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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

MONICA RAAB, Plaintiff, vs. CITY OF OCEAN CITY, NEW JERSEY, a municipal corporation of the State of New Jersey; CITY OF OCEAN CITY POLICE DEPARTMENT; OFFICER JESSIE (sic, JESSE) SCOTT RUCH in his official and individual capacity, Fictitious Designation, John Does (#1-25); Fictitious Designation, ABC Corps. (#1-25), Defendants.	:	Civil No. 1:11-CV-6818 (RBK/KMW)

BRIEF IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANT, OFFICER JESSE SCOTT RUCH

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REPLY

Moving Defendant has supplied this court with a copy of the video surveillance from the Raab residence on DVD taken on May 11, 2010. A videotape capturing the events in question that quite clearly contradicts the version of the story told by the Plaintiff permits a Court to conclude that no reasonable jury could believe the Plaintiff's discredited account and hence grant summary judgment to the Defendant. See Alfano v. Schaud, 429 N.J. Super. 469, 476 (App. Div.), cert. denied, 214 N.J. 119 (2013) (noting that "[t]he Supreme Court reversed, finding that a videotape capturing the events in question quite clearly contradicted the version of the story told by the driver and adopted by the district court and court of appeals. . . . In light of this blatant contradiction, the Court held that no reasonable jury could believe the plaintiff's discredited account, which therefore should not have been adopted for purposes of ruling on the summary judgment motion.") (citing Scott v. Harris, 550 U.S. 372, 378-81 (2007)). The video surveillance in the present matter quite clearly shows Plaintiff pushing the trailer into Officer Ruch. The portion of the video depicting this sequence of events is depicted from 9:24:22 A.M. to 9:24:30 A.M. See also Exhibit R, Photos taken from Video Surveillance dated May 11, 2010.

The video surveillance and snapshots taken from that video clearly contradicts Plaintiff's testimony that she did not push the trailer. See Exhibit C, at 31:12-15. The video clearly contradicts Plaintiff's testimony that when asked, "[d]o you remember pushing the trailer towards the officer?", she replied, "[a]bsolutely not. I could not have done that. It was too heavy." See Exhibit C, at 31:18-21. The video clearly shows Plaintiff lifting the tongue end of the trailer and pushing it towards Officer Ruch. The video also shows Officer Ruch being pushed back a step after being struck by the trailer as Plaintiff pushed the trailer directly at him. The video also shows that Plaintiff was well aware of the fact that Officer Ruch was on the opposite side of the trailer, as she pushed the trailer directly towards him. Indeed, on the video, Plaintiff walks right passed Officer Ruch on the sidewalk as she proceeds to the tongue end of the trailer, and must

have known she would be pushing the trailer directly into him as she could plainly see exactly where Officer Ruch was standing. See Video, at 9:24:12 A.M. to 9:24:25 A.M.

Plaintiff had possession of the video surveillance before Defendant obtained it. Indeed, it was Plaintiff's video surveillance contractors who obtained the video on the same day of the incident. See Exhibit M, at 56:15-17. The snapshots taken from this video surveillance and attached as Exhibit R were always available to Plaintiff, as she had access to the same video literally from the date of the incident. As there is nothing depicted in the video snapshots set forth in Exhibit R, that was not already previously available to Plaintiff in the form of the video surveillance itself, than Plaintiff did have access to these snapshots as of May 11, 2010. Moreover, the whole video surveillance footage has been provided to this Honorable Court, so the Court's ruling could easily be based on the evidence set forth in that video footage without any reference to Exhibit R.

Contrary to Plaintiff's counsel's claim that "Plaintiff certainly was not having an emotional outburst on the date of the incident," see Plaintiff's Brief at 18, the video surveillance conclusively shows that Plaintiff was indeed having an emotional outburst. The video captures Plaintiff waiving her arms as she approaches Officer Ruch. See Video, at 9:24:07 A.M. to 9:24:10 A.M. The video shows Plaintiff pointing her finger. Id. at 9:24:10 A.M. to 9:24:15 A.M. Plaintiff is then seen marching passed the Officer. Id. at 9:24:15 A.M. to 9:24:23 A.M. The video then shows Plaintiff lifting the trailer and pushing it toward Officer Ruch. Id. at 9:24:23 A.M. to 9:24:31 A.M. In all her excitement, Plaintiff then loses her balance and falls on her rear. Id. at 9:24:31 A.M. to 9:24:35 A.M. Despite this fall, being pinned down, and then being graciously released by the Officer, Plaintiff immediately gets up and tries to pull the trailer. Id. at 9:24:42 A.M. to 9:24:49 A.M. Plaintiff then points towards the Officer and walks away from him as he approaches her. Id. at 9:24:49 A.M. to 9:24:53 A.M. Plaintiff then tries pushing the trailer. Id. at 9:24:53 A.M. to 9:24:54 A.M. She then proceeds to throw her hand down at her side

toward the Officer. Id. at 9:24:55 A.M. to 9:24:58 A.M. And then, in what is clearly an emotional outburst, Plaintiff takes her shirt off and exposes her bare naked breasts while directly looking at the Officer, as she walks across her front lawn. Id. at 9:25:04 A.M. to 9:25:13 A.M.

When she comes back outside, Plaintiff throws her arms up in the air at the Officer. Id. at 9:26:23 A.M. to 9:26:25 A.M. She later walks right passed the Officer back to the tongue of the trailer. Id. at 9:26:37 A.M. to 9:26:43 A.M. She then lifts the trailer tongue and tries to force the trailer over the curb without asking for help, despite the presence of her daughter and Mr. Hinchman. Id. at 9:26:43 A.M. to 9:26:51 A.M. She then walks right passed Mr. Hinchman without acknowledging his presence. Id. at 9:27:04 A.M. to 9:27:09 A.M. Later, when she is pushing the trailer from behind with the help of her daughter and Mr. Hinchman, Plaintiff refuses to stop what she was doing when the Officer approached her to ask her name. Id. at 9:27:25 A.M. to 9:27:31 A.M. The video clearly shows that Plaintiff was indeed having an emotional outburst before she was ever handcuffed.

Officer Ruch was asked at deposition, "[s]o the day of the incident and before you wrote the report, you reported to Capt. Prettyman that she assaulted you with the trailer. Correct?". See Exhibit D, at 44:17-20. Officer Ruch replied, "[y]es, sir." Id. at 44:21. Obviously, Officer Ruch's impression at the time of the incident was that Plaintiff had assaulted him with the trailer, when she pushed it into him. The video surveillance clearly shows that Plaintiff walked right passed Officer Ruch on the sidewalk with full knowledge of Officer Ruch's position standing on the opposite side of the trailer, and then she lifted the heavy trailer up at the tongue end and purposely proceeded to push the trailer directly in Officer Ruch's direction. See Video, at 9:24:12 A.M. to 9:24:25 A.M. Plaintiff's conduct was clearly an "attempt[] to cause . . . bodily injury to another" or an "attempt[] by physical menace to put another in fear of imminent serious bodily injury." N.J.S.A. 2C:12-1 (a)(1) & (a)(3). Plaintiff was "aware of the existence of such circumstances", N.J.S.A. 2C:2-2(b)(1), as she knew she was pushing the trailer directly toward

Officer Ruch, that the trailer was heavy, and that she could cause bodily injury to Officer Ruch or place him in fear of imminent serious bodily injury. Indeed, Plaintiff testified at deposition that the trailer "was too heavy." See Exhibit C, at 31:21. Needless to say, the video surveillance indisputably shows that probable cause existed to arrest Plaintiff for aggravated assault on a police officer by her attempt to push the heavy trailer into Officer Ruch.

"Probable cause need only exist as to any offense that could be charged under the circumstances." Barna v. City of Perth Amboy, 42 F.2d 809, 819 (3d Cir. 1994). As Officer Ruch had probable cause to charge Plaintiff with aggravated assault by attempt at the moment of her arrest, the arrest was constitutionally valid regardless of the fact that Plaintiff was not actually charged with aggravated assault. "Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officer had probable cause to make it – whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). "[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." Devenpeck v. Alford, 543 U.S. 146, 153 (2004). "That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." Id. Consequently, as Officer Ruch knew of facts giving rise to probable cause to arrest Plaintiff for aggravated assault by attempt at the moment of her arrest, that arrest was constitutionally valid regardless of what Officer Ruch was actually thinking at the time of the arrest.

Moreover, "[t]he police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon . . . ." Hoffa v. U.S., 385 U.S. 293, 310 (1966). Accordingly, it is irrelevant that Officer Ruch did not immediately drop what he was doing and arrest Plaintiff for

pushing the garden trailer into him. Officer Ruch was constitutionally permitted to bide his time before arresting Plaintiff.

It is also irrelevant that Officer Ruch did not actually charge Plaintiff with a crime. See Alabi-Shonde v. Patterson, 2014 U.S. Dist. LEXIS 14788, *19-20 n.6 (D. De. Feb. 6, 2014) (noting that "probable cause can – and here, did – exist at the moment of arrest even if not all evidence points in the direction of guilt, and even if an arrested defendant is later determined to be not guilty **(or even not charged)**") (emphasis added). It is irrelevant whether Officer Ruch actually said to Plaintiff, "you are under arrest", because the facts leading up to the handcuffing of Plaintiff strongly indicated acts establishing probable cause and justifying the arrest. See U.S. v. Chiochuili, 103 F.Supp. 2d 523, 530 (N.D.N.Y. 2000) (noting that "[t]he Court's decision that the Defendant was in custody from the time she was stopped at the arrest scene is tightly implicated with the set of facts leading to the stop, facts that strongly indicated acts establishing probable cause and justifying an arrest. It is those facts and the probable cause arising from them that compel the Court's finding that Defendant was in custody from the time Agent Letourneau stopped her, as surely as if he had actually uttered the words, "You're under arrest," at that moment."). See also Bristow v. Clevenger, 80 F.Supp. 2d 421, 436 (M.D. Pa. 2000) (noting that "the detention of a person need not be accompanied by formal words of arrest or station house booking in order to constitute 'arrest.'").

Indeed, Officer Ruch's arrest of Plaintiff would be equally valid on grounds of her indecent exposure in public regardless of whether Officer Ruch was actually thinking of arresting her on those grounds at the time of her arrest. And again, Officer Ruch could bide his time and was not required to immediately arrest the Plaintiff for indecent exposure. Officer Ruch clearly saw Plaintiff expose her bare naked breasts in public, and therefore he was aware of facts that gave him probable cause to arrest her for indecent exposure – and it does not matter whether he actually thought to arrest her for indecent exposure – only that he could have arrested her for

indecent exposure. Ocean City Code 4-15.3 states that "[i]t is unlawful to act in a . . . indecent, obscene or offensive manner in any . . . place of the City. (Ord. #15-82, § 2)." As Plaintiff exposed herself in view of the public while in Ocean City, she committed indecent, obscene or offensive behavior, because the public could see her from the streets or sidewalks exposed on her front lawn regardless of whether the front lawn was private property. Consequently, there was probable cause to arrest her for this violation.

Contrary to Plaintiff's assertion, the record certainly reflects that Mrs. Raab had a long history of serious mental illness. Dr. Hankin diagnosed her with depression as early as 1991, and he prescribed her Klonopin and Prozac. See Exhibit N, at 5:17 to 10:3. Indeed, Dr. Hankin started Plaintiff on lithium at that time. Id. at 15:10 to 16:3. Plaintiff even told Dr. Hankin that she had been suffering from depression for nine years since 1993. Id. at 65:19 to 66:2. After that, Dr. Hankin diagnosed Plaintiff with bipolar depression. Id. at 68:8-10. In March of 2010, Dr. Albright notes that Plaintiff had been depressed for a number of years. See Exhibit P, at 30:2-6. Dr. Albright also concluded that Plaintiff exhibited poor judgment. Id. at 53:9-11. Plaintiff clearly has a history spanning more than two decades of depression, and was even diagnosed prior to the May 11, 2010 incident with bipolar depression, which is a major and serious mental illness.

Plaintiff has no objective evidence that she suffered any contusions or lacerations of her right wrist during the incident, but claims the force exerted on her through a handcuff on her right wrist resulted in the excessive force. See Hannula v. Lakewood, 907 F.2d 129, 132 (10th Cir. 1990) (granting police officer summary judgment on excessive force claim under qualified immunity, where Plaintiff "presents no evidence of contusions, lacerations or damage to the bones or nerves of her wrist"). Plaintiff acknowledges that she did not seek immediate medical treatment at a hospital after the incident, but then claims this fact is somehow irrelevant.

Clearly, Officer Ruch's testimony is that Plaintiff was resisting arrest. Officer Ruch testified that "[t]he moment she struck my hand she was on the ground . . . . That's why she went down. She put all of her strength pulling my hand away, and slapped at it, and that's - when she fell to the ground." See Exhibit D, at 85:10-20. Officer Ruch said, "I continued to hold her wrist as to not let her fall so hard. She was pulling so hard that her head arched further down than her shoulders." Id. at 86:3-6. Officer Ruch testified that she "[t]hen started putting her hands behind her and saying, don't touch me, don't touch me. You're not putting handcuffs on me." Id. at 88:4-6. Officer Ruch said she was "[k]icking and trying to subvert my efforts to try and take her into custody." Id. at 89:6-9. However, Officer Ruch also testified that "[s]he had some type of psychological episode as she hit the ground." Id. at 89:21 to 23.

Although Plaintiff claims Officer Ruch was acting as part of his ministerial duties as a police officer, the case law cited by Plaintiff does not at all support this allegation. Officer Ruch was not serving a temporary restraining order on Plaintiff, as was the case in Estate of Soberal v. City of Jersey City, 529 F.Supp. 2d 477 (D.N.J. 2007). Rather, "[a] 'discretionary act . . . calls for the exercise of personal deliberations and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed." S.P. v. Newark Police Dept., 428 N.J. Super. 210, 230 (App. Div. 2012) (citing Kolitch v. Lindedahl, 100 N.J. 485, 495 (1985) (internal quotation marks and citation omitted)). "In contrast, a ministerial act is 'one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done.'" Id. (citing Morey v. Palmer, 232 N.J. Super. 144, 151 (App. Div. 1989) (internal quotation marks and citations omitted)). There can be no question that Officer Ruch's encounter with Plaintiff on May 11, 2010 involved discretionary acts which called for the exercise of his personal deliberations and

judgments on how and when to arrest or restrain her, and therefore, he is entitled to immunity for his conduct performed in the exercise of his police function pursuant to N.J.S.A. 59:3-2(b).

There is also no genuine issue of material fact that Officer Ruch did not act with "willful misconduct" within the meaning of N.J.S.A. 59:3-14. Acts of "willful misconduct" are intentional. Velez v. City of Jersey City, 180 N.J. 284, 294-295 (2004). There is no evidence that Officer Ruch intended to harm Plaintiff or intended to falsely arrest or restrain her. Consequently, the Tort Claims Threshold still applies and likewise, punitive damages are unavailable. None of the doctors' reports Plaintiff attaches as Exhibits to her Opposition make any mention of objective medical evidence linking her supposed injuries to the incident of May 11, 2010, nor any explanation of permanency for any alleged psychological injury besides a conclusory and inadmissible "net opinion" without explanation. See Holman Enters. v. Fid. & Guar. Ins. Co., 563 F.Supp. 2d 467, 472 n.12 (D.N.J. 2008) (stating that "[u]nder New Jersey law, an 'expert's bare conclusions, unsupported by factual evidence' is an inadmissible net opinion. . . . 'The net opinion rule is merely a restatement of the well-settled principle that an expert's bare conclusions are not admissible under [the fit requirement of] Rule 702 of the Federal Rules of Evidence.'").

CONCLUSION

For the foregoing reasons, Defendant, Officer Jesse Scott Ruch respectfully requests that this Honorable Court grant his Motion for Summary Judgment.

Dated: June 9, 2014

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