NO. 18-CV-347-SPS

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

JERIEL EDWARDS,

Plaintiff

v.

STEVE HARMON, BOBBY LEE, GREG FOREMAN AND DILLON SWAIM

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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CERTIFICATE OF SERVICE.....

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

JERIEL EDWARDS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 18-CV-347-SPS**
	)	
	)	
(1)STEVE HARMON,	)	
(2)STEVEN WARRIOR	)	
(3) BOBBY LEE,	)	
(4) GREG FOREMAN, and	)	
(5) DILLON SWAIM,	)	
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS'

MOTION FOR SUMMARY JUDGMENT

Plaintiff, through his counsel, Andrea Worden, submits his response to the *Defendants' Motion for Summary Judgment* and requests that such *Motion* be denied.

FACTS

The Defendants' *Statement of the Case* and *Statement of Uncontroverted Facts* are based on Greg Foreman's body camera video, which has been provided to the Plaintiff along with at least fourteen (14) other relevant body camera and dash camera videos. These "statements" provided are for the most part misleading and false. In response to each of the Defendants' "uncontroverted statements," the Plaintiff offers the following (in corresponding order):

1. Not disputed.
2. In dispute. Defendants' version of the statement provided by the citizen is inaccurate.
3. Not disputed.
4. Disputed. Defendants claim Plaintiff failed to respond to numerous attempts made by the officer to communicate. Plaintiff responded, immediately, to all attempts to engage and obeyed all commands. This is a material fact.
5. Not disputed.
6. Not disputed.
7. Not disputed.
8. Not disputed.
9. Not disputed.
10. Not disputed.
11. Not disputed.
12. Disputed. Defendants claim Plaintiff failed to comply with the orders to put his hands behind his back. Plaintiff denies the assertion and asserts that the officers intentionally prevented him from placing his hands behind his back. This is a material fact.
13. Not disputed.
14. Not disputed.
15. Not disputed.
16. Not disputed.
17. Disputed. Defendants did not wait for Plaintiff to obey the command to get on the ground before tackling him to the ground; they did it simultaneously. This is a material fact.
18. Not disputed.

19. Disputed. Defendants claim Plaintiff actively resisted by not allowing himself to be handcuffed. Plaintiff denies resisting and asserts that he tried to comply, desperately, but Defendants prevented him from doing so. This is a material fact.
20. Disputed. Defendants claim Harmon struck Plaintiff in the ribs in effort to get Plaintiff to give up his left arm. The video clearly shows that Harmon already had ahold of Plaintiff's left arm, securely, and actually released it in order to apply the strikes to Plaintiff's ribs. This is a material fact.
21. Not disputed.
22. Disputed. Defendants claim they were unable to control Plaintiff's hands and arms. The video clearly shows that they had control of his hands and arms at multiple times throughout the incident, including the times when they were preventing him from putting them behind his back.
23. Not disputed.
24. Not disputed.
25. Not disputed.
26. Not disputed.
27. Disputed. Defendants claim the taser had no effect on Plaintiff and that he continued to resist. Plaintiff adamantly denies the assertion and argues the taser had a debilitating effect on him and that he never resisted arrest. This is a material fact.
28. Disputed. Defendants claim Harmon struck Plaintiff on the upper arm with a Maglite Flashlight. Plaintiff asserts Harmon struck him in the head. This is a material fact.
29. Disputed. Defendants claim Lee arrived and immediately tried to assist the other officers. The video clearly shows he immediately applied the chokehold upon arrival, for no

apparent legitimate, lawful reason as the Plaintiff was still restrained. This is a material fact.

30. Disputed. Defendants claim the move was a lateral vascular neck restraint. Plaintiff asserts it was not properly applied and therefore was an unlawful chokehold. This is a material fact.
31. Not disputed.
32. Not disputed.
33. Not disputed.
34. Not disputed.
35. Not disputed.
36. Not disputed.
37. Not disputed.
38. Disputed. Defendants claim the bi-lateral neck restraint is an accepted law enforcement restraint. Plaintiff asserts that, even if properly applied, the move is widely criticized and controversial. This is a material fact.
39. Not disputed.
40. Not disputed.
41. Not disputed.
42. Disputed. Defendants claim evidence obtained from Plaintiff's car was contraband but did not provide any reliable test results to support the claim. Plaintiff denies the assertion. This is a material fact.
43. Not disputed.
44. Not disputed.

45. Disputed. Defendants claim Plaintiff entered a plea of guilty on all counts. Plaintiff entered a plea of no contest. This is a material fact.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

The Defendants have moved for summary judgment under Fed. R. Civ. P. 56 on Edwards' Fourth Amendment excessive force claim. Under Rule 56(a), summary judgment is allowed only if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. When applying this standard, a court must construe the evidence in the light most favorable to the non-moving party, in this case Edwards. *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014). Additionally, the court must draw all reasonable inferences in the light most favorable to the non-moving party. *Lundstrom v. Romero*, 616 F.3d 1108, 1118 (10th Cir. 2010).

Where, as in the instant case, summary judgment is based on the defense of qualified immunity, a two-step inquiry applies. First, taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? If so, the inquiry then becomes whether the right was clearly established. *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1312 (10th Cir. 2002). The normal summary judgment burden of showing that no material facts remain in dispute that would defeat the qualified immunity defense remains on the defendant. If the record shows an unresolved question of fact relevant to this immunity analysis, a motion for summary judgment based on qualified immunity should be denied. *Id.*

II. THE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON EDWARDS' EXCESSIVE FORCE CLAIM

A. Collateral Estoppel Does Not Bar Edwards' Fourth Amendment Claim

The Defendants initially argue that because Edwards was convicted on a no contest plea to a misdemeanor resisting an officer charge[1], his claim under 42 U.S.C. § 1983 that the Defendants used excessive force on him during his October 25, 2016 arrest is barred. Invoking the doctrine of collateral estoppel, Defendants' contend that this precludes Edwards from prevailing on his Fourth Amendment claim. The Defendants' reasoning is that because Edwards's resistance to his arrest is established by the judgment in the prior criminal case arising from the incident, that resistance "alone support[s] that the amount of force used under the circumstances was reasonable" for purposes of the Fourth Amendment. (Doc. 54, at 14).

This argument is meritless on at least two grounds. First, the plea upon which Edwards' conviction was based was a "no contest" plea. (Doc. 54-10, at 16, 19-21, 23, 26). Oklahoma law provides that with respect to a "nolo contendere" plea, "[t]he legal effect of such plea shall be the same as that of a plea of guilty, *but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based*." 22 O.S. Sec. 513 (emphasis added). *See also Martin v. Phillips*, 422 P.3d 143, 146 (Okla. 2018) (Oklahoma law, mandates that nolo contendere ("no-contest") pleas may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based). The Defendants admit that Oklahoma law governs the preclusive effect to be given the prior judgment in Edwards' criminal case. (Doc. 54, at 12-13 (citing 28 U.S.C. § 1738)). Because Oklahoma law does not give preclusive effect to the judgment

[1] The conviction was entered under 21 O.S. 268, which provides that "[e]very person who knowingly resists, by the use of force or violence, any executive officer in the performance of his duty, is guilty of a misdemeanor. "

entered upon Edwards' no contest plea, *Martin*, 422 P.3d at 148, it does not give rise to collateral estoppel in these federal court proceedings.

Second, even if the prior no contest plea establishes that Edwards in some manner and to some degree resisted the officers' attempts to arrest him, the fact of resistance alone does not establish as a matter of fact or law that the Defendants did not deprive Edwards of his Fourth Amendment right to be free from the use of excessive force in the course of a seizure. As discussed in more detail *infra*, police violate the Fourth Amendment's prohibition on unreasonable seizures if, in the course of arresting a person, they employ force upon the person that is unreasonable, excessive or not warranted by the circumstances. *Graham v. Conner*, 490 U.S. 386 (1989). There are three, non-exclusive factors relevant to an excessive force inquiry: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Lundstrom v. Romero*, 616 F.3d 1108, 1126 (10th Cir. 2010). The ultimate issue in an excessive force case is whether the defendants' use of force was objectively reasonable when all the relevant facts and circumstances are considered. *Fisher v. City of Las Cruces*, 584 F.3d 888, 894-95 (10th Cir. 2009).

Thus, resistance by the plaintiff bringing an excessive force claim is only one factor that is balanced in determining whether the defendants' use of force is objectively reasonable. Contrary to the Defendants' collateral estoppel argument, the fact that a plaintiff resisted efforts by police to arrest him does not preclude a Fourth Amendment excessive force claim. For example, in *Chacon v. Copeland*, No. 12-CA-226, 2015 WL 2018937 (W.D. Tex. Apr. 30, 2015). The court there upheld a jury verdict[2] on an excessive force claim where police investigating a report of a

[2] The Court of Appeals for the Fifth Circuit had previously ruled in the case that the police were not entitled to summary judgment on their claim of qualified immunity. *Chacon v. Copeland*, 577 Fed. Appx. 355 (5th Cir. 2014).

man with a gun eventually grabbed the defendant, threw him to the ground and shot him with a taser several times. In the course of trying to subdue the plaintiff, the plaintiff had pulled away from one of the officers and shoved the officer off of him. The defendants alleged that these actions showed that the plaintiff was resisting and justified the force employed on him. But the court rejected this argument, ruling as follows:

> As the Fifth Circuit noted, "[t]he seriousness of Chacon's shove, and whether a finder of fact could conclude that the shove was not active resistance, or was disproportionately minor in relation to the severity of force used by the officers, were fact questions not resolvable by the video and properly put to a trier of fact.

Chacon, 2015 WL 2018937 at *6 (quoting *Chacon v. Copeland*, 577 Fed. Appx. at 362).

Because lack of resistance to an arrest by an excessive force plaintiff is only a factor, and not an element, of a Fourth Amendment excessive force claim, courts have repeatedly rejected collateral estoppel arguments like the one made by the Defendants in their summary judgment motion. In *Donovan v. Thames*, 105 F.3d 291 (3d Cir. 1997), the court reversed summary judgment against a plaintiff in an excessive force case where the judgment was based on the preclusive effect of plaintiff's conviction for resisting the arrest giving rise to the Fourth Amendment claim. "Because the issue of the officers' use of excessive force was not essential to the conviction for resisting arrest and because we have no evidence that the issue of excessive force was actually litigated in the state-court criminal proceeding, we hold based on Kentucky law that issue preclusion does not restrict Donovan's excessive force claim in federal court." *Id.* at 295. Similarly, in *Hernandez v. City of Los Angeles*, 624 F.2d 935, 938 (9th Cir. 1980), the court rejected police officers' claims that collateral estoppel, based on the plaintiff's resisting arrest conviction, barred the plaintiff's excessive force claim because the conviction did not necessarily decide that the defendant police officers did not use excessive force in arresting the plaintiff. *See also Sullivan v. Officer Gagnier*, 225 F.3d 161, 165 (2d Cir. 1999) (fact that plaintiff was convicted

of resisting arrest does not foreclose the possibility that the force used by police in response was excessive) and *Courteney v. Reeves*, 635 F.2d 326, 329 (5th Cir. 1981) (plaintiff's conviction for assaulting police officers as they tried to apprehend him did not collaterally estop plaintiff from prevailing on excessive force claim against officers; admitted assault upon a police officer does not negate the possibility that the officer's alleged force used in course of arrest) .

The Defendants' contention that Edwards' "efforts to resist alone support that the amount of force used under the circumstances was reasonable" (Doc. 54, at 19) is simply wrong and not supported by the cases they cite. The decisions in *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997), and *Mayard v. Hopwood*, 105 F.3d 1226 (8th Cir. 1997), do not even mention collateral estoppel, much less apply it, and the courts' references to resisting arrest were simply to note that it was a factor considered in judging the reasonableness of the officers' use of force.

To the contrary, the case law rejects the Defendants' collateral estoppel argument. Indeed, if resisting arrest constituted a bar to excessive force claims, police would be given *carte blanche* to abuse arrestees as they see fit without fear of being held responsible and regardless of the degree of resistance. *Donovan*, 105 F.3d at 328 (citing *Vazquez v. Metropolitan Dade County*, 968 F.2d 1101, 1109 (11th Cir.1992)). Because of this case law and the state law preventing Edwards' no contest plea from having preclusive effect, the Defendants are not entitled to summary judgment on the basis of collateral estoppel.

B. The Defendants' Are Not Entitled To Summary Judgment On The Basis Of Qualified Immunity

The Defendants' also invoke the defense of qualified immunity as grounds for granting summary judgment. Qualified immunity shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law. *Gann v. Cline*, 519 F.3d 1090, 1092 (10th Cir. 2008). As noted above, when a qualified immunity is raised as a basis for summary judgment, a two-step inquiry applies. A plaintiff must show first that the defendants' actions deprived the plaintiff of a constitutional right. If that showing is made, the court must then determine whether the defendants' conduct was objectively reasonable in light of clearly established law at the time it took place. *Weigel v. Broad*, 544 F.3d 1143, 1151 (10th Cir. 2008). Thus, "'if a [constitutional] violation could be made out *on a favorable view of the parties' submissions,* the next, sequential step is to ask whether the right was clearly established.'" *Id.* (quoting *Saucier v. Katz,* 533 U.S. 194, 201 (2001)) (emphasis by court).

Invocation of qualified immunity does not change the general rules governing summary judgment. Tenth Circuit precedent makes clear that qualified immunity may not be granted in excessive force cases where there are material factual issues in dispute. *Olsen*, 312 F.3d at 1314. *Accord Estate of Booker*, 745 F.3d at 414-15. Additionally, a court must still view the facts in the light most favorable to the non-moving party and resolve all factual disputes and reasonable inferences in favor of the non-moving party where qualified immunity is raised on a summary judgment motion. *Id.* at 411.

1. The Video Recordings Of Edwards' Arrest Demonstrate A Fourth Amendment Violation

Under the first prong, the inquiry is as follows: "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. The facts here, as depicted in the several video recordings of the

October 25, 2016 incident, demonstrate a brutalization of Edwards by the several Defendants that was wholly outside the bounds of legitimate police activity and unwarranted by any standard. A disoriented Edwards was smashed against his car, had his arms twisted, thrown to the ground and piled on by the Defendants despite his attempts to comply with their requests to investigate the matter and take him into custody. While on the ground, Edwards face and body were shoved into the pavement by the officers with their bodies and knees, he was punched numerous times in the rib area, he was put in a chokehold, he was tasered, and was struck additional times with a fist and an object wielded by one of the officers.

As shown by the video recordings, the force used by the Defendants upon Edwards was plainly excessive and unreasonable in violation of his rights under the Fourth Amendment. The standard for excessive force claims was established in *Graham v. Connor*, 490 U.S. 386, 397 (1990), which held that police may, in effecting the seizure of a person, only use that amount of force which is reasonable under all the circumstances. The "inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to underlying intent or motivation." *Id.* at 388. "Reasonableness is evaluated under a totality of the circumstances approach which requires that we consider the following factors: 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Weigel*, 544 F.3d at 1151-52 (quoting *Graham*, 490 U.S. at 396).

In arguing that their use of force was reasonable under the *Graham* test, the Defendants rely to a large extent on the third *Graham* factor, asserting that Edwards actively resisted them throughout the encounter and that this justified the violence they inflicted on Edwards. But review

of the video recordings fail to corroborate the contentions of the Defendants regarding resistance. Instead, the video shows that Edwards complied, albeit unsteadily and with difficulty due to his inebriated condition, to the officers requests to put down objects and to exit his vehicle. Yet the officers suddenly resorted to aggressively physical behavior toward Edwards, wrenching his arm behind him, shoving his body and head onto the vehicle and eventually throwing him to the ground. Once on the ground, Edwards struggled to keep his face, head and body from being ground into the pavement by the Defendants' pushing and kneeing into his body. This struggle, along with the manner in which Edwards' shirt was lifted up over his head, prevented Edwards from putting his hands behind his back as the Defendants demanded.

The circumstances here and depictions on the video are not unlike the situation presented in *Estate of Booker v. Gomez*, *supra*, in which police officers were sued for excessive force in subduing an arrestee in a manner that caused the arrestee's death from asphyxia. In claiming qualified immunity from the claims of the arrestee's estate, the defendant officers presented affidavits that the arrestee had resisted attempts to place him in a holding cell and that this resistance justified the level of force used. However, surveillance video of the incident was available and, although the defendants asserted this supported their claims of resistance, the court disagreed, ruling as follows:

> Because our record review indicates the primary factual dispute in the district court was Mr. Booker's resistance, we must resolve this dispute in the Plaintiffs' favor on interlocutory review. Our analysis therefore accepts Mr. Booker did not resist during the vast majority of the encounter. The Defendants argue the video evidence belies this conclusion, but they are mistaken. In fact, the video, which shows Mr. Booker motionless on the floor while the deputies subdue him, contradicts the Defendants' assertion that Mr. Booker consistently resisted them.

Estate of Booker, 745 F.3d at 414-15.

Similarly, the video recordings of Edwards arrest do not plainly and unequivocally show that Edwards resisted the officers, but instead show Edwards was compliant with the officers' requests and did not make any hostile or threatening moves toward the police before they became physically aggressive and threw Edwards to the pavement. At this stage of the case, the evidence must be viewed in Edwards' favor and all reasonable inference drawn in his favor. *Id.* at 411. Viewing the evidence in this light, the objective reasonableness of the Defendants' conduct must be judged on the basis that Edwards did not resist the efforts to arrest him. *See also Choate v. Huff,* 773 Fed. Appx. 484 (10th Cir. 2019) (police officers were not entitled to summary judgment on excessive force claim for shooting where body camera video footage they relied on did not blatantly contradict the plaintiff's version of the events and fact question precluded granting officers' qualified immunity defense).

Moreover, to the extent Edwards did not follow all the directives that he was given by police, this should not justify the brutal force used upon him by the Defendants for at least two other reasons. First, with respect to the orders Edwards was given to place his hand behind his back, he was prevented from doing so by the Defendants' actions of throwing him to the ground, pulling his shirt over his head, a forcing his head, face and body toward the pavement. In determining whether force police used was excessive and unreasonable, the officers' own reckless or deliberate conduct can be considered. *Fogarty v. Gallegos*, 523 F.3d 1147, 1159-60 (10th Cir. 2008). Second, any resistance by Edwards was minor and a natural response to being thrown to the ground by the Defendants. The Defendants' responsive force was wholly disproportionate and excessive. *See Chacon*, 2015 WL 2018937 at *6 (whether plaintiff's action was active resistance and was disproportionately minor in relation to the severity of force used by the officers, were fact questions properly put to a trier of fact).

With respect to the offense under investigation, the Defendants here were not faced with a particularly serious situation. Edwards was found sitting peacefully in his car and appeared to be intoxicated. The Defendants saw no indication of a weapon on or about Edwards. As indicated by Defendant Foreman, he planned to arrest Edwards for being under the influence of a controlled substance. While being under the influence is not a minor offense, it certainly is not so serious an offense as to warrant the brutalization Edwards was subjected to as shown on the video recordings. *See Casey v. City of Federal Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007) (where offenses plaintiff was arrested for were not violent offenses, they were not considered severe for purposes of weighing the *Graham* factors).

As to the remaining factor, the video evidence demonstrates that Edwards posed little immediate threat to the Defendants at the time they became physically aggressive toward Edwards. Although the Defendants rely on Edwards' apparent intoxication as showing he posed a danger, other factors mitigate any threat he posed because of his condition. The video recordings demonstrate that Edwards was peaceful and cooperative with police and made no threatening or furtive gestures toward them. In *Novitsky v. City of Aurora*, 491 F.3d 1244, 1255 (10th Cir. 2007), the court held that an intoxicated person posed a minimal threat to police who seized him using a painful "twist lock" hold under the circumstances of the encounter. "Mr. Novitsky did not make any furtive movements in the car. Moreover, Mr. Novitsky did not resist Officer Wortham in any way; in fact, his demeanor was apparently benign, as he had begun to help himself out of the car when the twist lock was applied." Under these circumstances, any threat to the officers or the public was mitigated and "[v]iewing these facts in the light most favorable to Mr. Novitsky, as we must, we think a reasonable jury could conclude . . . that Officer Wortham's application of the twist lock for officer safety purposes was unreasonable under the Fourth Amendment." *Id.*

When all the circumstances are considered, particularly when viewed in the light most favorable to Edwards, the force used by the Defendants was objectively unreasonable in violation of the Fourth Amendment. This is particularly apparent in light of the kinds of force used against Edwards, some of which was applied after Edwards was restrained and in the control of the police. Thus, the video recordings indicate, and Defendants have admitted that Edwards was subjected to chokeholds in the course of his arrest. In *Estate of Booker*, 745 F.3d at 425, the court wrote that

> [c]ourts from various jurisdictions have held the use of such force on a non-resisting subject to be excessive. *See United States v. Livoti,* 196 F.3d 322, 327 (2d Cir.1999) (upholding excessive force verdict where officer put victim in choke hold for one minute to render victim unconscious, and where department prohibited such holds); *Valencia v. Wiggins,* 981 F.2d 1440, 1447 (5th Cir.1993) (upholding district court's determination that the defendants' use of a "choke hold and other force ... to subdue a non-resisting [detainee] and render him temporarily unconscious" constituted excessive force under the Due Process Clause); *Papp v. Snyder,* 81 F.Supp.2d 852, 857 (N.D.Ohio 2000) (denying qualified immunity where jury could conclude that officer used a choke hold and carotid hold when the victim was restrained by others and handcuffed); *McQurter v. City of Atlanta, Ga.,* 572 F.Supp. 1401, 1414 (N.D.Ga.1983) (use of chokehold was "excessive and malicious" when used after victim was "manacled" and "effectively restrained"), *abrogated on other grounds by Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988).

That decision also cited to *Gouskos v. Griffith*, 122 Fed. App. 965, 976 (10th Cir. 2005), where the court reversed a grant of qualified immunity where the plaintiff submitted evidence that an officer put "him in a chokehold and chok[ed] him almost to unconsciousness when he was already on the ground, he was exclaiming that he was not resisting, and three other officers were sitting on him, holding his legs, and handcuffing him...."

Edwards also was forced into the pavement by the Defendants with a knee to the back and the full force of the officer upon Edwards' prone body. This technique also has been condemned as excessive under similar circumstances. In *Weigel v. Broad*, *supra*, the court upheld an excessive force claim against officers who subdued an arrestee by using one or two knees to pin the arrestee

to the ground, resulting in asphyxiation and death of the arrestee. The court upheld the trial court's conclusion that an objectively reasonable police officer would not have continued to apply pressure to the arrestee's upper torso after he was subdued and no longer a threat. *Weigel*, 544 F.3d at 1152. Similarly, in *Estate of Booker*, 745 F.3d at 429, the court found that the use of this technique upon a non-resisting, subdued suspect constitutes excessive force in violation of the Fourth Amendment.

Finally, the use of the taser upon Edwards also was objectively unreasonable. Under prevailing Tenth Circuit authority, "it is excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force—or a verbal command—could not exact compliance." *Casey,* 509 F.3d at 1286. If a reasonable jury could conclude that a lesser degree of force would have exacted compliance and that this use of force was disproportionate to the need, then summary judgment must be denied to police claiming qualified immunity. *See Cavanaugh v. Woods Cross City,* 625 F.3d 661, 665 (10th Cir.2010) (use of taser unconstitutional where jury could "conclude that [the victim] did not pose an immediate threat" to officer or others and where victim was not actively resisting).

Considering that Edwards was subjected to all these serious applications of violence and force, it can only be concluded that he was a victim of excessive force in violation of the Fourth Amendment. *See Estate of Booker*, 745 F.3d at 427. Therefore, Edwards has satisfied the first prong of the applicable test when qualified immunity is raised.

2. The Defendants' Use Of Force Violated Clearly Established Law

In their motion for summary judgment, the Defendants argue "there must be a Supreme Court or Tenth Circuit decision on point, or a clearly established weight of authority from other courts for

the law to be clearly established." (Doc. 54, at 15). However, this is not the qualified immunity test applied in this Circuit, particularly in excessive force cases.

In *Casey*, 509 F.3d at 1284, the court held that because excessive force jurisprudence requires an all-things-considered inquiry with careful attention to the facts and circumstances of each particular case, "there will almost never be a previously published opinion involving exactly the same circumstances. We cannot find qualified immunity wherever we have a new fact pattern." Indeed, "[t]he plaintiff is not required to show, however, that the very act in question previously was held unlawful in order to establish an absence of qualified immunity." *Weigel*, 544 F.3d at 1153.

Instead, the Tenth Circuit has "adopted a sliding scale to determine when law is clearly established. 'The more obviously egregious the conduct in light of prevailing constitutional principle, the less specificity is required from prior case law to clearly establish the violation.' . . . Thus, when an officer's violation of the Fourth Amendment is particularly clear from *Graham* itself, we do require a second decision with greater specificity to clearly establish the law." *Casey*, 509 F.3d at 1284 (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). *Accord Estate of Booker*, 745 F.3d at 427.

Applying either this test or the standard set forth in the Defendants' motion that the violative nature of particular conduct is clearly established, *Mullinex v. Luna*, 136 S. Ct. 305 (2015), it is plain that the Defendants claim to qualified immunity should be denied. Again, the decision in *Estate of Booker*, 745 F.3d at 428-29,[3] is highly instructive. In ruling that police officers were not entitled to qualified immunity on excessive force claims which involved the use

[3] Although *Estate of Booker* technically involved a due process excessive force claim, the Tenth Circuit made clear that the standards of reasonableness it was applying also applied to Fourth Amendment excessive force claims. *Estate of Booker*, 745 F.3d at 428.

of a choke hold, pressure on the back of the arrestee, and a taser, the court found that, by virtue of prior case law, the defendants were "on notice that use of such force on a person who is not resisting and who is restrained in handcuffs is disproportionate." *Id.* Where the police applied disproportionate force while the arrestee was prone on his stomach and not resisting, they had violated clearly established law and were not entitled to summary judgment on their qualified immunity defense. *Id. See also Lundstrom v. Romero*, 616 F.3d 1108, 1127 (10th Cir. 2010) (it is clearly established that *Graham's* reasonableness standard is violated if there were not substantial grounds for a reasonable officer to believe there was legitimate justification for acting as he did).

The tactics and methods employed by the Defendants against Edwards were clearly excessive, disproportionate and objectively unreasonable under the circumstances the Defendants confronted, and case law specifically addressed the unconstitutional nature of the force employed by the Defendants. Moreover, the video recordings of the incident depict particularly egregious conduct on the part of the Defendants in brutalizing Edwards using choke holds, punches to Edwards' body, tasering, and knees to his back. That each of these tactics has been found to be excessive and unreasonable as to a prone, subdued arrestee means that the Defendants were on notice that their combined use of them against Edwards was a violation of the Fourth Amendment. Because the Defendants' actions violate clearly established law, they are not entitled to summary judgment on the basis of qualified immunity.

The Plaintiff requests this Court deny the Defendants' *Motion*.

Respectfully submitted,

s/ Andrea L. Worden

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2019, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants who have appeared in this case.

s/ Andrea L. Worden