DOCKET NO. 18-55149

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAMELA FOX KUHLKEN

Plaintiff and Appellant,

v.

COUNTY OF SAN DIEGO, SHERIFF'S DEPUTY DARIN SMITH

Defendants and Appellees.

Appeal From The United States District Court,
Southern District of California, Case No. 3:16-cv-2504-CAB-DHB
Hon. Cathy Ann Bencivengo, District Judge

ANSWER BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

A simple Google search of "parking lot dispute" confirms that parking space disputes can quickly turn violent. The incident in this case arises from a parking lot dispute. San Diego County Sheriff's Deputy Darin Smith (Deputy Smith) arrived at the parking lot with reports that the fight escalated into an assault with a deadly weapon – the driver ran over a man's foot. Within moments of Deputy Smith arriving on scene with multiple people present, Mr. Platts reported that a woman ran over his foot and drove away. Pamela Fox Kuhlken (Fox) approached on foot and Mr. Platts identified her as *the woman*. Deputy Smith asked Fox for her identification. Fox refused and became defensive. Concerned about possible violent escalation without any back-up present, Deputy Smith moved to detain Fox in his patrol SUV pending investigation. Fox resisted and was taken to the ground. She continued to resist efforts to handcuff her despite the assistance of an off-duty police officer. The resistance continued until Fox was secured in the patrol SUV. Fox sued claiming her detention and arrest were unlawful and excessive force was used. She brought related state law claims.

This court should affirm the district court's grant of summary judgment in favor of Deputy Smith and the County. Deputy Smith had lawful grounds to detain Fox while he investigated, to arrest Fox based on her failure to provide identification, and to arrest Fox for delaying, obstructing and resisting Deputy

Smith's discharge of his duties in investigating the incident.[1] 1 EOR 11-12; Cal. Veh. Code, § 12951(b); Cal. Pen. Code § 148(a)(1). Undisputed video evidence shows Fox's active resistance. *Id.*, at 13.

The district court properly balanced the *Graham v. Connor,* 490 U.S. 386, 394-395 (1989) (*Graham*) factors in determining there was no excessive force used as a matter of law. 1 EOR 16-19. There is no dispute that Deputy Smith gave verbal commands for Fox's identification and Fox refused. Deputy Smith warned Fox she would be detained in the back of his SUV and might be tased if she did not comply. She still refused to produce her identification. She was taken to the ground after she resisted efforts to place her in the back of the patrol SUV. She then actively resisted efforts to handcuff her, including slipping out of the handcuffs while Deputy Smith adjusted them. She actively resisted efforts to place her into the SUV. Bystander video shows Deputy Smith only used proportional physical force necessary to overcome Fox's active resistance. SEOR 22; Exh. E.

The same evidence supported the district court's grant of qualified immunity and summary judgment on Fox's related state law claims. 1 EOR 13-16, 19-21.

Summary judgment should be affirmed.

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[1] Fox abandoned her unlawful detention claim. 1 EOR 10.

STATEMENT OF JURISDICTION

Appellees agree that federal jurisdiction exits under 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983. Appellate jurisdiction exists under 28 U.S.C. § 1294(1).

ISSUES PRESENTED

The issues presented by appellant Fox are:

1. Did the undisputed material facts show probable cause for Fox's arrest?
2. Did the undisputed material facts show that the force used against Fox was reasonable under the circumstances?
3. Did the undisputed material facts support the grant of qualified immunity?
4. Did the undisputed material facts support summary judgment on Fox's state law claims?

STATEMENT OF FACTS

On the morning of February 21, 2016, Deputy Smith responded to a radio call dispatching him to investigate a "415 argument" over a parking spot at the Epic Volleyball Club. SEOR 7; 2 EOR 67; Cal. Pen. Code § 415 (public fight/disturbing the peace). The radio dispatcher indicated:

"41P5 [Deputy Smith's call designation] unit to cover, 415 argument Stowe and Scripps Poway Parkway the Epic Volleyball. Now 415 in

> the parking lot over parking spaces, RP is unsure of the exact address. Unknown male. No further description at this time, P5."

2 EOR 67.

While driving to the location, Deputy Smith received an additional radio broadcast indicating that the dispute may have escalated. SEOR 8. The radio dispatcher advised:

> "41T3 unit to cover 11-83, 13955 Stowe Drive, San Diego [sic] Volleyball Club. RP is advising her husband was standing in the parking lot waiting for his wife to pull in. And another vehicle ran over his foot. Suspect vehicle is a red Chevy Volt, license 7KCX685. T3."

2 EOR 67. The dispatcher confirmed that this was related Deputy Smith's call. *Ibid.*

This additional radio dispatch informed Deputy Smith that the situation escalated into a possible assault with a deadly weapon – the driver of a Chevy Volt running over a man's foot. SEOR 8. Deputy Smith believed he would also be investigating a possible violation of Cal. Pen. Code § 245(a)(1), assault with a deadly weapon or force likely to produce great bodily injury, when he arrived on scene. *Ibid.*

Deputy Smith was the first officer to arrive. SEOR 8, 119-120. As he pulled into the parking lot, he saw Cleon Platts sitting on a curb, surrounded by people. *Ibid.* Deputy Smith made contact with Mr. Platts who reported that a woman in a red car ran over his foot and drove away. *Ibid.* Within a matter of seconds, Fox walked towards Deputy Smith's location. *Id.*, 8, 85. Mr. Platts identified Fox as the woman who drove over his foot. *Id.*, at 8, 89. Fox heard Mr. Platts identify her as she walked up. *Id.*, at 99-100. Fox knew Deputy Smith was present to investigate the parking lot dispute because she also called 9-1-1 when Mr. Platts' wife began screaming and accusing her of trying to kill her husband. *Id.*, at 73-76.

Deputy Smith asked Fox for her identification. SEOR 8, 90. California Veh. Code § 12951(b) requires a driver to "present his or her license for examination upon demand of a peace officer enforcing the provisions of this code." Fox responded by asking if Deputy Smith was there for her call to 9-1-1 and Deputy Smith responded it was all one situation. *Id.*, at 91.

Fox thought the situation appeared serious and feared she might be in trouble when Deputy Smith asked her for her identification. However, she believed Mr. Platts staged the accident and that no one was actually injured. SEOR 93-95. So, Fox refused Deputy Smith's request for her identification and questioned why it was necessary. *Id.*, at 8, 96. Deputy Smith warned Fox she

would be detained if she did not provide her identification – "I told her she would need to take a seat in my patrol SUV until another deputy arrived." *Id.*, at 8. Fox still refused to comply. *Ibid.* Deputy Smith then warned Fox that she might be tased if she did not provide her identification. Deputy Smith gave this taser warning because it ordinarily overcomes resistance and results in compliance. *Id.*, at 8-9. Not this time. *Ibid.* Fox responded, "No. I'm innocent. And I called 9-1-1 for help. I'm pretty sure you can't tase me for just standing here." *Id.*, at 96. Fox admitted that at this point she was angry and frustrated with Deputy Smith. *Ibid.* She admitted matching Deputy Smith's tone. *Ibid.*

Deputy Smith was concerned Fox's demeanor could reignite the confrontation with Mr. Platts. SEOR 8. He was also concerned because he had not yet determined the volatility of the dispute and was the only deputy on scene. There were multiple bystanders whose involvement, if any, was unknown and no one had been searched for weapons. *Ibid.* "To secure the scene, continue my investigation, and minimize the risk of further confrontation between Mr. Platts and Ms Fox Kuhlken, I decided to place Ms. Fox Kuhlken in the back of my patrol vehicle until help arrived." *Id.*, at 9. Deputy Smith went to grab Fox by the arm to lead her to rear driver side of his patrol SUV. *Ibid.* Fox actively and physically resisted Deputy Smith's efforts. *Ibid.* As Fox admitted, "I remained actively passively resisting. I just wanted to hold my person in tact." *Id.*, at 102. Fox tried

to hold her ground and admitted this required Deputy Smith to use greater strength to move her. *Ibid.* Deputy Smith instructed Fox "to put her purse down and have a seat in the back of the patrol SUV. She refused to let go of her large purse and tried to spin around to face me." *Id.*, at 9. Fox admitted resisting efforts to remove her purse. *Id.*, at 97. Deputy Smith turned Fox back around bringing both of her wrists behind her back. *Id.*, at 9. When Deputy Smith let go of one wrist to radio for the status of back-up, Fox again tried to spin around and face him. *Ibid.*; and see 2 EOR 68. Fox physically resisted Deputy Smith's efforts to regain control, leading Deputy Smith to use "an Arm Bar Take Down maneuver to put Ms. Fox Kuhlken on the ground face first and apply handcuffs." SEOR 9. "I purposefully did the maneuver slower than usual to minimize the impact to Ms. Fox Kuhlken." *Ibid.*

Fox continued to resist while on the ground. SEOR 9, 22 - Exh. E – Video of Incident. Off-duty police officer, Sergeant Shank, came to the assistance of Deputy Smith. *Ibid.* Together, it took the efforts of both officers to overcome Fox's resistance and handcuff her. *Ibid.* Once handcuffed, Deputy Smith and Sergeant Shank raised Fox to her feet. *Ibid.* When Deputy Smith went to adjust the handcuffs, Fox pulled one arm free and physically resisted efforts of Deputy Smith and Sergeant Shank to re-handcuff her. *Ibid.* While trying to re-cuff Fox,

Deputy Smith instructed her to "Stop resisting, just relax." Exh. E; 2 EOR 53. Fox continued to resist. Exh. E.

Back in handcuffs, Fox physically resisted efforts to place her into the back of the patrol SUV. SEOR 9, 22 - Exh. E. This included bracing her legs and hooking her feet around Deputy Smith's leg. *Id.*, at 9-10, 22 - Exh. E. It took the efforts of Sergeant Shank pulling Fox from the other side and Deputy Smith physically maneuvering Fox's legs to overcome Fox's resistance and place her into the back of the patrol SUV. *Ibid*.

When Deputy Andrew Peterson drove up to the scene, he observed Deputy Smith struggling to place Fox into the back of the patrol SUV. SEOR 17. Fox was in the SUV and the door closed by the time Deputy Peterson got out. *Ibid.*

Deputy Peterson took over the investigation of the primary incident while Deputy Smith interviewed witnesses related to his interaction with Fox. *Ibid.* Deputy Smith obtained bystander video showing Fox on the ground resisting Deputy Smith and Sergeant Shank's efforts to handcuff her through placement of Fox in the patrol SUV. *Id.*, at 10; 22 Exh. E. At that point, Fox was under arrest for obstructing/resisting a peace officer in violation of Cal. Pen. Code § 148(a)(1). *Id.*, at 10. Deputy Smith transported Fox to the Poway station while Deputy Peterson continued the investigation. SEOR 10, 17-18.

At the station, Fox was photographed – the only visible injury observed was a scratch across the knuckles of her left hand. *Id.*, 10, 31-38. Fox declined medical attention. *Id.*, at 13-14; 20 – Exh. D – audio recording of intake.

Deputy Smith was scratched across one of his hands during the incident. *Id.*, at 10-11, 42-44.

While still at the station, traffic investigator, Deputy Kenneth Newsom, informed Fox of the results of the investigation into the underlying incident. SEOR 14, 20 – Exh. D starting at approximately 18:25. Fox was informed that while Mr. Platts claimed Fox intentionally hit him with her car, three independent witnesses confirmed Mr. Platts sat down in front of the car and began kicking the underside of the car. *Ibid.* Mr. Platts's claims were determined to be unfounded. *Ibid.* Fox was informed that she nevertheless violated California law by refusing to produce her driver's license when requested by Deputy Smith. *Ibid.*

Fox was cited and released for resisting a peace officer in violation of Cal. Pen. Code § 148(a)(1). SEOR 11, 109-110. Deputy Smith gave Fox a courtesy ride back to the Epic Volleyball Club. *Ibid.*

STATEMENT OF CASE

Fox brought this 42 U.S.C. § 1983 case with related state law claims against the County and Deputy Smith. 2 EOR 23-35. In the operative First Amended Complaint, Fox alleged unreasonable detention, arrest, and excessive force in

violation of the Fourth Amendment. *Id.*, at 29-32. She alleged state law claims for negligence, false arrest, battery and violation of Cal. Civ. Code § 52.1. *Id.*, 32-34.

The County and Deputy Smith moved for summary judgment after the close of discovery. 2 EOR 47, 48, 301. Fox opposed. 2 EOR 302.

The district court granted summary judgment on all claims. 1 EOR 1, 22. It found Fox abandoned her unlawful detention claim and that the undisputed facts showed Deputy Smith had reasonable suspicion to detain Fox and ask for her identification while he investigated her alleged assault with a vehicle. *Id.*, at 10.

On the unlawful arrest claim, the district court concluded Deputy Smith had probable cause to arrest Fox based on her undisputed failure to provide identification in violation of Cal. Veh. Code § 12951(b). 1 EOR 10-13. The district court found the undisputed facts, particularly the videotape evidence and Fox's own admissions, demonstrated that Fox resisted efforts to detain, restrain and place Fox in the back of the patrol SUV. *Ibid.* Probable cause existed as a matter of law to arrest Fox for violations of Cal. Veh. Code §§ 12951(b), 20001, 20003 and by delaying, obstructing and resisting Deputy Smith in the discharge of his duties in violation of Cal. Pen. Code § 148(a)(1). *Ibid*.

The district court concluded there was no excessive force used as a matter of law under *Graham v. Connor* factors. 1 EOR 16-19. The same analysis barred Fox's related state law claims. 1 EOR 21.

Finally, the district court concluded that qualified immunity applied to bar the unlawful arrest and excessive force claims. 1 EOR 13-16, 19-21.

Judgment was entered on January 16, 2018. 2 EOR 298. Fox timely appealed. *Id.*, at 299, 303.

STANDARDS OF REVIEW

The grant of summary judgment is reviewed de novo. *S. B. v. County of San Diego*, 864 F.3d 1010, 1013 (9th Cir. 2017) (*S.B.*).

The facts are viewed in the light most favorable to Fox. *White v. Pauly*, 137 S. Ct. 548, 550 (2017) (*White*). However, "when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (uncontroverted videotape evidence controlled over plaintiff's assertions to the contrary).

The district court also found qualified immunity applied. Where the case concerns the defense of qualified immunity, "the Court considers only the facts that were knowable to the defendant officers." *White*, 137 S. Ct. at 550, citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015).

LEGAL DISCUSSION

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE UNDISPUTED FACTS DEMONSTRATED LAWFUL GROUNDS TO REQUEST FOX'S IDENTIFICATION, TO DETAIN FOX PENDING INVESTIGATION, AND TO ARREST FOX.

By abandoning her unlawful detention claim, Fox conceded Deputy Smith had grounds to detain her as part of his investigation into the 9-1-1 calls of a fight/disturbing the peace over a parking space which reportedly escalated into an assault with a deadly weapon. See 1 EOR 10; Doc. 25 at 22-23. There was no dispute Mr. Platts identified Fox as *the woman* who ran over his foot and drove away. SEOR 8, 89, 99-100. As correctly recognized by the district court, Deputy Smith had an obligation to investigate all claims arising out of the incident to determine whether crimes were committed. 1 EOR 12 at fn. 5, citing in part to *Hopkins v. Bonvicino*, 573 F.3d 752, 767 (9th Cir. 2009).

A. DEPUTY SMITH HAD THE RIGHT TO REQUEST FOX'S IDENTIFICATION AND TO DETAIN HER PENDING HIS INVESTIGATION INTO THE PARKING LOT INCIDENT.

A law enforcement officer "may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry*

v. Ohio, 392 U.S. 1, 22 (1968). Grounds for an investigatory detention "can be supplied on the basis of a 9-1-1 call alone if it has sufficient indicia of reliability" and officers may rely on a dispatcher's radio alert of the report. *United States v. Cutchin*, 956 F.2d 1216, 1217-1218 (D.C. Cir. 1992). Grounds may also be supplied by an officer's independent corroboration of information initially supplied during a 9-1-1 call. *Ibid.*

Deputy Smith had reasonable grounds to detain Fox as part of his investigation. The radio dispatches from the 9-1-1 calls informed Deputy Smith that a male victim's foot was run over. 2 EOR 67; SEOR 8. Upon arriving at the scene, Deputy Smith observed Mr. Platts, the reported male victim, sitting on the curb. SEOR 8, 119-120. Mr. Platts confirmed that a woman in a red car ran over his foot and drove away. *Ibid.* This corroborated the radio reports. Mr. Platts then identified Fox as the woman who drove over his foot. *Id.*, at 8, 89. By that point, Deputy Smith had sufficient information to detain Fox for investigation of alleged offenses involving her vehicle. Cal. Veh. Code §§ 20001, 20002, and 20003. Deputy Smith also had grounds to detain Fox pending his investigation of a potential felony assault by use of a vehicle. SEOR 8; Cal. Pen. Code § 245(a)(1); *and see* Cal. Veh. Code § 40301 (felony Vehicle Code offenses same as any other felony arrest).

Fox's statements confirmed her involvement in the incident. "I identified myself by saying, 'I called 9-1-1. Are you here in response to my car – call?'" 2 EOR 144. Fox knew that she and Mr. Platts' wife both called 9-1-1. *Id.*, at 145. She knew Deputy Smith was there to investigate the calls. *Ibid.*

It is undisputed that Deputy Smith requested Fox produce her identification. SEOR 8; 2 EOR 147. Investigative stops properly include determining the person's identity and briefly detaining the person "to maintain the status quo momentarily while obtaining more information." *Adams v. Williams*, 407 U.S. 143, 146 (1972); *and see People v. Long*, 189 Cal.App.3d 77, 83 (Cal.App. 1987) (superseded by statute on other grounds) (substantial need for police recording the identity of a person suspected of committing a crime justified requiring the production of identification and seizure when defendant refused to produce requested identification). "If the purpose underlying a *Terry* stop – investigating possible criminal activity – is to be served, the police must under certain circumstances be able to detain the individual" and engage in investigative techniques, including "both a request for identification and inquiry concerning the suspicious conduct of the person detained," communicate with others to verify explanations, confirm identification, determine whether a person of that identity is otherwise wanted, or "the suspect may be detained while it is determined if in fact

an offense has occurred in the area." *See Michigan v. Summers*, 452 U.S. 692, 700 n. 12 (1981).

Deputy Smith had lawful grounds to demand Fox produce her driver's license. The "driver of a motor vehicle shall present his or her license for examination upon demand of a peace officer enforcing the provisions of this code." Cal. Veh. Code § 12951(b). Fox was thus obligated by state law to provide her license to Deputy Smith upon his demand. That obligation existed regardless of whether Fox, the driver of the car involved in the incident, was at fault or not, and regardless of whether Mr. Platts was actually injured. *Ibid.* "'The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of [police] investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal ….'" *People v. Souza*, 9 Cal.4th 224, 233 (Cal. 1994) (internal citation omitted); *People v. Long*, 189 Cal.App.3d at 83.

Fox knew she was involved in an incident with her car, regardless of whether she believed it to be a staged accident. Fox admitted she pulled into the parking space when Mr. Platts stepped in front of her car and did not move despite her requests. 2 EOR 109-114, 116, 118. While Fox thought Mr. Platts might be developmentally disabled or a criminal (SEOR 68), she knew that there was physical contact between her car and Mr. Platts – kicking and shuffling under the

front engine area (2 EOR 70-72). Fox was also aware Mr. Platt's wife screamed, "What are you doing? Are you trying to kill my husband? You're trying to run him over." *Id.*, at 72-74. Although though Fox thought it might be a staged accident (*ibid*.), she knew she was the driver of a car involved in an incident with contact between her car and Mr. Platts. Fox was aware of information making it likely that Mr. Platts would claim personal injury. *See* SEOR 72, 80-81. Under Cal. Veh. Code §§ 20001 and 20003(b), Fox was required to produce her license to Deputy Smith because she knew it was possible Mr. Platts would claim personal injury. Fox was also required to produce her driver's license even in non-injury accidents. Cal. Veh. Code §§ 12951(b) and 20002(a)(1).

B. DEPUTY SMITH HAD LAWFUL GROUNDS TO ARREST FOX.

Fox's refusal to provide her driver's license to Deputy Smith upon his demand provided grounds for Fox's arrest. Cal. Veh. Code § 12951(b); *and see People v. McKay*, 27 Cal.4th 601, 619-622 (Cal. 2002) (Vehicle Code infraction; refusal to produce driver's license upon officer's request justified custodial arrest under Cal. Veh. Code § 40302(a) even when the defendant verbally provided identifying information); Cal. Pen. Code § 836(a)(1) (offense committed in officer's presence); Cal. Pen. Code § 836.5(a) (warrantless arrests when officer has reasonable cause to believe a misdemeanor was committed in his presence). "If an officer has probable cause to believe that an individual has committed even a very

minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

With Fox's refusal to provide identification despite multiple commands to do so, Deputy Smith had the option of immediately arresting Fox based on her violation of Cal. Veh. Code § 12951(b) or detaining her pending the completion of his investigation. Deputy Smith elected to detain Fox until back-up arrived. SEOR 8-9.

The "right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. Cal. Pen. Code § 835 allows officers to use "such restraint as is reasonable for his arrest and detention." Cal. Pen. Code § 834a imposes an affirmative duty on all persons to "refrain from using force" to resist detention and arrest by a peace officer.

Fox admitted physically resisting Deputy Smith's efforts to detain her. SEOR 97, 102; 2 EOR 154-155. According to Fox, when Deputy Smith took hold of her wrist and said "give me your purse," Fox resisted by holding on to her purse. 2 EOR 154-155. Fox admitted that when Deputy Smith tried guiding her towards his patrol SUV, "I remained actively passively resisting. I just wanted to hold my person in tact," "I was just trying to hold my ground and keep my person in tact

and safe and unmolested." 2 EOR 158. Fox admitted that when Deputy Smith put her arms behind her back she continued "actively passively" resisting. *Id.*, at 156-158. The videotape evidence also showed Fox resisting efforts to handcuff her and place her into the back of the patrol SUV, even after Deputy Smith instructed Fox to "Stop resisting, just relax." SEOR 22 – Exh. E; 2 EOR 53, 177.

It was unlawful for Fox to willfully resist, delay, or obstruct "any public officer, peace officer, … in the discharge or attempt to discharge any duty of his or her office or employment …." Cal. Pen. Code § 148(a)(1). Cal. Pen. Code § 148(a)(1) is a general intent crime. *People v. Roberts*, 131 Cal.App.3d Supp. 1, 9 (Cal. App. Dep't. Super. Ct. 1982); *accord People v. Rasmussen*, 189 Cal.App.4th 1411, 1420 (Cal. App. 2010). A violation of Cal. Pen. Code § 148(a)(1) occurs if "at some time during a 'continuous transaction' an individual resisted, delayed, or obstructed an officer when the officer was acting lawfully." *Hooper v. County of San Diego*, 629 F.3d 1127, 1132 (9th Cir. 2011) (*Hooper*).

Deputy Smith was lawfully investigating the 9-1-1 calls. Deputy Smith had grounds to arrest Fox for a violation of Cal. Pen. Code § 148(a)(1) when she resisted Deputy Smith's efforts to detain her pending his investigation, resisted efforts to be handcuffed, and resisted efforts to place her into the back of the patrol SUV. *Hooper*, 629 F.3d at 1132; *In re Gregory S.*, 112 Cal.App.3d 764, 776-778 (Cal.App. 1980) (officer had right to detain minor identified as suspect of offense

pending investigation; minor refused request to identify himself; held officer's grabbing of wrist to prevent minor from departing until investigation completed was reasonable and minor's resistance to grabbing of wrist and delay of officer's investigation violated Cal. Pen. Code § 148(a)(1)).

The arrest of Fox was lawful based on both Fox's refusal to provide her driver's license and her resistance to Deputy Smith's detention pending investigation. "Because the probable cause standard is objective, probable cause supports an arrest so long as the arresting officers had probable cause to arrest the suspect for any criminal offense, regardless of their stated reason for the arrest." *Edgerly v. City & Cty. of S.F.*, 599 F.3d 946, 954 (9th Cir. 2010).

Fox's unlawful arrest claim failed as a matter of law. Summary judgment is properly affirmed on the unlawful arrest claim.

II. FOX'S EXCESSIVE FORCE CLAIMS FAILED AS A MATTER OF LAW UNDER FOURTEENTH AMENDMENT STANDARDS.

A claim for excessive force is analyzed under the objective reasonableness standard of the Fourth Amendment. *Graham*, 490 U.S. at 388, 394-395. "[O]bjective reasonableness turns on the 'facts and circumstances of each particular case.'" *Kingsley*, 135 S. Ct. at 2473, quoting *Graham*, 490 U.S. at 396. "A court must make this determination from the perspective of a reasonable officer

on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight. *Ibid.*

The objective factors properly considered include: (1) whether the suspect posed an immediate threat to the safety of the officers or others; (2) the severity of the crime; and (3) whether the subject actively resisted arrest and/or attempted to evade arrest by flight. *Graham*, 490 U.S. at 396-397. The giving of a warning is also a factor to be considered. *Nelson v. City of Davis*, 685 F.3d 867, 882 (9th Cir. 2012).

As previously addressed, Deputy Smith had grounds to detain Fox pending investigation and to arrest Fox for her refusal to provide her driver's license. Deputy Smith was authorized to use physical force to effect Fox's detention. *Graham*, 490 U.S. at 396; Cal. Pen. Code § 835. Grabbing Fox's wrist to escort her to the back of Deputy Smith's patrol SUV to which Fox admitted resisting and Fox's refusal to let go of her large purse which Fox also admitted resisting, supported Deputy Smith's decision to take Fox to the ground and handcuff her. SEOR 9, 97, 102; *Jackson v. City of Bremerton*, 268 F.3d 646, 650, 652 (9th Cir. 2001) (pushing kneeling, *non-resistant* suspect to the ground to handcuff behind the back was objectively reasonable); *accord Calvi v. Knox County*, 470 F.3d 422, 425, 428 (1st Cir. 2006) (no constitutional excessive force as a matter of law when officer handcuffed an arrestee behind her back according to standard police

practice even when officer was informed the suspect was "frail"). Fox continued to resist efforts to handcuff her and to place her into the back of Deputy Smith's patrol SUV. SEOR 9, 22 – Exh. E; 2 EOR 53. At various points, Deputy Smith gave verbal commands to comply and not resist, but Fox continued resisting. *Ibid*.

Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 921-922 (9th Cir. 2001) (*Arpin*) is virtually on point.

> Arpin refused to cooperate and provide her Transit Identification when requested. Officer Stone warned Arpin that she would be arrested if she did not cooperate. After Arpin refused to hand over her purse upon Officer Stone's request, Officer Stone grabbed Arpin's right hand and attempted to handcuff Arpin. Arpin stiffened her arm and attempted to pull free. In response, Officer Stone used physical force to handcuff Arpin. Stone then indicated that Arpin was handcuffed without injury. Under the circumstances described by Officer Stone, his use of force was reasonable. See *Forrester v. City of San Diego*, 25 F.3d 804, 806-07 (9th Cir. 1994) (finding the use of pain compliance techniques on nonresisting abortion protestors, that resulted in complaints of bruises, a pinched nerve and a broken wrist, was objectively reasonable); *Foster v. Metro. Airports Comm'n*, 914 F.2d 1076, 1082-83 (8th Cir 1990) (determining resistance justified

use of force in handcuffing suspect where force was not sufficient to create evidence of injury).

Arpin, 261 F.3d at 921-922.

Fox's version of the sequencing of events – that she was handcuffed and slipped out of the handcuffs before being taken to the ground and then re-handcuffed – does not change this conclusion. First, to the extent it differs from the indisputable videotape evidence of her being handcuffed and placed into the back of the patrol SUV, it is properly disregarded.[2] *Scott v. Harris*, 550 U.S. at 380 (on summary judgment videotape evidence controlled over party's contrary assertion of events). Second, Fox admitted knowing that Deputy Smith placed her hands behind her back to handcuff her and that she should not resist. 2 EOR 156-157. When, according to Fox, the handcuffs slipped off one of her wrists, she turned around to face Deputy Smith, Deputy Smith pulled her hands behind her back and proceeded to take her to the ground and handcuff her again. *Id.* at 164-169, 173-175. Even presuming this version as true, the decision to take Fox to the ground to re-handcuff her was objectively reasonable. Deputy Smith was

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[2] At the very beginning of the bystander video (Exh. E), Fox is already on the ground and not yet handcuffed. Deputy Smith can be seen pulling his handcuffs out to handcuff Fox with Fox resisting. After that, Fox was lifted up off the ground and as Deputy Smith adjusts the handcuffs, Fox slips out and then resists efforts to re-handcuff her despite verbal commands to stop resisting. Since Fox confirmed only being handcuffed twice (2 EOR 161), not three times, the video demonstrates Fox's recollection was mistaken in the sequencing of events.

investigating a potential felony offense with Fox identified as the suspect. SEOR 8-9. She had not been searched, nor had her large black purse been searched. *Ibid.*; 2 EOR 152. Deputy Smith had not ascertained the volatility of the dispute between Fox and Mr. Platts and was concerned about potential escalation of tensions between Fox, Mr. Platts and multiple bystanders, none of whom had been searched. SEOR 8-9. Deputy Smith was the only officer present. *Ibid.* He turned around, according to Fox, to find a previously handcuffed suspect now un-handcuffed. The decision to take Fox to the ground to handcuff her was objectively reasonable under Fox's description of the circumstances. *Arpin*, 261 F.3d at 921-922; *Jackson v. City of Bremerton*, 268 F.3d at 650, 652; *and see Lloyd v. Tassell*, 384 F. App'x 960, 964 (11th Cir. 2010) (officer's use a routine "arm bar" takedown procedure to put unsearched suspect on the ground in a way that ensured suspect could not access any weapons before he was handcuffed did not constitute excessive force even though it resulted in abrasions to suspect's forehead and nose).

The force used by Deputy Smith was objectively reasonable to detain Fox pending investigation, to overcome her admitted resistance, and to place her into the patrol SUV pending arrival of backup and completion of the investigation. Summary judgment should be affirmed.

III. SUMMARY JUDGMENT IS PROPERLY AFFIRMED ON QUALIFIED IMMUNITY.

The district court also granted summary judgment on grounds of qualified immunity. 1 EOR 13-16, 19-21. The district court found qualified immunity barred the claims consistent with the recent holding in *White*, 137 S.Ct. 548 and *S.B.*, 864 F.3d 1010. 1 EOR 20. Summary judgment in favor of Deputy Smith is properly affirmed on this ground.

Qualified immunity protects officers not just from liability, but also from suit entirely, and is properly decided at the summary judgment stage. *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987); and *see Scott v. Harris*, 550 U.S. at 379-380 (qualified immunity appropriate where video establishes type of force used was supported by circumstances confronting the officer). Qualified immunity protects government officials from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known... 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." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (*Pearson*).

Under Fourth Amendment standards, "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' [cite] violates the Fourth Amendment." *Graham*, 490 U.S. at 396; *Jackson v. City of Bremerton*, 268

F.3d at 651. The Supreme Court recently addressed a qualified immunity defense in the context of a Fourth Amendment excessive force claim in *White*, 137 S. Ct. 548. Reversing the Tenth Circuit's denial of qualified immunity, the Supreme Court explained that "[i]n the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases." *Id*., at 551. "The Court has found this necessary both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *Ibid*. (internal citations and quotations omitted).

The Ninth Circuit followed *White* in *S.B.*, 864 F.3d at 1015. This Circuit specifically "acknowledge[d] the Supreme Court's recent frustration with failures to heed its holdings." *Ibid*. *S.B.* stated; "[w]e hear the Supreme Court loud and clear." *Ibid*.

Before liability can be imposed on a law enforcement officer, a plaintiff must satisfy a two prong test. "Qualified immunity shields a police officer from suit under 42 U.S.C. § 1983 unless (1) the officer violated a statutory or constitutional right; and, (2) the right was clearly established at the time of the challenged conduct." *Thomas v. Dillard*, 818 F.3d 864, 874 (9th Cir. 2016), *as amended* (May 5, 2016) (citations omitted). This is not a sequential inquiry and

"[c]ourts have discretion to decide the order in which to engage these two prongs." *Tolan v. Cotton,* 134 S. Ct. 1861, 1866 (2014), citing *Pearson*, 555 U.S. at 236.

A. QUALIFIED IMMUNITY APPLIES TO THE ARREST.

While acknowledging that she must identify a specific case where an officer acting under similar circumstances was held to have violated a clearly established right, Fox solely argues the general principle that warrantless arrests require probable cause. AOB at 42-43. Fox cites no case to show that Deputy Smith initial detention of Fox pending investigation was unlawful. *Ibid.* Rather, the undisputed evidence addressed in Section I, above, showed that Deputy Smith had lawful grounds to demand Fox's identification and that she violated California law in Deputy Smith's presence when she refused to produce her identification. This gave rise to probable cause for arrest on that ground alone.

Fox also conceded there were lawful grounds for her detention as part of Deputy Smith's investigation into the 9-1-1 calls. See 1 EOR 10. The undisputed evidence and Fox's own admissions showed that she delayed, obstructed and resisted Deputy Smith's efforts to investigate and to detain Fox. This gave Deputy Smith probable cause to arrest of Fox for violating Cal. Pen. Code § 148(a)(1). Qualified immunity for Fox's arrest was properly granted.

B. QUALIFIED IMMUNITY APPLIES TO THE FORCE USED TO EFFECT THE DETENTION AND ARREST.

Fox's inquiry into whether Deputy Smith's use of force was reasonable is misguided. Under *Graham*, "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396.

As the district court pointed out, "none of the cases cited by [Fox] regarding handcuffing involve a suspect who was accused of running over someone with her car, refused to provide identification, physically resisted being detained and slipped out of her handcuffs when they were first applied." 1 EOR 20. Under *Graham* alone, the force used by Deputy Smith was justifiably increased as Fox continued to disregard and resist Deputy Smith's efforts to investigate the incident and to detain Fox as part of his investigation.

A grab of Fox's purse and wrist as part of detaining her in Deputy Smith's patrol SUV pending arrival of back-up and completion of his investigation was an objectively reasonable and the least intrusive means of force to secure Fox's detention. It was undisputed Fox refused multiple requests for her identification. SEOR 91-93, 96. Neither Fox nor her large purse had been searched for weapons. SEOR 8-9, 97. Fox admitted resisting Deputy Smith's efforts to take hold of her purse and move her closer to his patrol SUV. *Id.*, at 101-102; 2 EOR 155, 158.

This resistance made taking Fox to the ground to handcuff her an objectively reasonable means to overcome the resistance, gain compliance and prevent access to potential weapons. *See Arpin*, 261 F.3d at 921-922; *Jackson v. City of Bremerton*, 268 F.3d at 650, 652; *accord*; *Hunt v. Massi*, 773 F.3d 361, 364-365, 370 (1st Cir. 2014) (affirming qualified immunity to peace officers who handcuffed arrest warrant suspect behind his back even though there was no resistance; arrestee resisted after officers refused request to handcuff in front); *cf. Morreale v. City of Cripple Creek*, 1997 U.S. App. LEXIS 12229, at 3, 17-18 (10th Cir. 1997) (handcuffing of traffic offender behind back was objectively reasonable use of force precluding excessive force claim).

Qualified immunity protections are not limited to lawful conduct; it establishes immunity recognizing that officers are often faced with making split second decisions, without complete facts – mistakes and misjudgments may occur. "It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Saucier v. Katz*, 533 U.S. 194, 205-206 (2001), overruled on other grounds in *Pearson*, 555 U.S. at 236.

> *Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances. This reality serves to refute respondent's claimed distinction between excessive force and other Fourth Amendment contexts; in both spheres the law must be elaborated from case to case. Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes "hazy border between excessive and acceptable force," [cite] and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.

Ibid.; *accord Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015); *S. B.*, 864 F.3d at 1015.

Thus, the Supreme Court has frequently stated, qualified immunity protects "'all but the plainly incompetent or those who knowingly violate the law."' *Mullenix v. Luna*, 136 S.Ct. at 308. 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. *Pearson*, 555 U.S. at 231-232. Here, Deputy Smith had ample grounds for the use of force to detain Fox and to proportionately increase the level of force in response to Fox's resistance.

C. FOX FAILS TO IDENTIFY ANY CLEARLY ESTABLISHED RIGHT PARTICULARIZED TO THE FACTS OF THIS CASE.

Fox must show the asserted constitutional right was clearly established at the time of the officer's alleged misconduct. To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what [the official] is doing violates that right." *Anderson v. Creighton*, 483 U.S. at 640. The clearly established law must be "particularized to the facts of the case" and cannot be defined "at a high level of generality." *White*, 137 S. Ct. at 552; *cf. Mullenix v. Luna*, 136 S. Ct. at 308 (the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition"). This does not require a case directly on point, but "existing precedent must have placed the statutory or constitutional questions beyond debate." *S.B.*, 864 F.3d at 1015, 1017 (acknowledging *White's* standard as "exacting"). A rule *suggested* by then-existing precedent is insufficient. "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that "every reasonable official" would know." *Dist. of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018) (citation omitted).

Fox must establish there was precedent as of February 21, 2016, that put Deputy Smith "on clear notice that using force in these particular circumstances

would be excessive." *S.B.*, 864 F.3d at 1015. General excessive force principles do not, by themselves, create clearly established law for purposes of qualified immunity. *Ibid*. Instead, Fox must "identify a case where an officer acting under similar circumstances as [Deputy Smith] was held to have violated the Fourth Amendment." *Id.* at 1015-1016.

Fox cites no case on point. If cases on point existed, she would cite and argue them. It is telling that Fox ignores this court's 2001 decision in *Jackson v. City of Bremerton*, *supra*, 268 F.3d at 650, 652, where it was concluded that an officer conducting an arrest for failure to disburse did not use excessive force in allegedly pushing a *nonresisting* suspect to the ground, kneeling on her back to handcuff her behind her back, and then aggressively pulling her up to a standing position even though the suspect voluntarily kneeled in submitting to arrest. The cases of *Hunt v. Massi*, 773 F.3d at 364-365, 370, and *Morreale v. City of Cripple Creek*, 1997 U.S. App. LEXIS 12229, at 3, 17-18, discussed above also demonstrate that taking Fox to the ground to handcuff her and handcuffing Fox were not excessive uses of force.

Fox tries to compensate for the lack of precedent by asking this court to view the issues at a high level of abstract contrary to the dictates of *White* and *S.B.* AOB at 44-49. However, framing the inquiry in such general terms misinterprets the 'exacting' nature of the applicable standard and overlooks the disparate facts of

the cases she cites. *White* distinctly held, "clearly established law should not be defined at a high level of generality." *White*, 137 S. Ct. at 552; *accord S.B.*, 864 F.3d at 1015. None of the cases cited by Fox meet the exacting standard required by *White*, 137 S. Ct. at 552 and *S.B.*, 864 F.3d at 1015.

None of Fox's cited cases involved someone who slipped out of the handcuffs thereby making tightening of the handcuffs during re-handcuffing reasonable. The indisputable videotape evidence shows Fox actively removing her wrist when Deputy Smith went to adjust the handcuffs after initially handcuffing Fox and Fox actively resisting Deputy Smith and the off-duty officer's efforts to re-handcuff her. Exh. E – videotape.

Fox's own version that she turned to show Deputy Smith that the handcuffs slipped off (2 EOR 159, 164-169), made a decision to take Fox to the ground to handcuff her objectively reasonable. An officer who turns around to find a previously handcuffed suspect un-handcuffed could reasonably believe the situation was caused by the suspect actively slipping out of the handcuffs and presenting a danger when she had not been searched. A tighter application of handcuffs was also objectively reasonable when the first handcuffing was insufficient to secure the suspect.

Ninth Circuit case law supports the conclusion that a suspect *can* be painfully handcuffed without constituting excessive force. In *Sinclair v. Akins*, the

court found no precedent establishing that "tight handcuffs alone, without any physical manifestation of injury ..., where the initial handcuffing was justified, constituted excessive force." *Sinclair v. Akins*, 696 Fed. Appx. 773, 776 (9th Cir. Unpub. 2017). The Ninth Circuit upheld the district court's grant of qualified immunity due to plaintiff's failure to identify sufficiently specific precedent. *Ibid.* Similarly, *Wyant v. City of Lynnwood*, held that "there is no clearly established right to be free from painfree, non-injuring force used to effect an arrest." *Wyant v. City of Lynnwood*, 2010 WL 128389, at *4 (W.D. Wash. 2010); *see also LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 960 (9th Cir. 2000) (officer refusal to loosen tight handcuffs despite requests; fact-specific inquiry required to determine whether tight handcuffing may constitute excessive force). In *Injeyan v. City of Laguna Beach*, this Circuit found "no precedent placing the conclusion that [defendant's] alleged conduct under the particular circumstances he confronted was unreasonable beyond debate." *Injeyan v. City of Laguna Beach*, 645 F. App'x 577, 579 (9th Cir. Unpub. 2016) (forcibly lifting plaintiff's arms behind her back was not excessive force under the particular circumstances of the case). In *Redon v. Jordan*, a district court held that an officer "used no more than the amount of force necessary under the circumstances" when he took a resisting individual to the ground and handcuffed him. *Redon v. Jordan*, 2017 WL 1155342, at *7- 8 (S.D.

Cal. Mar. 28, 2017) (basing its decision on the "nature of the call, plaintiffs deteriorating emotional state, and [p]laintiff's active resistance").

Fox's admitted resistance when she had not been searched presented an objective threat to officer and bystander safety; objectively reasonable force was used to overcome Fox's active resistance. *See, e.g.*, *Hunt v. Massi*, 773 F.3d at 364-365, 370. Indeed, it is telling that it took the efforts of both Deputy Smith and an off-duty officer to overcome Fox's resistance in initially handcuffing Fox. SEOR 9; Exh. E. It took both officers' efforts to overcome Fox's resistance when she slipped her hand out of the handcuffs and to re-handcuff her. *Ibid*. It took the efforts of both officers to overcome Fox's resistance to being placed into Deputy Smith's patrol SUV pending completion of the investigation into the incident. SEOR 9-10; Exh. E. Summary judgment on qualified immunity should be affirmed.

IV. SUMMARY JUDGMENT IS PROPERLY AFFIRMED ON THE STATE LAW CLAIMS BECAUSE THE DETENTION AND ARREST OF FOX WAS LAWFUL AND REASONABLE FORCE WAS USED TO OVERCOME FOX'S ACTIVE RESISTANCE.

Regardless of whether the state law claim is for battery or negligence, under California law the reasonableness of the officer's conduct is evaluated under the *Graham* reasonableness standard. *Hayes v. County of San Diego*, 57 Cal.4th 622, 632 (Cal. 2013) (*Hayes*); *Yount v. City of Sacramento*, 43 Cal.4th 885, 902 (2008)

(the same reasonableness standards for Fourth Amendment claims apply to battery); *Martinez v. County of Los Angeles*, 47 Cal.App.4th 334, 349-350 (1996) (applying *Graham* standard to police battery claim); *Munoz v. City of Union City*, 120 Cal.App.4th 1077, 1101-1103 (2004) (applying *Graham* to negligence claim).

California law authorizes a peace officer use reasonable force to effect a detention, an arrest, prevent escape, and overcome resistance. Cal. Penal Code § 835a; *Edson v. City of Anaheim*, 63 Cal.App.4th 1269, 1272-1273 (Cal.App. 1998). Use of force claims against peace officers are evaluated as seizures under the Fourth Amendment. *Graham*, 490 U.S. at 395; *Hayes*, 57 Cal.4th at 637-639. An officer is permitted to use such force as is "objectively reasonable" under the totality of the circumstances. *Graham*, 490 U.S. at 396-397.

Courts must determine whether, under all of the circumstances known to the officer at the scene, the use of force was objectively reasonable from the perspective of a reasonable peace officer. Factors include: (1) whether the suspect posed an immediate threat to the safety of the officers or others; (2) the severity of the crime; and (3) whether the subject actively resisted arrest and/or attempted to evade arrest by flight. *Graham*, 490 U.S. at 396-397. The giving of a warning is also a factor to be considered under the *Graham* balancing test. *Nelson v. City of Davis*, 685 F.3d at 882.

The same analysis supporting Fox's detention and the force used to detain and arrest her, discussed at length above, warranted the grant of summary judgment on Fox's related state law claims. Fox concedes that if her claims are barred under section 1983, then her state law claims are also barred. AOB 50; 1 EOR 21. Summary judgment on the state law claims should be affirmed.

V. SUMMARY JUDGMENT IS PROPERLY AFFIRMED ON THE BANE ACT CLAIM BECAUSE THERE WAS LAWFUL GROUNDS FOR THE ARREST AND NO EVIDENCE TO SHOW EXCESSIVE FORCE, OR THAT DEPUTY SMITH HAD A SPECIFIC INTENT TO VIOLATE FOX'S RIGHTS.

The California Bane Act is an enabling statute that allows a party to recover damages if that party can prove a violation of his or her federal or state constitutional rights. Cal. Civ. Code § 52.1. It is limited to instances where threats, intimidation or coercion is used to accomplish the constitutional violation. *Ibid.*

Fox repeats, virtually verbatim, her district court argument that if this court agrees her arrest was unlawful, then the force used to effect the arrest constituted a violation of Cal. Civ. Code § 52.1. AOB 51; Doc. 25 at 30, citing in part to *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1196 (9th Cir. 2015) and *Bender v. County of L.A.*, 217 Cal.App.4th 968, 978 (2013) ("the Bane Act applies because there was a Fourth Amendment violation – an arrest without probable cause – accompanied

by the beating and pepper spraying of an unresisting plaintiff, i.e., coercion that is in no way inherent in an arrest, either lawful or unlawful."). As addressed above, the undisputed evidence established that Deputy Smith had probable cause to arrest Fox and that the force used was objectively reasonable in relation to Fox's admitted resistance. Summary judgment is properly affirmed on that ground alone.

Several recent decisions warrant additional discussion because they establish independent grounds to affirm summary judgment on Fox's Bane Act claim. As background, in *Allen v. City of Sacramento*, 234 Cal.App.4th 41, 67-69 (Cal.App. 2015) (*Allen*), the Third District observed that the California Supreme Court had not answered the question of whether an unlawful detention or arrest, without more, was sufficient to satisfy both elements of a Cal. Civ. Code § 52.1 claim. The *Allen* Court held that "a wrongful arrest or detention, without more, does not satisfy both elements of section 52.1." *Allen*, 234 Cal.App.4th at 69. In *Cornell v. City and County of San Francisco*, 17 Cal.App.5th 766, 799-802 (Cal.App. 2017), rev. denied 2018 Cal. LEXIS 1730 (Cal. 2018) (*Cornell*),[3] the First District distinguished *Allen* and held that where "an unlawful arrest is properly pleaded and proved, the egregiousness required by Section 52.1 is tested by whether the circumstances indicate the arresting officer had *a specific intent* to violate the

[3] *Cornell* was issued days before the summary judgment motion was filed in this case and was available to Fox for use in support of her opposition filed in December of 2017.

arrestee's right to freedom from unreasonable seizure, not by whether the evidence shows something beyond the coercion 'inherent' in the wrongful detention." *Cornell*, 17 Cal.App.5th 766, 801-802 (emphasis added); *accord B.B. v. County of L.A.*, 25 Cal.App.5th 115, 133 (Cal.App. 2018).

The *Cornell* Court adopted the specific intent standard first enunciated in Justice Douglas's plurality opinion in *Screws v. United States*, 325 U.S. 91, 101 (1981) which was in turn adopted by the California Supreme Court in *In re M.S.*, 10 Cal.4th 698, 713 (Cal. 1995) in interpreting criminal statutes adopted in conjunction with the Bane Act. *Cornell*, 17 Cal.App.5th at 802. Cornell adopted a two prong test. The first prong is a pure legal determination and asks: is the right at issue clearly delineated and plainly applicable under the circumstances of the case? *Id.*, at 803. The second prong is a fact determination and asks: did the defendant commit the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that right? *Ibid.*

The Ninth Circuit recently followed *Cornell*. *Reese v. County of Sacramento*, 888 F.3d 1030, 1043 (9th Cir. 2018) ("the Bane Act requires 'a specific intent to violate the arrestee's right to freedom from unreasonable seizure.'"); *Rodriguez v. County of L.A.*, 891 F.3d 776, 802 (9th Cir. 2018) ("in the context of an unlawful arrest, 'the egregiousness required by Section 52.1 is tested

by whether the circumstances indicate the arresting officer had a specific intent to violate the arrestee's right to freedom from unreasonable seizure.'").

As this court explained, "'a mere intention to use force that the jury ultimately finds unreasonable – that is, general criminal intent – is insufficient.'" *Reese v. County of Sacramento*, 888 F.3d at 1045, quoting *United States v. Reese*, 2 F.3d 870, 885 (9th Cir. 1993). The plaintiff must establish that the officers "intended to use unreasonable force – that is, that they intended not only the force, but its unreasonableness, its character as 'more than necessary under the circumstances.'" *United States v. Reese*, 2 F.3d at 885; *accord Reese v. County of Sacramento*, 888 F.3d at 1045.

Here, Deputy Smith's use of force to detain was initiated in response to Fox's admitted refusal and resistance to providing her identification, in response to her resisting efforts to place her in his patrol SUV, and in response to efforts to handcuff her. SEOR 9, 2 EOR 153-158. Fox proffered no evidence to demonstrate a specific intent to use excessive force. At most, she indicated that Deputy Smith used an "aggressive" and "demanding tone" when he asked for her identification. 2 EOR 147. Not surprising when she refused to comply with a lawful order. When he reached for her purse, she resisted. *Id.*, at 154-155. When he tried to lead her by the wrist to his SUV, she resisted. *Id.*, at 156, 158. In each

instance, the use of force was in response to Fox's own admitted resistance and non-compliance.

Now, according to Fox, the take-down to the ground occurred after the handcuffs slipped off her wrist and she showed Deputy Smith her now un-cuffed hands. *Id.*, at 169. Fox's own description admitted that Deputy Smith turned to find a previously handcuffed suspect un-handcuffed and that he responded by grabbing both of her hands, using his legs to place her on the ground to re-handcuff her. *Ibid.* Fox's speculation that "he seemed to really delight in using force" is inadmissible. *Id.*, at 165; *Alexis v. McDonald's Rests.*, 67 F.3d 341, 347 (1st Cir. 1995) (deponent's inference of racial animus based on personal observation of defendant's tone of voice, and perceptions of defendant as unfriendly properly excluded under Fed. R. Evid. 701(a) on summary judgment); *Hester v. BIC Corp.*, 225 F.3d 178, 184 (2d Cir. 2000) (observations of harsh management style and demeaning conduct did not permit lay opinion that demeanor was racially motivated). Further, it does not demonstrate that Deputy Smith had the required specific intent to use excessive force against Fox, particularly where the indisputable videotape evidence shows Deputy Smith solely used that level of force necessary to overcome Fox's resistance. Indeed, it took the efforts of both Deputy Smith and Sergeant Shank to overcome Fox's resistance. Summary judgment should be affirmed on the Bane Act claim.

CONCLUSION

For the above stated reasons, the judgment in favor of all defendants should be affirmed.

Dated: August 31, 2018

Respectfully submitted,

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CERTIFICATION OF BRIEF FORMAT

Pursuant to Fed. R. App. 32(a)(7), I hereby certify that this Appellees' Answer Brief was produced using Word and that the brief contains 9412 words based on Word's word count.

Dated: August 31, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for Appellees is informed that there are no related appeals in the Ninth Circuit.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2018, I electronically filed the foregoing **ANSWER BRIEF and the SUPPLEMENTAL EXCERPTS OF RECORD** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I also certify the document and a copy of the Notice of Electronic Filing was served via mail on the following non-CM/ECF participants:

Not applicable.

/s Darin L. Wessel
Darin L. Wessel