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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 JESSE SCOTT RUCH in his official and individual capacity, Fictitious Designation, John Does (#1-25); Fictitious Designation, ABC Corps. (#1-25). Defendants.	CIVIL ACTION NO.: 11-cv-06818

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT, OFFICER JESSE SCOTT RUCH'S MOTION FOR SUMMARY JUDGMENT

Motion Return Date – June 16, 2014
Before the Hon. Robert B. Kugler

On the Brief:
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STATEMENT OF FACTS

Plaintiff, Monica Raab, hereby opposes Defendant, Officer Jesse Scott Ruch's (hereinafter referred to as "Officer Ruch"), Motion for Summary Judgment and refers the Court to her Responsive Statement of Material Facts and the Supplemental Statement of Material Facts, which pursuant to Fed. R. Civ. Pro. 56.1(a) is separately bound and submitted.

LEGAL ARGUMENT

Pursuant to Fed. R. Civ. Pro. 56, summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Nebraska v. Wyoming, 507 U.S. 584, 590 (1993); Fed. Rule Civ. Pro. 56. If the dispute about a material fact is "genuine," meaning the evidence would allow a reasonable jury to return a verdict for the nonmoving party, then summary judgment should be denied. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A party opposing a motion for summary judgment must set forth specific facts to show that a genuine issue exists for trial. Id. The issue of material fact "is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." Id. at 249; citing, First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-89 (1968); see also Fed. R. Civ. Pro. 56(c). Summary judgment should be denied when the moving parties' submissions do not foreclose "the possibility of the existence of certain facts from which it would be open to a jury" to conclude the facts in favor of the nonmoving party. See, Anderson, supra, 477 U.S. at 249; citing, Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970) (internal quotations omitted).

At the summary judgment stage, the function of the court is not to weigh the evidence and determine the truth of the matter but instead is to determine whether there is a genuine issue for trial. Anderson, supra, 477 U.S. at 249. The trial judge is not required to make findings of fact. Id. at 250. "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id.

"The principal purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." Celotex Corp. v. Carett, 477 U.S. 317, 324 (1986). Per Rule 56(c), a party contending that a fact is genuinely disputed must support their contention by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials." Fed. R. Civ. Pro. 56(c).

The moving party seeking summary judgment always bears the initial responsibility of identifying to the court those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes evidences that no genuine issue of material fact exists. Celotex, supra, 477 at 323 (1986). In opposition, the nonmoving party must demonstrate the existence of specific facts to show that there is a genuine issue for trial. Id. In order to avoid summary judgment, the nonmoving party is not required to produce evidence in a form that would be admissible at trial. Id. at 324. The nonmoving party may properly oppose a summary judgment motion "by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." Id.; citing, Rule 56(e).

I. GENUINE ISSUES OF MATERIAL FACTS EXIST AS TO EACH AND EVERY CLAIM BROUGHT BY PLAINTIFF AGAINST OFFICER RUCH THAT PRECLUDES HIS APPLICATION FOR SUMMARY JUDGMENT IN ITS ENTIRETY

With his motion for summary judgment, Officer Ruch baldly asserts that he acted lawfully and properly when interacting with Plaintiff on the date of the incident. In support of this assertion, Officer Ruch cites to his version of numerous material facts involved in this matter claiming his conduct was reasonable and justified. The unmistakable problem with Officer Ruch's argument, however, is that his version of each and every fact not only directly contradicts other witnesses' accounts of the events that transpired between him and Plaintiff, but are also vehemently disputed by Plaintiff herself. Officer Ruch has not, and cannot, cite to undisputed material facts to support his request for summary judgment and therefore his application must be denied in its entity.

First, Officer Ruch claims during the initial encounter with Plaintiff that she pushed the trailer into him and struck him with it. This material fact is certainly disputed. Although Officer Ruch now claims that Plaintiff assaulted him with the trailer, he stated in his police report that she merely "bumped" him with the trailer and that he did not think it was intentional. Plaintiff stated that she absolutely did not push the trailer at Officer Ruch. She stated that she could not physically have done so because the trailer was too heavy. Plaintiff unmistakably testified that she did not push or move the trailer out of its position on her own. With his moving papers, Officer Ruch contends that photographs of the video surveillance conclusively show Plaintiff pushing the trailer at and hitting him with it. That contention, however, is ridiculous and misleading. Not only were these photographs never produced by Defendants during discovery, but due to the quality of the pictures no reasonable person viewing them could conclude that they show Plaintiff hitting Officer Ruch with the trailer. The photographs simply do not support that conclusion at all.

Second, Officer Ruch argues on summary judgment that Plaintiff "pushed" a telephone into his chest when trying to get him to speak with her husband, thereby assaulting him. This material fact is vehemently disputed, not only by Plaintiff but also her daughter. Plaintiff stated that she "handed" Officer Ruch the phone. She further stated that Officer Ruch took the phone and spoke with her husband. Also, Plaintiff's daughter, Hillary, stated that she saw her mother "hand" the phone to Officer Ruch and that he took the phone from her mother's hand. Officer Ruch even admits that this "assault" was not included in his police report because it "hadn't really bothered" him and he did not think Plaintiff did so intentionally. Again, Officer Ruch's assertion that the surveillance photos depict Plaintiff shoving the phone into his chest is completely untrue as no reasonable person viewing the photograph could come to that conclusion.

Third, Officer Ruch further claims that as the trailer was being moved up the driveway, Plaintiff repeatedly refused to answer his requests to provide her name. This fact is also completely disputed. Plaintiff stated that while she did not know who Officer Ruch was speaking to when asking for her name, she nevertheless responded "we are the Raabs." Plaintiff's daughter, Hillary also stated that she heard her mother reply to Officer Ruch's question by responding "we are the Raabs."

Fourth, Officer Ruch contends that Plaintiff pushed him out of her way with her forearm once the trailer was moved up the driveway and came to rest. This material fact is absolutely disputed by Plaintiff and two (2) other individuals. Plaintiff stated that once the trailer came to rest in the driveway, Officer Ruch suddenly grabbed her from behind and threw her to the ground. Plaintiff never stated that she pushed Officer Ruch with her forearm. Also, Mr. Hinchman, the neighbor who helped moved the trailer up the driveway, testified that he saw Officer Ruch go to arrest Plaintiff once the trailer was put down, which

completely surprised him. He further stated that once the trailer was put down he did not see Plaintiff strike Officer Ruch. Additionally, Hillary stated she was standing next to her mother and Officer Ruch when the trailer was put down and that she did not see her mother physically touch him or try to move past him toward the house.

Fifth, Officer Ruch's contention that Plaintiff had a long history of mental illness in arguing that she experienced a mental breakdown which somehow justified his actions, is not only untrue, but simply offensive. Plaintiff testified that she has absolutely never been hospitalized for any psychological, emotional, or psychiatric problems. Plaintiff's husband, Dr. Gary Raab testified that he never told any Ocean City Officer that his wife had recently come home from the hospital for stress or psychological related treatment. Dr. Raab stated that Plaintiff had never been admitted to a hospital for psychiatric reasons. Plaintiff's daughter, Hillary also testified that Plaintiff was never admitted to any kind of hospital to address emotional or mental issues. Additionally, Captain Prettyman even acknowledged that Officer Ruch told him after the incident that he thought he was dealing with a mentally impaired person only after placing the handcuff upon Plaintiff. While Plaintiff had treated with a psychiatrist and psychologist before this incident for problems with depression, there is no indication that this is anything other than routine treatment that millions of individuals seek to address feelings of depression. To baldly suggest that Plaintiff's prior treatment for depression is evidence of a long history of mental illness, despite numerous statements to the contrary, is simply offensive and inappropriate.

A. Sufficient Facts Exist For A Jury To Conclude That Officer Ruch Used Excessive Force Upon Plaintiff During The Incident

The United States Supreme Court has held that claims asserted against law enforcement officers alleging their use of excessive force in the course of an arrest, investigatory stop or other seizure of an individual should be analyzed under the Fourth

Amendment and its "reasonableness" standard. Graham v. Conner, 490 U.S. 386, 395 (1995). In determining the reasonableness of force used to effectuate a seizure "requires a careful balancing of the nature and quality of the intrusion of the individual's Fourth Amendment interests against the countervailing government interests at state." Id. at 396; citing Tennessee v. Garner, 471 U.S. 1, 8, (1985). The "test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application" but "requires careful attention to the facts and circumstances of each particular case." Graham, supra, 490 U.S. at 396; citing Bell v. Wolfish, 441 U.S. 520, 559 (1979).

The reasonableness determination should include consideration of "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, supra, 490 U.S. at 396; citing Tennessee, supra, 471 U.S. at 8-9. The reasonable inquiry with respect to an excessive force claim is an objective analysis in determining whether the officer's actions are "objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham, supra, 490 U.S. at 397; citing Scott v. United States, 436 U.S. 128, 137-39 (1978).

In order to state a claim for excessive force as an unreasonable seizure under the Fourth Amendment "a plaintiff must show that the seizure occurred and that it was unreasonable." Kopec v. Tate, 261 F.3d 772 (3rd Cir. 2004); citing Estate of Smith v. Marasco, 318 F.3d 497, 505 (3rd Cir. 2003). With respect to analyzing an excessive force claim challenged by way of summary judgment, the Third Circuit has stated:

> Reasonableness under the Fourth Amendment should frequently remain a question for the jury, however, defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances.

Kopec, supra, 261 F.3d at 777 (emphasis added)(internal citations omitted).

In this case, there is no argument that Plaintiff was subject to a seizure by Officer Ruch. There is no dispute that when Officer Ruch secured one handcuff to Plaintiff's arm, while holding on to the other end of the handcuff, Plaintiff was seized under the law. Therefore, the inquiry on Officer Ruch's motion for summary judgment as to the excessive force claim should focus on whether the force he used was objectively reasonable after resolving all factual disputes in favor of Plaintiff.

When reviewing the factual disputes in Plaintiff's favor, a jury could certainly conclude that the force used by Officer Ruch was completely unnecessary, not justified and absolutely unreasonable. Plaintiff did not strike Officer Ruch with either the trailer, the telephone or with her forearm to push him out of the way as he claims. According to Plaintiff and two (2) other witnesses, once the trailer was put down on the driveway, Officer Ruch suddenly and without warning grabbed her from behind, threw her to the ground and secured one (1) handcuff to her arm while holding on the other end of the handcuff.

Officer Ruch argues that he is entitled to summary judgment on the excessive force claim because there is no objective evidence that Plaintiff was visibly injured during the encounter. This argument is completely ridiculous. First, the fact that Plaintiff did not go to the hospital, did not suffer any lacerations or refused an ambulance immediately after the assault is irrelevant to the reasonableness determination of the force employed against her by Officer Ruch during the incident. In any event, Plaintiff's husband who is a medical doctor attended to Plaintiff's injuries immediately following the assault. Hillary stated that as she saw Officer Ruch pulling and twisting Plaintiff's arm while holding onto the other end of the handcuff, she heard her mother crying and pleading with Officer Ruch to stop hurting her. Plaintiff's other daughter, Monica Jr., stated that she heard her mother say "Help. He's

hurting me" while her arm was being pulled and twisted. Mr. Hinchman stated that before he walked away from the scene because he was "repulsed" by Officer Ruch's actions, he heard Plaintiff say that Officer Ruch was hurting her arm. Plaintiff was clearly in pain and physical distress during the assault of which Officer Ruch was acutely aware.

In an attempt to justify the reasonableness of his conduct, Officer Ruch argues that the entire encounter "amounted to nothing more than a push or shove in an attempt to handcuff her while she was resisting." (Defendant's Brief, pg. 10). However, this argument could not be more disputed. Officer Ruch himself admits that he never told Plaintiff that she was under arrest. Plaintiff had no inclination that Officer Ruch was going to arrest her and restrain her with handcuffs. Plaintiff stated that as she had both hands on the trailer as it was being put down, Officer Ruch suddenly grabbed her from behind and threw her to the ground. Hillary stated that she saw Officer Ruch push her mother to the ground. Moreover, Plaintiff stated that while on the ground, Officer Ruch repeatedly pulled and twisted her arm while holding the other end of the handcuff. Hillary also stated that she observed Officer Ruch pulling and yanking at her mother's arm hard enough that it caused her head to be lifted up off the ground and then hit the ground which lasted several minutes.

Officer Ruch completely ignores the fact that while Plaintiff was on the ground with one handcuff secured to her arm, he held onto the other end of the handcuff while pulling and twisting Plaintiff's arm. A jury could certainly find this conduct unreasonable under the circumstances.

Contrary to what Officer Ruch would like the Court to believe, this was not a situation where he was simply attempting to handcuff an arrestee by attempting to place her arm behind her back which she resisted. Officer Ruch never told Plaintiff that she was under arrest. He did not give any indication whatsoever to Plaintiff as to why he was behaving in

such a manner. Moreover, Officer Ruch's argument that jerking Plaintiff's arm around amounted to "no more than to be expected" since Plaintiff was resisting is absurd. Even if an individual is resisting arrest, there is no expectation that the officer will continue to violently pull and twist their arm while holding on to one end of the handcuff causing the person's head to hit the ground repeatedly. Officer Ruch even admits that after securing the handcuff, while on the ground he did not intend to secure the other handcuff on Plaintiff. This undercuts his argument that she was resisting arrest since he was not even trying to arrest her any longer.

The circumstances did not require Officer Ruch to use the force he exhibited. Officer Ruch was investigated a simple abandoned trailer, not a serious crime involving a dangerous suspect. Plaintiff was at her residence. She and her family are well known in the community. Plaintiff did not pose any threat to Officer Ruch or others. While there are numerous material facts in dispute that preclude summary judgment as to the excessive force claim, there is no dispute that sufficient facts exist when viewed in favor of Plaintiff to enable a fact finder to conclude that Officer Ruch's force and conduct exhibited toward Plaintiff was completely unreasonable and unjustified under the circumstances.

B. Sufficient Facts Exist To Support Plaintiff's Claim For False Arrest Committed by Officer Ruch

A claim for false arrest may be based upon an individual's Fourth Amendment right to be free from unreasonable seizures. Albright v. Oliver, 510 U.S. 266, 274 (1994). The United States Supreme Court has noted that "false arrest and false imprisonment overlap; the former is a species of the latter." Wallace v. Kato, 549 U.S. 384, 388 (2007). The Third Circuit has stated that "an arrest made without probable cause creates a cause of action for false arrest" under § 1983 and "where the police lack probable cause to make an arrest, the

arrestee has a claim under §1983 for false imprisonment based on a detention pursuant to that arrest." O'Conner v. City of Philadelphia, 855 F.2d 136, 141 (3rd Cir. 2007).

In order to state a claim for false arrest a plaintiff must prove the following two (2) elements: 1) that there was an arrest; and 2) that the arrest was made without probable cause. Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3rd Cir. 1988). In order to establish the absence of probable cause, a plaintiff must show "that at the time when the defendant put the proceedings in motion the circumstances were such as not to warrant an ordinary prudent individual in believing that an offense had been committed. Lind v. Schmid, 67 N.J. 255, 262 (1975). "Probable cause required more than mere suspicion." Orsatti v. New Jersey State Police, 71 F.3d 480, 482-83 (3rd Cir. 1995). Rather, probable cause exists when the facts and circumstances are "sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." Gerstein v. Pugh, 420 U.S. 103, 111 (1975). Additionally, the question of whether probable cause existed is a factual issue and is often a question left for the jury to decide. Groman v. Township of Manalapan, 47 F.3d 628, 635 (3rd Cir. 1995).

As stated, there is no dispute that Plaintiff was subject to an "arrest" in the legal sense when Officer Ruch secured one handcuff to her arm and restrained her freedom of movement. Therefore, the inquiry on Officer Ruch's motion for summary judgment as to the false imprisonment claim should focus on whether Officer Ruch had probable cause to believe that Plaintiff had committed a criminal offense.

Officer Ruch presents three (3) separate grounds in attempting to argue that he had probable cause to arrest Plaintiff, all of which are unconvincing and without merit.

First, Officer Ruch claims that Plaintiff "assaulted" him three (3) times thereby justifying his decision to arrest her. As stated above, however, his claims that Plaintiff

assaulted him several times are completely disputed by her and the witnesses involved. Officer Ruch did not even mention all of these "assaults" in his police report, which discredits his credibility in making the allegations. Plaintiff stated that she did not and could not have pushed the trailer into Officer Ruch. His repeated attempts to convince this court that the photographs submitted in support of his current application "unmistakably" show Plaintiff assaulting him with the trailer is completely misleading and inappropriate. The photographs certainly do not depict any such assault, and cannot resolve this factual dispute conclusively in Officer Ruch's favor. Additionally, his claims that Plaintiff pushed the phone into his chest are completely disputed by Plaintiff and her daughter. Furthermore, his claims that Plaintiff pushed him aside with her forearm after putting the trailer down in the driveway are disputed by Plaintiff, her daughter and Mr. Hinchman.

Second, Officer Ruch's contention that he had probable cause to arrest Plaintiff because she violated a municipal ordinance prohibiting indecent exposure is ridiculous. Plaintiff took off her nightshirt after leaving the public street and as she entered her home. Plaintiff was on her private property and arguably did not violate the alleged ordinance. Also, this entire case is about an abandoned trailer and has nothing to do with Plaintiff taking off her nightshirt as she entered her residence. If Officer Ruch truly intended to arrest Plaintiff for indecent exposure, then he would have done so right after Plaintiff came back outside and continued the encounter. However, he did not and instead proceeded to allow Plaintiff and others to move the trailer up the driveway. Officer Ruch never told Plaintiff that she was under arrest for indecent exposure. He certainly did not arrest her for indecent exposure. His argument that probable cause existed based upon this ground is simply his meager attempt to justify his conduct after the fact, when no reasonable justification exists.

Third, Officer Ruch contends that he had probable cause to arrest Plaintiff for purposes of obtaining a mental health screening, which is equally without merit. Officer Ruch's repeated assertions that Plaintiff suffered from a long history of mental illness is simply untrue and inappropriate to suggest. He claims there is no doubt that Plaintiff experienced a mental episode because she was aggressive, combative, assaulted him several times, took off her night shirt and refused to give him her name. While these facts are in dispute, even if established as true, they do not lead a reasonable person to conclude that Plaintiff was in need of mental health screening.

Plaintiff's behavior after she was handcuffed and any claim that said behavior is evidence of some mental distress cannot form the basis of Officer Ruch's probable cause determination. See, Groman v. Township of Manalapan, 47 F.3d 628, 635 (3rd Cir. 1995)(holding that probable cause for offenses that occurred either during or after the arrest cannot provide the requisite probable necessary to justify the initial arrest). Captain Prettyman testified during deposition that Officer Ruch admitted to him that he, Officer Ruch, thought he was dealing with a mental episode only after he secured the handcuff on Plaintiff. By his own admission, Officer Ruch cannot now claim that he sought to restrain Plaintiff due to his belief that she was having a mental breakdown. He cannot argue that the alleged after-acquired probable cause justified the initial arrest.

Refusing to respond to a police officer's request to provide your name certainly is not an indication of a mental episode, and even if true, the refusal does not amount to probable cause to support an arrest. See, Trafton v. City of Woodbury, 799 F.Supp2d 417, 439-40 (D.N.J. 2011)(holding that a suspect's refusal to provide her name does not constitute a violation of an obstruction statute and cannot form probable cause to support an arrest).

The fact remains that Plaintiff was not involuntary committed for a mental health

assessment as a result of this incident because there was no basis or probable cause supporting such action. Officer Ruch stated that while he was aware of the department's standard procedures for dealing with individuals suspected of having a mental breakdown, he admitted that he did not know whether he is supposed to take the person into custody or stay away and give them room. Therefore, he cannot now claim to have had probable cause to arrest Plaintiff based upon this ground, when he himself did not know whether he was supposed to take her into custody in the first place. Officer Ruch's argument that probable cause existed based upon his allegation that Plaintiff suffered from a long history of mental illness is offensive, not supported by the facts and again is his meager attempt to justify his conduct after the fact by shifting the blame for his actions to Plaintiff.

C. Genuine Issues of Material Fact Exist To Preclude Summary Judgment On Plaintiff's Claims Of Assault, Battery and Negligence

In arguing for summary judgment on Plaintiff's claims for assault, battery, negligence and negligent infliction of emotional distress, Officer Ruch acknowledges that same are predicated upon his use of excessive force. Officer Ruch summarily concludes that the Court should grant summary judgment as to these claims because the use of force exhibited by him was reasonable and not excessive. However, as set forth in detail above, the reasonableness of Officer Ruch's entire conduct and the force he exhibited on the date of this incident are issues that must be resolved by a jury since the material facts underlying such a determination are certainly in dispute in this matter. Therefore, these claims should be presented to a jury as they cannot be dismissed as a matter of law.

II. THERE IS NO TYPE OF IMMUNITY APPLICABLE TO OFFICER RUCH'S CONDUCT TOWARD PLAINTIFF

A. Officer Ruch Is Not Entitled To Qualified Immunity

Section 1983 provides a remedy for deprivations of Constitutional rights or federal laws. Kopec, supra, 361 F.3d at 775. Qualified immunity is intended to shield government officials performing discretionary functions, including police officers, "from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 776; citing Harlo v. Fitzgerald, 457 U.S. 800, 818 (1982). The defendant carries the burden of proof to establish that he is entitled to qualified immunity. Kopec, supra, 361 F.3d at 776. A qualified immunity determination is analyzed using a two-part analysis: 1) whether the officer violated a constitutional right; and 2) whether the right was clearly established such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id.; citing Saucier v. Katz, 533 U.S. 194, 200-02 (2001).

In resolving this inquiry, the Court must consider the facts in the light most favorable to the plaintiff. Kopec, supra, 361 F.3d at 776. The Court should not grant summary judgment on the basis of qualified immunity when disputed facts are "material to the objective reasonableness of an officer's conduct." Curley v. Klem, 499 F.3d 199, 278 (3rd Cir. 2007).

In this case and as explained above, disputed material facts certainly exist as to the reasonableness of officer Ruch's conduct, and for that reason alone, the Court should not grant summary judgment on the basis of qualified immunity. Officer Ruch's qualified immunity argument is premised simply upon his self-serving assertion that his conduct was objectively reasonable. However, this assertion completely ignores and overlooks the many disputed material facts in this case, which must be resolved in Plaintiff's favor at this stage.

The facts in a light most favorable to Plaintiff reveal that she did not push, shove or assault Officer Ruch. After the trailer was moved up the driveway, Officer Ruch suddenly and without provocation grabbed Plaintiff and threw her to the ground. Officer Ruch grabbed Plaintiff's arm and secured a handcuff on one arm intending to arrest her without any probable cause to do so. While holding onto one end of the handcuff, Officer Ruch continued to pull and yank Plaintiff's arm causing her great pain and physical distress while he ignored her pleas for him to stop hurting her. Officer Ruch then released the handcuff only when immediately instructed to do so by his superior.

With respect to the second inquiry, a reasonable officer would have known that this conduct was unlawful with respect to the situation Officer Ruch faced. There is no question that grabbing a person and throwing them to the ground for no reason is unlawful. There is no question that arresting an individual without probable cause is unlawful. There is no question that pulling and yanking a person by their arm with a handcuff while ignoring their pleas to stop is unlawful. See, Kopec, supra, 361 F.3d at 778 (holding that a reasonable officer would have known that employing excessive force in the course of handcuffing would violate the Fourth Amendment).

Therefore, Officer Ruch is not entitled to qualified immunity with respect to any of Plaintiff's Constitutional claims.

B. Officer Ruch Is Not Entitled To Any Immunities Under The New Jersey Tort Claims Act

Pursuant to N.J.S.A. 59:3-3, "A public employee is not liable if he acts in good faith in the execution or enforcement of any law." In order to satisfy this good faith standard for immunity under the New Jersey Tort Claims Act ("TCA"), a public employee must either demonstrate objective reasonableness or that he behaved with subjective good faith. Toto v. Ensuar, 196 N.J. 134 (2008); Alston v. City of Camden, 168 N.J. 170 (2001). "The burden

of proof is upon the [public] employee, who must prove either of those components in order for the good faith immunity to attach." Toto, supra, 196 N.J. at 146. In order to prevail on a motion for summary judgment on immunity under the TCA, the public employee must present proof of a nature and character that would exclude any genuine dispute of facts as to the application of immunity. See, Leang v. Jersey City Bd. of Educ., 198 N.J. 557 (2009).

As stated at length herein, Officer Ruch is incapable of demonstrating the objective reasonableness of his conduct toward Plaintiff in light of the disputed facts that must be resolved in her favor.

Also, Officer Ruch bears the burden of proving that he behaved with subjective good faith. Clearly, Officer Ruch cannot satisfy this burden. Once again, Officer Ruch simply contends that his conduct was undertaken in subjective good faith without setting forth proofs to support same. The disputed facts in this case suggest otherwise and require denial of his request for summary judgment based upon good faith immunity.

Additionally, Officer Ruch conveniently ignores the remaining language contained in N.J.S.A. 59:3-3, which sates "Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment." The Courts have unmistakably confirmed that the good faith immunity is not applicable when a public employee is liable for false arrest or false imprisonment. See, e.g., Toto, supra, 196 N.J. at 146; DelaCruz v. Borough of Hillsdale, 183 N.J. 149, 163 (2005); Trafton, supra, 799 F.Supp2d 417. Therefore, the good faith immunity provided under the TCA is not available as a defense for Officer Ruch with respect to Plaintiff's claims of false arrest.

Officer Ruch also contends that he is entitled to immunity pursuant to N.J.S.A. 59:3-2(b). However, that argument is completely without merit. First, N.J.S.A. 59:3-2(b) states, "A public employee is not liable for legislative or judicial action or inaction, or administrative

action or inaction of a legislative or judicial nature." That section is clearly not applicable to Officer Ruch as a police officer. It seems that Office Ruch is arguing that this statute provided him with absolute immunity for the exercise of his discretionary acts, which is set forth in subsection 2(a). N.J.S.A. 59:3-2(a). However, this statute also states that "nothing in this section shall exonerate a public employee for negligence arising out of his acts or omissions in carrying out his ministerial functions." Clearly the statute does not provide for absolute immunity. This statue does not provide Office Ruch with discretionary immunity since he decided to interact with Plaintiff as part of his ministerial duties as a police officer. See, eg., Estate of Soberal v. City of Jersey City, 529 F.Supp.2d 477 (D.N.J. 2007)(holding that police officers' actions in serving a temporary restraining order were ministerial and thus officers were not entitled to immunity from tort claims asserted against them); Wilson ex rel. Manzano v. City of Jersey City, 415 N.J. Super. 138 (App. Div. 2010) (finding the discretionary immunity does not provide immunity from liability for negligence in performance of ministerial police duties once the police decide to act).

Lastly, Officer Ruch also attempts to claim immunity pursuant to N.J.S.A. 59:5-2(B)(3), claiming he cannot be held liable for injury caused by a person resisting arrest. This argument is also without merit. There is no evidence that Plaintiff was resisting arrest in this case. After Officer Ruch suddenly threw Plaintiff to the ground and pulled and twisted her arm causing her to smash her head on the ground, she was scared for her safety and well-being and repeatedly asked him to stop hurting her. Officer Ruch admits that he never told Plaintiff that she was under arrest. In fact, Officer Ruch could not conclusively state why he chose to arrest Plaintiff and admits that after he secured one handcuff on her he then decided not to secure the other handcuff. Ultimately, Plaintiff was not charged with any crime or offense. Certainly, Officer Ruch cannot be entitled to immunity on summary

judgment by claiming that Plaintiff's injuries resulted from her resisting arrest when the lawfulness of the arrest and the issue of whether she actually resisted same are vehemently disputed in this case.

C. Officer Ruch Is Not Entitled To Immunity Pursuant to N.J.S.A. 30:4-27.7(a)

Officer Ruch contends that he is entitled to immunity pursuant to N.J.S.A. 30:4-27.7(a), which provides that "a law enforcement officer . . . acting in good faith . . . who takes reasonable steps to assess, take custody of, detain or transport an individual for the purposes of mental health assessment or treatment is immune from civil and criminal liability." Once again, Officer Ruch conclusively asserts that there is no dispute that he took custody of Plaintiff because of his good faith belief that she needed a mental health assessment, an assessment which never occurred. However, this assertion is simply untrue and ignores the overwhelming existence of facts which suggest otherwise. This assertion also contradicts Officer Ruch's own admission to Captain Prettyman that he did not think he was dealing with a mentally impaired person until after he placed the handcuff on Plaintiff.

The issue whether Officer Ruch acted in "good faith" and took "reasonable steps" when dealing with Plaintiff on the date of the incident is certainly a disputed issue of fact which must be resolved by a jury. It defies logic to assert that when confronted with a possible situation involving a mentally unstable individual, a reasonable officer would suddenly grab the person, throw them to the ground, place one handcuff on their arm and proceed to pull and yank their arm about, especially when that individual is on their private property and presents no danger to the officer or others.

The reality is that Plaintiff certainly was not having an emotional outburst on the date of the incident. She was not forced to undergo any mental health evaluation as a result of this incident. While Plaintiff may have been aggravated with Officer Ruch's investigation of

the trailer, her demeanor became excited and emotional only after Officer Ruch threw her to the ground and handcuffed her for no reason, which put her in fear for her life. Officer Ruch's contention that he was trying to protect Plaintiff and tried to help her is outrageous and unbelievable.

III. PLAINTIFF CERTAINLY CAN SATISFY THE TORT CLAIMS THRESHOLD PURSUANT TO N.J.S.A. 59:9-2(D)

Pursuant to the Tort Claims Act,

> no damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00

N.J.S.A. 59:9-2(d). Officer Ruch contends that Plaintiff cannot vault this threshold with respect to recovery for damages for pain and suffering claiming she has offered no objective medical evidence of any new injury resulting from the incident. This contention is completely untrue and misleading.

Plaintiff certainly has provided objective medical evidence in this case as to the permanent injury associated with her upper right extremity. Plaintiff has submitted multiple expert reports through discovery from several different doctors supporting the opinion of the permanent physical injury relating to her right arm and shoulder area caused by this incident. These providers based their opinions not only upon their own personal examinations of Plaintiff, but also after reviewing her multiple EMG and MRI studies. All of these doctors opine as to causation as well.

Plaintiff underwent surgery of her brachial plexus in October 2013. There is no genuine dispute that Plaintiff has suffered a permanent loss of a bodily function with respect

to her right arm. Plaintiff remains unable to use her right arm and has basically lost the use of her right arm completely. For example, Plaintiff cannot do the following: wash her hair; write efficiently; raise her arm, hold a young child; set the table; prepare food as she used to or bless herself in church. Therefore, Plaintiff can certainly vault the verbal threshold.

Additionally, when addressing the verbal threshold under N.J.S.A. 59:9-2(d), the New Jersey Supreme Court has held that "when a public employee's actions constitute willful misconduct, the plaintiff need not satisfy the verbal threshold and may instead recover the full measure of damages applicable to a person in the private sector." Toto, supra, 196 N.J. at 137. Genuine issue of facts exist in this case as to whether Officer Ruch's actions constitute willful misconduct on the date of the incident due to the outrageousness and unreasonableness of his actions. Therefore, a question of fact exists as to whether the verbal threshold is even applicable in this case.

IV. PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES SHOULD SURVIVE SUMMARY JUDGMENT

Officer Ruch contends that since he acted with probable cause and exercised reasonable force in effectuating the arrest of Plaintiff, then she cannot prove that he acted maliciously in order to support a punitive damages award. As with his prior arguments on summary judgment, Officer Ruch's self-serving assertion completely ignores the contradictory facts which must be viewed in light most favorable to Plaintiff.

Punitive damages are available able for § 1983 claims, "when a defendant's conduct is shown to be motivated by evil motive or intent, when it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30 (1983).

There certainly are sufficient facts in this case to support a jury determination that Officer Ruch acted with evil motive or intent or at least acted with reckless indifference to

Plaintiff's rights. Officer Ruch, as with all other members of the Ocean City Police Department, were aware before this incident to approach situations at Plaintiff's residence uniformly and with the assistance of supervisors. Instead of approaching this abandoned trailer situation gingerly or with some semblance of professionalism, Officer Ruch became angry at Plaintiff and grabbed her from behind, threw her to the ground and placed a handcuff upon her because in his words he was "tired of not getting any answers." When Officer Ruch grabbed Plaintiff's right wrist he intended to take her into custody and arrest her at that point. However, after he secured one handcuff upon her wrist, he did not intend to secure the offer handcuff and instead wanted to wait for a supervisor. Officer Ruch himself is not even certain as to what his intentions were.

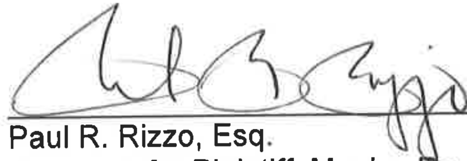
Additionally, Officer Ruch acknowledged that within less than one (1) month prior to this incident he received a negative performance notice admonishing him for his "lack of assertiveness and inability to take command." He admits that this notice and reprimand played a part in his actions on the date of the incident. After the incident, he advised his superiors that he was just trying to be more assertive and establish command with Plaintiff just as he had been counseled to do. Clearly Officer Ruch's actions toward Plaintiff were made purposefully and with intent to be more assertive and establish command over Plaintiff. Sufficient facts certainly exist for a jury to determine that these actions were purposefully made and with reckless indifference to Plaintiff's protected rights to be free from unreasonable seizures.

CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests that the Court deny Defendant, Officer Ruch's Motion seeking summary judgment in its entirety.

Respectfully submitted:

DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis, Lehrer & Flaum, P.C.



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Dated: June 2, 2014