necessarily inconsistent with her excessive force claims, I deny defendants' motion.

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[2] The complaint mistakenly identifies count IV as count II. Doc. 1 at 5.

A. Motions to Dismiss Generally

"To withstand a motion to dismiss, a complaint must have enough allegations of fact, taken as true, 'to state a claim to relief that is plausible on its face.'" *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir .2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While "'a court must accept as true all of the allegations contained in a complaint,'" this rule does not apply to legal conclusions. *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[A] plaintiff must offer specific factual allegations to support each claim." *Id.* (citation omitted). A complaint survives only if it "states a plausible claim for relief." *Id.* (citation omitted).

"Generally, a court considers only the contents of the complaint when ruling on a 12(b)(6) motion." *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 (10th Cir. 2013). In determining whether to grant the motion, the Court must accept all the well-pleaded allegations of the complaint as true, even if doubtful in fact, and must construe the allegations in the light most favorable to the plaintiff. *Twombly*, 550 U.S. at 555; *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 556 and *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

B. Section 1983 Excessive Force Claims and Qualified Immunity Generally

Section 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. To establish a claim under § 1983, a plaintiff must allege that a defendant acted under color of state law to deprive the plaintiff of a right, privilege, or immunity secured by the Constitution or the laws of the United States. *West v. Atkins*, 487 U.S. 42, 48 (1988). An excessive force claim is treated as a seizure subject to the Fourth Amendment's reasonableness requirement. *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008). To state an excessive force claim under the Fourth Amendment, a plaintiff must allege that the force used to effect a seizure was objectively unreasonable under the totality of the circumstances. *Id.* The "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 1259 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). An officer may use deadly force

if a reasonable officer under similar circumstances would have had probable cause to believe that there was a threat of serious physical harm to the officer or someone else. *Id.* at 1260.

Qualified immunity shields government officials performing discretionary functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would be aware. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under the Tenth Circuit's two-part test for evaluating qualified immunity, the plaintiff must show (1) that the defendant's conduct violated a constitutional or statutory right, and (2) that the law governing the conduct was clearly established when the alleged violation occurred. *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1255 (10th Cir. 1998); *accord Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 516 (10th Cir. 1998). For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Unless both prongs are satisfied, the defendant will not be required to "engage in expensive and time consuming preparation to defend the suit on its merits." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

C. The *Heck* Doctrine and its Application to this Case

In *Heck*, the Supreme Court held that a plaintiff cannot bring a § 1983 civil rights claim based on actions whose unlawfulness would render an existing

criminal conviction invalid. 512 U.S. at 486-87. If, on the other hand, a court determines that a plaintiff's civil rights claim, even if successful, would not necessarily demonstrate the invalidity of a criminal conviction, the action may proceed absent some other bar to the suit. *Id.* at 487.

The defendants' sole argument for dismissing Ms. Torres's complaint is that if her excessive force claim is successful, it necessarily would invalidate her March 2015 convictions for assault on a peace officer and aggravated fleeing. *See* Doc. 32 at 5-9; Doc. 36 at 2-5. They urge the Court to dismiss Ms. Torres's complaint because, they say, Ms. Torres's "convictions conclusively establish that she willfully and carelessly drove her vehicle, that she endangered the life of another person after being told to stop, that the officers were in lawful discharge of their duties at the time, and that her actions caused a police officer to reasonably believe that a battery was imminent." Doc. 36 at 6. Thus, according to defendants, Officers Madrid and Williamson necessarily acted reasonably under the circumstances, and they therefore are entitled to qualified immunity.

The main problem with defendants' argument is that the Court only may consider the facts alleged in Ms. Torres's complaint in deciding defendants' motion. *See* FED. R. CIV. P. 12(d); *Berneike*, 708 F.3d at 1146. Even if the Court considers the plea agreement attached to defendants' motion, it is not evident, based solely on the pleadings and the plea agreement, that the unlawful actions attributed to Officers Madrid and Williamson in Ms. Torres's complaint

necessarily would render Ms. Torres's assault and aggravated fleeing convictions invalid.

As the Tenth Circuit explained in *Havens v. Johnson*, 783 F.3d 776, 782 (10th Cir. 2015)—a case on which defendants heavily rely—"[a]n excessive-force claim against an officer is not necessarily inconsistent with a conviction for assaulting the officer." A claim that an officer used too much force in response to an assault, or that the officer used force after the need for force disappeared, for example, would not invalidate an assault conviction. *Id.* To determine the effect of *Heck* on an excessive-force claim, the court must compare the plaintiff's allegations in the complaint to the plaintiff's prior criminal offense. *Id.* If the theory of the plaintiff's claim is inconsistent with the prior conviction, the excessive-force claim would be barred in its entirety. *Id.*

In this case, Ms. Torres's complaint does not mention her criminal convictions at all. *See* Doc. 1. Thus, although the parties disagree as to whether the court may consider the plea agreement attached to defendants' motion, even if the Court considers it, the information in the plea agreement does not make clear that Ms. Torres's claims are inconsistent with her convictions. Importantly, the plea agreement provides few details of the offenses that Ms. Torres committed. It does not disclose which officer Ms. Torres assaulted. It is unclear whether the officer Ms. Torres assaulted was, in fact, Officer Madrid, Officer Williamson, another officer at the apartment complex, or some other officer she encountered during a separate incident on or about July 15, 2014. *See* Doc. 32-1.

Likewise, the plea agreement does not disclose whether Ms. Torres fled from Officer Madrid, Officer Williamson, another officer at the scene, or some other officer she encountered later that day. *See id.* Although defendants make much of the fact that Ms. Torres's assault conviction establishes that the police officer whom she assaulted must have been assaulted while in the lawful discharge of his or her duties, *see* Doc. 32 at 6, the plea agreement does not establish that either Officer Madrid or Officer Williamson, or any other officer in their presence, was the officer whom Ms. Torres assaulted. *See* Doc. 32-1. Thus, Ms. Torres's claim that the officers shot at her for no lawful reason is not necessarily inconsistent with the information in the plea agreement about her assault conviction. Similarly, although Ms. Torres's conviction for aggravated fleeing may establish that she willfully and carelessly drove her vehicle in a manner that endangered the life of another person after being given a signal to stop, *see* Doc. 32 at 8, it is not evident from the plea agreement that either Officer Madrid or Officer Williamson shot at her in reaction to her aggravated fleeing. *See* Doc. 32-1. In short, the pleadings themselves, even when considered in conjunction with the plea agreement showing Ms. Torres's convictions, do not provide sufficient information for the Court to conclude that the *Heck* doctrine bars Ms. Torres's claims. The Court therefore will deny defendants' motion.

IV. Conclusion

For the foregoing reasons, the Court DENIES Defendants' Motion to Dismiss or Motion for Judgment

on the Pleadings on Plaintiff's Complaint on the Basis of Qualified Immunity and Other Grounds (Doc. 32).

IT IS SO ORDERED.

/s/ Laura Fashing
Laura Fashing
United States Magistrate Judge