APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-2181

Melanie Kelsay,
Plaintiff-Appellee,

v.

Matt Ernst, individually and in his official capacity,
Defendant-Appellant,

Jay Welch, individually and in his official capacity; City of Wymore, Nebraska; Russell Kirkpatrick, individually and in his official capacity; Matthew Bornmeier, individually and in his official capacity,
Defendants,

Appeal from United States District Court for the District of Nebraska - Lincoln

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Submitted: April 19, 2019
Filed: August 13, 2019

Before SMITH, Chief Judge, BEAM, LOKEN, COLLOTON, GRUENDER, BENTON, SHEPHERD, KELLY, ERICKSON, GRASZ, STRAS, and, KOBES, Circuit Judges, En Banc.

COLLOTON, Circuit Judge.

Melanie Kelsay sued sheriff's deputy Matt Ernst under 42 U.S.C. § 1983, alleging that Ernst used excessive force while arresting Kelsay. The district court denied Ernst's motion for summary judgment, and Ernst appeals on the ground that he is entitled to qualified immunity. We conclude that Ernst did not violate a clearly established right of Kelsay under the Fourth Amendment, so we reverse the order.

The question presented is whether Ernst is entitled to summary judgment, so while there are some disputes about the facts, we ultimately consider the evidence in the light most favorable to Kelsay. On May 29, 2014, Kelsay, her three children, and her friend Patrick Caslin went swimming at a public pool in Wymore, Nebraska. At one point, Caslin came up behind Kelsay like he was going to throw her in the pool, and she objected. Although Kelsay later explained that she and Caslin were "just playing around," some onlookers thought Caslin was assaulting her, and a pool employee contacted the police.

As Kelsay and her party left the pool complex, they encountered Wymore Police Chief Russell Kirkpatrick and Officer Matthew Bornmeier. Kirkpatrick informed Caslin that he was under arrest for domestic assault and escorted him to a patrol car. Kelsay was "mad" that Caslin was arrested. She tried to explain to the officers that Caslin had not assaulted her, but she thought that the officers could not hear her.

According to Kirkpatrick, Caslin became enraged once they reached the patrol car and resisted going inside. Kirkpatrick says that after he secured Caslin in handcuffs, Kelsay approached the patrol car and stood

in front of the door. Kirkpatrick claims that he told her to move three times before Bornmeier escorted her away so that Kirkpatrick could place Caslin into the patrol car.

Kelsay denies approaching the patrol car until after Caslin was inside the vehicle. At that point, while Kirkpatrick interviewed witnesses, she walked over to the car to talk to Caslin. Bornmeier told her to back away from the vehicle, and Kelsay says that she complied. Two more officers—Deputy Matt Ernst and Sergeant Jay Welch from the Gage County Sheriff's Office—then arrived on the scene. When they appeared, Kelsay was standing about fifteen feet from the patrol car where Caslin was detained, and twenty to thirty feet from the pool's exit doors. Kelsay's younger daughter was standing next to her; her older daughter and son were standing by the exit doors. Kelsay stood approximately five feet tall and weighed about 130 pounds.

Police Chief Kirkpatrick told Ernst and Welch that Kelsay had interfered with Caslin's arrest. According to Welch, Kirkpatrick explained that Kelsay tried to prevent Caslin's arrest by "trying to pull the officers off and getting in the way of the patrol vehicle door." Kirkpatrick thus decided that Kelsay should be arrested.

In the meantime, Kelsay's older daughter was near the pool exit doors yelling at a female patron who the daughter assumed had contacted the police. Kelsay started to walk toward her daughter, but Ernst ran up behind Kelsay, grabbed her arm, and told her to "get back here." Kelsay stopped walking and turned around to face Ernst, at which point Ernst let go of Kelsay's arm. R. Doc. 53-8, at 54, lines 10-12. Kelsay

told Ernst that "some bitch is talking shit to my kid and I want to know what she's saying," and she continued walking away from Ernst and toward her daughter and the woman. The patron testified that she did not feel threatened at that particular moment, but later realized that Kelsay was "coming towards me to hurt me or yell at me or whatever she was planning on doing."

After Kelsay walked a few feet away from Ernst on the grass, the deputy placed Kelsay in a bear hug, threw her to the ground, and placed her in handcuffs. Kelsay momentarily lost consciousness after she hit the ground. When she regained her senses, she was already handcuffed, and she began screaming about pain in her shoulder.

Ernst drove her to the Gage County jail, but a corrections officer recommended that Kelsay be examined by a doctor. Kirkpatrick took Kelsay to a hospital, where she was diagnosed with a fractured collarbone. Kelsay ultimately was convicted of two misdemeanor offenses after pleading no contest to attempted obstruction of government operations and disturbing the peace.

Kelsay later sued the City of Wymore and Kirkpatrick, Bornmeier, Ernst, and Welch in their individual and official capacities, alleging wrongful arrest, excessive force, and deliberate indifference to medical needs. The district court granted summary judgment in favor of all defendants on all claims but one. The court ruled that Deputy Ernst was not entitled to qualified immunity on a claim that he used excessive force to arrest Kelsay when he took her to the ground and caused the broken collarbone. The court reasoned that the evidence, viewed in the light most favorable

to Kelsay, could lead a factfinder to conclude that Ernst's use of force was unreasonable and violated Kelsay's clearly established rights under the Fourth Amendment.

As an initial matter, Kelsay challenges our jurisdiction over this appeal. We have jurisdiction over an interlocutory appeal of an order denying qualified immunity if the appeal seeks review of a purely legal issue, but we ordinarily lack jurisdiction to decide "which facts a party may, or may not, be able to prove at trial." *Johnson v. Jones*, 515 U.S. 304, 313 (1995). Unless the district court's assumed facts are blatantly contradicted by incontrovertible evidence of a sort that is not present here, we cannot entertain a contention by Ernst disputing the district court's determination about which facts Kelsay could prove at trial—for example, that Kelsay was not in a position to threaten witnesses or that she posed no danger to anyone. *See Wallace v. City of Alexander*, 843 F.3d 763, 766-67 (8th Cir. 2016). But Ernst ultimately raises the purely legal question whether the evidence viewed in the light most favorable to Kelsay shows that he violated her clearly established rights under the Fourth Amendment. We have jurisdiction to decide that question. *See Shannon v. Koehler*, 616 F.3d 855, 861 (8th Cir. 2010).

Qualified immunity shields a government official from suit under § 1983 if his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). 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 is doing violates

that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). A plaintiff must identify either "controlling authority" or "a robust 'consensus of cases of persuasive authority'" that "placed the statutory or constitutional question beyond debate" at the time of the alleged violation. *Ashcroft v. al-Kidd*, 563 U.S. 731, 74142 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). In other words, the law at the time of the events in question must have given the officers "fair warning" that their conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

The state of the law should not be examined at a high level of generality. "The dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted). "Such specificity is especially important in the Fourth Amendment context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id.* (internal quotation marks omitted). "Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (internal quotation marks omitted).

In this case, Kelsay alleged that Ernst's takedown maneuver violated her right under the Fourth Amendment to be free from the use of unreasonable force. The district court rejected Ernst's defense of qualified immunity. The court reasoned that where a nonviolent misdemeanant poses no threat to officers

and is not actively resisting arrest or attempting to flee, an officer may not employ force just because the suspect is interfering with police or behaving disrespectfully. *See Shekleton v. Eichenberger*, 677 F.3d 361, 366-67 (8th Cir. 2012); *Montoya v. City of Flandreau*, 669 F.3d 867, 871-72 (8th Cir. 2012); *Johnson v. Carroll*, 658 F.3d 819, 827 (8th Cir. 2011); *Shannon*, 616 F.3d at 864-65; *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009); *Kukla v. Hulm*, 310 F.3d 1046, 1050 (8th Cir. 2002). The court ruled that the excessiveness of Ernst's use of force would have been apparent to a reasonable officer, because while Kelsay "was not precisely 'compliant'—that is, she had been told to stop but kept walking instead—she was not using force or actively resisting arrest, and posed no danger to anyone."

We respectfully disagree with this conclusion. It was not clearly established in May 2014 that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to "get back here" and continued to walk away from the officer. None of the decisions cited by the district court or Kelsay involved a suspect who ignored an officer's command and walked away, so they could not clearly establish the unreasonableness of using force under the particular circumstances here.

None of Kelsay's authorities "squarely governs the specific facts at issue." *Kisela*, 138 S. Ct. at 1153. *Shekleton* addressed an officer's use of a taser against a compliant, nonviolent, nonfleeing misdemeanant after the officer unsuccessfully sought to handcuff the suspect and the two men accidentally fell to the ground. 677 F.3d at 366-67. *Shannon* held that an officer acted unreasonably in a pub by performing a

takedown of a bar owner who was not reasonably suspected of committing any crime, did not flee or actively resist arrest, and posed little or no threat to the officer or others. 616 F.3d at 862-63 & n.3. *Brown* involved a nonviolent, nonfleeing passenger in a car who refused an officer's commands to discontinue a cell phone call with an emergency operator; the court held that shocking her with a taser for failing to get off the phone was an unreasonable use of force. 574 F.3d at 496-98. And *Montoya* held that a police officer's takedown of a suspect was unreasonable when the nonthreatening, nonresisting, nonfleeing misdemeanant merely raised her hands above her head in frustration while standing ten to fifteen feet away from the officer. 669 F.3d at 871-72.

Decisions concerning the use of force against suspects who were compliant or engaged in passive resistance are insufficient to constitute clearly established law that governs an officer's use of force against a suspect who ignores a command and walks away. The Supreme Court recently vacated the denial of qualified immunity for an officer who executed a takedown of a man who posed no apparent danger but disobeyed the officer's command not to close an apartment door and then "tried to brush past" the officer. *City of Escondido v. Emmons*, 139 S. Ct. 500, 503-04 (2019) (per curiam). On remand, the Ninth Circuit concluded that precedent involving force employed in response to passive resistance was not sufficiently on point to constitute clearly established law that governed the takedown at the apartment door. *Emmons v. City of Escondido*, 921 F.3d 1172, 1175 (9th Cir. 2019) (per curiam). This court's precedent likewise

did not clearly establish that Ernst was forbidden to perform a takedown when Kelsay walked away.

In this case, moreover, Ernst knew when he spoke to Kelsay that she was going to be arrested for attempting to interfere with Caslin's arrest. Kelsay then walked toward another patron after stating that "some bitch is talking shit to my kid and I want to know what she's saying." Even if a jury could find that Kelsay posed no danger to anyone at the time of the seizure, a reasonable officer in Ernst's position could have believed that it was important to control the situation and to prevent a confrontation between patrons that could escalate. This is another factor that was not present in previous cases, and reasonableness depends on the totality of the circumstances.

Although the principal dissent suggests that there is a factual dispute about whether Kelsay complied with Ernst's command by momentarily stopping and turning around, the relevant question is not whether Kelsay complied as a factual matter. The issue is whether a reasonable officer could have believed that Kelsay was not compliant. Whether the officer's conclusion was reasonable, or whether he was "reasonably unreasonable" for purposes of qualified immunity, *see Anderson*, 483 U.S. at 643-44, are questions of law, not fact. They are matters for resolution by the court, not by a jury. And Ernst's conclusion that Kelsay failed to comply was objectively reasonable. A reasonable police officer could expect Kelsay to understand his command to "get back here" as an order to stop and remain, not as a directive merely to touch base before walking away again.

Our closest decision on point supports qualified immunity for Ernst. In *Ehlers v. City of Rapid City*,

846 F.3d 1002 (8th Cir. 2017), we held that an officer did *not* violate the Fourth Amendment by executing a takedown of a nonviolent misdemeanant when the officer twice ordered the suspect to place his hands behind his back, but the suspect continued walking away. *Id.* at 1011. The court concluded that a reasonable officer would interpret the subject's behavior as "noncompliant," and reasoned that he "at least appeared to be resisting" when he continued to walk away, so the officer was "entitled to use the force necessary to effect the arrest." *Id.*

Under Kelsay's version of the facts, Ernst told Kelsay only once to "get back here" before she continued to walk away, but even if there might be a constitutionally significant distinction between one command and two, no such rule was clearly established when Ernst made his arrest. Where the district court correctly acknowledged that Kelsay "had been told to stop but kept walking instead," and this court's most analogous decision in *Ehlers* held that it was reasonable to perform a takedown of a suspect who disobeyed two commands and walked away, we cannot deem this "the rare obvious case" in which "the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (internal quotation marks omitted). The constitutionality of Ernst's takedown was not beyond debate, and he is thus entitled to qualified immunity.

For these reasons, the order of the district court denying qualified immunity is reversed.[1]

[1] Kelsay also appears to contend that Ernst violated her Fourth Amendment rights by failing to remove handcuffs despite her repeated complaints of shoulder pain. The district court did not address this claim, and Ernst does not appeal any ruling about it. Accordingly, we do not consider whether Kelsay properly presented this claim in the district court or, if so, whether it would survive a motion for summary judgment.

SMITH, Chief Judge, with whom KELLY, ERICKSON, and GRASZ, Circuit Judges, join, dissenting.

I respectfully dissent. Our case law was sufficiently clear at the time Deputy Ernst forcefully arrested Kelsay to have put a reasonable officer on notice that the use of force against a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring other commands violates that individual's right to be free from excessive force.

To satisfy the specificity requirement for law to be clearly established, the Supreme Court "ha[s] stressed the need to 'identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment.'" *Wesby*, 138 S. Ct. at 590 (ellipsis in original) (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam)). The Supreme Court has made clear that it does "not require a case directly on point." *al-Kidd*, 563 U.S. at 741. "But a body of relevant case law is usually necessary to clearly establish the answer . . . ." *Emmons*, 139 S. Ct. at 504 (ellipsis in original) (quoting *Wesby*, 138 S. Ct. at 590). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. Thus, "[t]o be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *Wesby*, 138 S. Ct. at 589. The legal principle set forth in that precedent "must be settled law, which means it is dictated

by controlling authority[2] or a robust consensus of cases of persuasive authority." *Id.* at 589–90 (cleaned up). "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* at 590.

I. *Existing Precedent on Excessive Force*

"[W]hether an officer has used excessive force 'requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Kisela*, 138 S. Ct. at 1152 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Our precedent has applied these factors to circumstances similar to Kelsay's and held that "it is clearly established that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." *Brown*, 574 F.3d at 499. In *Brown*, law enforcement pulled over the plaintiff's husband for allegedly driving under the influence. *Id.* at 493–94. After the husband was handcuffed, the plaintiff, who was seated in the front passenger seat, became frightened and called 911 on her cell phone. *Id.* at 494. An officer told her to hang up. *Id.* The passenger responded that she was frightened and wanted to remain on the phone with 911. *Id.* The officer ordered the plaintiff a second time to get off the phone,

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[2] The Supreme Court has "[a]ssum[ed] for the sake of argument that a controlling circuit precedent could constitute clearly established federal law." *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam).

and the plaintiff again responded that she was frightened. *Id.* The officer then entered the car and tased the plaintiff. *Id.*

Ultimately, the husband was ticketed for speeding, while the plaintiff was charged with obstruction of legal process and an open bottle violation. *Id.* at 494–95.

We held that the responding officer's use of force was not objectively reasonable under the circumstances. *Id.* at 496. First, the passenger was suspected of committing a misdemeanor open bottle violation as opposed to "a severe or violent crime." *Id.* Second, the passenger "posed at most a minimal safety threat to" the officers. *Id.* at 497. At no time did the passenger "threaten the officers, verbally or physically." *Id.* Third, the passenger "was not actively resisting arrest or attempting to flee." *Id.* Instead, the passenger's "principal offense . . . was to disobey the commands to terminate her call to the 911 operator." *Id.* "Whether [the responding officer] reasonably interpreted [the passenger's] refusal as a realistic threat to his personal safety or whether it constituted nothing more than an affront to his command authority," we explained, was "a matter for a jury to decide." *Id.*

Second, in *Shannon*, an officer responded to a call for a disturbance between two females at a bar involving an injured person. 616 F.3d at 858. At the scene, the female who called 911 told the officer "that one of the females inside [the bar] had been 'touched or grabbed by the male who was in the bar.'" *Id.* (quotation omitted). Once inside the establishment, the plaintiff walked toward the officer and, "using profanity," told the officer that he owned the bar and did not need the officer. *Id.* (quotation omitted). The plaintiff

ordered the officer out of the bar. *Id.* The plaintiff "eventually [came] within arm[']s length of [the officer]." *Id.* (second alteration in original) (quotation omitted). While the officer alleged that the plaintiff poked him in the chest two times, the plaintiff denied doing so. *Id.* The officer performed a takedown of the plaintiff, causing the plaintiff "to hit a bar stool and land on the hardwood floor." *Id.* (quotation omitted). The officer had to use additional force in handcuffing the plaintiff. *Id.* The plaintiff alleged he was injured during the arrest. *Id.* The plaintiff "was convicted in state court of interfering with official acts, a misdemeanor offense." *Id.* at 863 n.4.

In holding that the officer's use of force was not objectively reasonable under the circumstances based on the plaintiff's version of events, we noted that the plaintiff "was not suspected of committing a serious crime, that he did not attempt to flee or actively resist arrest, and that he posed little or no threat to [the officer] or others." *Id.* at 862. "It follow[ed], *a fortiori*, that using enough force to cause the injuries that [the plaintiff] allege[d]—a partially collapsed lung, multiple fractured ribs, a laceration to the head, and various contusions—was also unreasonable." *Id.* at 863 (citing *Crumley v. City of St. Paul*, 324 F.3d 1003, 1007 (8th Cir. 2003) ("In addition to the circumstances surrounding the use of force, we may also consider the result of the force.")). We next held that the plaintiff's constitutional right to be free from excessive force in such circumstances was clearly established. *Id.* at 864. "Long before [the date of the incident], this court (among others) had announced that the use of force against a suspect who was not threatening and not resisting may be unlawful." *Id.* We recognized that

"[a]lthough [the plaintiff] greeted [the officer] in a disrespectful, even churlish manner, that alone did not make [the officer's] use of force acceptable under extant law." *Id.* at 865 (citing *Bauer v. Norris*, 713 F.2d 408, 412 (8th Cir. 1983) ("'[T]he use of any force by officers simply because a suspect is argumentative, contentious, or vituperative' is not to be condoned." (alteration in original) (quoting *Agee v. Hickman*, 490 F.2d 210, 212 (8th Cir. 1974)))).

Third, *Montoya* involved two officers responding to a domestic dispute between the plaintiff and her ex-boyfriend at the ex-boyfriend's home. 669 F.3d at 869. Upon their arrival to the residence, the officers witnessed the plaintiff and her ex-boyfriend arguing outside. *Id.* Thereafter, the plaintiff, the ex-boyfriend, the plaintiff's mother, the plaintiff's friend, and the officers stood in a circle. *Id.* The exboyfriend stood between the two officers, while the plaintiff stood opposite of them, approximately ten to fifteen feet away. *Id.* The plaintiff and the ex-boyfriend were having words. *Id.* The officers stated that the plaintiff had taken a step forward and raised her fist, but, according to the plaintiff's account, she was merely using her hands to express herself. *Id.* One of the officers grabbed the plaintiff's left arm, put it behind her back, and handcuffed her left wrist. *Id.* The second officer then attempted to get the plaintiff's right arm behind her and told her to stop resisting. *Id.* The first officer then performed a takedown of the plaintiff, causing her to fall to the ground face first. *Id.* The officer fell on top of the plaintiff. *Id.* The takedown fractured the plaintiff's knee. *Id.* at 870. The plaintiff was charged with

simple assault or, in the alternative, disorderly conduct, as well as resisting arrest. *Id.* She was convicted only of disorderly conduct. *Id.*

We held that the officer's takedown of the plaintiff was not objectively reasonable under the circumstances. *Id.* at 871. First, the plaintiff posed no threat to the safety of the officers or others. *Id.* She "was standing ten to fifteen feet away from [the ex-boyfriend] when she raised her hands above her head in frustration. She assert[ed] she did not intend to hit [the ex-boyfriend], and [he] testified he did not feel threatened by her actions." *Id.* Second, the plaintiff "was not actively resisting arrest, and [she] was not attempting to flee." *Id.* Third, the plaintiff's "actions amounted to a violation of a law restricting disorderly conduct, a misdemeanor." *Id.* Fourth, "although not dispositive, the severity of the injuries she sustained [—a broken leg—was] a relevant factor in determining the reasonableness of the force used." *Id.* at 872. We held that the plaintiff's right to be free from excessive force under such circumstances was clearly established:

> Assuming once again [the plaintiff's] story is true, the contours of the right at issue were sufficiently clear to inform a reasonable officer in [the officer's] position it was unlawful for him to perform a 'leg sweep' and throw to the ground a nonviolent, suspected misdemeanant who was not threatening anyone, was not actively resisting arrest, and was not attempting to flee.

Id. at 873.

Finally, in *Shekleton*, an officer approached the plaintiff outside of a bar after allegedly witnessing the plaintiff arguing with the bartender. 677 F.3d at 363–64. The officer believed that the plaintiff was intoxicated and asked the plaintiff to move away from the street; the plaintiff complied. *Id.* The officer asked the plaintiff three times why he had been arguing with the bartender. *Id.* After the officer inquired for the third time, the plaintiff became agitated, again told the officer he had not been arguing with the bartender, and demanded an apology from the officer. *Id.* After demanding an apology, the plaintiff stopped leaning against a wall, unfolded his arms, and turned toward the officer. *Id.* The officer then twice instructed the plaintiff to put his hands behind his back. *Id.* The plaintiff replied that he was unable to do so, and the officer confirmed knowing that the plaintiff was unable to do so (the plaintiff had a condition preventing him from doing so which was well-known in the community). *Id.* at 364–65. The officer attempted to handcuff the plaintiff, but he lost his grip on the plaintiff's arm. *Id.* at 365. The two men fell to the ground. *Id.* Two other officers then exited the bar and heard the officer tell the plaintiff to stop resisting. *Id.* After attempts to restrain the plaintiff's arms failed, the officer yelled "taser, taser, taser" and discharged the taser at the plaintiff. *Id.* The electric charge into the plaintiff's chest and rib cage caused him to fall face-first to the ground; he suffered minor head injuries. *Id.* The plaintiff was handcuffed and arrested for public intoxication and interference with official acts. *Id.* But the charges against the plaintiff were subsequently dropped. *Id.*

"Viewing the facts in the light most favorable to [the plaintiff]," we concluded that the plaintiff had "established that a violation of a constitutional right occurred." *Id.* at 366. The plaintiff "was an unarmed suspected misdemeanant, who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him." *Id.* The facts showed that the plaintiff "complied with the officer's orders to step away from the street and did not behave aggressively towards [the officer], nor did [the plaintiff] direct obscenities towards [the officer] or yell at him." *Id.* The officer was on notice that the plaintiff could not physically place his hands behind his back when the officer asked the plaintiff to do so. *Id.* And, while the officer and the plaintiff fell away from each other during the attempted handcuffing, the plaintiff "did not resist and did not intentionally cause the two to break apart." *Id.* Based on these facts, we held that "a reasonable officer would not have deployed his taser under the circumstances as presented by [the plaintiff]." *Id.* As in *Brown*, we concluded that "the general law prohibiting excessive force in place at the time of the incident was sufficient to inform an officer that use of his taser on a nonfleeing, nonviolent suspected misdemeanant was unreasonable." *Id.* at 367 (citing *Brown*, 574 F.3d at 499–500).

II. *Application of Existing Precedent to Present Case*

Brown, *Shannon*, *Montoya*, and *Shekleton* comprise our "body of relevant case law," *see Emmons*, 139 S. Ct. at 504 (quotation omitted), that made it sufficiently clear at the time of the incident to warn a reasonable officer that the use of force against a nonthreatening misdemeanant who was not fleeing, resisting arrest, or ignoring other commands violates

that individual's right to be free from excessive force. Viewing the facts in the light most favorable to Kelsay—which we are required to do at this stage of the litigation—she satisfies all of these criteria. First, Kelsay was a misdemeanant and not suspected of a "severe or violent crime." *See Brown*, 574 F.3d at 496. She was convicted of two misdemeanor offenses after pleading no contest to attempted obstruction of government operations and disturbing the peace. *See id.* (open bottle violation); *Shannon*, 616 F.3d at 863 n.4 (interfering with official acts); *Montoya*, 669 F.3d at 871 (disorderly conduct); *Shekleton*, 677 F.3d at 365 (interference with official acts).

Second, viewing the facts in the light most favorable to Kelsay, Kelsay was non-threatening.[3] Kelsay was a small woman standing at 5 feet tall and weighing 130 pounds and dressed in a swimsuit, who was *walking* toward her daughter both before and after her conversation with Deputy Ernst. She had no weapon and never verbally or physically threatened anyone. *See Brown*, 574 F.3d at 497. As the majority recognizes, while the female patron who was arguing with Kelsay's daughter "later realized that Kelsay was 'coming towards me to hurt me or yell at me or whatever she was planning on doing,'" she initially "testified that she did not feel threatened *at that particular moment*." *See supra* Op. at 3 (emphasis added).

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[3] The majority acknowledges the district court's "assumed fac[t]" "that Kelsay was not in a position to threaten witnesses [and] that she posed no danger to anyone" is not "blatantly contradicted by inconvertible evidence." *See supra* Op. at 4.

Third, viewing the facts in the light most favorable to Kelsay, she was not attempting to flee, resisting arrest, or ignoring Deputy Ernst's commands. In response to Deputy Ernst grabbing Kelsay's arm and commanding her to "get back here," Kelsay "stopped, turned around, and . . . told him, someone is talking shit to my kid, I want to know what's going on." Br. in Support of Mot. for Summ. J., Ex. C, at 43, *Kelsay v. Ernst*, No. 4:15-cv-3077 (D. Neb. Feb. 2, 2017), ECF No. 53-8. At that time, Deputy Ernst "let go" of Kelsay's arm. *Id.* at 54; *see also id.* at 47. Deputy Ernst said nothing in response to Kelsay's explanation. Because Deputy Ernst "didn't say anything" to Kelsay in response, she "turned around and started walking back." *Id.* at 54. Kelsay testified that she was not resisting arrest or stopping Deputy Ernst from handcuffing her. She also testified that she did not know that Chief Kirkpatrick wanted Deputy Ernst to arrest her. Nevertheless, Deputy Ernst "ran up behind [Kelsay] and he grabbed [her] and slammed [her] to the ground." *Id.* at 51. The maneuver—"like, a bear hug"—lifted Kelsay "off the ground." *Id.* at 98, 99. Due to the ground impact, Kelsay briefly lost consciousness. Deputy Ernst's takedown maneuver broke Kelsay's collarbone.

The majority characterizes Kelsay's actions as one of "a suspect who ignores a command and walks away"; therefore, it holds that "[d]ecisions concerning the use of force against suspects who were compliant or engaged in passive resistance are insufficient to constitute clearly established law that governs an officer's use of force." *Supra* Op. at 7. But crediting Kelsay's account of the events, Kelsay complied with

Deputy Ernst's command to "get back here" by stopping, turning around, and explaining what she was doing; in response, Deputy Ernst let go of Kelsay's arm and said nothing further. If there is a dispute of fact on this question, it is material and should be resolved by a jury.

The majority relies on *Ehlers* as "[o]ur closest decision on point," *supra* Op. at 7, but *Ehlers* is distinguishable. The plaintiff in *Ehlers* twice ignored the officer's command to put his hands behind his back and continued walking as he passed the officer. For this reason, we held that the plaintiff "at least appeared to be resisting." 846 F.3d at 1011 (citing *Small v. McCrystal*, 708 F.3d 997, 1005 (8th Cir. 2013). By contrast, the facts construed in the light most favorable to Kelsay show that she *did* comply with Deputy Ernst's command to "get back here" by stopping, turning around, and explaining what she was doing. Deputy Ernst implicitly recognized her compliance by letting go of her arm and saying nothing in response to her explanation.

In summary, construing the facts in the light most favorable to Kelsay, a reasonable officer would have known based on our body of precedent that a full-body takedown of a small, nonviolent misdemeanant who was not attempting to flee, resisting arrest, or ignoring other commands was excessive under the circumstances.

For these reasons, I respectfully dissent.

GRASZ, Circuit Judge, dissenting.

While the physical injury suffered by Ms. Kelsay is a serious and unfortunate event, the outcome here underscores a wider legal problem.

Like the other dissenting judges, I believe any reasonable officer would have known his conduct in this case violated Ms. Kelsay's constitutional rights under existing case law. That is simply a disagreement with the majority on the application of precedent. Beyond this, however, I do take exception to the court's opinion in one important respect.

At oral argument, the absence of judicial opinions in this circuit addressing the specific facts here, including the precise take-down maneuver used on Ms. Kelsay, was used to counter the arguments of her counsel. Yet, the court now declines to address whether the maneuver used on Ms. Kelsay violated her constitutional rights. Instead, the court relies solely on the second ("clearly established") prong of qualified immunity analysis. While this is allowed by governing precedent, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), it is, in my view, inappropriate in this case as it perpetuates the very state of affairs used to defeat Ms. Kelsay's attempt to assert her constitutional rights. *See Zadeh v. Robinson*, 928 F.3d 457, 479-80 (5th Cir. 2019) (Willet, J. concurring in part, dissenting in part) ("Section 1983 meets Catch-22."). The Supreme Court indicated in *Pearson* that the option for courts to skip to the second prong of analysis would not necessarily stunt the development of constitutional law. *Pearson*, 555 U.S. at 242. The court's opinion belies that expectation, at least in the context of excessive force claims.

This situation has much broader implications than Ms. Kelsay's broken collar bone. In the context of violations of constitutional rights by state officials, application of *Pearson* in this manner imposes a judicially created exception to a federal statute that effectively prevents claimants from vindicating their constitutional rights. The law is never made clear enough to hold individual officials liable for constitutional violations involving excessive force as Congress authorized in 42 U.S.C. § 1983. Importantly, while *Pearson* authorizes this analytical approach, it does not require it.

There is a better way. We should exercise our discretion at every reasonable opportunity to address the constitutional violation prong of qualified immunity analysis, rather than defaulting to the "not clearly established" mantra, where, as here, such analysis is not an "academic exercise," *Pearson*, 555 U.S. at 237, and where it is "difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Id.* at 236 (quoting *Lyons v. Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)).

While implementation of this approach may or may not have brought relief to Ms. Kelsay in this court, it would help ensure this sad situation is not repeated. The protection of civil rights and the preservation of the rule of law deserves no less.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 17-2181

Melanie Kelsay,
Appellee,

v.

Matt Ernst, individually and in his official capacity,
Appellant,

Jay Welch, individually and in his official capacity, et al.,

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Appeal from United States District Court for the District of Nebraska – Lincoln
(4:15-cv-0377-JMG)

ORDER

Appellee's petition for rehearing en banc has been considered by the Court and is granted. The opinion and judgment of this Court filed on September 27, 2018 are vacated.

The en banc argument will be scheduled in April in St. Louis, Missouri. The argument date will be fixed by a later order of this court.

Counsel shall, within ten days, submit 30 additional copies of previously filed briefs and 8 additional copies of the appendix.

November 30, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-2181

Melanie Kelsay,
Plaintiff-Appellee,

v.

Matt Ernst, individually and in his official capacity,
Defendant-Appellant,

Jay Welch, individually and in his official capacity; City of Wymore, Nebraska; Russell Kirkpatrick, individually and in his official capacity; Matthew Bornmeier, individually and in his official capacity,
Defendants,

Appeal from United States District Court for the District of Nebraska - Lincoln

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Submitted: May 16, 2018
Filed: September 27, 2018

Before SMITH, Chief Judge, BEAM and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Melanie Kelsay sued sheriff's deputy Matt Ernst under 42 U.S.C. § 1983, alleging that Ernst used excessive force while arresting Kelsay. The district court denied Ernst's motion for summary judgment,

and Ernst appeals on the ground that he is entitled to qualified immunity. We conclude that Ernst did not violate a clearly established right of Kelsay under the Fourth Amendment, so we reverse the order.

The question presented is whether Ernst is entitled to summary judgment, so while there are some disputes about the facts, we ultimately consider the evidence in the light most favorable to Kelsay. On May 29, 2014, Kelsay, her three children, and her friend Patrick Caslin went swimming at a public pool in Wymore, Nebraska. Caslin engaged Kelsay in what she described as "horseplay," but some onlookers thought he was assaulting her, and a pool employee contacted the police.

As Kelsay and her party left the pool complex, they encountered Wymore Police Chief Russell Kirkpatrick and Officer Matthew Bornmeier. Kirkpatrick informed Caslin that he was under arrest for domestic assault and escorted him to a patrol car. Kelsay was "mad" that Caslin was arrested. She tried to explain to the officers that Caslin had not assaulted her, but she thought that the officers could not hear her.

According to Kirkpatrick, Caslin became enraged once they reached the patrol car and resisted going inside. Kirkpatrick says that after he secured Caslin in handcuffs, Kelsay approached the patrol car and stood in front of the door. Kirkpatrick claims that he told her to move three times before Bornmeier escorted her away so that Kirkpatrick could place Caslin into the patrol car.

Kelsay denies approaching the patrol car until after Caslin was inside the vehicle. At that point, while Kirkpatrick interviewed witnesses, she walked over to

the car to talk to Caslin. Bornmeier told her to back away from the vehicle, and Kelsay complied. Two more officers—Deputy Matt Ernst and Sergeant Jay Welch from the Gage County Sheriff's Office—then arrived on the scene. When they appeared, Kelsay was standing about fifteen feet from the patrol car where Caslin was detained, and twenty to thirty feet from the pool's exit doors. Kelsay's younger daughter was standing next to her; her older daughter and son were standing by the exit doors. Kelsay stood approximately five feet tall and weighed about 130 pounds.

Kirkpatrick told Ernst and Welch that Kelsay had interfered with Caslin's arrest. According to Welch, Kirkpatrick explained that Kelsay tried to prevent Caslin's arrest by "trying to pull the officers off and getting in the way of the patrol vehicle door." Kirkpatrick thus decided that Kelsay should be arrested.

In the meantime, Kelsay's older daughter was near the pool exit doors yelling at a patron who the daughter assumed had contacted the police. Kelsay started to walk toward her daughter, but Ernst ran up behind Kelsay, grabbed her arm, and told her to "get back here." Kelsay stopped walking and turned around to face Ernst, at which point Ernst let go of Kelsay's arm. Kelsay told Ernst that "some bitch is talking shit to my kid and I want to know what she's saying," and she continued walking away from Ernst and toward her daughter.

After Kelsay moved a few feet away from Ernst, the deputy placed Kelsay in a bear hug, took her to the ground, and placed her in handcuffs. Kelsay momentarily lost consciousness after she hit the ground.

When she regained her senses, she was already handcuffed, and she began screaming about pain in her shoulder.

Ernst drove her to the Gage County jail, but corrections officers recommended that Kelsay be examined by a doctor. Kirkpatrick took Kelsay to a hospital, where she was diagnosed with a fractured collarbone. Kelsay ultimately was found guilty of two misdemeanor offenses after pleading no contest to attempted obstruction of government operations and disturbing the peace.

Kelsay later sued the City of Wymore and Kirkpatrick, Bornmeier, Ernst, and Welch in their individual and official capacities, alleging wrongful arrest, excessive force, and deliberate indifference to medical needs. The district court granted summary judgment in favor of all defendants on all claims but one. The court ruled that Deputy Ernst was not entitled to qualified immunity on a claim that he used excessive force to arrest Kelsay when he took her to the ground and caused the broken collarbone. The court reasoned that the evidence, viewed in the light most favorable to Kelsay, could lead a factfinder to conclude that Ernst's use of force was unreasonable and violated Kelsay's clearly established rights under the Fourth Amendment.

As an initial matter, Kelsay challenges our jurisdiction over this appeal. We have jurisdiction over an interlocutory appeal of an order denying qualified immunity if the appeal seeks review of a purely legal issue, but we lack jurisdiction to decide "which facts a party may, or may not, be able to prove at trial." *Johnson v. Jones*, 515 U.S. 304, 313 (1995). In this case,

Ernst does not challenge any determination of the district court about which facts Kelsay could prove at trial. He raises only the legal question whether the evidence viewed in the light most favorable to Kelsay shows that he violated her clearly established rights under the Fourth Amendment. We have jurisdiction to decide that question. *See Shannon v. Koehler*, 616 F.3d 855, 861 (8th Cir. 2010).

Qualified immunity shields a government official from suit under § 1983 if his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). 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 is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). A plaintiff must identify either "controlling authority" or "a robust 'consensus of cases of persuasive authority'" that "placed the statutory or constitutional question beyond debate" at the time of the alleged violation. *Ashcroft v. al-Kidd*, 563 U.S. 731, 74142 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). In other words, the law at the time of the events in question must have given the officers "fair warning" that their conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

The state of the law should not be examined at a high level of generality. "The dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted). "Such specificity is especially important in

the Fourth Amendment context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id.* (internal quotation marks omitted).

In this case, Kelsay alleged that the takedown maneuver violated her right under the Fourth Amendment to be free from excessive force. The district court rejected Ernst's defense of qualified immunity. The court reasoned that where a nonviolent misdemeanant poses no threat to officers and is not actively resisting arrest or attempting to flee, an officer may not employ force just because the suspect is interfering with police or behaving disrespectfully. *See Shekleton v. Eichenberger*, 677 F.3d 361, 366-367 (8th Cir. 2012); *Montoya v. City of Flandreau*, 669 F.3d 867, 871-72 (8th Cir. 2012); *Johnson v. Carroll*, 658 F.3d 819, 827 (8th Cir. 2011); *Shannon*, 616 F.3d at 864-65; *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009); *Kukla v. Hulm*, 310 F.3d 1046, 1050 (8th Cir. 2002). The court ruled that the excessiveness of Ernst's use of force would have been apparent to a reasonable officer, because while Kelsay "was not precisely 'compliant'—that is, she had been told to stop but kept walking instead—she was not using force or actively resisting arrest, and posed no danger to anyone."

We respectfully disagree with this conclusion. It was not clearly established in May 2014 that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to "get back here" and continued to walk away from the officer. We held in *Ehlers v. City of Rapid City*, 846 F.3d 1002 (8th Cir. 2017), that an officer did not violate the

Fourth Amendment by executing a takedown of a nonviolent misdemeanant when the officer twice ordered the suspect to place his hands behind his back, but the suspect continued walking away. *Id.* at 1011. The court concluded that a reasonable officer would interpret the subject's behavior as "noncompliant," and reasoned that he "at least appeared to be resisting" when he continued to walk away, so the officer was "entitled to use the force necessary to effect the arrest." *Id.* Under Kelsay's version of the facts, Ernst told Kelsay only once to "get back here" before she continued to walk away, but even if there might be a constitutionally significant distinction between one command and two, no such rule was clearly established when Ernst made his arrest. None of the decisions cited by the district court or Kelsay involved a suspect who ignored an officer's command and walked away, so they could not clearly establish the unreasonableness of using force under the particular circumstances here. The constitutionality of Ernst's takedown was not beyond debate, and he is thus entitled to qualified immunity.

The dissenting opinion concludes that *Ehlers* is obviously distinguishable by relying on a *different* section of the decision concerning whether a *different* officer had probable cause to arrest the suspect. Because the officer who directed the arrest in *Ehlers* reasonably interpreted the suspect's behavior as "threatening," *id.* at 1009, the dissent apparently concludes that the second officer's use of force against the suspect was reasonable only because the suspect posed a threat. But this was not the court's rationale. *Ehlers* explained that the arresting officer reasonably exe-

cuted a takedown of the suspect, a "nonviolent" misdemeanant, because he ignored two commands and "at least appeared to be resisting." *Id.* at 1011. The opinion did *not* rely on threatening behavior by the suspect to justify the takedown. Indeed, there is nothing in the opinion to show that the arresting officer was even aware that the suspect posed a threat to the first officer. The first officer simply told the arresting officer to "[t]ake this guy, he's not listening." *Id.* at 1010. A reasonable officer thus could interpret *Ehlers* to mean that it is reasonable to execute a takedown when a nonviolent misdemeanant ignores two commands. If that was the law in 2017, then it was not obvious or beyond debate in 2014 that an officer was forbidden to execute a takedown when a nonviolent misdemeanant ignored one command.

For these reasons, the order of the district court denying qualified immunity is reversed.[1]

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[1] Kelsay also appears to contend that Ernst violated her Fourth Amendment rights by failing to remove handcuffs despite her repeated complaints of shoulder pain. The district court did not address this claim, and Ernst does not appeal any ruling about it. Accordingly, we do not consider whether Kelsay properly presented this claim in the district court or, if so, whether it would survive a motion for summary judgment.

BEAM, Circuit Judge, concurring.

I concur in the court's reversal of this matter. But, I do so somewhat advisedly because of the extant but confusing precedent available to the district court at that time. And, speaking parenthetically, the slamming of this lady to the ground by the deputy with force sufficient to fracture her shoulder was uncalled for given the nature of the encounter underway.

SMITH, Chief Judge, dissenting.

I respectfully dissent. The court rightfully concludes that in May 2014, case law did not clearly establish "that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer." *Supra* p. 6. But, "in an obvious case," the clearly-established prong can be met "even without a body of relevant case law." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (citing *Hope*, 536 U.S. at 738; *Pace v. Capobianco*, 283 F.3d 1275, 1283 (11th Cir. 2002)). Prior case law is unnecessary where "a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct in question." *Capps v. Olson*, 780 F.3d 879, 886 (8th Cir. 2015) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). This is such a case.

Kelsay was a small woman standing at 5 feet tall and weighing 130 pounds dressed in a swimsuit. She acknowledged that Deputy Ernst grabbed her arm and "said to get back here." *Kelsay v. Ernst*, No. 4:15-CV-3077, 2017 WL 5953112, at *2 (D. Neb. May 19, 2017) (citation to the record omitted). But, according to Kelsay, she walked away from the deputy to check on her daughter. She denied resisting Deputy Ernst's efforts to handcuff or arrest her. Nevertheless, Deputy Ernst "ran up behind [Kelsay] and he grabbed [her] and slammed [her] to the ground." *Id.* (second and third alterations in original) (citation to the record omitted). The maneuver—"like, a bear hug"—lifted Kelsay "completely off the ground." *Id.* (citation to the record omitted). Due to the ground impact, Kelsay

briefly lost consciousness. Deputy Ernst's takedown maneuver broke Kelsay's collarbone.

Kelsay's and Deputy Ernst's versions of factual events materially differ, but at this stage of the litigation, Kelsay gets the benefit of all reasonable inferences. The record did not reflect that Kelsay was a threat, physical or otherwise, to either the officers or bystanders. Deputy Ernst's bear-hug takedown could be found by a jury to be unreasonable under the circumstances. "Police officers undoubtedly have a right to use *some* degree of physical force, or threat thereof, to effect a lawful seizure, and reasonable applications of force may well cause pain or minor injuries with some frequency." *Grider v. Bowling*, 785 F.3d 1248, 1252 (8th Cir. 2015) (emphasis added) (quoting *Chambers v. Pennycook*, 641 F.3d 898, 907 (8th Cir. 2011)). But it should be obvious that a blind body slam of a comparatively slightly built and nonviolent misdemeanant unreasonably increased the probability of injury. The amount of force applied was unreasonable and was more than what was reasonably necessary to effectuate an arrest under the circumstances.

The Court relies on *Ehlers*, but *Ehlers* is distinguishable. In *Ehlers*, we concluded that

> [a] reasonable officer in Hansen's position would at least consider the possibility that Ehlers could produce a weapon or otherwise attack him, especially given that Ehlers had directly disobeyed unequivocal orders, was in close proximity to Hansen, and continued to approach Hansen while he was arresting Ehlers's son. In order to continue to place Derrik in the patrol car, Hansen would have had to turn his back to Ehlers and leave

> himself vulnerable to this risk. Thus, it is not unreasonable that Hansen would interpret Ehlers's physical presence, close proximity, and refusal to comply as threatening and preventing him from completing the task at hand.

846 F.3d at 1009. In contrast to *Ehlers*, Kelsay did not have a weapon or access to one; she was walking *away* from Deputy Ernst; she disobeyed Deputy Ernst's order once; and Deputy Ernst did not have to place himself in a vulnerable position. Moreover, in contrast to the officer in *Ehlers*, Deputy Ernst gave Kelsay *no* warning[2]after she turned her back and walked away from him. Deputy Ernst simply tackled her from behind. The officers in *Ehlers* reasonably interpreted the arrestee's "physical presence, close proximity, and refusal to comply as threatening." *Id.* at 1009. No facts in the instant case support a reasonable belief that Kelsay's actions were threatening.

Given the facts, a reasonable officer on the scene would have known that a fullbody takedown of a small and nonviolent misdemeanant was excessive under the circumstances. Deputy Ernst was entitled to use the force necessary to effect an arrest. However, a jury might decide that Deputy Ernst used substantially more force than necessary. *See Small v. McCrystal*, 708 F.3d 997, 1005 (8th Cir. 2013) ("It was unreasonable for [an officer] to use more than de minimis force against [the arrestee] by running and tackling him from behind without warning." (citing *Shannon*, 616

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[2] Deputy Ernst told Kelsay to "get back here," *Kelsay*, 2017 WL 5953112, at *2, but that order occurred before Kelsay turned her back to the deputy and continued walking away.

F.3d at 863; *Bauer v. Norris*, 713 F.2d 408, 412–13 (8th Cir. 1983))); *see also Morelli v. Webster*, 552 F.3d 12, 24 (1st Cir. 2009) ("Here, the facts, seen through the prism of the plaintiff's account, simply do not justify yanking the arm of an unarmed and non-violent person, suspected only of the theft of $20, and pinning her against a wall for three to four minutes with sufficient force to tear her rotator cuff. That is particularly so in view of the marked disparity in height and weight between the officer and the suspect, the absence of any evidence of either dangerousness or attempted flight, and the presence of a cadre of other officers at the scene. In short, the plaintiff's version of the relevant facts places Webster's actions outside the universe of protected mistakes." (citations omitted)); *Solomon v. Auburn Hills Police Dep't*, 389 F.3d 167, 175 (6th Cir. 2004) ("[T]he officers here were not faced with a tense and uncertain situation where they feared for their safety and the safety of bystanders. . . . Officer Miller then shoved [the arrestee] into the [theater] display case, putting his entire weight—nearly twice the amount of her own weight—against her. Finally, without directing Solomon to act, he yanked her arm behind her with such force that it fractured. Officer Miller's actions, in total, were excessive and resulted in Solomon suffering from bruising and a fractured arm.").

Officer Ernst did not need to be put on notice by a prior case with the instant facts to know that his conduct could be challenged as unreasonable.

For these reasons, I respectfully dissent.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

[filed May 19, 2017]

MELANIE KELSAY, Plaintiff,	)	
vs.	)	4:15-CV-3077
MATT ERNST, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, et al., Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on two motions for summary judgment. First, defendants Matt Ernst and Jay Welch move for summary judgment (filing 52) with respect to the plaintiff's excessive force claim. The Court will grant that motion in part and deny it in part. Specifically, the Court will grant summary judgment with respect to the plaintiff's claim against Ernst and Welch in their official capacities, and with respect to her claim against Welch in his individual capacity. But the Court will deny the motion with respect to the plaintiff's individual-capacity claim against Ernst.

Second, defendants Russell Kirkpatrick, Mathew Bornemeier, and the City of Wymore move for summary judgment (filing 54) with respect to the plaintiff's claims against them. The Court will grant that motion.

I. BACKGROUND

The underlying incident occurred at the city pool in Wymore, Nebraska on May 29, 2014. Filing 53-8 at 10. The plaintiff, Melanie Kelsay, was at the pool with her children and Patrick Caslin, who Kelsay describes as a "family friend." Filing 53-8 at 11. At some point, someone called police and said that Kelsay and Caslin were involved in what was reported as a "domestic assault." Filing 53-8 at 19. According to Kelsay, it was just horseplay: Kelsay says she was taking pictures of the children by the side of the pool and Caslin came up behind her and pretended he was going to throw her in the pool, and she told him not to. Filing 53-8 at 19.[1] But regardless, when Kelsay and the others left the pool, Wymore police chief Kirkpatrick and Wymore police officer Bornemeier were waiting for them. Filing 53-8 at 20.

According to Kelsay, Kirkpatrick and Bornemeier confronted Kelsay and her companions as soon as they left the pool. Filing 53-8 at 29. Kirkpatrick told Caslin that Caslin needed to come to the police car with him. Filing 53-8 at 29. After repeatedly being asked why, Kirkpatrick said that someone had reported a domestic assault. Filing 53-8 at 29. So, Kelsay says, she told Kirkpatrick that nothing had happened and that she and Caslin had just been playing around. Filing 53-8 at 29.

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[1] The parties dispute what actually happened between Kelsay and Caslin that prompted the call to police. *Compare* filing 53 at 4 *with* filing 57 at 4-5. But it is not clear to the Court why the precise nature of that incident is relevant to the plaintiff's remaining claims.

Caslin agreed to accompany Kirkpatrick, and Kelsay could no longer hear them, but she saw that Caslin was being handcuffed. Filing 53-8 at 30. Kelsay says she "was mad" but didn't approach the patrol car at that point. Filing 53-8 at 30-31. After Kirkpatrick went to speak to some other witnesses, though, Kelsay went to the window of the patrol car and asked Caslin, who was in the back, what to do. Filing 53-8 at 31. Bornemeier warned Kelsay to back up, and Kelsay says she backed up about 15 feet. Filing 53-8 at 31. By that time, deputies from the Gage County sheriff's office—Ernst and Welch—had arrived on the scene. Filing 53-8 at 32.

Kelsay tried to call her husband, and then some other people after she was unable to reach her husband. Filing 53-8 at 32. Kelsay says that Kirkpatrick yelled over to her and asked if she was calling her husband, and that when she said "yes," he said "good." Filing 53-8 at 32. Kelsay walked toward her children. Filing 53-8 at 35. One of Kelsay's daughters was arguing with someone. Filing 53-8 at 38. Ernst approached Kelsay quickly from behind. Filing 53-8 at 36-37.

Kelsay says that Ernst grabbed her arm and "said to get back here." Filing 53-8 at 43. So, Kelsay says, she turned around and told him that someone was "talking shit to my kid" and she wanted to know what was happening. Filing 53-8 at 43. She denies resisting Ernst's efforts to handcuff or arrest her. Filing 53-8 at 139. But she continued to walk toward her daughter. Filing 53-8 at 43. Then, according to Kelsay, Ernst "ran up behind [her] and he grabbed [her] and slammed [her] to the ground." Filing 53-8 at 51. Kelsay is 5 feet tall and weighs about 130 pounds.

Filing 53-8 at 97. She says that Ernst had her in "like, a bear hug" and lifted her completely off the ground. Filing 53-8 at 98-99, 139. She remembers being "up in the air" and "hitting the ground," and then doesn't remember anything until being picked up, already in handcuffs. Filing 53-8 at 52, 140. She briefly lost consciousness. Filing 53-8 at 25, 140.

Ernst's account of the incident differs in some respects. Ernst says that he saw Kelsay "hurriedly begin walking" toward the person arguing with her daughter, and was "screaming at this person." Filing 17-1 at 2. So, Ernst says, he ran to Kelsay and placed himself between her and the woman she was approaching, and instructed her to stop moving and put her hands behind her back. Filing 17-1 at 2. Ernst reports that Kelsay "then became violent," attempting to hit and kick him, so that's when he took her forcibly to the ground. Filing 17-1 at 2. Welch's account is consistent with Ernst's. Filing 17-3 at 2. And other witnesses have corroborated different aspects of that account. Filing 53-8 at 166, 169; filing 53-9 at 6-8, 12.

After she came to, Kelsay complained of a broken shoulder. Filing 53-8 at 56, 140. Ernst placed her in a patrol car and took her to the Gage County jail, where correctional officers said that she would need to be examined by a doctor. Filing 17-1 at 2; filing 53-8 at 57, 62. Kirkpatrick took her to the hospital, where she was found to have a broken collarbone. Filing 53-8 at 68, 76. Kelsay claims to have incurred significant medical bills and permanent injury. Filing 21-1 at 4. She was eventually convicted of attempting to obstruct government operations and disturbing the peace. Filing 17-5 at 6, 9.

Kelsay sued the City of Wymore and Kirkpatrick, Bornemeier, Ernst, and Welch (in their individual and official capacities) alleging claims for wrongful arrest, excessive force, and deliberate indifference to medical needs. Filing 13. The Court has previously dismissed the wrongful arrest and deliberate indifference claims as to Ernst and Welch: the Court found that the wrongful arrest claim was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), filing 28, and that there was no evidence Ernst or Welch had been deliberately indifferent to Kelsay's medical needs, filing 61. So, the only claim remaining as to Ernst and Welch is the excessive force claim. All three of Kelsay's claims remain pending as to Wymore, Kirkpatrick, and Bornemeier.

II. STANDARD OF REVIEW

Summary judgment is proper if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). The movant bears the initial responsibility of informing the Court of the basis for the motion, and must identify those portions of the record which the movant believes demonstrate the absence of a genuine issue of material fact. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). If the movant does so, the nonmovant must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial. *Id.*

On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts. *Id.* Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences

from the evidence are jury functions, not those of a judge. *Id.* But the nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts. *Id.* In order to show that disputed facts are material, the party opposing summary judgment must cite to the relevant substantive law in identifying facts that might affect the outcome of the suit. *Quinn v. St. Louis County*, 653 F.3d 745, 751 (8th Cir. 2011). The mere existence of a scintilla of evidence in support of the nonmovant's position will be insufficient; there must be evidence on which the jury could conceivably find for the nonmovant. *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 791-92 (8th Cir. 2011). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Torgerson*, 643 F.3d at 1042.

III. DISCUSSION

Ernst and Welch move to dismiss Kelsay's remaining claim against them, for excessive force. Kirkpatrick, Bornemeier, and the City of Wymore move to dismiss all of Kelsay's claims as to them.

1. ERNST AND WELCH

Kelsay sued Ernst and Welch in their individual and official capacities. Those claims will be considered separately.

(a) Individual-Capacity Claims

Ernst and Welch argue that they are entitled to qualified immunity from Kelsay's individual-capacity claims. Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established

statutory or constitutional rights of which a reasonable person would have known. *Ransom v. Grisafe*, 790 F.3d 804, 810-11 (8th Cir. 2015), *cert. denied,* 136 S. Ct. 838 (2016). This immunity applies to discretionary functions of government actors, including the decision to use force and to detain an individual. *Id.* To overcome the defense of qualified immunity, a plaintiff must show that the officer's actions violated a constitutional right that was clearly established at the time of their alleged misconduct. *Id.* In other words, the officer must have been plainly incompetent, or must have knowingly violated the law, when he used force to seize the plaintiff. *Id.*

So, for purposes of qualified immunity, the Court considers (1) whether law enforcement violated a constitutional right—here, whether their use of force was objectively reasonable—and, (2) whether that right was clearly established at the time of the incident. Once the relevant predicate facts are established, the reasonableness of the officer's conduct under the circumstances is a question of law. *McKenney v. Harrison*, 635 F.3d 354, 359 (8th Cir. 2011); *Mann v. Yarnell*, 497 F.3d 822, 825 (8th Cir. 2007); *see Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007). And the ultimate question of qualified immunity is also one of law, once the predicate facts are determined. *Littrell v. Franklin*, 388 F.3d 578, 584-85 (8th Cir. 2004).

(i) Violation of Constitutional Right

A claim that law enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's "reasonableness" standard. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014). Determining the objective reasonableness of a

particular seizure under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. *Id.* This inquiry requires analyzing the totality of the circumstances, "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citation and quotation omitted). This allows for the fact that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* (citation and quotation omitted).

Police officers undoubtedly have a right to use some degree of physical force, or threat thereof, to effect a lawful seizure, and reasonable applications of force may well cause pain or minor injuries with some frequency. *Grider v. Bowling*, 785 F.3d 1248, 1252 (8th Cir. 2015). Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. *Peterson v. Kopp*, 754 F.3d 594, 600 (8th Cir. 2014) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). The key question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Smith v. City of Brooklyn Park*, 757 F.3d 765, 772 (8th Cir. 2014); *see Schoettle v. Jefferson Cty.*, 788 F.3d 855, 859 (8th Cir. 2015). The Court looks to the specific circumstances, such as the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether she is actively resisting arrest

or attempting to evade arrest by flight. *Peterson*, 754 F.3d at 600.

The Court begins with Ernst, who actually employed the force about which Kelsay complains. Ernst argues that he is entitled to qualified immunity because the technique he used "was a reasonable maneuver under the circumstances to control Plaintiff Kelsay, who was perceived by all officers and objective witnesses present to be aggressive, resisting, and noncompliant." Filing 53 at 13-14. Ernst also contends that the use of force was justified by Kelsay's "seeming effort to verbally berate and to even potentially fight certain witnesses" and that

> Kelsay actively resisted Deputy Ernst's efforts to place her in handcuffs to effectuate her arrest. When Kelsay started to refuse to submit to arrest, and started to kick and physically resist Deputy Ernst, she was not yet handcuffed, and he used a common law enforcement maneuver to "bear hug" her from behind and take her to the ground to subdue her in order to get her handcuffed. . . . All witnesses agree that Kelsay began her interfering behaviors as Caslin was arrested, and subsequently directed her anger towards certain witnesses, all of which collectively led to her arrest[.]

Filing 53 at 20. But those arguments are inconsistent with the Court's standard of review on summary judgment, under which the question is "whether the facts, *viewed in the light most favorable to the plaintiff*, demonstrate the deprivation of a constitutional or statutory right." *Ehlers v. City of Rapid City*, 846 F.3d 1002, 1008 (8th Cir. 2017)

(emphasis supplied). The Court must accept Kelsay's account of the facts where there are material inconsistencies. *Henderson v. Munn*, 439 F.3d 497, 499 n.2 (8th Cir. 2006). And Kelsay denies the conduct relied upon by Ernst to justify his use of force.

Ernst's argument essentially asks the Court to find that Kelsay's testimony is incredible. But at the summary judgment stage, the Court is not permitted to weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. *United States v. Bame*, 721 F.3d 1025, 1028 (8th Cir. 2013); *see Coker v. Arkansas State Police*, 734 F.3d 838, 843 (8th Cir. 2013). The Court must view the evidence in the light most favorable to Kelsay, and seen in that light—if her testimony was credited—a finder of fact could conclude that Ernst's use of force was unreasonable. If Kelsay's testimony is credited, even in part, it establishes that she was walking away from police, and was not in a position to threaten witnesses or law enforcement. While she was not precisely "compliant"—that is, she had been told to stop but kept walking instead—she was not using force or actively resisting arrest, and posed no danger to anyone.[2] *See*, *Kukla v. Hulm*, 310 F.3d 1046, 1050

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[2] The Court has carefully considered its previous conclusion that Kelsay's excessive force claim is not *Heck*-barred. Filing 28 at 4-5. But the Court stands by its previous conclusion that the Eighth Circuit's decision in *Colbert v. City of Monticello, Ark.* is on point. 775 F.3d 1006, 1007-08 (8th Cir. 2014). Specifically, Kelsay's conviction for attempting to obstruct government operations did not require her to use force or violence. Neb. Rev. Stat. § 28-901; *State v. Stolen*, 755 N.W.2d 596, 601-02 (Neb. 2008). Nor did her conviction for disturbing the peace, despite the allegation that she had engaged in a "verbal and physical altercation with law enforcement personnel." Filing 17-5 at 9;

(8th Cir. 2002); *Lollie v. Johnson*, 159 F. Supp. 3d 945, 95960 (D. Minn. 2016).

Ernst relies on the opinion of Mark Sundermeier, an experienced law enforcement officer whom the defendants proffer as an expert on police use of force. Filing 53-2. He opines that Ernst's use of force was reasonable and prudent. Filing 53-2 at 1. But that opinion rests on factual assumptions that are inconsistent with Kelsay's account of the incident: he presumes that Kelsay was approaching other witnesses and yelling at them aggressively, that she was non-compliant with Ernst's efforts to control her, and that she lifted her own feet off the ground and was kicking and flailing. Filing 53-2 at 2. But Kelsay says otherwise. Sundermeier notes that, but contends that Kelsay's account is "directly contradicted" by the officers and "objective thirdparty witnesses," and that all the "objective witnesses" describe the incident the same way. Filing 53-2 at 4. And perhaps that's how it happened, but as explained above, it is not the Court's function, on summary judgment, to decide which witnesses are more credible. Sundermeier's assessment does not preclude the existence of genuine issues of material fact as to what actually happened in the parking lot of the Wymore pool.

(ii) Clearly Established Right

Moreover, taking Kelsay's version of events as true, the Court finds that her right to be free from the excessive use of force under those circumstances was clearly established. For a right to be clearly

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see, Neb. Rev. Stat. § 28-1322; *State v. Broadstone*, 447 N.W.2d 30, 33-34 (Neb. 1989); *see also Union Pac. R. Co. v. State*, 130 N.W. 277, 278 (Neb. 1911).

established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Parker v. Chard*, 777 F.3d 977, 980 (8th Cir. 2015). It is unnecessary to have a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. *Id.* at 980. Clearly established law is not defined at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced. *Id.* (citing *Plumhoff*, 134 S. Ct. at 2023). "The dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quotation omitted). "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id.* (quotation omitted).

The Court evaluates the defense of qualified immunity from the perspective of a reasonable police officer based on facts available to the officer at the time of the alleged constitutional violation. *Id.* Thus, if an officer acts in a manner about which officers of reasonable competence could disagree, the officer should be immune from liability. *Johnson v. Schneiderheinz*, 102 F.3d 340, 341 (8th Cir. 1996).

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. . . . An officer might correctly perceive all of the relevant

> facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Saucier v. Katz, 533 U.S. 194, 205 (2001), *overruled on other grounds*, *Pearson v. Callahan*, 555 U.S. 223 (2009). Qualified immunity operates to protect officers from the sometimes hazy border between excessive and acceptable force, and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful. *Id.* at 206.

It is clearly established that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public. *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009). And it has often been held under comparable circumstances that the use of force may be unwarranted against a person who poses no threat and is not actively resisting arrest or attempting to flee, even if that person is interfering with police or behaving disrespectfully. *See*, *e.g.*, *Shekleton v. Eichenberger*, 677 F.3d 361, 366-67 (8th Cir. 2012); *Montoya v. City of Flandreau*, 669 F.3d 867, 871-72 (8th Cir. 2012); *Johnson v. Carroll*, 658 F.3d 819, 827 (8th Cir. 2011); *Shannon v. Koehler*, 616 F.3d 855, 864-65 (8th Cir. 2010); *Brown*, 574 F.3d at 499; *Kukla*, 310 F.3d at 1050; *Lollie*, 159 F. Supp. 3d at 959-60. Force may only be used to overcome physical resistance or threatened force, and may not be employed simply because a suspect is disagreeable. *See Shannon*, 616 F.3d at 864-65. In this case, if

Kelsay's account is taken as true, then the excessiveness of Ernst's use of force would have been apparent. Accordingly, there are genuine issues of material fact with respect to Ernst that preclude qualified immunity and summary judgment.

(iii) Claim Against Welch

That having been said, the same is not true of Welch, because he did not employ force against Kelsay. Kelsay's claim against Welch depends on his failure to intervene to prevent Ernst's use of force.

An officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer may be held liable for violating the Fourth Amendment. *Hollingsworth v. City of St. Ann*, 800 F.3d 985, 991 (8th Cir. 2015). To establish a failure to intervene claim, however, the plaintiff must show that the officer observed or had reason to know that excessive force would be or was being used. *Id.* And that showing was not made here. Kelsay says her interaction with Ernst resulting in his use of force was "very quick": that it took "[m]aybe 30 seconds to a minute. It was - it was brief." Filing 53-8 at 85. There is nothing in the record to suggest that Welch had any notice Ernst intended to use force, much less any opportunity to intervene.

Kelsay seems to argue that Welch can be held liable because he may have indicated to Ernst that she was to be taken into custody—therefore, Kelsay argues, Welch "was complicit in causing her to be tackled." Filing 57 at 30. But an officer may be held liable only for his or her own use of excessive force, so because Welch was not involved in the allegedly unconstitutional acts of Ernst, Welch could not have

violated Kelsay's constitutional rights based on Ernst's use of excessive force. *Grider*, 785 F.3d at 1252. And while an officer "can be liable for nonfeasance, where the officer is aware of the abuse and the duration of the episode is sufficient to permit an inference of tacit collaboration[,]" there is no evidence here that Welch was aware of Ernst's takedown before it occurred or had the opportunity to "take action to deescalate the situation." *Id.* at 1253. As a matter of law, Welch cannot be liable for nonfeasance under the circumstances of this case. *See id.* Accordingly, Kelsay's excessive force claim against Welch, in his individual capacity, will be dismissed.

(b) Official-Capacity Claims

Kelsay also brought her excessive force claim against Ernst and Welch in their official capacities. A suit against government officials in their official capacity is another way of pleading an action against the entity of which they were agents. *Baker v. Chisom*, 501 F.3d 920, 923 (8th Cir. 2007). So, the actual defendant with respect to official-capacity claims against Ernst and Welch is Gage County. *See id.* at 925.

A local government can be held liable under § 1983 only where the local government *itself* causes the constitutional violation at issue. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). *Respondeat superior* or vicarious liability will not attach under § 1983. *City of Canton*, 489 U.S. at 385; *Johnson v. Douglas Cnty. Med. Dep't*, 725 F.3d 825, 828 (8th Cir. 2013). But local governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance,

regulation, or decision officially adopted and promulgated by that body's officers. *Johnson*, 725 F.3d at 828 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978)). Moreover, local governments may be sued for constitutional deprivations visited pursuant to governmental custom even though such a custom has not received formal approval through the body's official decisionmaking channels. *Id.* (citing *Monell*, 436 U.S. at 690-91). And § 1983 liability may attach if a constitutional violation resulted from a "deliberately indifferent" failure to train or supervise. *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1214 (8th Cir. 2013) (citing *City of Canton*, 489 U.S. at 388.)

Gage County's Use of Force policy provides that:

> No specific rule fits all cases as to how much force and means may be used in an arrest and each case must be determined in the light of its own facts and circumstances. The person making an arrest is acting lawfully if the force and means used are such as would be considered necessary by the ordinary reasonable person placed in the same position and if from the standpoint of such a reasonable person, the force and means used was apparently necessary, the person making the arrest if [sic] justified even though in the light of the actual facts later discovered such a degree of force or means was not actually necessary.
>
> Willful inhumanity or oppression toward a prisoner or unlawfully assaulting or beating a prisoner is punishable as a crime but if the assault is aggravated by its violence, it may

> amount to a felony and if death ensues, it might amount to murder.
>
> Deputies shall not use unnecessary force or violence in making an arrest or in dealing with a prisoner or any person.

Filing 53-12 at 1. Kelsay's argument with respect to that policy is brief:

> The policies of Gage county offer little in the way of guidance to the officers. The policies basically say "don't use too much force." The expert witness [Sundermeier] proffered by the Defendant's [sic] in this case claims the policy and it "was within the standard use of force continuum expected to be used by officers acting within the scope of their lawful duties." The policy does not contain a use of force continuum which is expected.

Filing 57 at 32.

But that argument does not direct the Court to any facially unlawful county policy or custom. *See Atkinson*, 709 F.3d at 1216. Nor does it direct the Court to evidence that Kelsay's injuries were caused by any county "action or inaction, taken with 'deliberate indifference' as to its known or obvious consequences." *Id.* And even the *complete* absence of a written policy on the use of force would not demonstrate "deliberate indifference." *See id.* A local government "may not be held liable under § 1983 merely because it failed to implement a policy that would have prevented an unconstitutional act by an employee otherwise left to his own discretion." *Atkinson*, 709 F.3d at 1216; *see Szabla v. City of*

Brooklyn Park, Minnesota, 486 F.3d 385, 390 (8th Cir. 2007).

> [A] written policy that is facially constitutional, but fails to give detailed guidance that might have averted a constitutional violation by an employee, does not itself give rise to municipal liability. There is still potential for municipal liability based on a policy in that situation, but only where a city's inaction reflects a deliberate indifference to the constitutional rights of the citizenry, such that inadequate training or supervision actually represents the city's "policy."

Szabla, 486 F.3d at 392. And there is neither evidence nor argument here to support a finding that Gage County's failure to adopt a use-of-force policy including a "use of force continuum" was a "deliberate or conscious choice by policymakers" that "was the product of deliberate indifference to the constitutional rights of its inhabitants." *Id.* at 390. Accordingly Ernst and Welch are entitled to summary judgment with respect to Kelsay's official-capacity excessive force claims. *See id.*

2. CITY OF WYMORE DEFENDANTS

As above, Kirkpatrick and Bornemeier have been sued in both their individual and official capacities. And the City of Wymore has also been sued. The Court will again consider Kelsay's individual-capacity and official-capacity claims separately.

(a) Individual-Capacity Claims

As noted above, Kelsay has three remaining claims against the Wymore defendants: unlawful arrest, excessive force, and deliberate indifference to serious medical needs. None of those claims are cognizable against Kirkpatrick or Bornemeier.

To begin with, the Court previously dismissed Kelsay's unlawful arrest claim, as against Ernst and Welch, pursuant to *Heck*, 512 U.S. 477. Filing 28 at 3-4. That conclusion has equal force with respect to Kirkpatrick and Bornemeier, and Kelsay's unlawful arrest claim will be dismissed as to them as well.

Next, the Court's reasoning above with respect to Welch is also dispositive of Kelsay's excessive force claim as to Kirkpatrick and Bornemeier. There is evidence that Kirkpatrick helped handcuff Kelsay after she was forcibly taken into custody. Filing 17-3 at 2; filing 53-8 at 206. But there is no evidence that Kirkpatrick and Bornemeier used excessive force, had any reason to know Ernst intended to use force, or were in any position to intervene.

Finally, the Court previously dismissed Kelsay's claim for deliberate indifference to a serious medical need as asserted against Ernst and Welch, finding no evidence of any detrimental effect from any delay in providing medical treatment. Filing 61 at 2-5. The same reasoning is even more applicable to Kirkpatrick and Bornemeier, who also bore no responsibility for any delay in providing medical care.

(b) Official-Capacity Claims

Kelsay also asserts her claims against the City of Wymore, and as explained above, her claims against

Kirkpatrick and Bornemeier in their official capacities are effectively claims against the City as well. *See Baker*, 501 F.3d at 925.

The Court will dismiss Kelsay's claims against the City for two reasons. First, the Court has already rejected Kelsay's claims of a constitutional violation on the part of Kirkpatrick or Bornemeier, and without a constitutional violation there can be no § 1983 municipal liability, *Hall v. Ramsey Cty.*, 801 F.3d 912, 920 n.5 (8th Cir. 2015), *cert. denied sub nom. Hall v. Ramsey Cty., Minn.*, 136 S. Ct. 2379 (2016). Second, there is no evidence that a policy or custom of the City of Wymore caused a constitutional violation. *See Elder-Keep v. Aksamit*, 460 F.3d 979, 986 (8th Cir. 2006).

Kelsay's argument to the contrary—which appears to be limited to her claim for deliberate indifference to serious medical needs—is premised on two contentions. First, she claims that Kirkpatrick's decisions were official city "policy" because he, as the Wymore chief of police, was a "policymaker" for the City of Wymore. But the Eighth Circuit rejected a similar argument in *Atkinson*, in which the plaintiff argued that the police chief for a Missouri city was a "final policymaker" for the city. 709 F.3d at 1214. The Court of Appeals explained that identification of a final policymaking authority for a local government is a question of state law, and that under Missouri law, the mayor and the board of aldermen for the city were the final policymakers. *Id.* at 1215. Specifically, the Court of Appeals relied on a Missouri statute providing that the mayor and board of aldermen were responsible for the "good government of the city [and] the preservation of peace and good order." *Id.* (quoting

Mo. Ann. Stat. § 79.110); *see Copeland v. Locke*, 613 F.3d 875, 882 (8th Cir. 2010).

Similar statutory language is found here: under Nebraska law, it is the mayor of a city of the second class like Wymore who "shall have superintendence and control of all the officers and affairs of the city and shall take care that the ordinances of the city and all laws governing cities of the second class are complied with." Neb. Rev. Stat. § 17-110. The city is empowered to establish a police department, and define its powers and duties, which include the power to arrest people who break the law. Neb. Rev. Stat. §§ 17-118 & 17-124. The mayor, with the consent of the city council, appoints police officers, and the city council adopts rules and regulations governing the removal, demotion, or suspension of police officers, including the chief of police. Neb. Rev. Stat. § 17-107(3).

In other words, under Nebraska state law, it is the elected officials of a city such as Wymore who are the final policymakers for the "superintendence and control of all the officers and affairs of the city." § 17-110; *see Copeland*, 613 F.3d at 882. Kelsay directs the Court to neither "state and local positive law" nor "state and local 'custom or usage' having the force of law" establishing that Kirkpatrick was a "final policymaker." *See Atkinson*, 709 F.3d at 1215. Even if Kirkpatrick was invested with discretion in exercising particular functions—and there is scant evidence of even that much—such discretion "does not, without more, give rise to municipal liability based on an exercise of that discretion." *Copeland*, 613 F.3d at 882. In short, any decision Kirkpatrick may have made regarding medical care for arrestees "is not, as a matter of law, one over which he has any

policymaking authority." *See id.* at 883. And the record is devoid of any evidence showing that the elected officials of Wymore delegated such authority to him. *See id.*

Second, even if Kirkpatrick could be considered a policymaker, there is no evidence of any policy set by Kirkpatrick that is causally connected to any deprivation of Kelsay's rights. Kelsay relies on an affidavit from Gary Redden, who was the safety training officer for Wymore Emergency Medical Services (EMS). Filing 60 at 29. Redden avers that he stopped by Kirkpatrick's home a few days before Kelsay's arrest "to discuss protocol for the working relationship between the police and the Emergency Management Responders because he was new to Wymore police department and because Officer Bornemeier was also a new officer in need of training." Filing 21-7 at 1. Redden avers that there were "some incidents that were not handled properly" and that

> [w]hile I was visiting with him we discussed protocol of working with the EMS and he actually disagreed with me about whether if a person complained of injury or a suspected medical issue while in custody that he needed to allow them to get medical treatment. He argued with me about what roll [sic] EMS would play on the scene and said "I can do whatever I want to as an officer."

Filing 21-7 at 1. Redden explains that on another occasion, he had experienced Kirkpatrick "interacting with EMS that he acted in an unprofessional manner and was in the way of us treating a patient. Also borderline practice medicine without a license." Filing

21-7 at 2. Redden opines that "[t]he protocol in Nebraska when a person is complaining of injury or need of medical treatment, Law enforcement in Nebraska is supposed to call EMS to have the patient examined." Filing 21-7 at 2. "There were[,]" Redden says, "EMS people on duty when Kelsay was injured and they would have checked her out." Filing 21-7 at 2.

But the issue in this case is not the proper use of Wymore EMS, so Redden's opinion that Kirkpatrick had not appropriately deferred to Wymore EMS is beside the point. The issue is whether law enforcement was deliberately indifferent to a serious medical need in violation of the Fourteenth Amendment. *See Ryan v. Armstrong*, 850 F.3d 419, 424-25 (8th Cir. 2017). And the Court is not aware of any authority establishing a *constitutional* requirement that emergency medical services be summoned to the scene of an injury, and deferred to on the scene, so long as what *is* done satisfies constitutional standards. The Court has already determined that it did. *See* filing 61 at 2-5. Moreover, it was Ernst who injured Kelsay, Ernst who took her into custody, and Ernst who transported her to the Gage County jail—and Kirkpatrick who eventually took her from the jail to the hospital. So, there is little to causally connect any purported "policy" of Kirkpatrick's to any delay in Kelsay's treatment.

In sum, the Court finds no evidence that Kirkpatrick or Bornemeier violated Kelsay's constitutional rights, and no evidence linking the violations she alleges to any municipal policy or custom. Kelsay's claims against Kirkpatrick and

Bornemeier in their individual and official capacities, and against the City of Wymore, will be dismissed.

IV. CONCLUSION

Qualified immunity is denied with respect to Kelsay's excessive force claim against Ernst in his individual capacity, and that claim may proceed. Kelsay's remaining claims are dismissed.

IT IS ORDERED:

1. Ernst and Welch's motion for summary judgment with respect to Kelsay's excessive force claim (filing 52) is granted in part and in part denied.
2. Kelsay's excessive force claim against Welch in his individual capacity, and against Ernst and Welch in their official capacities, is dismissed.
3. The Wymore defendants' motion for summary judgment *(filing 54) is granted.*
4. Kelsay's claims against Kirkpatrick and Bornemeier in their individual and official capacities, and against the City of Wymore, are dismissed.
5. Welch, Kirkpatrick, Bornemeier, and the City of Wymore are terminated as parties.

Dated this 19th day of May, 2017.

BY THE COURT:

/s/ John M. Gerrard
John M. Gerrard
United States District Judge