

APPENDIX

**UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT**

No: 16-1412

Rodney Brossart, et al.

Appellants

v.

Kelly Janke, individually and in his official capacity
as Sheriff for Nelson County, et al.

Appellees

Appeal from U.S. District Court for
the District of North Dakota – Fargo
(3:14-cv-00062-RRE)

ORDER

The petition for rehearing en banc is denied.
The petition for rehearing by the panel is also denied.

August 07, 2017

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 16-1412

Rodney Brossart, et al.

Plaintiffs – Appellants

v.

Kelly Janke, et al.

Defendants – Appellees

Appeal from United States District Court for
the District of North Dakota – Fargo

Submitted: February 7, 2017

Filed: June 16, 2017

Before LOKEN, COLLOTON, and KELLY, Circuit
Judges.

LOKEN, Circuit Judge.

During confrontations that extended over two days at the Brossart family farmstead in Nelson County, North Dakota, Deputy Sheriff Eric Braathen tased both Rodney Brossart and his son, Thomas Brossart. The Brossarts, including Rodney's wife, Susan, brought this action against Braathen, his supervisor, Sheriff Kelly Janke, and Nelson County, asserting federal claims under 42 U.S.C. § 1983 that Braathen used excessive force in violation of the Fourth Amendment, Janke is liable for the violations in his supervisory capacity, and Nelson County is liable for adopting an unconstitutional Taser Policy and for failing to train Braathen. The Brossarts also asserted pendent state law claims. The district court¹ dismissed the state law claims as time-barred in a December 2014 Order. After the Brossarts filed an Amended Complaint, the district court granted defendants summary judgment and dismissed the Amended Complaint with prejudice in a January 2016 Order. The Brossarts appeal both orders. Reviewing the grant of summary judgment *de novo* and viewing the facts in the light most favorable to the Brossarts, the non-moving parties, we affirm.

I. Background.

A. Tasing of Rodney Brossart. On June 22, 2011, the Brossarts discovered six loose cattle on their property. They did not own these cattle but secured them in an old missile silo that evening without giving notice to the county sheriff or to the chief brand inspector required by a North Dakota estray statute.

¹ The Honorable Ralph R. Erickson, United States District Judge for the District of District of North Dakota.

See N.D.C.C. § 36-13-01 (2012). The following morning, Rodney's neighbor, Chris Anderson, tracked the cattle to the Brossarts' property and spoke to Rodney, who declined to release the cattle and said Anderson should contact his insurance company regarding damage the cattle caused. Anderson left and phoned a complaint to the Nelson County Sheriff's Department, which was referred to Deputy Braathen. Braathen contacted the State's attorney, who advised that a criminal violation of the estray laws might be an issue. Braathen next contacted Fred Frederickson, a licensed peace officer and brand inspector for the North Dakota Stockman's Association.

Braathen and Frederickson met with Anderson, who said he found his cattle at the Brossart missile silo, and Rodney said Anderson would have to pay to get them back. Anderson provided Frederickson brand papers for the cattle. Braathen and Frederickson set out for the Brossart farm in a patrol car to investigate.

Near the farm, the officers encountered Rodney and his son Jacob blocking the rural road while using a pump to drain water from a ditch. The summary judgment record includes a transcript of the recorded conversation. Braathen first introduced Frederickson to Rodney, who refused to shake hands and questioned Frederickson's authority. Frederickson asked for permission to inspect the cattle, explaining he had brand papers and the officers had received a complaint. Rodney said, "Well, when I get done here." Braathen said, "We're going to do it now, Rodney." Rodney replied,

“if you can step foot on that property, mister, you’re not going to be walking away.” Frederickson interjected, “Hey, you don’t want to make threats, okay? Don’t make threats like that.”²

Braathen then said they were going to see the cattle. Rodney replied, “I’ll be done here after a bit,” turned away from Braathen, and walked towards his equipment to remove his pump from the roadway, ignoring Braathen’s warning, “We’re not giving you a choice here.” When Rodney insisted he would finish his work, Braathen said, “You’re going to go to jail if we don’t cooperate now.” Rodney replied, “Where’s the writ? Give me the writ.” Braathen said, “All right, you’re under arrest.”³ The confrontation escalated. The Amended Complaint described the following sequence:

² A state court jury subsequently convicted Rodney of terrorizing in violation of N.D.C.C. § 12.1-17-04, a class C felony, after a trial at which Frederickson testified he took this comment as a serious threat. The Supreme Court of North Dakota held that a jury could find the comment to be a true threat, rather than protected speech, but remanded for a new trial because the jury was not properly instructed on that issue. State v. Brossart, 858 N.W.2d 275, 280-85 (N.D. 2015).

³ In affirming Rodney’s conviction for preventing arrest, a class A misdemeanor, and failing to comply with estray law, a class B misdemeanor, the Supreme Court of North Dakota upheld the trial court’s ruling that Braathen had probable cause to arrest Rodney after he threatened the officers, for terrorizing and for violation of an estray law, N.D.C.C. § 36-13-08. Brossart, 858 N.W.2d at 290.

At that point, Deputy Sheriff Braathen pulled out his pair of handcuffs and grabbed Rodney Brossart's right hand to secure him in handcuffs. Rodney resisted by backing away, according to Deputy Sheriff Braathen's testimony. Then Braathen pulled out his Taser gun, activated it, and pointed it at Brossart, while instructing him to get to the ground. He said,

'I commanded him at least three times.'

...Rodney Brossart yelled to his son, Jacob, to 'get it' and pointed at the pickup.

Jacob Brossart was detained by Inspector Frederickson and place[d] in his car.

Then Deputy Sheriff Braathen decided to activate his Taser.

The patrol car recording supports these allegations. After Braathen informs Rodney that he is under arrest, Rodney inquires "for what," and is heard saying "[g]et, get." Braathen testified that Rodney said those words to his son, Jacob, who headed for the pickup truck but was intercepted by Frederickson before he reached it. The truck contained two firearms and ammunition. Braathen is heard saying: "Rodney! Down on the ground! Down on the ground! Down on the ground! Down on the ground."

Braathen then deployed his taser for the first time, firing two probes in dart-mode into Rodney's pectoral region. Rodney stumbled backward to the edge of the road. On the patrol car recording, Braathen is heard saying "[d]on't move! Stay on the ground.... Down on the ground, Rodney!" The Amended Complaint alleged, "Brossart goes down on one knee and then gets back up again." Braathen re-activated the taser

when Rodney continued to ignore commands to stay down. Rodney fell down and rolled into the ditch. On the recording, Braathen tells Frederickson to “cuff him” and calls for back-up. Rodney says, “I want some proof of that guy’s authority.” In response to Braathen’s repeated commands to “stay down,” Rodney first accuses Deputy Braathen of stepping on his phone and then repeatedly says, “Where’s my glasses?” Braathen repeatedly warns, “You move again Rodney, and you’re going to get tased ... Stay down! ...Rodney, if you move at all I’ll tase you again!” The patrol car recording reveals that Rodney would not stay on his knees or otherwise cooperate:

OFFICER FREDERICKSON: Put your hands behind your back.

RODNEY BROSSART: (inaudible) my phone!

OFFICER FREDERICKSON: Rodney!
Down! Get down on your knees!

RODNEY BROSSART: There it is!

DEPUTY BRAATHEN: Down on your knees!

RODNEY BROSSART: Where’s my glasses?

DEPUTY BRAATHEN: Rodney!

RODNEY BROSSART: Where’s my glasses?

DEPUTY BRAATHEN: Rodney, I’m going to tase you again!

RODNEY BROSSART: Where’s my glasses?
(Taser sounds and moaning).

The Amended Complaint alleges that Braathen “noticed that Rodney Brossart was attempting to stand up in a ‘very hostile, aggressive manner’” and tased Rodney a third time in the ditch for “not responding to his command to get back down.” Braathen also touched the taser to the back of Rodney’s neck. “Moments later, Rodney Brossart attempted to get up and Deputy Sheriff Braathen command[ed] him to get back down in the mud, while waiting for Inspector Frederickson to come down into the ditch to assist in handcuffing Brossart.” Braathen tased him a fourth time for trying to resist, deploying more darts in his pectoral region. When Rodney resisted the attempted handcuffing, Braathen tased him a fifth time, achieving “complete neuromuscular incapacitation.”

Braathen and Frederickson handcuffed Rodney, walked him to the patrol car, and placed him in the back seat. Transported by ambulance to a local hospital, Rodney was examined for two hours and five darts were removed before he was transported to the correctional center. He suffered no permanent scarring or disfigurement.

B. June 23 Armed Standoff. That evening, Braathen and Sheriff Janke returned to the Brossart farmstead with a search warrant to retrieve the six cattle. When they walked into the yard, three of Rodney’s sons, Alex, Thomas, and Jacob, exited the house carrying rifles and told officers they were trespassing on private property. The officers drew their guns and backed away, then retreated “about a mile north” where they called a crisis negotiation team. The Grand Forks SWAT team with support from adjoining counties arrived to establish a

perimeter around the Brossart home, then left for the evening. Two agents did a drive-by and confirmed the cattle remained in the missile silo.

C. June 24 Tasing of Thomas Brossart. The next morning, law enforcement including the SWAT team proceeded to the missile silo to execute the search warrant. As they were removing the cattle, Thomas Brossart came to the silo on his three-wheeler, while brothers Jacob and Alex rode over on a tractor. Thomas told law enforcement that they were trespassing on private property and to leave. The SWAT team arrested the brothers on terrorizing charges, based on the prior evening's events. Deputies Braathen and Olson, waiting two miles south, were called in to transport the brothers to the correctional center. When Braathen arrived, the three brothers were handcuffed and lying on the ground, held at gun point by a SWAT team member.

Thomas refused to walk to the patrol car, so the deputies dragged him and placed him in the back seat. So all three brothers could be placed in the back seat, Braathen told Thomas to move over. Thomas moved a couple inches. Thomas alleges that Braathen then tased him on his left leg in drive stun mode. The parties dispute whether Braathen warned Thomas that he would be tased if he did not move. Braathen claims Thomas would only say: "This is my property and I don't agree to the sale" (an obvious reference to the cattle). Braathen considered Thomas's refusal to be further resistance and testified that he used the taser because physically moving Thomas risked being kicked by Thomas or causing him greater injury. The tasing resulted in a slight burn mark on Thomas that

lasted less than a day and did not require medical treatment.

After the tasing, Deputy Olson pulled Thomas to the middle seat, and Jacob and Alex were placed in the back seat with Thomas. Throughout the drive to the correctional center, the brothers chanted: “This is my property and I don’t agree to the sale.” Thomas explained they found this phrase on the internet, and it conveyed their belief they were illegally arrested.

D. The Nelson County Taser Policy. At the time of these events, the Nelson County Sheriff’s Department had written policies in place for the use of force, entitled “Use of Control Continuum,” and for the use of tasers, entitled “Less Lethal Weapons – Taser X26” (hereafter referred to as the “Taser Policy”). Janke adopted the Taser Policy in 2009. The Use of Control Continuum instructed officers to use control methods “only to the extent reasonable and necessary” and to consider the “totality of the circumstances.” The Taser Policy required officer training: “Only officers receiving training and certification from an authorized TASER X26 instructor will be allowed to carry and deploy the weapon system when deemed appropriate. These officers will be required to attend and successfully complete an initial certification course of instruction and will also be required to successfully re-certify annually.” Braathen was trained in taser use in January 2009 and again in January 2011, five months prior to the incidents at issue. Neither Nelson County nor Sheriff Janke had received any prior complaints regarding excessive force or taser use by any member of the Nelson County Sheriff’s Department.

The Taser Policy recommended taser use when it “reduces the risk of injury or death to those involved.” The Policy instructed that “[o]fficers are authorized to deploy the TASER X26 to gain control when faced with actual or threatened physical resistance. Officers are discouraged from deploying the TASER X26 on subjects where no physical violence or threat of physical violence exists (i.e. non-violent fleeing subjects).” The “Deployment Procedures” section provided that “[o]fficers should, if feasible and safe, provide a verbal warning to the suspect of the pending deployment of the TASER X26 in order to provide a final opportunity for compliance.” The “Restrictions” section instructed that a taser “should not be deployed...[i]n cases of passive resistance,” unless lesser force was unsuccessfully attempted, is not possible given the circumstances, or risks “a possibility of injury of suspect or officer,” and “shall never be used punitively or for coercion or threat in the absence of actual or threatened physical resistance ...[or] against a person already in custody unless physical resistance has to be overcome.”

E. Procedural History. After the district court dismissed state law claims of the tort of outrage, battery, negligent supervision, and mental anguish as time-barred, plaintiffs filed an Amended Complaint alleging that Susan experienced severe emotional distress as a result of the federal constitutional violations committed against Thomas and Rodney. The district court granted defendants’ motions for summary judgment and dismissed the Amended Complaint with prejudice. On appeal, the Brossarts argue the district court erred in granting summary judgment on their Fourth Amendment excessive force

claims, dismissing all claims of supervisory and municipal liability, and dismissing their state law claims as time-barred.

II. Discussion

A. Rodney's Excessive Force Claim. Plaintiffs argue the district court erred in granting Deputy Braathen and Sheriff Janke qualified immunity because Braathen's actions "aggressively approaching Rodney, escalating the conflict, and repeatedly tasing Rodney" violated his clearly established Fourth Amendment rights.⁴

Qualified immunity shields officer from civil damage liability for discretionary acts when "[their] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." White v. Pauly, 137 S. Ct. 548, 551 (2017) (quotations omitted). To avoid pre-trial dismissal, a plaintiff must show both that (1) the facts demonstrate that the plaintiff suffered a violation of a constitutional or statutory right and (2) the right was clearly established at the time of the defendant's alleged misconduct. See, eg., Ehlers v. City of Rapid City, 846 F.3d 1002, 1008 (8th Cir. 2017).

In this case, the district court concluded that Braathen was entitled to qualified immunity because plaintiffs made neither showing. First, the court concluded, there was no Fourth Amendment violation because "Rodney engaged in conduct during the

⁴ Plaintiffs also argue that qualified immunity was not timely raised because defendants missed the district court's deadline for filing threshold motions. As plaintiffs first raised this argument on appeal, it is waived. See Joseph v. Allen, 712 F.3d 1222, 1226 (8th Cir. 2013).

course of his encounter with law enforcement officers that renders Braathen's conduct reasonable." Second, the court concluded, "Rodney's assertion that multiple tasings constitute a violation of a clearly established constitutional right is also unsupported in law." We agree with both conclusions.⁵

The Fourth Amendment's objective reasonableness standard governs a claim that an officer used excessive force "in the course of making an arrest, investigatory stop, or other 'seizure.'" Graham v. Connor, 490 U.S. 386, 388 (1989). We apply this standard to Fourth Amendment claims of excessive force brought by detainees in custody. See Davis v. White, 794 F.3d 1008, 1011-12 (8th Cir. 2015). The analysis "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," as well as "careful attention to the facts and circumstances of each particular case." Graham, 490 U.S. at 396 (quotations omitted); see County of Los Angeles v. Mendez, --- S. Ct. ---, 2017 WL 2322832, at *6 (2017). We consider the "reasonableness" of a particular use of force...from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. Whether the force used

⁵ The district court also ruled that Rodney's claim was barred by the Supreme Court's decision in Heck v. Humphrey, 512 U.S. 477 (1994), because the state court jury in convicting Rodney of preventing arrest necessarily found that Braathen did not use excessive force. The parties briefed and argued this issue on appeal, but because we affirm the district court's alternative ground, we need not consider it.

was constitutionally excessive is an issue of law. Davis, 794 F.3d at 1013.

In applying this standard, the district court reasoned:

Rodney told Frederickson that the officers would not leave his property if they stepped foot on it. Throughout the course of his arrest, Rodney persisted in resisting Braathen's commands. In addition, Brossart made an apparent threat involving firearms when he commanded his son to "get it." From a reasonable officer's perspective, Rodney's behavior was volatile, dangerous and clearly posed a threat to Braathen and Frederickson's personal safety. Given the circumstances in which he found himself, Braathen's actions fall squarely within the guidelines of Nelson County's use of force continuum, which the court has found constitutional on its face. Braathen's actions were not unreasonable under the circumstances.

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personal safety. Given the circumstances in which he found himself, Braathen's actions fall squarely within the guidelines of Nelson County's use of force continuum, which the court has found constitutional on its face. Braathen's actions were not unreasonable under the circumstances.

We agree with the district court's reasoning. The undisputed summary judgment record establishes, and the state court jury verdict and Supreme Court of North Dakota's opinion strongly confirm, that Rodney made two threats of violence to the law enforcement officers, repeatedly did not comply with Braathen's orders to cooperate in a potentially criminal investigation, and then resisted being handcuffed when told he was under arrest. Braathen's use of a taser under the circumstances was a reasonable use of significant non-lethal force. See Ehlers, 846 F.3d at 1012.

Rodney argues that "even if the first Taserings were legitimate, the subsequent Taserings of a suspect on the ground are unconstitutional." He asserts that our decision affirming the denial of qualified immunity in Shekleton v. Eichenberger, 677 F.3d 361 (8th Cir. 2012), clearly established that Braathen's conduct was unconstitutional. We disagree. In Shekleton, the officer tased "an unarmed suspected misdemeanor, 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. at 366. Here, the Amended Complaint alleged that Rodney continually ignored commands to stay down, attempted to stand up, and resisted arrest. On the patrol car recording, Braathen repeatedly tells

Rodney that he must not move or he will be tased again and instructs Rodney to stay on his knees.

“Law enforcement officers may use physical force to subdue an arrestee when he fails to comply with orders to lie still during handcuffing.” Carpenter v. Gage, 686 F.3d 644, 649 (8th Cir. 2012), cert. denied, 135 S. Ct. 955 (2013)(rejecting a claim that tasing was the use of excessive force). Shekleton does not apply to the facts of this case.

We further agree with the district court’s alternative conclusion that Braathen is entitled to qualified immunity because, even if his repeated use of the taser was unreasonable, it did not violate clearly established law. For a right to be clearly established, “existing precedent must have placed the statutory or constitutional question beyond debate.” Pauly, 137 S. Ct. at 551 (quotations omitted). Our prior cases have clearly established that “use of [a] taser on a nonfleeing, nonviolent suspected misdemeanor [is] unreasonable.” Shekleton, 677 F.3d at 367, citing Brown v. City of Golden Valley, 574 F.3d 491, 499-500 (8th Cir. 2009).

Here, Rodney refused to cooperate with officers attempting to investigate a possible criminal violation, made threats of violence sufficient to support conviction of a terrorizing felony, then physically resisted a lawful arrest, ignoring repeated commands to lie down or be tased. Use of force requires a particularized Graham v. Connor Fourth Amendment analysis, and the Supreme Court has instructed that, in the qualified immunity context, “Graham do[es] not by [itself] create clearly established law outside ‘an obvious case.’” Pauly, 137

S. Ct. at 552. Braathen's repeated use of the taser against a potentially violent, defiant arrestee was not an obvious case. For example, in DeBoise v. Taser Int'l, Inc., 760 F.3d 892 (8th Cir. 2014), cert. denied, 135 S. Ct. 2348 (2015), we affirmed the grant of qualified immunity to officers whose multiple tasings resulted in the death of a violent, delusional schizophrenic person who threatened officers attempting to handcuff him and continued to struggle after eight tasings. We explained that "no reasonable officer, observing DeBoise's behavior, would have understood the actions taken to be so disproportionate and unnecessary as to amount to a [constitutional] violation." Id. at 897-98.

B. Thomas's Excessive Force Claim. Plaintiffs argue that Braathen's tasing of Thomas while he was handcuffed and detained in the back seat of a squad car constituted clearly established use of excessive force. In rejecting this contention, the district court explained:

The undisputed facts show that Thomas actively opposed law enforcement officers' efforts to secure his neighbor's cattle. He participated in an armed standoff with law enforcement and the Grand Forks SWAT Team. Two officers were necessary to get him in the police car after he was placed under arrest. While under arrest, he continued to verbally resist the officers' actions by stating, "This is my property and I don't agree to the sale." Once in the car Thomas intentionally failed to comply with a lawful command by refusing to move over. His response to the command was classically

passive aggressive – he moved mere inches. Given the tense, stand-off-like situation the arresting officers found themselves in coupled with Thomas’s apparent failure to comply with Braathen’s commands, Braathen’s actions were reasonable under the circumstances. The situation at hand was tense, involved a real potential for life threatening circumstances to erupt and required action that was prompt and designed to get a response.

Again, we agree with the district court’s analysis. Plaintiffs argue the district court inappropriately considered facts preceding Thomas’s arrest in granting Braathen qualified immunity. This contention is frivolous. Graham v. Connor requires taking all relevant circumstances into account, 490 U.S. at 396.

Plaintiffs rely heavily on our decisions in Shekleton and Brown that “use of [a] taser on a nonfleeing, nonviolent suspected misdemeanant was unreasonable.” Shekleton, 677 F.3d at 367. But the principle does not apply in this case. Thomas was not nonviolent – he had participated in armed standoff resulting in deployment of a SWAT team and then his arrest for felony terrorizing. Called to the scene to transport the brothers to a detention center, Braathen observed that a SWAT team member had handcuffed the brothers and was holding them on the ground at gun point. Thomas resisted lawful arrest by refusing to walk to the patrol car and then by refusing to comply with Braathen’s command that he move over so the squad car could transport all three brothers. In response to this dangerous defiance, Braathen deployed his taser in drive stun mode, a use of force

that “only causes discomfort and does not incapacitate the subject.” DeBoise, 760 F.3d at 895 n.5.⁶

“[T]he infliction of only *de minimas* injuries supports the conclusion that the officer did not use excessive force.” Davis, 794 F.3d at 1012 (quotation omitted).

For these reasons, we conclude the district court did not err in dismissing plaintiff’s claims that Deputy Braathen used constitutionally excessive force in tasing Rodney and Thomas Brossart.⁷

⁶In Brooks v. City of Seattle, 599 F.3d 1018, 1027-28 (9th Cir. 2010), the court observed that “use of the Taser in drive-stun mode is painful, certainly, but also temporary and localized, without incapacitating muscle contractions or significant lasting injury” – an injury of force “more on par with pain compliance techniques, which this court has found involve a ‘less significant’ intrusion...than most claims of force, even when they cause pain and injury,” rev’d on other grounds sub nom. Mattos v. Agarano, 661 F.3d 433 (9th Cir.2011).

⁷The Brossarts object to the district court’s dismissal of Susan Brossart’s claim in the Amended Complaint for “severe emotional distress and mental anxiety suffered as an indirect, but related, result of the constitutional violations made against her husband and son.” This derivative claim is obviously foreclosed by our decision that there was no constitutional violation. In addition, we agree with the district court that the Amended Complaint failed to assert a § 1983 claim for violation of Susan’s constitutional rights. See Coon v. Ledbetter, 780 F.2d 1158, 1160-61 (5th Cir. 1986).

C. Supervisory Liability. Sheriff Janke was not present when either Rodney or Thomas was tased and therefore did not directly participate in the alleged use of excessive force. Plaintiffs allege Janke is nonetheless individually liable because he “failed to properly train, supervise, and control Deputy Braathen.” Our decision that Braathen did not use excessive force against either Rodney or Thomas forecloses this claim. See Moore v. City of Desloge, 647 F. 3d 841, 849 (8th Cir. 2011) (“to maintain an action for training or supervisory liability, a plaintiff must show the failure to train or supervise caused the injury”). Moreover, the failure to train claim is without merit. “When a supervising official who had no direct participation in an alleged constitutional violation is sued for failure to train or supervise the offending actor, the supervisor is entitled to qualified immunity unless plaintiff proves that the supervisor (1) received notice of a pattern of unconstitutional acts committed by a subordinate, and (2) was deliberately indifferent to or authorized those acts.” S.M. v. Krigbaum, 808 F. 3d 335, 340 (8th Cir. 2015). It is undisputed that these tasings were the first that Braathen committed and that neither Nelson County nor Janke had received any prior complaints regarding taser use.

D. Municipal Liability. Plaintiffs argue the district court erred in dismissing their claims against Nelson County, asserting two theories of municipal liability on appeal: (1) that the Nelson County Taser Policy is unconstitutional, and (2) that the County (and Sheriff Janke) failed to appropriately train its officers in Taser use. Both theories are without merit.

A municipal policy or practice is unconstitutional “on its face” where the policy or

practice “itself violates federal law, or directs and employee to do so.” Szbala v. City of Brooklyn Park, 486 F.3d 385, 389 (8th Cir. 2007) (en banc), quoting Bd. of the County Comm’rs v. Brown, 520 U.S. 397, 404-05 (1997). Neither the Nelson County Taser Policy or Use of Force Continuum directs and employee to violate the Fourth Amendment. We concluded that a similar taser policy was facially constitutional in Hollingsworth v. City of St. Ann, 800 F.3d 985, 992 (8th Cir. 2015). Plaintiffs, who first briefed this argument in their Reply Brief, argue that the Taser Policy is facially unconstitutional because it permits the use of a taser on non-violent subjects can lead to constitutional violations.” The argument is both untimely and without merit. “[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.” Szbala, 486 F.3d at 392.

A municipality may also be liable where its policies are lawful on their face but municipal action, such as failure to train or supervise, “was taken with deliberate indifference as to its known or obvious consequences” and “led an employee to violate a plaintiff’s rights.” Hollingsworth, 800 F.3d at 992, quoting Szbala, 486 F.3d at 389-90. As we have explained, plaintiffs’ failure to train claim against Nelson County is foreclosed by our conclusion that Braathen’s tasing of Rodney and Thomas did not constitute excessive force. Moreover, the absence of prior complaints to Nelson County of improper taser use means there was no pattern of constitutional violations demonstrating that “the need for more or different training [was] so obvious, and the inadequacy so likely to result in the violation of

constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.” Canton v. Harris, 489 U.S. 378, 390 (1989).

E. Dismissal of the State Law Claims. The district court dismissed the Brossarts’ state law claims as time-barred. North Dakota law provides that a claim against a political subdivision or Sheriff “must be commenced within three years” after it accrues. N.D.C.C. § 32-12.1-10; 28-01-17. Under North Dakota law, an action is commenced “as to each defendant when the summons is served on that defendant.” N.D.C.C. § 28-01-38, N.D. R. Civ. Pro. 3. By contrast, Rule 3 of the Federal Rules of Civil Procedure provides that a “civil action is commenced by filing a complaint with the court.” In Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980), the Supreme Court held that federal “Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.”

Plaintiffs filed their Original Complaint on June 23, 2014, three years after the tasing of Rodney Brossart. They served Sheriff Janke by certified mail on June 28, 2014, and all other defendants by process server on July 25, 2014. The district court applied the North Dakota rule and held that the Brossarts’ state law claims were time-barred. The court rejected the Brossarts’ contention that the federal rule should apply because their Complaint included federal claims, correctly noting that we “subsequently extended the Walker holding to actions involving a ‘federal claim along with state claims.’” On appeal, plaintiffs argue the district court cited no Eighth Circuit case, only “Id. at 1286.” But that was obviously

an oversight, as the court correctly quoted and applied our decision in Appletree Square I, Ltd. V. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994) (where “[t]he state claims would be barred in state court...they should not be allowed to proceed in federal court.”). The Brossarts’ suggestion that they are entitled to equitable tolling of the statute of limitations is contrary to North Dakota law. See Oakland v. Bowman, 840 N.W.2d 88, 91-92 (N.D.2013).

The judgment of the district court is affirmed. KELLY, Circuit Judge, concurring in part and dissenting in part.

I respectfully dissent from Part II.B of the court’s opinion. In determining whether an official is entitled to qualified immunity, we must view the facts “in the light most favorable to the party seeking damages” ---here, the Brossarts. McKenney v. Harrison, 635 F.3d 354 (8th Cir. 2011). So construed, the facts are that Thomas Brossart was home on the evening of June 23, 2011, when law enforcement entered the Brossarts’ property. Thomas and his two brothers went outside with firearms, and Thomas told the officers to leave because they were trespassing. Thomas did not know the officers were there to serve a search warrant. The encounter ended in a standoff, and the officers left the property. No shots were fired.

The next day, law enforcement returned to the Brossarts’ property. Thomas (on a three-wheeler) and his brothers (on a tractor) approached law enforcement, who were near the Brossarts’ silo. Neither Thomas nor his brothers were carrying firearms. All three brothers were then arrested, handcuffed, and ordered to law on the ground at gunpoint. Officer Braathen and another officer carried

Thomas to a police car because he would not walk on his own, and placed him in the back seat. Thomas remained handcuffed. Once Thomas was seated in the car, Braathen told Thomas to “move over.” Thomas moved over a couple of inches; he did not know that the officers needed room to place both of his brothers in the back seat with him. Without warning, Braathen tased Thomas on his left leg for approximately five seconds, resulting in a slight burn. Another deputy then pulled Thomas to the middle of the back seat. Thomas said: “This is my property and I don’t agree to the sale.”

Viewed in the light most favorable to Thomas, Braathen used excessive force. While the events of the prior evening are relevant to whether the force used against Thomas was excessive, see Graham, 490 U.S. at 396 (reasonableness of use of force under Fourth Amendment “requires careful attention to the facts and circumstances of each particular case”), equally as important are the circumstances immediately surrounding the arrest, including “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,” id.; cf. County of Los Angeles v. Mendez, --- S. Ct. ---, 2017 WL 2322832, at *6-8 (2017) (officers’ prior Fourth Amendment violation cannot render a subsequent reasonable use of force unreasonable). Thomas may have earlier posed a threat to officers, but at the time he was tased, he was handcuffed and secured in the back seat of a police car. See Chambers v. Pennycook, 641 F.3d 898, 907 (8th Cir. 2011)(kicking restrained and non-resisting subject found objectively unreasonable). Multiple officers were at the scene,

including at least two in the immediate vicinity of the car. See Brown, 574 F.3d at 498 (finding force less justified where multiple officers were present). There is no evidence that Thomas made any aggressive movements or verbal threats toward Braathen when he was getting into or while he was seated in the police car. See Shekleton, 677 F.3d at 366 (excessive force when officer tased “an unarmed suspected misdemeanor, who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him”); Bryan v. MacPherson, 630 F.3d 805-826-27 (9th Cir. 2010) (suspect yelling and standing fifteen to twenty-five feet away did not pose immediate threat); Brown, 574 F.3d at 497 (officer’s testimony that plaintiff may have used glass tumbler as weapon insufficient to establish immediate danger when suspect did not reach for glass or threaten officers).

Furthermore, according to Thomas, Braathen told him to “move over,” and Thomas – still handcuffed – did so by shifting a couple of inches, not understanding that he was expected to move even further. Such actions, viewing in the light most favorable to Thomas, do not constitute resistance. See Peterson v. Kopp, 754 F.3d 594, 597, 600 (8th Cir. 2014) (arguing with officer and talking back held to not be resisting); Brown, 574 F.3d at 498 (refusing to hang up phone not resisting arrest). And, according to Thomas, Braathen gave no warning before deploying his taser. See Smith v. Kansas City Police Dep’t, 586 F. 3d 576, 581 (8th Cir. 2009)(excessive force when plaintiff was forcibly removed from his home before having the opportunity to comply with commands); Brown, 574 F.3d at 497 (summary judgment not

appropriate where evidence presented jury question as to whether officer warned plaintiff that she would be tased). Similarly, Braathen did not tell Thomas why he needed to move, and another officer was able to successfully pull Thomas into the middle seat. See Tatum v. Robinson, ---F.3d ---, 2017 WL 2324709, at *2 (8th Cir. 2017)(though use of some degree of force may have been reasonable, use of taser was not.) Though Braathen contends that Thomas refused to comply with his order and that Braathen warned Thomas that he would be tased, those assertions are directly contradicted by Thomas' deposition testimony. "This court may not resolve genuine issues of material fact in [Braathen's] favor at the summary judgment state." Id. at *6.

Because the facts here establish a genuine issue of material fact as to whether officers used excessive force during Thomas' arrest and demonstrate that Thomas' right to be free from this excessive force was clearly established at the time of the events, I would reverse the grant of summary judgment on Thomas Brossart's excessive force claim and remand for further proceedings. I concur in the court's opinion in all other respects.

**UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT**

No: 16-1412

Rodney Brossart; Susan Brossart; Thomas Brossart

Plaintiffs – Appellants

v.

Kelly Janke, individually and in his official capacity
as Sheriff for Nelson County; Eric Braathen,
individually and in his official capacity as Deputy
Sheriff for Nelson County; Nelson County,
North Dakota

Defendants – Appellees

Appeal from U.S. District Court for
the District of North Dakota – Fargo
(3:14-cv-00062-RRE)

JUDGMENT

Before LOKEN, COLLOTON AND KELLY,
Circuit Judges.

This appeal from the United States District
Court was submitted on the record of the district
court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and
adjudged that the judgment of the district court in this
cause is affirmed in accordance with the opinion of
this Court.

June 16, 2017

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

Rodney Brossart, Susan Brossart,	)	
and Jacob Brossart,	)	Civil No.
	)	3:14-cv-62
Plaintiffs,	)	
	)	
vs.	)	
	)	
Kelly Janke, Individually and in his	)	
Official Capacity as Sheriff for Nelson	)	
County; Eric Braathen, Individually	)	
and in his Official Capacity as Deputy	)	
Sheriff for Nelson County, and Nelson	)	
County, North Dakota,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER
GRANTING DEFENDANTS' MOTIONS FOR
PARTIAL SUMMARY JUDGMENT**

INTRODUCTION AND SUMMARY OF HOLDING

Rodney, Thomas, and Susan Brossart (collectively “the Brossarts”) commenced this action against then-Sheriff Kelly Janke (“Janke”), individually and in his capacity as Nelson County Sheriff; then-Deputy Eric Braathen (“Braathen”), individually and in his capacity as a Deputy of the Nelson County Sheriff’s Department; and Nelson County, alleging violations of a clearly established constitutional right under 42 U.S.C. § 1983. The Brossarts allege three causes of action: (1) Rodney and Thomas Brossart were subjected to an unreasonable

seizure of their persons under the Fourth and Fourteenth Amendments to the United States Constitution, constituting unreasonable and excessive force; (2) Rodney and Thomas were subjected to cruel and unusual punishment under the Eighth Amendment; and (3) Susan Brossart suffered “severe emotional distress and mental anxiety...as an indirect, but related, result of the constitutional violations made against her [husband and son]”.¹

Before the court are the defendants’ motions for partial summary judgment² and the Brossarts’ motion to strike a submitted unanswered request for admissions relied upon by the defendants in their third motion for partial summary judgment, or, in the alternative, for leave to answer the request for admissions.³ The matter came regularly on for a hearing on December 10, 2015.

Viewing the evidence in a light most favorable to the non-moving party, the record establishes: (1) Susan’s claims are derivative of Rodney’s constitutional claim; (2) Rodney’s claims are barred due to his conviction of resisting arrest in the underlying criminal action where the jury was required to find the absence of excessive force beyond a reasonable doubt to convict; (3) Rodney and Thomas were not incarcerated at the time of the tasing but merely in the process of being arrested; (4) that Nelson County does not have an unconstitutional policy or custom, deliberate indifference, or tacit authorization of offensive acts; (5) Janke’s supervision of Braathen was not constitutionally deficient; and (6) Rodney’s and Thomas’s arrests were not a violation of

¹ Doc. #64 at pp. 17-19.

² Docs. #77, 80, 99.

³ Docs. #103, 106.

any clearly established law. In light of these deficiencies, the Brossarts' claims fail as a matter of law. The defendants' motions for partial summary judgment are GRANTED.

Because the court has not relied on any of the contested requests for admissions, the Brossarts' motion to strike or answer the request for admissions is denied as MOOT.

FACTS

The facts are viewed in a light most favorable to the plaintiffs as the non-moving parties. The following facts are undisputed and come largely from the Brossarts' depositions.⁴ Where the Brossarts have expressed a failure to recall the events as they occurred, the facts are taken from the Amended Complaint.⁵

In June 2011, Thomas Brossart discovered stray cattle on the family property.⁶ The Brossarts acknowledge that they knew the cattle were not theirs, but did not ascertain ownership of the cattle until approximately 9:30 a.m. the next day.⁷ The cattle's rightful owner, Chris Anderson, asked for their return but the Brossarts declined to release them, indicating that they needed to be in contact with Anderson's insurer to make sure that they were compensated for their alleged losses.⁸ Anderson left without his cows.⁹

⁴ Docs. #82-4, 82-6.

⁵ Doc. #64. This is due in large part to the fact that in their various motions for partial summary judgment, defendants admit many of the facts asserted in the amended complaint.

⁶ Doc. #82-6 at p. 18.

⁷ Id. at 19, 26-27.

⁸ Id. at p. 27

⁹ Id. at p. 28

Later that same day, Nelson County Sheriff's Deputy Braathen and Fred Frederickson, a brand inspector with the Stockmen's Association, drove to the Brossarts' farmstead to investigate a report of cattle being wrongfully detained by Rodney.¹⁰ After Braathen and Frederickson identified themselves and their purpose for being there, Rodney told the law enforcement officers that they could inspect his property when he was done working in just a minute.¹¹ Braathen insisted that Brossart immediately allow the inspection or Rodney would be arrested.¹² Rodney told Braathen to wait until he had moved the water pump.¹³ Braathen informed Rodney he would not wait and insisted on checking the cattle immediately.¹⁴ Rodney then told Braathen if "you step foot on my property, you are going to not be walking away."¹⁵

The situation deteriorated rapidly. In a vain attempt to diffuse the situation, Braathen decided to place Rodney under arrest.¹⁶ Rodney responded by demanding that Braathen produce "the God damn writ".¹⁷ Braathen pulled out his handcuffs, grabbed Rodney's arm, and attempted to handcuff Rodney.¹⁸

¹⁰Doc. #64 at ¶ 39.

¹¹ Doc. #82-4 at pp. 51-55.

¹² Id. at p. 54-55

¹³ Id. at p. 58.

¹⁴ Id. at p. 74.

¹⁵ Doc. #64 at ¶ 42; Doc. #82-4 at p. 62, 64-65 (Rodney stating he did not recall if Braathen attempted to place handcuffs on him).

¹⁶ Doc. #82-4 at pp. 59-60; see also Doc. #64 at ¶ 41.

¹⁷ Doc. #82-4 at p. 60-61.

¹⁸ Doc. #64 at ¶ 42; Doc. #82-4 at p. 62, 64-65 (Rodney stating he did not recall if Braathen attempted to place handcuffs on him).

Rodney resisted by backing away.¹⁹ Whereupon Braathen either commanded Rodney to get on the ground²⁰ or tasered Rodney.²¹ Rodney fell to the ground and rolled into the ditch when he was tasered.²²

After the first application of the taser, Rodney hollered at his son Jacob to “get it.”²³ While there is some dispute as to what “it” was, it is undisputed that the Brossarts had firearms in their truck—both a .22 and a 30.06—which were laying on the seat, with loaded magazines in the glove compartment.²⁴

Rodney continued to refuse to comply with Braathen’s command to stay on the ground with his face down (in a muddy ditch), so the deputy applied his taser a second time.²⁵ After the second tasing, Braathen continued to command Rodney to stay on the ground, and told Frederickson to handcuff Rodney.²⁶ Rodney, in a clear voice, insisted on seeing authority for the arrest and the charges against him.²⁷ Rodney continued to be noncompliant.²⁸ Braathen warned Rodney that if he continued to resist the arrest, he would be tased again.²⁹ In all, Rodney

¹⁹ Doc. #64 at ¶ 42; see also Doc. #82-4 at p. 62 (Rodney stating he went to his pickup instead of complying with Braathen’s commands).

²⁰ Doc. #102 at 0:34-0:35.

²¹ Doc. #82-4 at p. 63.

²² Id. at ap. 71

²³ Doc. #64 at ¶ 43; see also Doc. #82-4 at p. 78 (Rodney stating he did not recall telling his son to “get it”).

²⁴ Doc. #82-4 at p. 79.

²⁵ Doc. #82-4 at p. 77-78; Doc. #102 at 0:41-0:44

²⁶ Doc. #102 at 0:41-0:43.

²⁷ Id. at 0:51-0:59.

²⁸ See id.

²⁹ Id. at 0:59-1:01, 1:23-1:24.

recalled 4-5 taser prongs being removed from him at the hospital.³⁰ While there is confusion in the testimony about the number of times the taser was employed, the report from the device itself supports a conclusion that Rodney was tased 7 times in a four minute period.³¹ None of the taser applications have resulted in permanent scarring or disfigurement.³² Eventually, Rodney was taken into custody and transported to jail.³³

A jury found Rodney guilty of Preventing Arrest or Discharge of Other Duties.³⁴ At trial, Rodney contended Braathen engaged in an unlawful application of excessive force.³⁵ Rodney offered the defense of excessive force and the trial judge instructed the jury accordingly.³⁶ The judge instructed the jury that an essential element of Preventing Arrest or Discharge of Other Duties was “[t]he nonexistence of a defense.”³⁷ The judge further instructed the jury that self-defense against excessive force used by a law enforcement officer was a defense to the charge.³⁸ When the jury convicted Rodney, it necessarily found that the state had proven the absence of self-defense beyond a reasonable doubt. The North

³⁰ Doc. #82-4 at pp. 110.

³¹ Doc. 136-1.

³² Doc. #82-4 at p. 99.

³³ Doc. #64 at ¶ 55.

³⁴ Transcript of Criminal Trial of Rodney Brossart at 519, State v. Brossart, 32-2011-cr-49 and 32-2011-cr-71.

³⁵ Doc. #79-3 at 42.

³⁶ Doc. #79-3 at 42; Transcript of Criminal Trial of Rodney Brossart at 436, State v. Brossart, 32-2011-cr-49 and 32-2011-cr-71.

³⁷ Transcript of Criminal Trial of Rodney Brossart at 57, State v. Brossart, 32-2011-cr-49 and 32-2011-cr-71.

³⁸ Id. at p. 436.

Dakota Supreme Court upheld the conviction, specifically noting that the issue of excessive force was considered and rejected by the jury, stating:

Here, the district court declined to dismiss the preventing arrest charge as a matter of law and found there was at least a question of fact whether excessive force was used. The court properly determined the issue was a question of fact for the jury. The court gave a jury instruction on self defense against a law officer for the preventing arrest charge, including an instruction that “a person is justified in using force to resist excessive force used by a public servant under color of law.” The issue was raised before the jury and the court instructed the jury that a person is justified in using force to resist excessive force by an officer. The jury found Brossart guilty of preventing arrest. We conclude the district court did not err in denying Brossart’s motion to dismiss the preventing arrest charge as a matter of law.³⁹

The instructions given and the North Dakota Supreme Court opinion make plain that the jury’s verdict necessarily means that the absence of excessive force was proven beyond a reasonable doubt in the criminal trial.⁴⁰

Other claims in this action relate to events occurring the next day. On June 24, 2011, law

³⁹ State v. Brossart, 2015 ND 1, ¶ 45, 858 N.W.2d 275.

⁴⁰ Id.

enforcement officers were again dispatched to the Brossarts' farmstead – this time to retrieve the cattle.⁴¹ When the officers arrived on the scene they were confronted by Thomas, who met them at the old missile silo where the cattle were being held.⁴² Thomas told the officers that they were trespassing and they had to leave the property.⁴³ Almost immediately Thomas was joined by his brothers Alex and Jacob who drove a tractor to the silo site.⁴⁴ An armed standoff ensued during which time firearms were displayed but no shots were fired.⁴⁵

Eventually the officers placed Thomas and his brothers under arrest.⁴⁶ Braathen placed Thomas in the backseat of a patrol car.⁴⁷ Braathen then told Thomas to move over, so he moved over a couple inches.⁴⁸ Braathen considered Thomas's refusal to move over a sufficient distance as resistant⁴⁹ and, without warning, applied the taser to Thomas for five seconds.⁵⁰ This resulted in a slight burn mark that lasted approximately one day.⁵¹ Thomas did not suffer any permanent scarring or physical injury.⁵² Thomas did not require medical assistance at any time as a

⁴¹ Doc. #82-6 at pp. 45-46.

⁴² Id. at p.45.

⁴³ Id.

⁴⁴ Id. at p. 48.

⁴⁵ Id. at pp. 46-47.

⁴⁶ Id. at p. 49.

⁴⁷ Id.

⁴⁸ Id. at p.50.

⁴⁹ Doc. #96-4 at p. 119.

⁵⁰ Doc. #82-6 at pp. 51, 53.

⁵¹ Id. at pp. 51-52.

⁵² Id. at p. 61. Thomas now specifically rejects his supplemental response to interrogatory No. 2 wherein he claimed permanent scarring.

result of the taser incident.⁵³ Nor has he suffered any permanent discomfort or disfigurement due to the tasing.⁵⁴

After the taser incident, Thomas was pulled to the center of the car and the officers placed Jacob and Alex in the back seat as well.⁵⁵ The men were taken to the correctional center.⁵⁶ During the ride to the jail Thomas asserted ownership of the cattle, saying, “This is my property and I don’t agree to the sale.”⁵⁷

Sheriff Janke was not present during either of the altercations that underlie the Brossarts’ claims.⁵⁸ Braathen called Janke to brief him on the situation because Janke was absent from Nelson County, dropping his daughter off at a basketball camp in Mayville, North Dakota.⁵⁹

On January 28, 2009, Janke developed the County’s training policies.⁶⁰ After he took office in 2006, Janke implemented the “Use of Control Continuum.”⁶¹ In developing these policies Janke used various other counties’ policies as guides.⁶² In pertinent part, the following policy was implemented:

The Nelson County Sheriff’s Department places the greatest possible value and emphasis upon the preservation of human life and requires its sworn officers to exercise utmost care and reasonable judgment in performing their duties. In vesting law

⁵³ Id. at p. 52.

⁵⁴ Id. at p. 52.

⁵⁵ Id. at p. 55.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Doc. #82-4 at p. 155; #82-6 at pp. 49.

⁵⁹ Doc. #82-3 at pp. 90, 92.

⁶⁰ Id. at pp. 14-15

⁶¹ See id. at pp. 10, 18.

⁶² Id. at p. 18.

enforcement officers with the lawful authority to use force to protect the public welfare, a careful balancing of all human interests is required. Therefore, officers shall only use that force which is objectively reasonable and necessary, based on the totality of all circumstances, to effectively bring an incident under control while protecting themselves and others from physical harm.⁶³ The department defines less-than-lethal/non-lethal force as “[f]orce that does not [c]reate a substantial risk of causing death or serious bodily injury.”⁶⁴

At the time of the events at issue, it was the policy of Nelson County:

IV. TRAINING/AUTHORIZED USE:

- A. Only officers receiving training and certification from an authorized TASER X26 instructor will be allowed to carry and deploy the weapon system when deemed appropriate. These officers will be required to attend and successfully complete an initial certification course of instruction and will also be required to successfully re-certify annually on the proper use and deployment of the TASER X26.⁶⁵

It is undisputed that Braathen underwent the requisite training, and the North Dakota Peace Officer Standards and Training Board recognized and accepted these sessions.⁶⁶ Less than six months prior to the incident in question, Braathen attended a certified taser training.⁶⁷ In addition, Janke held

⁶³ Doc. #82-8 at p. 1.

⁶⁴ Id. at p. 2.

⁶⁵ Id. at p. 3.

⁶⁶ Doc. #82-10 at p. 2.

⁶⁷ Id.

annual in-service training sessions within the sheriff's department in order to review the policy.⁶⁸

According to the use of control continuum, the department has 6 levels of control: (1) verbal; (2) soft empty hand-non-injury producing weaponless techniques; (3) less lethal restraint devices-hand delivered aerosol restraint sprays and taser; (4) hard empty hand-potential injury causing weaponless techniques; and (6) lethal/deadly-neck restraint or any force that may result in death or serious bodily injury.⁶⁹ Law enforcement officers are to use each level of control to a corresponding level of resistance: (1) psychological intimidation; (2) resistive dialogue; (3) passive physical resistance; (4) defensive physical resistance; (5) active physical aggression; and (6) aggravated active physical aggression.⁷⁰

When this action was commenced, Nelson County had not received any complaints regarding taser use by the Nelson County Sheriff's Department.⁷¹ Nor were there any complaints of excessive force made against Nelson County prior to the events of June 23, 2011.⁷²

DISCUSSION

Summary Judgment Standard

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.⁷³ Summary

⁶⁸ Doc. #82-8 at p.1.

⁶⁹ Doc. #82-9.

⁷⁰ Id.

⁷¹ Doc. #84; see also Doc. #82-6 at p. 64.

⁷² Doc. #84

⁷³ FED.R.CIV.P.56(a)

judgment is available “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issues as to any material fact and that the movant is entitled to judgment as a matter of law.”⁷⁴ When the record as a whole at the time of the motion “could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial” and summary judgment is appropriate.⁷⁵ A party opposing summary judgment must set forth specific facts sufficient to raise a genuine issue for trial.⁷⁶ The facts must be viewed in the light most favorable to the non-moving party.⁷⁷

1. *Rodney Brossart’s Excessive Force Claims are Barred by the Heck v. Humphrey⁷⁸ Doctrine*

In Heck v. Humphrey,⁷⁹ the United States Supreme Court held that if a judgment from a district court on a § 1983 claim would “necessarily imply the invalidity of his [state court] conviction,” then the court must grant summary judgment for the defendants, unless plaintiffs can establish that the conviction has been invalidated by either federal court habeas action or a state court action.⁸⁰ In reaching its decision, the Supreme Court noted that, “[t]he

⁷⁴ Arena Holdings Charitable, LLC v. Harman Profl, Inc., 785 F.3d 292, 293 (8th Cir. 2015)(quoting Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011)).

⁷⁵ Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

⁷⁶ Wood v. SatCom Mktg, LLC, 705 F.3d 823, 828 (8th Cir. 2013).

⁷⁷ Id. (quoting Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc)).

⁷⁸ 512 U.S. 477 (1994).

⁷⁹ Id.

⁸⁰ Id. at 487

principle barring collateral attacks [on a state conviction]-a longstanding and deeply rooted feature of both the common law and our own jurisprudence-is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.”⁸¹ Rodney contends that the Supreme Court’s concern was mostly about persons in custody collaterally attacking the validity of a state conviction in a § 1983 action. Such a reading inappropriately focuses on the claimant’s liberty status-something the Court expressly rejected.

In a prosecution for Physical Obstruction of a Governmental Function, North Dakota law provides that the unlawful application of excessive force is a defense to the charge.⁸² It is the settled law of this case that “[a] defendant’s forceful resistance to an arrest is not justified unless the arresting officers use of ‘excessive force’”⁸³, and the trial court properly instructed the jury of this defense.⁸⁴ The jury was required to find beyond a reasonable doubt that Braathen’s force was not excessive in order to convict.⁸⁵ Rodney’s conviction and the affirming

⁸¹ Id. at 490 n.10

⁸² N.D. Cent. Code § 12.1-08-01(3)(“[i]t is a defense to a prosecution under this section that the administration of law or other government function was not lawful...”).

⁸³ State v. Brossart, 2007 ND 39, ¶ 14, 729 N.W.2d 137.

⁸⁴ Transcript of Criminal Trial of Rodney Brossart at 436, State v. Brossart, 32-2011-cr-49 and 32-2011-cr-71; State v. Brossart, 2015 ND 1, ¶ 45, 858 N.W.2d 275; see also N.D. Cent. Code § 15.1-05-03(1)(“A person is not justified in using force for the purpose of resisting arrest, execution of process, or other performance of duty by a public servant under color of law, but excessive force may be resisted.”).

⁸⁵ See Transcript of Criminal Trial of Rodney Brossart at 519, State v. Brossart, 32-2011-cr-49 and 32-2011-cr-71.

opinion by the North Dakota Supreme Court establishes as a fact that Braathen did not use excessive force.

It follows naturally that if this court issued a judgment finding Rodney's § 1983 excessive force claim valid, it would "necessarily imply" that the state court conviction is invalid. The only exception would be if some other court proceeding, either habeas corpus or post-conviction relief, had set aside the verdict. The record before the court is devoid of any such evidence.⁸⁶ Rodney Brossart's excessive force claims are barred by the Heck doctrine, and the defendants are entitled to summary judgment on these claims.

2. All Claims Against Former Sheriff Janke and Former Deputy Braathen in their Official Capacities are barred as redundant.

The Brossarts concede that the official capacity claims against Janke and Braathen should be dismissed because Janke and Braathen no longer hold any official position with Nelson County and because the claims are redundant.⁸⁷ The court agrees. The Brossarts' official capacity claims against Janke and Braathen are dismissed.

3. All Remaining Claims Against Nelson County are Barred Because There is No Facially Unconstitutional Policy or Custom and No Showing of Deliberate Indifference

⁸⁶ See Brossart, 2015 ND 1, 858 N.W.2d 275.

⁸⁷ Doc. #95 at p.5.

A local government cannot be held liable pursuant to § 1983 on a *respondeat superior* theory.⁸⁸ Rather, a local government may be liable for constitutional deprivations because it has a policy or a custom that caused the deprivation.⁸⁹ Customs need not have official approval of “the body’s official decision making channels.”⁹⁰ Indeed, “it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that government as an entity is responsible under §1983.”⁹¹ Under North Dakota law, the primary duties of a county are budgetary.⁹² As an elected official, a county sheriff possesses broad powers including “[w]ide latitude in the appointment of deputies.”⁹³

The Brossarts have failed to allege any fact demonstrating a facially unconstitutional policy or that the sheriff’s department operates an unconstitutional custom. A careful review of Nelson County’s Use of Control Continuum policy⁹⁴ and its Taser policy⁹⁵ shows that they are facially constitutional. This court, in a prior case, determined that an almost identical policy was constitutional.⁹⁶ Furthermore, the policy itself fits well within the excessive force law delineated by North Dakota and

⁸⁸ Monell v. Dep’t of Soc. Servs. of City of New York, 436 U.S. 658, 691 (1978).

⁸⁹ Id.

⁹⁰ Id. at 690-91.

⁹¹ Id. at 694.

⁹² N.D. Cent .Code § 11-11-11.

⁹³ Carlson v. Dunn County, 409 N.W.2d 111, 113 (N.D. 1987).

⁹⁴ Doc. # 82-9.

⁹⁵ Docs. #82-8.

⁹⁶ Bjerke v. Germain et al., Case No. 3:13-cv-92.

Eighth Circuit law.⁹⁷ The policy is plainly constitutional on its face.

When a policy is facially constitutional, a plaintiff must show that there is a question of fact regarding whether the county exercised deliberate indifference to constitutional rights.⁹⁸ “Municipal liability under § 1983 attaches where-and only where-a deliberate choice to follow a course of action is made from among various alternatives’ by city policy makers.”⁹⁹ In other words, if it was known or obvious to the policy maker that the facially constitutional policy would result in constitutional violations, then the local governmental policy maker could be liable under a theory of deliberate indifference.¹⁰⁰

While a single act can sometimes establish an unconstitutional policy, a claim may only arise when an official with the authority to make policy is the actor. There is no evidence in the record to support a claim Braathen had such authority, as he made a nearly immediate and contemporaneous report to Janke of the incidents leading up to and involving the Brossarts.

The same analysis applies to the claim of an unconstitutional custom. For the county to be liable for an unconstitutional custom, the plaintiff must put forth evidence that establishes “persistent and widespread discriminatory practices of state officials,”

⁹⁷ See N.D. Cent. Code § 29-06-13; N.D. Cent. Code § 29-06-17; Schell v. Collis, 83 N.W.2d 422, 425-426 (N.D. 1957); Brown v. City of Golden Valley, 574 F.3d 491, 496 (8th Cir. 2009).

⁹⁸ Szabla v. City of Brooklyn Park, Minn., 486 F.3d 385, 390 (8th Cir. 2007).

⁹⁹ City of Canton v. Harris, 489 U.S. 378, 389 (1989) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 183-84 (1986)).

¹⁰⁰ Szabla, 486 F.3d at 390 (citing Bd. of the Cty. Com’rs v. Brown, 520 U.S. 397, 405 (1997)).

which, while not officially sanctioned by governmental officials, “could well be so permanent and well settled as to constitute a ‘custom or usage’ within the force of law.”¹⁰¹ The Brossarts have established no such custom. The undisputed record establishes that there had been no prior discharge of a taser during the course of an arrest.¹⁰² While it might be possible, under unusual circumstances, to find the existence of a custom in a single instance of misconduct, it would require the establishment of a culture that so plainly favored the unconstitutional act that it was inevitable that a deprivation would eventually occur. No such evidence exists in this case.

The Brossarts further contend that Nelson County inadequately supervised or trained its sheriff deputies. The circumstances where a local government may be held liable for failure to train its employees pursuant to § 1983 are relatively rare.¹⁰³ The law imposes liability in such cases “[o]nly where a municipality’s failure to train its employees in a relevant respect evidences a ‘deliberate indifference’ to the rights of its inhabitants...”¹⁰⁴

Recently, the Supreme Court explained in Connick v. Thompson:

“‘[D]eliberate indifference’ is stringent standard of fault, requiring proof that municipal actor disregarded a known or obvious consequence of his action.’ Bryan Cty., 520 U.S., at 410 ... Thus, when city policy makers are on actual or constructive notice that

¹⁰¹ See Monell, 436 U.S. at 691. (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970)).

¹⁰² Doc. #84; Doc. #82-6 at p. 64.

¹⁰³ See Harris, 489 U.S. at 388

¹⁰⁴ Id. at 389.

a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. *Id.*, at 407¹⁰⁵ However, "[t]his requires a showing that the supervisor had notice that the training procedures and supervision were inadequate and likely to result in constitutional violation."¹⁰⁶

The Brossarts contend that Nelson County was deliberately indifferent for two reasons: (1) Nelson County itself only monitors its sheriff's department's budget; and (2) the sheriff's department had notice of Braathen's propensity to act in an unconstitutional manner because he was not retained after an initial probationary employment by the City of Devils Lake, North Dakota. Neither of these contentions support a claim that the defendants had notice that the training procedures and supervision of Braathen were inadequate. The training records show that Braathen was both P.O.S.T. certified and had completed taser training at the time of the incident. Likewise, the record shows that Braathen had no prior discipline regarding taser use. There is a paucity of evidence in the record to support a claim that Nelson County had abdicated a duty to train. More importantly, the County's primary function, under North Dakota law, in regards to the sheriff's department is budgetary. The sheriff has broad discretion in hiring, training and supervising deputies.

In short, the Brossarts have shown nothing more than a *respondeat superior* theory of liability for

¹⁰⁵ Connick v. Thompson, 563 U.S. 51, 61 (2011).

¹⁰⁶ Andrews v. Fowler, 98 F.3d 1069, 1078 (8th Cir. 1996).

Nelson County.¹⁰⁷ The Brossarts' claims against Nelson County fail as a matter of law.

4. Claims Against Former Sheriff Janke in His Individual Capacity Fail as a Matter of Law.

For an individual to be personally liable under § 1983, he must have directly participated in the constitutional violation or his failure to train or supervise caused such a violation.¹⁰⁸ The standard for failure to train or supervise is deliberate indifference or tacit authorization.¹⁰⁹ “This requires a showing that the supervisor had notice that the training procedures and supervision were inadequate and likely to result in a constitutional violation.”¹¹⁰

Janke was not present and did not participate in any of the events at issue here.¹¹¹ Thus, Janke's liability, if it exists at all, must arise out of his role in training and supervising Braathen. It is undisputed that Braathen successfully completed the training required to carry a taser¹¹² and that the tasing at issue were the first to occur both in Nelson County and by Braathen.¹¹³ Braathen's training records reflect that he had completed P.O.S.T. certification and all follow-up training required.

While the Brossarts make much of the decision to hire Braathen after he failed to be retained by the City of Devils Lake, they have produced no evidence

¹⁰⁷ See Monell, 436 U.S. at 691.

¹⁰⁸ Wilson v. Spain, 209 F.3d 713, 717 (8th Cir. 2000).

¹⁰⁹ Tilson v. Forrest City Police Dept., 28 F.3d 802, 807 (8th Cir. 1994).

¹¹⁰ Andrews, 98 F.3d at 1078.

¹¹¹ Doc. #82-4 at p. 155; #82-6 at pp. 49, 64.

¹¹² Doc. #82-10 at p. 2.

¹¹³ Doc. #84. See also Doc. #826 at p. 64; Doc. #82-4 at 159-160.

that Braathen's employment was terminated as a result of a propensity to engage in unconstitutional conduct or that there was anything in his employment past that would have placed Janke on notice that Braathen required additional supervision. The Brossarts' only claim for liability is based on *respondeat superior* liability which unavailable under § 1983 causes of action.¹¹⁴ Janke has no personal liability for Braathen's actions.

*5. Former Sheriff Janke and Former Deputy
Braathen are Entitled to Qualified
Immunity*

The court performs a two-step analysis when determining qualified immunity:¹¹⁵ (1) whether the "facts shown by the plaintiff make out a violation of a constitutional or statutory right;" and (2) "whether the right was clearly established at the time of the defendant's alleged misconduct."¹¹⁶ The court has discretion to decide the order of the two-step analysis based on the interests of judicial economy.¹¹⁷ In Pearson v. Callahan,¹¹⁸ the Supreme Court recognized:

The doctrine of 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." *Harlow v. Fitzgerald*, 457 U.S. 818 ... (1982). Qualified immunity balances two important interests – the need to hold

¹¹⁴ See Cotton v. Hutto, 577 F.2d 453, 455 (8th Cir. 1978).

¹¹⁵ Smith v. City of Minneapolis, 754 F.3d 541, 545 (8th Cir. 2014).

¹¹⁶ Id.

¹¹⁷ Pearson v. Callahan, 555 U.S. 223, 236 (2009).

¹¹⁸ 555 U.S. 223.

public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." [citation omitted].¹¹⁹

Although the defendant bears the burden of proving qualified immunity, to withstand a motion a "plaintiff must (1) assert a violation of a constitutional right; (2) demonstrate that the alleged right is clearly established; and (3) raise a genuine issue of fact as to whether the official would have known his conduct would have violated the clearly established right."¹²⁰ "If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability, or indeed, even the burdens of litigation."¹²¹

When excessive force is alleged, qualified immunity shields officers from suit when the officer "makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances...confronted."¹²² "To establish a constitutional violation under the Fourth Amendment's right to be free from excessive force, the test is whether the amount of force used was objectively reasonable under the particular

¹¹⁹ Id. at 231(citations omitted).

¹²⁰ Habiger v. City of Fargo, 80 F.3d 289, 295 (8th Cir. 1996).

¹²¹ Brosseau v. Haugen, 543 U.S. 194, 198 (2004).

¹²² Smith, 754 F.3d at 545 (quoting Brosseau v. Haugen, 543 U.S. 194 (2004)).

circumstances.”¹²³ The determination is made from a reasonable officer’s perspective, not the “20/20 vision of hindsight.”¹²⁴ In determining whether the use of force was objectively reasonable the court looks to “the totality of the circumstances, including the severity of the crime, the danger the suspect poses to the officer or others, and whether the suspect is actively resisting arrest or attempting to flee.”¹²⁵

North Dakota law is similar. Under North Dakota law, “[i]f, after notice of intention to arrest the defendant, the defendant either flees or forcibly resists, the officer may use all necessary means to effect the arrest.”¹²⁶ The officer need not inform the defendant of the cause of the arrest when the defendant is engaged in the offense, is “pursued immediately after the commission of the offense or after an escape”, or “flees or forcibly resists before the officer has opportunity so to inform the person” of the cause of the arrest.¹²⁷ North Dakota law:

Protects an officer who is trying to do his duty as long as he does not use more force than is necessary. In making an arrest [the officer] is under no obligation to retreat but has both the legal right and the official duty to press forward and accomplish his object by overcoming any resistance offered.

[T]he presumption is that an officer performs his duty correctly and acts with ordinary

¹²³ Brown, 574 F.3d at 496 (quoting Henderson v. Munn, 439 F.3d 497, 502 (8th Cir. 2006)).

¹²⁴ Graham v. Connor, 490 U.S. 386, 396 (1989).

¹²⁵ Cook v. City of Bella Villa, 582 F.3d 840, 849 (8th Cir.2009).

¹²⁶ N.D. Cent. Code § 29-06-13.

¹²⁷ N.D. Cent. Code § 29-06-17.

caution and in good faith. That presumption prevails unless overcome by definite evidence to the contrary.¹²⁸

A. Braathen is Entitled to Qualified Immunity

As discussed in detail above, any claim by Rodney Brossart that he was subjected to excessive force is barred by the jury's verdict in the criminal case.

Even if this was not the case, Rodney engaged in conduct during the course of his encounter with law enforcement officers that renders Braathen's conduct reasonable. Rodney told Frederickson that the officers would not leave his property if they stepped foot on it. Throughout the course of his arrest, Rodney persisted in resisting Braathen's commands. In addition, Brossart made an apparent threat involving firearms when commanded his son to "get it".¹²⁹ From a reasonable officer's perspective, Rodney's behavior was volatile, dangerous and clearly posed a threat to Braathen and Frederickson's personal safety. Given the circumstances in which he found himself, Braathen's actions fall squarely within the guidelines of Nelson County's use of force continuum, which the court has found constitutional on its face.¹³⁰ Braathen's actions were not unreasonable under the circumstances.

Rodney's assertion that multiple tasings constitute a violation of a clearly established constitutional right is also unsupported in law. In order to prevail, the plaintiff must establish that

¹²⁸Schell v. Collis, 83 N.W.2d 422, 425-426 (N.D. 1957).

¹²⁹ Doc. #64 at ¶40; Doc. #82-4 at pp. 78-79

¹³⁰ See Doc. #82-9.

Rodney had a right to be “free from excessive force...so sufficiently clear that a reasonable officer would know that the multiple tasings under the circumstances were a violation of that right.”¹³¹ “When determining whether an action was a clearly established constitutional violation, we look to the state of the law at the time of the incident.”¹³² As early as 2009, it was established that “non-violent, non-fleeing subjects have a clearly established right to be free from the use of tasers.”¹³³ However, “whether a violent subject, acting aggressively toward officers, has clearly established right to be free from multiple tasings” was not clearly determined in 2011.¹³⁴ Braathen did not violate a clearly established regarding multiple tasings of an individual who resists his or her arrest and is entitled to qualified immunity as to Rodney’s claims.

B. Braathen is entitled to qualified immunity against Thomas Brossart

Braathen is also entitled to qualified immunity against Thomas’s claims because his actions were reasonable under the circumstances. The court does not assess the reasonableness of a law enforcement officer’s conduct in a claim for excessive force in a vacuum.¹³⁵ “Officers are certainly not required in all cases to wait until they are attacked before they resort to force.”¹³⁶ Requiring a physical attack on a police officer “would expose them to an unnecessary and

¹³¹ DeBoise v. Taser International, Inc., 760 F.3d 892, 897 (8th Cir. 2014).

¹³² Shekleton v. Eichenberger, 677 F.3d 361, 366 (8th Cir. 2012).

¹³³ DeBoise, 760 F.3d at 897.

¹³⁴ See Id.

¹³⁵ McCrary-El v. Shaw, 992 F.2d 809, 812 (8th Cir. 1993).

¹³⁶ Id.

unreasonable risk of harm.”¹³⁷ The locus of this inquiry is what a reasonable officer would do under the circumstances, not the alleged victim’s perspective of the events in question.¹³⁸

The undisputed facts show that Thomas actively opposed law enforcement officers’ efforts to secure his neighbor’s cattle. He participated in an armed standoff with law enforcement and the Grand Forks SWAT Team.¹³⁹ Two officers were necessary to get him in the police car after he was placed under arrest.¹⁴⁰ While under arrest, he continued to verbally resist the officers’ actions by stating, “This is my property and I don’t agree to the sale.”¹⁴¹ Once in the car Thomas intentionally failed to comply with a lawful command by refusing to move over.¹⁴² His response to the command was classically passive aggressive—he moved mere inches.¹⁴³ Given the tense, stand-off-like situation the arresting officers found themselves in coupled with Thomas’s apparent failure to comply with Braathen’s commands, Braathen’s actions were reasonable under the circumstances.¹⁴⁴ The situation at hand was tense, involved a real potential for life threatening circumstances to erupt and required action that was prompt and designed to get a response. Under these circumstances, the use of the taser was objectively reasonable. Braathen is

¹³⁷ Id.

¹³⁸ Partlow v. Stadler, 774 F.3d 497, 502 (8th Cir. 2014).

¹³⁹ See Doc. 82-6 at pp. 45-46

¹⁴⁰ Id. at p.49.

¹⁴¹ Id. at p. 55.

¹⁴² Id. at p. 50.

¹⁴³ Doc. 82-6 at p. 50.

¹⁴⁴ See Doc. #82-9.

entitled to qualified immunity against Thomas Brossart's claims.

Even if Braathen's actions amounted to excessive force, the law in June 2011 as recited in the previous section was not sufficiently clear as to provide guidance to a reasonable officer that his actions were unconstitutional. While it is possible to view Thomas's resistance in failing to move over as a minimal violation-to do so requires the court to completely ignore the situation as it really existed. Braathen was in a situation in which an armed stand-off had occurred. Thomas's actions were irrational and potentially life threatening. His comments asserting that he owned the cattle in question were completely devoid of any basis in reality. His behavior during the entire incident were fraught with danger. Under the circumstances Braathen encountered, it is in no way clear that a reasonable officer would have believed that the use of a taser in drive stun mode "was unlawful in the situation he confronted."¹⁴⁵ Thomas was not a "nonviolent" subject of an arrest. Braathen is entitled to qualified immunity as to Thomas Brossart's claims.

C. Janke is Entitled to Qualified Immunity against both Rodney and Thomas Brossart

To survive a summary judgment motion on qualified immunity, the Brossarts must show that Janke, as a supervisor, directly participated in the alleged unconstitutional act and he failed to properly supervise Braathen.¹⁴⁶ As previously noted, Janke

¹⁴⁵ See Brown, 574 F.3d at 499 (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

¹⁴⁶ Andrews v. Fowler, 98 F.3d 1069, 1078 (8th Cir. 1996).

was never on the scene, did not direct anyone, and had no direct involvement in the conduct in question.

As to the claim of improper supervision, the Brossarts' claim is equally flawed. Braathen engaged in no unconstitutional act, which ends the inquiry. Even if there were some viable constitutional claim against Braathen, the Brossarts would still be unable to meet the second prong of the inquiry. To establish improper supervision the Brossarts must allege facts demonstrating that Janke had "notice of pattern of unconstitutional acts committed by [Braathen]" and that he failed to take appropriate action.¹⁴⁷ As already noted, Braathen had not exercised use of his taser prior to the incidents in question.¹⁴⁸ Likewise, there is no evidence to show that Janke had received any information that would have raised a supervision question. Janke was not on notice of any pattern of allegedly unconstitutional acts. Janke is entitled to qualified immunity against all claims by Rodney and Thomas Brossart.

*6. The Brossarts Have no Viable Claims
Under the Eighth Amendment*

Section 1983 claims arising out of the Eighth Amendment's bar on cruel and unusual punishment are reserved for "convicted criminals serving their sentences."¹⁴⁹ The reason for this is obvious, the Eighth Amendment contemplates punishments, something that only arises following conviction. Rodney and Thomas Brossart were not convicted of a crime nor serving their sentences at the time the alleged constitutional violation occurred. The

¹⁴⁷ Id.

¹⁴⁸ Doc. # 82-4 at pp. 159-60.

¹⁴⁹ Wilson v. Spain, 209 F.3d 713, 715 (8th Cir. 2000).

Brossarts' claim under the Eighth Amendment fails as a matter of law.

7. Susan Brossart's Claim in the Amended Complaint is Barred

Susan Brossart's claims under the Amended Complaint are for loss of consortium. A claim for loss of consortium, however, is not plainly pled in either the original or amended complaint. The court did not grant Susan Brossart leave to amend her complaint to add a consortium claim. Rather the amendment was limited to substituting Thomas for Jacob.¹⁵⁰

More importantly, the proposed amendment is futile. While her claim is likely not barred by the applicable statute of limitations, it is clearly a derivative claim dependent on Rodney's claim. Derivative claims are not cognizable in a § 1983 excessive force claim because an action under § 1983 is a personal suit not a derivative one.¹⁵¹ Since none of Rodney's claims survive summary judgment and Susan Brossart has no cognizable non-derivative claim, Susan Brossart's claim for loss of consortium is dismissed.

CONCLUSION

For the foregoing reasons, the defendants' motions for summary judgment are **GRANTED** and the Brossarts' amended complaint is **DISMISSED** with prejudice. Because the record shows that

¹⁵⁰ See Doc. #56.

¹⁵¹ See Dohaish v. Tooley, 670 F.2d 934, 936 (10th Cir. 1982) (a §1983 cause of action is personal and does not accrue to a relative); Coon v. Ledbetter, 780 F.2d 1158, 1160 (5th Cir. 1986) (under § 1983, plaintiff is required to prove a violation of their personal rights); Jaco v. Bloechle, 739 F.2d 239, 241 (6th Cir. 1984) (a §1983 cause of action is "*personal* to the injured party" (emphasis in original)).

summary judgment is appropriate without the admissions, the Brossarts' motion to strike the request for admissions, or, in the alternative, for leave to respond, is **DENIED as moot**.

IT IS SO ORDERED.
LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 12th day of January, 2016.

/s/ Ralph R. Erickson

Ralph R. Erickson
Chief District Judge
United States District Court

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

Rodney Brossart, Susan Brossart,	)	
and Jacob Brossart,	)	Civil No.
	)	3:14-cv-62
Plaintiffs,	)	
	)	
vs.	)	
	)	
Kelly Janke, Individually and in his	)	
Official Capacity as Sheriff for Nelson	)	
County; Eric Braathen, Individually	)	
and in his Official Capacity as Deputy	)	
Sheriff for Nelson County, and Nelson	)	
County, North Dakota,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER
GRANTING DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT, GRANTING
PLAINTIFFS' MOTION TO AMEND, DENYING
PLAINTIFFS' MOTION FOR DEFAULT, AND
DENYING PLAINTIFFS' MOTION FOR
ATTORNEY'S FEES**

INTRODUCTION AND SUMMARY OF HOLDING

Before the Court is Defendants Kelly Janke, Eric Braathen, Nelson County Sheriff's Department ("Sheriff's Department"), and Nelson County, North Dakota's motion for partial summary judgment.¹ The

¹ Doc. #18.

summary judgment for three reasons: (1) The Sheriff's Department should be dismissed as a party because it is not a legal entity capable of being sued; (2) all of the State law claims are barred by the applicable statute of limitation; and (3) all claims as against Kelly Janke ("Janke") and Eric Braathen ("Braathen"), as employees of Nelson County, arise out of their employment and must be brought solely against Nelson County. Because there are no genuine issues of material fact with regard to the issues raised by the defendants and the defendants are entitled to judgment as a matter of law, the motion for partial summary judgment is GRANTED.

The Brossarts' motion for leave to amend the complaint is GRANTED, as the substitution of Thomas Brossart for Jacob Brossart does not unfairly prejudice the defendants. Because the Brossarts failed to show that Janke did not plead or otherwise defend the claims against him in this action, the motion for default judgment, or, in the alternative, request for additional time to personally serve Janke is DENIED. Finally, the Brossarts' motion for attorney's fees is wholly unsupported and is also DENIED.

FACTS

On June 23, 2011, Rodney and Jacob Brossart were working in a drainage ditch near their farmstead in Nelson County, North Dakota.² Nelson County Sheriff's Deputy Braathen and Fred Frederickson, an inspector with the Stockmen's Association, drove to the Brossarts' farmstead to investigate a report of cattle that had wandered onto the Brossarts' land.³ An

² Doc. #1 at ¶ 34.

³ Doc. #1 at ¶ 39.

argument ensued, resulting in Deputy Braathen tasing and arresting Rodney Brossart.⁴

On June 24, 2011, law enforcement officers were again dispatched to the Brossarts' farmstead to retrieve the same cattle.⁵ An altercation ensued between the Brossart family and law enforcement. Deputy Braathen arrested Thomas Brossart and placed him in the backseat of his patrol car.⁶ Thomas Brossart alleges he was tased for no apparent reason.⁷

The Brossarts have brought both federal and state claims against the defendants. Rodney and Thomas Brossart allege that the defendants violated their Fourth, Eighth, and Fourteenth Amendment Rights and are entitled to relief under 42 U.S.C. § 1983.⁸ Rodney and Thomas allege that Janke and Braathen are liable to them under state law in their individual capacity for torts of outrage⁹ and for battery.¹⁰ Each of the Brossarts also contend that Janke, the Sheriff's Department, and Nelson County are liable for damages for negligent supervision and for mental anguish.¹¹ The Brossarts seek compensatory damages, as well as reasonable attorney's fees, costs, and punitive damages.

The Brossarts' complaint was filed in this Court on June 23, 2014.¹² Janke was personally served with the summons and complaint by mail on June 28,

⁴ Id. at ¶¶ 40-57.

⁵ Doc. #39-1 at ¶ 56.

⁶ Id.

⁷ Id.

⁸ Doc. #1 at ¶¶ 101-13.

⁹ Id. at ¶¶ 114-17.

¹⁰ Id. at ¶¶ 118-21.

¹¹ Id. at

¹² Doc. #1

2014.¹³ Braathen was served with the summons and complaint on July 25, 2014.¹⁴ Odell Flaagan, a member of the Nelson County Commission, was served with the summons and complaint on July 25, 2014.¹⁵

DISCUSSION

Summary judgment is appropriate only when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.¹⁶ Summary judgment is available "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."¹⁷ When the record as a whole at the time of the motion "could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial" and summary judgment is appropriate.¹⁸ A nonmovant must set forth specific facts sufficient to raise a genuine issue for trial.¹⁹ The facts must be viewed in the light most favorable to the nonmovant.²⁰

1. The Nelson County Sheriff's Department is not an entity capable of being sued.

¹³ Doc. #12

¹⁴ Doc. #13

¹⁵ Doc. #14

¹⁶ Fed. R. Civ. P. 56(a)

¹⁷ Fed. R. Civ. P. 56(c)(2).

¹⁸ Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

¹⁹ Wood v. SatCOM Marketing, LLC, 705 F.3d 823, 828 (8th Cir. 2013).

²⁰ Id. (quoting Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011)(en banc)).

Rodney and Thomas Brossart allege that the Sheriff's Department unconstitutionally violated their Fourth, Fourteenth, and Eighth Amendment rights. The Sheriff's Department counters that it is not an entity capable of being sued.

Under Eighth Circuit precedent and North Dakota law, a sheriff's department is not an entity amenable to suit for purposes of § 1983 actions.²¹ Defendants' motion for partial summary judgment on this basis is **GRANTED**. Counts One and Two of the complaint alleged against the Nelson County Sheriff's Department are hereby **DISMISSED**.

The Brossarts have also alleged state law claims against the Sheriff's Department, claiming it is liable for damages for the torts of outrage, negligent supervision, and intentional infliction of mental anguish. The Brossarts assert that the Sheriff's Department should be considered a political subdivision capable of being sued under N.D. Cent. Code Ch. 32-12.1 because it is a unit of local government created for public purposes as defined by state statute.²²

North Dakota's Governmental Liability Act provides that a political subdivision is liable for money damages for injuries that are proximately caused by the negligent acts or omissions of an employee acting within the scope of employment, if that employee would otherwise be personally liable.²³ A county is

²¹ De La Garza v. Kandiyohi County Jail, 18 Fed. Appx.436, 437, 2001 WL 987542, at *1 (8th Cir. 2001); Christianson v. McLean Co. Sheriff's Department, 2010 WL 3421083, at *4 (D.N.D. August 3, 2010)(explaining that sheriff's departments are not suable entities from which damages can be collected under North Dakota law.

²² N.D. CENT. CODE § 32-12.1-02(6)(a).

²³ N.D. CENT. CODE § 32-12.1-03(1).

specifically identified as a political subdivision, along with “any other units of local government which are created either by statute or by the Constitution of North Dakota for local government or other public purposes....”²⁴

The Brossarts have failed to cite to any statute or constitutional provision that establishes an entity known as the Nelson County Sheriff’s Department. Indeed, the North Dakota Constitution establishes counties as political subdivisions.²⁵ Even more telling, the Constitution imposes on the county a duty to provide law enforcement, stating: “[e]ach county shall provide for law enforcement...an any other governmental services or functions as may be provided by law.”²⁶ Likewise, the N.D. Cent. Code recognizes a county as a corporate body capable of suing and being sued, but does not recognize a sheriff’s department as an entity capable of either suing or being sued.²⁷ Undoubtedly, a plaintiff may sue the sheriff in his official capacity,²⁸ but there is no comparable provision recognizing the Nelson County Sheriff’s Department as a separate legal entity capable of being sued.

The Brossarts’ reliance on Lang v. Burleigh County Sheriff’s Department²⁹ is unpersuasive. In Lang, the action was brought solely against the sheriff under N.D. Cent. Code § 32-12.1-03. While the caption identifies the Burleigh County Sheriff’s Department as a named party, the case was dismissed with no

²⁴ N.D. CENT. CODE § 32-12.1-02(6)(a).

²⁵ N.D. CONST. art. VII, § 2.

²⁶ N.D. CONST. art. VII, § 8.

²⁷ N.D. CENT. CODE § 11-10-01.

²⁸ N.D. CENT. CODE § 28-01-17.

²⁹ 496 N.W. 2d 24 (N.D. 1993).

discussion on whether it was an entity capable of being sued. This is thin gruel to build a claim that an entity neither created by statute nor constitution exists.

There is no constitutional or statutory provision establishing a political subdivision known as the Nelson County Sheriff's Department, and it is not a political subdivision capable of being sued. Accordingly, Counts Three, Five, and Six of the complaint pertaining to the Nelson County Sheriff's Department are hereby **DISMISSED**.

2. The state law claims brought by the Brossarts are barred by the statute of limitation.

None of the defendants were served with a summons until after June 23, 2014, the date the complaint was filed. Each of the defendants move to dismiss the state law claims on the ground that they are barred by the applicable statute of limitation.

Fed. R. Civ. P. 3 provides: “[a] civil action is commenced by filing a complaint with the court.” The rule is not absolute. In Walker v. Armco Steel Corp.,³⁰ the United States Supreme Court determined that “in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statute of limitations.”³¹ The Supreme Court explained that there is no reason why “an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court...”³²

The Eighth Circuit subsequently extended the Walker holding to actions involving “a federal claim

³⁰ 446 U.S. 740 (1980).

³¹ Id. at 751.

³² Id. at 753.

along with state claims.”³³ The appellate court reasoned that “[i]t is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law.”³⁴ The determination of whether a claim is barred by the state statute of limitation is governed by state law for commencing an action. Unlike Fed. R Civ. P.3, North Dakota law allows commencement of a civil action by the service of a summons.³⁵

The state law claims alleged by the Brossarts have a three year statute of limitation.³⁶

The defendants had to be served with the summons on or before June 23, 2014. It is undisputed that this did not occur.³⁷ Because the Brossarts failed to timely serve the defendants, Counts Three, Four, Five, and Six of the complaint are barred as a matter of law.

Although the Brossarts have not raised the issue of equitable tolling, the Court notes that such a claim would be unavailing. As the North Dakota Supreme Court has recently stated: “[T]he doctrine of equitable tolling is an exception to the statute of limitations which has never been adopted by this Court. N.D. Cent. Code § 1-01-06 provides that “there is no common law in any case in which the law is declared by the code.”³⁸

All state law claims are **DISMISSED** as untimely.

³³ Id. at 1286

³⁴ Id.

³⁵ N.D.R.Civ.P. 3.

³⁶ N.D. Cent. Code §§ 32-12.1-10 and 28-01-17.

³⁷ Doc. ## 12-14.

³⁸ Oakland v. Bowman, 840 F.3d 88, 91 (N.D. 2013) (citations omitted).

3. The issue of whether the Brossarts are precluded from suing Defendants Janke and Braathen in their individual capacity is moot.

The Brossarts allege claims against Janke and Braathen in both an official and individual capacity. In light of the dismissal of all state claims as untimely, this objection is **MOOT**.

4. The Brossarts' Motions.

A. *Motion for Leave to Amend*

The Brossarts contend they mistakenly named Jacob Brossart instead of Thomas Brossart as a party plaintiff. They seek to have the amendment relate back to the original pleading and request leave to correct this mistake under Fed. R. Civ. P. 15(c). The defendants maintain that the incident involving Thomas Brossart arises out of a different occurrence and is an attempt to circumvent the statute of limitation.

A party may amend the complaint at any time with leave of the court.³⁹ “The court should freely give leave when justice so requires.”⁴⁰ An amendment to substitute a plaintiff relates back if “the defendant knew or should have known that it would be called on to defend against claims asserted by the newly-added plaintiff unless the defendant would be unfairly prejudiced in maintaining a defense against the newly-added plaintiff.”⁴¹

The claims involving Thomas Brossart arise “out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original

³⁹ FED. R. CIV. P. 15(2)

⁴⁰ Id.

⁴¹ Plubell v. Merck & Co., Inc., 434 F.3d 1070, 1072 (8th Cir. 2006).

pleading.”⁴² The incident stems from the retrieval of cattle that wandered onto the Brossarts’ property. The chain of events involving Thomas Brossart on June 24, 2011, are a continuation of the events that commenced on June 23, 2011, involving Rodney Brossart. The original complaint alleges that Braathen unlawfully tased Jacob Brossart; however, the defendants knew that Thomas Brossart was actually the person involved in the incident. Both the original and the amended complaint set forth exactly the same conduct of the defendants with the only difference being substitution of the names. The substitution does not alter the underlying claims in this action. The defendants are not unfairly prejudiced by the substitution and justice mandates granting leave to correct the mistake.

Although the amended complaint relates back, it does not change this Court’s ruling on the motion for partial summary judgment. Therefore, Thomas Brossart’s state law claims are also barred by the applicable statute of limitation and should be redacted from the amended complaint. The Brossarts’ motion for leave to amend the complaint is **GRANTED**. The Brossarts are directed to file an amended complaint consistent with this Order within fourteen days of the date of this Order.

B. Motion for Default Judgment

The Brossarts have moved for default judgment or in the alternative an extension of time to serve Janke on the basis that Janke has failed to answer the complaint. The Brossarts are unable to establish that Janke has failed to plead or otherwise defend the claims asserted against him in this action. While

⁴² Fed. R. Civ. P. 15(c)(1)(B).

Janke did not file an answer in his official capacity, Nelson County timely filed an answer addressing all claims against Janke.⁴³ The Brossarts' motion for default judgment or an extension of time to personally serve him is **DENIED**.

C. Motion for Attorney Fees

The Brossarts have moved for attorney's fees. Their motion is wholly unsupported and is **DENIED**.

CONCLUSION

The defendants' motion for partial summary judgment is **GRANTED**. The Nelson County Sheriff's Department is not an entity amenable to suit for purposes of federal or state law and is entitled to be dismissed. Additionally, all state law claims are barred by the appropriate statute of limitation and are dismissed. In summary, all claims are **DISMISSED** except: Counts One and Two of the complaint which allege a violation of 42 U.S.C. § 1983 against Defendants Nelson County; Kelly Janke, both individually and in his capacity as Nelson County Sheriff; and Eric Braathen, both individually and in his capacity as Nelson County Deputy Sheriff. Further, the Brossarts' motion for leave to amend the complaint is **GRANTED**. An amended complaint consistent with this Order shall be filed within fourteen days of the date of this Order. The Brossarts' motions for default judgment and attorney's fees are **DENIED** as they are unsupported.

LET JUDGMENT BE ENTERED ACCORDINGLY.

⁴³ Doc. #24.

Dated this 23rd day of December, 2014.

/s/ Ralph R. Erickson

Ralph R. Erickson
Chief District Judge
United States District Court