IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOANNA CASTRO, *PLAINTIFF*	§ § §	
V.	§	**CIVIL NO. 5:18-CV-00312-JKP**
ALBERT SALINAS, *DEFENDANT*	§ § §	

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE U.S. DISTRICT COURT:

NOW COMES, DEFENDANT, Salinas and present the following Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment **(Dkt. 43)** and would respectfully show the Court the following:

I. PLAINTIFF FAILS TO ESTABLISH THE EXISTENCE OF ESSENTIAL ELEMENTS FOR A FOURTH AMENDMENT VIOLATION OF EXCESSIVCE FORCE

1. *Fed. R. Civ. Proc.* Rule 56 mandates the entry of summary judgment against a party who fails to, in response to a motion for summary judgment, establish the existence of an essential element of that party's case. *Beard v. Banks*, 126 S. Ct. 2572, 2578 (2006). Plaintiff cannot sustain her Fourth Amendment §1983 excessive force claim against Defendant, Officer Salinas, because Plaintiff cannot establish she was (1) seized; (2) suffered an injury (3) that resulted directly and only from the use of force that was excessive to the need; and (4) that the force used was objectively unreasonable. *Graham v. Connor*, 490 U.S. 386 (1989); *Flores v. City of Palacios*, 381 F. 3d 391, 396 (5th Cir. 2004), *citing*, *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000). Therefore, Officer Salinas retains his qualified immunity.

A. Requisite: Plaintiff has not shown that she was seized by Officer Salinas.

2. Plaintiff's contention that Officer Salinas seized Plaintiff by merely touching her has no merit. Plaintiff's reliance on the findings in *California v. Hodari*, 499 U.S. 621, 625 (1991), and *Fontenot v. Cormier*, 56 F. 3d 669, 674 (5th Cir 1995) in support of her contention is unsustainable. *Hodari* and *Fontenot* are distinguishable to the instant case. In *Hodari*, the Supreme Court acknowledged that in order to apply the "slightest application of physical force" standard under Fourth Amendment purposes the <u>act of arresting</u> the person is required. *Id* at 625. "[A]n officer <u>effects an arrest of a person</u> whom he has authority to arrest, by laying his hand on him for the purpose of arresting him. . . ." *Id.* at 624, citing *Whitehead v. Keyes,* 85 Mass. 495, 501 (1862) (Emphasis added). *Fontenot* is also distinguishable from this case, because the Appellant was the subject of an arrest where officers attempted to subdue him. *Fontenot* at 674. Defendant does not dispute that Plaintiff was touched during her was arrest on March 27, 2018. However, the fact that Plaintiff was not seized fails to meet the threshold under *U.S. v. Mendenhall*, 44 U.S. 544, 553 (1980).

3. In *Hodari,* the court found that "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 627-628, *citing, INS v. Delgado*, 466 U.S. 210, 215, (1984). Plaintiff plead in her Second Amended Complaint and testified in her deposition that Salinas did not detain her the night of February 20, 2018, nor do the videos submitted as Exhibits indicate a detention. **[Dkt. 39, ¶ 22, Exhibits C-3, D, D-7, D-8; and Plaintiff's Second Amended Complaint, Dkt. No. 17 ¶¶ 13, 15, 15j]**[1]. Accepting Plaintiff's

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1 The Court may "assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene." *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012). "When one party's description of the facts is discredited by the record, we need not take his word for it but should view 'the facts in the light depicted by the videotape.' " *Id.* (quoting *Scott v. Harris*, 550 U.S. 372, 380–81 (2007).

allegations as true, Plaintiff was not seized by Officer Salinas. Therefore, Plaintiff's seizure requirement fails, and her Fourth Amendment violation cause of action must be dismissed.

B. First Element: Plaintiff has not shown that her physical injuries were more than "*de minimis*" or that she suffered substantial psychological injuries.

4. It is an undisputed fact that Officer Salinas pushed Plaintiff out of the way after his arrival at the scene. **[Dkt. 39, ¶¶ 1, 7, 34, 35, and 36].** It is also undisputed that Plaintiff did not suffer more than a "*de minimis*" injury. **[Dkt. 39, ¶¶ 24-29, Exhibit D, Attachment D-7; Dkt. 17].** In Plaintiff's Response, Plaintiff's counsel attempts to lessen the threshold of what is a *de minimis* injury in order to allow her client to cross unimpeded. Plaintiff cites to *Williams v. Bramer*, 180 F. 3d 699, 704 (5th Cir. 1999) in support of her contention that suffering mere lightheadedness is more than a *de minimis* injury. **[Dkt. 43, p. 9]**. However, Plaintiff applies the incorrect facts in *Williams* to support her position. Williams was a victim of two choking incidents by Officer Bramer. The first incident the court concluded that during the performance of a search, the contact between Williams and Bramer did not result in a cognizable injury and found that, ". . . fleeting dizziness, temporary loss of breath and coughing does not rise to the level of a constitutional violation", in the performance of Bramer's duty as an officer. *Id.* at 704. Plaintiff's counsel mistakenly applies the facts in the second choking incident, where Williams suffered more than "fleeting dizziness" and more than "a temporary a loss of breath", and where Bramer was not legitimately in the performance of his duties as an officer. *Id.* at 704. The Court in *Williams* found, "[a]lthough plaintiff is not required to show significant injury for a Fourth Amendment excessive force claim, it is necessary that plaintiff suffered at least some form of injury that is more than *de minimis*." *Id.* at 703.

5. Plaintiff reasserts in her Response that her alleged psychological injuries alone are more

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than *de minimis* and cites to *Flores v City of Palacios,* 381 F. 3d 391, 397-398, in support of her argument. **[Dkt. 43, p. 8].** However, Plaintiff misquotes the holding in *Flores*. Plaintiff asserts that *Flores* held that, psychological injuries alone **can** be sufficient to satisfy the injury requirement for excessive force. However, the actual quote is "... psychological injuries **may** sustain a Fourth Amendment claim." *Id.* at 398 (Emphasis added). The *Flores* Court relied on *Dunn v. Denk,* 79 F.3d 401,402 (5th Cir. 1996), in support of its holding. *Dunn* held that psychological injures must be **substantial** to support a Fourth Amendment violation of excessive force. *Id.* at 400-401. The facts in *Dunn* revealed that Dunn was currently hospitalized for "severe depression and agitation" prior to the incident that made the basis of her lawsuit. Dunn's doctor testified that the incident shocked Dunn and was harmful in terms of her recovery.[2] *Id.* at 256.

6. Plaintiff has provided no medical records for treatment of her alleged physical injuries allegedly resulting from Officer Salinas' actions, much less any evidence of treatment for "substantial" psychological damages. In addition, Plaintiff admitted in her deposition that she has taken no medication for her alleged mental anguish. **[Dkt. 39-1, Exhibit D pp. 73:24-74:3].** Plaintiff's conduct as shown on the videos do not evidence substantial mental anguish or substantial psychological damages. **[Dkt. 39, ¶¶ 28, 29; Exhibit C-3, 00:01:45-0:04:39; Exhibit D, Attachments D-7, 0:00:28- 0:03:45 and D-8, 0:13:51-0:18:44].** Plaintiff has failed to prove that she suffered more than a *de minimis* injury and substantial psychological injuries.

C. Second and Third Elements: Plaintiff has not shown that the use of force was clearly excessive to the need or that the force used was objectively unreasonable.

7. The standard for determining whether the use of force is objectively unreasonable is firmly established: it is a fact-sensitive inquiry that turns on the <u>totality</u> of the circumstances. *Holcomb v. McCraw,* 262 F. Supp 3d 437, 447 (W.D. Tex. 2017).

2 *Dunn v. Denk,* 54 F. 3d 248, 256 (5th Cir. 1995)

8. In her Response, Plaintiff argues that, no amount of force was appropriate under the circumstances, because Plaintiff was not interfering with the arrest of Jack Miller and Plaintiff was not committing any crime. **[Dkt. 43, p. 2]**. Plaintiff boldly contends that it is clearly established law in Texas that the fact pattern in the instant case does not support a charge of interference with public duties under *Texas Penal Code §38.15*, and cites *Carney v. State,* 31 S.W. 3d 392 (Tex. App—Austin, 2000, no pet.) as the foundation of her argument. However, the facts in *Carney* are clearly distinguishable from this case taking into account the totality of circumstances.[3]

(i). The facts in *Carney* did not involve tense, uncertain, and rapidly evolving' " circumstances.

9. The reasonableness standard of an officer's conduct must be judged from the perspective of those reasonable officers at the scene. *Graham* at 396-97. *Carney* involved Department of Public Safety Officers attempting to serve a writ of attachment on the wife of Appellant Carney. Appellant was not armed, but only attempted to stall the officers from entering his home to serve the warrant on his wife. The officers in *Carney* were judged on the fact that they had ample time to determine if Appellant was blocking[4] the door and if pushing him to clear the way was in violation of clearly established law. Under the standard used in *Carney*, the proof of "blocking" could not be met under the requirements of §38.15[5]; therefore, finding no force was required to move Appellant out of the way.

10. However, the reasonable standard of an officer's actions used in *Carney* is notably distinguishable from the instant case. Here, the police responded to a tense, quick evolving, and

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3 Plaintiff contends that the facts in this case are also similar to *Turner v. Lieutenant Driver,* 484 F. 3d 678,694 (5th Cir. 2017) and *Glik v. Cunniffe,* 655 F.3d 78, 80 (1st Cir. 2011). Plaintiff's contention is incorrect. Both cases did not involve tense, uncertain, and rapidly evolving circumstances.

4 The court found that "Blocking" was not defined in §38.15, but used its plain meaning to obstruct, stop, impede, or hinder. [*Casey* at 397].

5 (a) A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with: (1) a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law.

more severe situation of a man carrying an AR-15 across his chest in public at nighttime, as compared to the less severe situation of serving a writ of attachment on Appellant's wife for failing to appear at a deposition in a civil case. *Carney* at 394. Plaintiff's contention that the reasonable standard of an officer's actions in *Carney* should parallel the reasonable standard to be used in this case is without merit and fails to sustain Plaintiff's argument that clearly established Texas law supports Plaintiff's actions and does not violate §38.15.

(ii). Plaintiff physically inserted herself into the investigation and arrest of Jack Miller

11. Echoing the holding in *Carney*, Plaintiff contends that, like Carney, pushing Plaintiff out of the way was not necessary. However, unlike *Carney*, this case has video evidence of Plaintiff placing herself near Officer Salinas and Jack Millers' arrest area causing interference, disruption, and/or hindering Officer Salinas in the performance and exercise of his authority as an officer in response to a man carrying a clearly visible AR-15 rifle in the front of his chest. **[Dkt. 39, Exhibit C-3, 01:20 – 01:28, *Plaintiff can be seen at the upper left of the video moving forward to an approaching Officer Salinas*; Exhibit D-8, 0:09:38-0:10:01]**.[6]

12. Plaintiff positioned herself to come into close proximity of the advancing Officer Salinas and put herself in a dangerous area despite the numerous warnings she received to stay away from Jack Miller: 1) Miller instructed Plaintiff to stay away to disassociate herself from him to avoid being handcuffed. **[Dkt. 39, Exhibit D-8, 0:3:10-17]**; 2) Plaintiff remarked that her husband [Todd] told her to stay away from Jack Miller **[Dkt. 39, Exhibit D-8, 0:6:29-32]**; 3) Plaintiff herself informed Jack Miller to stay away from her and not to get close. **[Dkt. 39, Exhibit D-8,**

6 Plaintiff asserts that the facts in *Glik* are similar to this case; however, the *Glik* court recognized the right to film is not without limitations and is subject to time, place and manner restrictions finding that **"peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties** is not reasonably subject to limitation." *Glik* at 84. Glik was arrested for filming officers only, not for interference with public duties. The distance between Glik and the officers involved was not at issue. (Emphasis added).

09:25-34]; Salinas ordered Plaintiff three (3) times to get back[7] prior to having to push Plaintiff away from the area and another three (3) times afterwards **[Dkt. 39, Exhibit D-8, 13:31-47]**; and 4) Jack Miller warned Plaintiff to stay back twice after Officer Salinas pushed Plaintiff away from the arrest area. **[Dkt. 39, Exhibit D-8, 13:48-53]**. Plaintiff admitted in her deposition that a police officer has no right to move people or push them out of the way or get them out of the way if they perceive a dangerous area. Her reason was that they were just officers and that, "You think just because they wear a badge and a uniform, that we're supposed do [sic] bow down to these people. Well, I don't. We don't." **[Dkt. 39, Exhibit D pp. 41:18-42:1-4]**. Plaintiff testified that she did not put her camera down because she did not have to and that Officer Salinas had no business "No right to tell me nothing. Nothing." **[Dkt. 39, ¶ 7; Exhibit D p. 42:17-24]**.

(iii). It was Plaintiff's intent to get arrested and handcuffed.

13. Plaintiff's contention that like the Appellant in *Carney*, she was not interfering with the arrest of Jack Miller and that she was not committing any crime[8]. Plaintiff's assertion rings hollow given Plaintiff's admission that she wanted to get handcuffed and wanted to get arrested. **[Dkt. 39, Exhibit D-8, 0:03:16-18]**. The instant case is dissimilar to *Carey,* because Plaintiff admits that she intended to commit an act which would be in violation of *Texas Penal Code §38.15* (fn 6, infra).

(iv). Officer Salinas' actions were reasonable taking into consideration the tense and uncertain circumstances that existed at the time of Miller's arrest.

14. In her Response, Plaintiff argues that, no amount of force was appropriate under the circumstances, because Plaintiff was not interfering with the arrest of Jack Miller and Plaintiff was not committing any crime. **[Dkt. 43, p. 2]**. Plaintiff concludes "[O]bjectively, the facts in this case show there was no need for **any** force." **[Dkt. 43, p. 8]**. However, reasonableness of a police

7 Officer Salinas made attempts to temper the contact with Plaintiff by first telling her to get back.
8 **Dkt. 43, p. 2.**

officer's actions "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, at 396. The reasonableness of a police officer's action is not judged by the objective perspective from someone who is not a police officer. The testimony from Defendant's expert, Jerry Staton, a retired police officer, opined that when Officer Salinas' attempted to use verbal commands for Plaintiff to "get back" failed, he used "minimal reasonable force to accomplish the task." **[Dkt. 39, ¶ 35; 39-1, p. 92]**. Plaintiff has not designated any retained expert or provided an expert opinion report to state otherwise.

15. Similar to the fact pattern in the instant case, in *Haggerty v. Texas Southern University,* 391 F. 3d 653 (5th Cir. 2004) the court found that a reasonable officer in arresting officer's position could have believed with fair probability that arrestee, who stepped forward toward officer after having previously been warned to not interfere with officer's handling of potentially tense and dangerous situation and who was within relative proximity of the officer, had interfered with officer's duties in violation of Texas law. *Id.* at 656-657. The *Haggerty* court found that, "[t]hus, viewing the totality of circumstances in the light most favorable to Haggerty, but from the perspective of a reasonable officer in Williams's position. . . . an approaching person in relative proximity to Williams (Haggerty)—who had previously been told to "step back"[9]. . . A reasonable officer in Williams's position could have believed that the situation was tense and dangerous . . . there was a fair probability that Haggerty's actions constituted interference with his duties". *Id* at 657. "Officers may consider a suspect's refusal to comply with instructions ... in assessing whether physical force is needed to effectuate the suspect's compliance." *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (per curiam). "Even if an officer is mistaken in assessing the amount of force necessary to effectuate an arrest, that mistake is entitled to qualified immunity so

9 "Haggerty stepped forward toward Williams after having previously been warned to not interfere and was within relative proximity (10 to 15 feet away)".

long as it is reasonable." *Rogers v. Owings* 2011 WL 1842756 *7 (S.D. Tex.-Beaumont, 2011) citing *Battiste v. Rojeski*, 257 F.Supp.2d 957, 960 (E.D.Mich.2003). Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. *Graham* at 396-397. Considering the totality of circumstances, Officer Salinas used a reasonable amount of force to push Plaintiff away to a safe distance, away from a dangerous or a potentially dangerous situation, while evaluating the level of danger upon arrival at the scene in a matter of seconds, and far enough away for Plaintiff not to interfere with the duties of Officer Salinas and Officer Schumacher in arresting Jack Miller.

II. OFFICER SALINAS IS ENTITLED TO QUALIFIED IMMUNITY TO PLAINTIFF'S RETALIATION CLAIM.

16. Plaintiff asserts that she has met the requirements in *Keenan v. Tejeda*, 290 F. 3d 252, 258 (5th Cir. 2002) to proceed with a First Amendment violation against Officer Salinas. However, Plaintiff admitted in her deposition that Officer Salinas did not order her to stop filming and she continued filming Jack Miller's arrest with her other camera after Officer Salinas knocked away Plaintiff's video camera, which interrupted recording with that camera for approximately 19 seconds **[Dkt. 39, Exhibit D-8, 013:41 –014:00]**. Therefore, Plaintiff was not deprived of her First Amendment right to film police officers. In addition, Plaintiff was charged with criminal conduct pursuant to §38.15 based on probable cause and as a result cannot maintain a cause of action for violation of her First Amendment right. **[Dkt. 39, Exhibit C-6; Exhibit E]**. Section 38.15 criminalizes: (1) interference in some way that is <u>beyond speech</u> with (2) the performance of an officer's official duties. *Carney* at 395-396.

17. Plaintiff misinterprets the holding in *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (May 28, 2019) to support her contention that she falls within the Supreme Court's narrow exception/qualification that a Plaintiff does not have to prove the no-probable cause requirement

to maintain a First Amendment retaliation claim. The exception provides that, "the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves* at 1727. Plaintiff mistakenly contends that the case refers to Officer Salinas' alleged discretion not to arrest Plaintiff on the night of February 20, 2019. Nevertheless, the exception in *Nieves* cannot apply to Plaintiff, because this exception was not clearly established when Officer Salinas confronted Plaintiff on February 20, 2018 or when Plaintiff was arrested on March 27, 2018. Sgt. Ruiz determined that he had probable cause in his submittal of an affidavit in support of an arrest warrant for Plaintiff. **[Dkt. 39, Exhibit C-6; Exhibit E]**. The existence of probable cause was also found by the Magistrate's review of the charge and the issuance of the arrest warrant. More importantly, Sgt. Ruiz, upon review of the video, incident reports and discussion with the police officers involved in the arrest of Jack Miller on February 20, 2018, was the officer to make the determination to issue a warrant for Plaintiff's arrest. Officer Salinas did not request that an arrest warrant issue for Plaintiff, nor did he arrest Plaintiff on March 27, 2018. **[Dkt. 39, Exhibit E]**. Therefore, no liability for retaliatory prosecution can be established and Officer Salinas' qualified immunity applies.

III. PLAINTIFF IS NOT ENTITLED TO DECLARATORY RELIEF

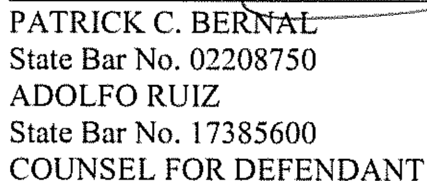
18. Declaratory relief is not appropriate in this case. To obtain a declaratory judgment, there must be a justiciable controversy as to the rights and status of the parties that the declaration sought will resolve. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995); *HMT Tank Serv. LLC v. Am. Tank & Vessel, Inc.*, 565 S.W.3d 799, 808 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Where a declaratory judgment would not clarify future legal relations between the parties, the action serves no useful purpose and courts will not entertain it. *Koon v. Lynch*, No. 4:15-

CV2107 DCN, 2015 WL 4771881, at *3 (D.S.C. Aug. 12, 2015), *aff'd*, 627 Fed. Appx. 227 (4th Cir. 2015). In this case, it does not appear that a declaratory judgment action would serve to clarify future legal relationships between the parties, because the mere possibility of another encounter between Plaintiff and Defendant might someday occur, does not present "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007). Pursuant to the above-arguments, the Court should not award declaratory relief to Plaintiff.

SIGNED this 12th day of November, 2019.

Respectfully submitted,

DENTON NAVARRO ROCHA BERNAL & ZECH
A Professional Corporation
2517 N. Main Avenue
San Antonio, Texas 78212
Telephone: (210) 227-3243
Facsimile: (210) 225-4481
patrick.bernal@rampage-sa.com
adolfo.ruiz@rampage-sa.com

BY: 

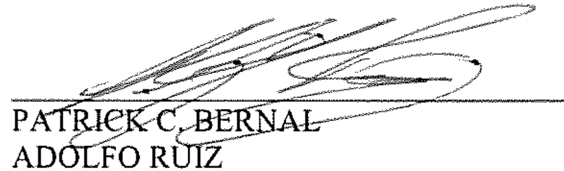
PATRICK C. BERNAL
State Bar No. 02208750
ADOLFO RUIZ
State Bar No. 17385600
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served in accordance with the Texas Rules of Civil Procedure on this 12th day of November, 2019, to the following:

Millie L. Thompson
Law Office of Millie L. Thompson
1411 West Ave., Ste. 100
Austin, Texas 78701

E-NOTIFICATION



PATRICK C. BERNAL
ADOLFO RUIZ

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