UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

STEPHANIE BOTTOM, Plaintiff, vs. CITY OF SALISBURY, et al., Defendants.	)	Case No. 1:21-cv-322-WO-JEP PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOW COMES the Plaintiff and respectfully submits this response to Defendant's Motion for Summary Judgment. Doc. #54 and #55.

STATEMENT OF FACTS

The Traffic Stop

On May 30, 2019, Plaintiff Stephanie Bottom was driving on I-85 from Atlanta to North Carolina to attend a family funeral. (Exhibit A, Bottom Tr. 26:9-14, hereinafter "Bottom Tr."). Bottom was a 67-year-old Black woman who worked as a public librarian in Fulton County, Georgia. (Bottom Tr. 7:4-21; Exhibit B, Deposition Exhibit 7, Summons). She was driving her vehicle, a 2005 dark grey Toyota Sequoia. (Bottom Tr. 26:15-17).

Unbeknownst to Bottom, the Salisbury Police Department and Rowan County Sheriff's Office were conducting an operation along I-85. (Exhibit C, Benfield Tr. 6:14-7:19, hereinafter "Benfield Tr."). A written plan, prepared in advance, indicates that the operation would target speeding offenses and enforce criminal laws. (Exhibit D, Salisbury Police Operation Plan, Taylor Deposition Exhibit 47). To conduct the operation, officers positioned themselves on an overpass, such that they were facing oncoming cars, enabling them to identify the race of motorists prior to initiating traffic stops. (Benfield Tr. 6:3-19, 65:1-19).

Defendant Devin Barkalow volunteered for the assignment; he had worked for years as a drug enforcement officer for Salisbury PD and generally made "very, very few" traffic stops. (Exhibit E, Barkalow Tr. 33:7-25, hereinafter "Barkalow Tr.") Another officer, who traveled with a K-9, joined Defendants, along with a second Salisbury officer, Defendant Adam Bouk. (Barkalow Tr. 41:1-5, 43:2-5).

Officer James Hampton used LIDAR on the overpass, calling out vehicles that he clocked speeding. (Benfield Tr. 6:24-7:13). Hampton's declaration that a car was speeding functioned to provide basis for other officers to pursue and stop the vehicle. (Benfield Tr. 6:14-19). As Plaintiff

approached the overpass, Officer Hampton called out a **"Toyota, gold in color"** driving ten miles over the speed limit. (Exhibit F, Smith Bodycam, 2:20-2:30, hereinafter "Smith Video"). Seconds later, Plaintiff drove under the overpass in her dark gray/silver Toyota SUV, and officers began to pursue her. (Smith Bodycam, 2:20-2:30).

According to Plaintiff's Expert Roy Taylor, a former Chief of Police in North Carolina, the officers appeared to be engaged in a drug interdiction effort, using speed enforcement as a pretext to conduct searches. (Exhibit G, Taylor Tr. 41:3-42:9, hereinafter "Taylor Tr."). On the day in question, Bottom was wearing her hair in dreadlocks and her car bore a license plate from out-of-state. (Exhibit J, Deputy Smith Report, Benfield Deposition Exhibit 9, at 1 (hereinafter "Smith Report"); Barkalow Tr. 69:22-25).

Officers followed Bottom for miles before she noticed the patrol vehicle lights. This upset the officers, but Bottom did not realize they were trying to stop her because she was driving with the flow of traffic, listening to her music, and not looking in her rearview mirror. (Bottom Tr. 29:6-19, 34:2-8 & 18-24). It was only when Deputy Smith pulled

beside Bottom that she realized police were attempting to stop her.[1] (Bottom Tr. 33:20-34:8). When Bottom saw Smith, she raised her hands, signaling that she was confused about what was happening. (Bottom Tr. 34:1-8; Benfield Tr. 40:4-41:17). Smith announced on the radio that the only person in the car was the driver, who he said appeared to be an older black female who might be confused. (Benfield Tr. 41:5-25; Smith Report, at 10-11).

When she realized police were focused on her, and there were multiple officers in pursuit, Bottom was afraid. (Bottom Tr. 102:2-19). She began looking for a place to pull over where there would be people present. At no point did the pursuit become a "high speed chase." (Barkalow Tr. 45:19-23; Exhibit K, Bouk Tr. 46:22-24, hereinafter "Bouk Tr."). Bottom drove below the speed limit. (Bouk Tr. 88:1-16). She did not discard any contraband or evidence from her vehicle. (Bouk Tr. 47:18-24). Officers had no information, at any time, that she may be armed or dangerous or posed a threat to anyone. (Barkalow Tr. 47:23-49:4, 92:9-13).

[1] Bottom's vehicle came to a halt four-and-a-half minutes later. (Exhibit I, Barkalow Deposition Exhibit 25, Deputy Smith Bodycam, 6:28-11:11).

Before Bottom could find a suitable location where she felt safe, a deputy threw spike sticks in front of her vehicle, flattening her tires. (Bottom Tr. 36:14-21; Barkalow Tr. 49:5-13). She was frightened as her car came to a stop on the side of the road. (Bottom Tr. 123:5-126:20; Benfield Tr. 13:3-16:19). The spike strips were deployed as intended, and as officers approached, they observed that they had been effective in disabling Bottom's vehicle. (Barkalow Tr. 49:9-13).

The Use of Force

With her vehicle disabled, Deputy Mark Benfield[2] pulled his cruiser behind Bottom's car and exited with his gun drawn. (Benfield Tr. 16:16-17:21). Officers shut the road down, and multiple patrol vehicles were on the scene. Sirens were blasting, and they "were so loud we couldn't hear nothing." (Benfield Tr. 29:2-4).

As Benfield approached Bottom on the driver's side, he saw her raised hands come out of the window; he interpreted this to mean she was unarmed, and he holstered his weapon. (Benfield Tr. 19:19-20:2).

[2] Claims against Deputy Benfield and former Sheriff Auten were dismissed after a settlement was reached in mediation.

Benfield was at her door within four seconds. (Benfield Tr. 17:10-17 (10:23), Tr. 20:1-8 (10:27)).

Defendants Bouk and Barkalow were in the same vehicle and parked to the rear passenger area of Bottom's car. (Bouk Tr. 49:20-50:5). Barkalow and Bouk approached the passenger side of Bottom's vehicle while Benfield simultaneously approached her on the driver's side. Barkalow had his gun drawn and aimed at Bottom. (Bouk Tr. 50:9-16).

Bouk opened the passenger door, just after Benfield opened the driver's door; Bouk leaned over to unbuckle her seatbelt. (Bouk Tr. 51:22-52:4). Bottom made no threatening remarks or gestures. (Barkalow Tr. 47:23-48:4). Bouk could see Bottom sitting in the driver's seat with her right hand up in the air and facing Benfield. (Bouk Tr. 103:18-104:17).

While Benfield stood at Bottom's door and Bouk was unbuckling her belt, Barkalow ran around behind Bottom's vehicle, approached Benfield from behind, pushed him into the driver's door, and pulled Bottom from the vehicle by her hair, face down to the ground. (Benfield Tr. 22:7-23:10). Bottom was face down on the ground within fifteen seconds of when Benfield exited his vehicle with his gun drawn. (Benfield

Tr. 23:12-19; Exhibit H, Benfield Video, at 10:22-10:37,[3] hereinafter "Benfield Video").

Contrary to the Defendant's affidavits, Benfield did not "repeatedly tell the driver to get out." Def. Br. at 6. He testified that it was not possible to hear, due to the sirens, (Benfield Tr. 29:2-4), and that he motioned for Bottom to get out of the vehicle only once—five seconds before Barkalow barged up from behind him, pushed him into the driver's door, and yanked Bottom to the ground by her hair. (Benfield Video, 10:33-10:38). Bottom did not hear multiple commands to get out of the car. (Bottom Tr. 51:20-52:8).

Contrary to Barkalow's Declaration, Deputy Benfield did not "assist" Barkalow when he pulled her out of the car by her hair. Def. Br. at 7. Benfield said he did not expect Barkalow's actions and had planned to talk with Bottom to get her out of the vehicle: "It was a split second. And I did not know what happened until it was over, pretty much. She was on the ground." (Benfield Tr. 23:1-24:6). "Had I been given 10 or 15

[3] At 10:22, Benfield exits his vehicle; at 10:26, he draws his gun; at 10:28, Bottom puts her hands out of her window and Benfield holsters his weapon; at 10:32, Benfield motions for Bottom to get out; at 10:37, Barkalow pushes Benfield aside and pulls Bottom face down to the ground by her hair. It all happened in fifteen seconds.

more seconds, I could've talked her out of the vehicle." (Benfield Tr. 37:17-19). A review of body camera footage shows that Barkalow summarily threw Bottom face down into the ground by her hair, and she was not "laid on the ground."[4] (Exhibit L, Barkalow Video, 10:38-10:53).

Bottom was also not refusing to get out of the vehicle when Barkalow used force to remove her. According to Bottom, she was "[t]rying to get out of the vehicle before he grabbed my arm." (Bottom Tr. 141:18-21). She briefly placed her right hand on the steering wheel in order to turn her body and brace herself as she got out of the car. (Bottom Tr. 140:4-25). "The car sits three feet off the ground, and I had bad knees.

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[4] The videos do not depict, and the Defendants in their depositions did not characterize, their actions as "laying" Bottom on the ground. Doc. 55 p. 7-8, Barkalow Declaration ¶ 12-13. In fact, Bottom was pulled face down to the ground by Barkalow alone. (Benfield Tr. 23:1-24:6, 37:17-19). The Court of Appeals has said that it "would greatly diminish the utility of summary judgment" if a party who "has been examined at length on deposition" was permitted to rely upon an "affidavit [that] contradict[s] his earlier-given testimony," *Stevenson v. City of Seat Pleasant, Md.*, 743 F.3d 411, 422 (4th Cir. 2014), and "a party's deposition testimony 'will usually be more reliable than his affidavit, since the deponent was either cross-examined by opposing counsel, or at least available to opposing counsel for cross-examination.'" *Wilson v. Gaston Cnty., NC*, 685 F. App'x 193, 205 (4th Cir. 2017) (Diaz, J., dissenting in part). "[M]any courts have disregarded self-serving affidavits that contradict prior sworn statements of the affiant as sham affidavits[.]" *J & J Sports Prods., Inc. v. Hernandez*, No. 1:11CV749, 2013 WL 5937909, at *3 (M.D.N.C. Nov. 5, 2013).

So I'm trying to get myself out of the car." (Bottom Tr. 55:13-17). Salisbury Police Lieutenant Patrick J. Smith's written report on the body cam footage aligns with Bottom's version of events: "When Det. Barkalow grabbed the female *she was already in the motion of exiting the vehicle* with the assistance of Deputy Benfield." (Exhibit M, Salisbury Use of Force Report, at 5-6 (emphasis added)).

According to Benfield and the Rowan County Sheriff's department, Barkalow's use of force was unnecessary, because Bottom would have gotten out of the vehicle if given more time. (Benfield Tr. 37:17-19). According to Benfield's supervisor, Lieutenant Myers, "It is my opinion that had MD Benfield been afforded the opportunity to talk the female out of the vehicle a little longer she would have eventually complied. The use of force used by the other agency officer would have been greater force necessary to handle the situation given the circumstances." (Exhibit N, Rowan County Use of Force Report, at 7). The Rowan County Sheriff himself reviewed the materials, and he concurred that "*Barkalow used more force than was necessary*." (Exhibit O, Auten Tr. 23:15-20) (emphasis added).

Plaintiff's police expert shared the opinion of the Rowan Sheriff's department that force used by the Salisbury PD officers in this situation was excessive. (Taylor Tr. 75:10-76:2). He stated it was unreasonable for officers to fail to instruct Bottom to get out of the vehicle, put her hands behind her back, and submit to arrest. (Taylor Tr. 23:1-24):

> "A properly trained officer would've used more de-escalation techniques and not rushed right in. . . . [T]hey never issued any commands about, you know, get down on the ground, put your arm behind your back. They just fought her. They didn't give her any instruction. And that's one of the things we teach in basic law enforcement training is to give commands, very clear, concise commands so that people will do what you want to." *Id.*

The evidence shows Bottom did not resist getting out of the vehicle, was not afforded a reasonable time to get out of her vehicle before Barkalow used force, and that the amount of force used was unreasonable.[5] Defendant Officer Bouk and Salisbury Police Chief Stokes approved of Barkalow's handling of the situation, indicating his use of force was consistent with the policies and procedures of the Salisbury

[5] Plaintiff does not address the state assault and battery claims in a standalone section, but maintains she has shown "sufficient facts to establish that Officer[s] . . . acted with malice in committing the alleged battery." *Maney v. Fealy*, 69 F. Supp. 3d 553, 565 (M.D.N.C. 2014).

Police Department. (Bouk Tr. 134:1-135:9; Exhibit P, Stokes Tr. 107:16-108:22, hereinafter "Stokes Tr.").

Once she was face down on the ground, Benfield and Barkalow put handcuffs on Bottom. (Bouk Tr. 109:13-110:21). Bottom did not willfully resist being handcuffed and told the officers she had a hard time putting her hands behind her back because of a previous injury. (Bottom Tr. 159:21-160:12). "What I told them was that it might take me a minute to put it back there." *Id.* Being thrown to the ground knocked the breath out of her, and at the time, she was in shock and scared for her life. (Bottom Tr. 49:22-50:6).

Defendant Bouk joined Deputy Benfield and Defendant Barkalow in placing handcuffs on her left wrist. (Bouk Tr. 110:16-21). While Barkalow pulled Bottom's hand around to be handcuffed, Bouk pulled her left arm into the air, lifting it away from her back. (Bouk Tr. 111:25-112:21; Exhibit Q, Bouk Video, 10:59-11:12, hereinafter "Bouk Video"). As the Defendants pulled her in this way, Bottom heard her shoulder pop and become dislocated. (Bottom Tr. 46:6-47:18). Bouk and Barkalow secured the handcuffs. (Bouk Tr. 113:8-10). Bottom began pleading with the officers, appeared to be in pain, and asked why they were doing this

to her. (Bouk Tr. 113:12-16, Tr. 121:10-12). She told the officers she could not move her arm. (Bouk Tr. 128:14-16). Barkalow and Bouk stood Bottom up, lifting her under her arm pits, and moved the handcuffs on her hands in front of her stomach. (Bouk Tr. 70:1-16). Eventually, the officers called EMS, released Bottom from custody, and she went to the hospital for treatment. (Benfield Tr. 34:21-35:24).

As a result of their use of force, Bottom suffered a fully torn rotator cuff in her shoulder that required surgery. (Bottom Tr. 81:5-22; Exhibit R, Declaration of Dr. Steven Kane). She has never recovered full use of her arm. Following the incident, Bottom permanently shaved her hair off and began wearing wigs, because of the trauma connected to having been violently pulled by her hair and her inability to raise her arm to style her hair. (Bottom Tr. 84:4-17).

Barkalow was captured on video after the incident was over, laughing about pulling Bottom to the ground by her hair by grabbing "a handful of dreads," and stating, "she'd earned it." (Barkalow Tr. 69:9-25; Exhibit Q, 24:30-25:07). Bouk agreed with Barkalow that she had "earned it." (Bouk Tr. 134:10-21).

The Search of Plaintiff's Vehicle and Purse

With Bottom handcuffed, secured, and away from her vehicle, Defendant Bouk searched her vehicle and her purse. Bouk opened the driver's side door, saw an object in the door, picked it up to see what it was, and then put it back. (Bouk Tr. 72:17-73:1, 117:19-118:2; Bouk Video, 13:15-13:18). Bouk had no reason to believe the vehicle contained evidence of crime or contraband. (Bouk Tr. 126:4-13).

Bouk also emptied the contents of Bottom's purse, pulled out each item, one by one, went through it, and dumped it in the driver's seat. (Bouk Tr. 123:1-127:12; Bouk Video, 17:26-21:38). At one point, he took a small journal from the purse and flipped through every page. (Bouk Video, 17:39-17:43). Bottom did not give Bouk consent to search her purse. She saw Bouk going through her purse and said, "there is nothing in my purse," and asked what he was looking for. (Bouk Tr. 125:9-19; Bouk Video, 19:52-19:55). Bouk explained he was searching for weapons or drugs. (Bouk Tr. 125:9-19; Bouk Video, 19:52-19:55). He took out a small card case, popped it open, and looked at the cards in the case. (Bouk Video, 20:18-20:21). After removing and going through all the items in

her purse, Bouk shoved them all back in her purse. (Bouk Video, 20:20-20:21).

Bottom was never taken to jail, was released from custody when she was taken to the hospital, and later served with a summons to appear in court. (Benfield Tr. 34:21-35:24). Defendants have tried to characterize Bouk's search of Bottom's car and purse as an inventory search after the fact, but had it occurred, it would have been done by the Rowan County Sheriff's Office, who took custody of her car. (Bouk Tr. 74:14-22). In deposition, Bouk admitted he was searching for contraband and drugs, not conducting an inventory of valuables. (Bouk Tr. 125:9-19).

DISCUSSION OF APPLICABLE LAW

In ruling on Summary Judgment, this court must "view the evidence in the light most favorable to the nonmoving party" and refrain from "weigh[ing] the evidence or mak[ing] credibility determinations." *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568-69 (4th Cir. 2015) (internal quotation marks omitted).

The Fourth Amendment "proscribes all unreasonable searches." *United States v. Dart*, 747 F.2d 263, 266 (4th Cir. 1984). It likewise provides a right to be free from unreasonable seizures, including the use

of excessive force. *Jones v. Buchanan*, 325 F.3d 520, 527 (4th Cir. 2003). Factors to consider in excessive force cases include "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 v. Connor*, 490 U.S. 386, 396 (1989). Also at issue here is the Fourteenth Amendment's "right not to be stopped on the basis of race[.]" *Martin v. Conner*, 882 F. Supp. 2d 820, 839 (D. Md. 2012) (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

Qualified Immunity and Clearly Established Law

In determining if an officer is entitled to summary judgment on the basis of qualified immunity, courts ask whether the facts, viewed in the light most favorable to the plaintiff, show the conduct violated a federal right, *see Saucier v. Katz*, 533 U.S. 194, 201 (2001), and whether the right was clearly established at the time the violation occurred such that a reasonable person would have known that it was unconstitutional. *Ridpath v. Board of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006).

In the pages below, Plaintiff identifies numerous cases that established Defendants' conduct was unreasonable. Even so, Plaintiff need not point to a case on all fours. The U.S. Court of Appeals for the Fourth Circuit has "repeatedly . . . held that there is no requirement that the precise right allegedly violated already have been recognized specifically by a court before such right may be held 'clearly established' for qualified immunity purposes." *Hutchinson v. Lemmon*, 436 F. App'x 210, 215 (4th Cir. 2011) (unpublished) (collecting six such cases); *see also Williams v. Hansen*, 326 F.3d 569, 581 (4th Cir. 2003); *McCarter v. Univ. of N. Carolina at Chapel Hill*, No. 1:20-CV-1050, 2021 WL 4482983, at *14 (M.D.N.C. Sept. 30, 2021); *Swick v. Wilde*, No. 1:10-CV-303, 2012 WL 3780350, at *14 (M.D.N.C. Aug. 31, 2012).

The U.S. Supreme Court has held that "[a]lthough earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, *they are not necessary to such a finding*." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (emphasis added). It has expressed some iteration of this principle in more than half a dozen cases dating back over 35 years. *See, e.g.*, *Taylor v. Riojas*, __ U.S. __, __ & n.2, 141 S. Ct. 52, 54 & n.2 (2020); *Safford*

Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377-78 (2009); *Wilkie v. Robbins*, 551 U.S. 537, 585 (2007); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *United States v. Lanier*, 520 U.S. 259, 271 (1997); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Selective Enforcement: Racial Profiling

"The Fourteenth Amendment right not to be stopped on the basis of race [is] clearly established[.]" *Martin v. Conner*, 882 F. Supp. 2d 820, 839 (D. Md. 2012). Defendants assert the selective enforcement and racial profiling claim "fails *ab initio* because there is zero evidence these officers targeted Bottom for a traffic stop in the first place." Def. Br. at 19. Yet this statement mischaracterizes the evidence. Instead, Plaintiff has put forth information, detailed *supra*, sufficient for a jury to find that she was stopped as the result of Defendants racially profiling her as a drug courier. *See, e.g.*, *Martin*, 882 F. Supp. 2d 820, 841 (D. Md. 2012) ("Martin need not provide overwhelming evidence—he must only show that a reasonable jury could conclude that a violation occurred. . . . [A] reasonable jury could conclude that Sgt. Conner saw that Martin was African-American, then decided to pull him over. Summary judgment is inappropriate."). In selective enforcement cases where "it is not apparent

'beyond doubt' that [a plaintiff] cannot prove a set of facts in support of [a] claim that would entitle her to relief, her claim should not be dismissed at this stage of the litigation." *Green v. Maroules*, 211 F. App'x 159, 162 (4th Cir. 2006) (unpublished).

Plaintiff's police practices expert, a former North Carolina Chief of Police, has observed that the circumstances indicate officers suspected her of drug activity. Plaintiff's out-of-state plate, as well as the visibility from the overpass of her dreadlocks, are circumstantial factors that support a reasonable inference that officers racially profiled her as a drug courier. *Martin*, 882 F. Supp. 2d at 840 & n.22; *United States v. Phillips*, No. CR 3:04-00083-04, 2004 WL 7333227, at *1 (S.D.W. Va. Aug. 27, 2004).

The involvement of Defendant Barkalow, a drug enforcement officer, as well as a second officer with a K-9, supports a reasonable inference that Defendants' motivation was not simply to demonstrate a "zero tolerance approach for speed violations," as they have claimed. Def. Br. at 4; *cf. Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) ("[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may

often serve as an excuse for stopping and harassing an individual."). Defendant Barkalow's boasts about grabbing "a handful of dreads" are the kind of "race-tinged remarks" that may support a "meritorious selective enforcement claim." *United States v. Mason*, 774 F.3d 824, 836 (4th Cir. 2014) (Gregory, J., concurring in part, dissenting in part).

In the Fourth Circuit, "the arguable absence of any legitimate justification for [a] stop" may support a Plaintiff's selective enforcement claim. *Maryland State Conf. of NAACP Branches v. Maryland State Police*, 454 F. Supp. 2d 339, 349 (D. Md. 2006). Here, there is an arguable absence of a legitimate justification for the stop, since the Defendants' explanation for initiating the traffic stop is contradicted by their recorded radio transmissions indicating the offending vehicle was "gold in color," whereas Bottom was driving a dark gray vehicle.

The evidence also supports a reasonable inference that white Salisbury officers employ a more aggressive approach against Black people than other racial groups. Salisbury's Chief of Police testified that during the year in which Defendants encountered Bottom, white Salisbury police officers used force against 43 people, 33 of whom (or 76.7%) were Black. (Stokes Tr. 140:10-18; Exhibit S, Salisbury CALEA

Use of Force Report, at 9, hereinafter "CALEA Report"). A summary of the department's use of force data shows a similar pattern for use of force against Black people in the years prior (2018-67%, 2017-62%, 2016-72%).[6] (Stokes Tr. 135:13-16; CALEA Report, at 8). By contrast, 38% of Salisbury residents are Black. (Stokes Tr. 122:3-16). Similar data on the Defendant officers' traffic stop history is unavailable to Plaintiff, because on the date of the incident, and on prior occasions, the Defendants did not comply with a general statute that mandates the collection of racial stop data for purposes of identifying officers engaged in unlawful racial profiling practices. *See generally* N.C. Gen. Stat. § 143B-903; (Barkalow Tr. 13:15-14:3; Stokes Tr. 69:7-17, 132:4-135:11).

The Use of Force

In the Fourth Circuit, clearly established law puts officers on notice about the objective unreasonableness of pointing guns at and forcefully pulling an elderly woman, who had shown no physical or verbal resistance, from a raised vehicle by her hair, throwing her face first on

[6] Stokes' condonation of his officers' actions and his knowledge of this data is evidence sufficient to establish Plaintiff's right to proceed on her *Monell* claims. *Owens v. Baltimore City State's Att'ys Off.*, 767 F.3d 379, 402-03 (4th Cir. 2014).

the ground, and wrenching her arm behind her back such that her rotator cuff suffered a complete tear, necessitating surgery and rendering her permanently disabled. *See, e.g.*, *Young v. Prince George's Cnty., Md.*, 355 F.3d 751, 756-58 (4th Cir. 2004) (holding district court erred in granting summary judgment for officer on excessive force claim stemming from a traffic stop involving armed motorist; the driver was wanted for a minor traffic violation, placed his hands on his head, and after being handcuffed, the officer put him in headlock, spun him around, and threw him to the ground); *Weigle v. Pifer*, 139 F. Supp. 3d 760, 773-74 (S.D.W. Va. 2015); *Veney v. Ojeda*, 321 F. Supp. 2d 733, 744 (E.D. Va. 2004); *Bennett v. Booth*, No. CIV.A. 3:04-1322, 2005 WL 2211371, at *5 (S.D.W. Va. Sept. 9, 2005) (unpublished); *see also Jones v. Buchanan*, 325 F.3d 520, 530-31 (4th Cir. 2003) (stating that the severity of a Plaintiff's injuries "is another consideration in determining whether force was excessive"). At the time he decided to use force against Plaintiff, Barkalow knew Bottom was an older woman who had not threatened anybody in any way; he could see her hands were empty; he could see other parts of her body, besides her hair, were available for him to make

contact, if necessary; and he had determined her vehicle was disabled. Barkalow Tr. at 47-50.

Courts have held police do not have an unfettered authority to "display [a] pointed gun as both a deterrent and a ready self-defense option" when pursuing or stopping a vehicle driven by someone who is wanted for a minor offense. *Magwood v. Fowler*, No. 2:19-CV-2277-RMG, 2021 WL 2885975, at *3 (D.S.C. July 9, 2021). The Court of Appeals has characterized the practice of "approaching a suspect with drawn weapons [as an] extraordinary measure," *see United States v. Sinclair*, 983 F.2d 598, 602 (4th Cir. 1993), and it has held that a person wanted for a minor offense, who presents themselves with raised hands and offers no physical resistance, states a Fourth Amendment claim where a police officer points his gun at them, grabs them forcefully, spins them around, and handcuffs them. *Turmon v. Jordan*, 405 F.3d 202, 207-08 (4th Cir. 2005).

Contrary to Defendant Barkalow's testimony,[7] case law similarly makes clear that officers should account for an arrestee's relative

[7] *See, e.g.*, Barkalow Tr. at 21-22 (Oct. 5, 2022) (stating that he would not let a person's age or body type dictate the amount of force he would use if he determined he needed to use force).

vulnerability when assessing the appropriate level of force, if any, to apply. This was recently reaffirmed in *Estate of Jones v. City of Martinsburg, W. Virginia*, 961 F.3d 661, 669 (4th Cir. 2020), but it has been the law for many years. *See, e.g.*, *Bailey v. Kennedy*, 349 F.3d 731, 745 (4th Cir. 2003); *Kane v. Hargis*, 987 F.2d 1005, 1008 (4th Cir. 1993); *see also Goodman v. Barber*, 539 F. App'x 87, 89-90 (4th Cir. 2013) (unpublished). Reasonable police officers understand that it is unnecessary and unreasonable to use aggressive hands-on, arm bar and hair-pulling techniques on an elderly woman whose hands are raised and who is seat-belted into a disabled vehicle. *See generally* Report of Plaintiff's Expert, Roy Taylor; *cf. Teames v. Henry*, No. CIV. 303CV1236H, 2004 WL 2186549, at *6-7 (N.D. Tex. Sept. 29, 2004) ("A rational trier of fact could not find that a seventy-nine year-old woman . . . posed an immediate threat to anyone.").

Cases of excessive force against elderly women appear to be very uncommon. Where they have occurred, courts appear to have generally denied officers' claims of qualified immunity or motions to dismiss, making note of the plaintiffs' inability to pose an immediate threat to officers. *See, e.g.*, *John v. Lake Cnty.*, No. C 18-06935 WHA, 2019 WL

859227, at *3 (N.D. Cal. Feb. 22, 2019); *Teames v. Henry*, No. CIV. 303CV1236H, 2004 WL 2186549, at *6-7 (N.D. Tex. Sept. 29, 2004); *Hebron v. Parks*, No. 86 C 7722, 1987 WL 12171, at *4 (N.D. Ill. June 9, 1987).

Violent and unnecessary or gratuitous hair-pulling violates the Fourth Amendment, and officers pulling hair as mechanism of excessive force has been a feature of several cases in the Fourth Circuit. Where courts have discussed it, they have indicated disapproval. *See, e.g.*, *Smith v. Ray*, 781 F.3d 95, 99 (4th Cir. 2015); *Jones v. Buchanan*, 325 F.3d 520, 534 (4th Cir. 2003) (discussing *Vinyard v. Wilson*, 311 F.3d 1340, 1355 (11th Cir. 2002)); *Hutchinson v. Lemmon*, 436 F. App'x 210, 212, 217 (4th Cir. 2011) (unpublished); *Elder v. Thompson*, No. 4:13-CV-00047, 2014 WL 1607381, at *10-11 (W.D. Va. Apr. 22, 2014) (discussing *Rambo v. Daley*, 68 F.3d 203 (7th Cir. 1995)); *Love v. Rumgay*, No. CIV.A. RDB-13-1402, 2013 WL 6094670, at *2-3 (D. Md. Nov. 18, 2013). Clearly established law also indicates that officers are not, as Defendants assert, entitled to "physically remove [a] driver from the vehicle as quickly as possible" under the circumstances described here. Def. Br. at 13; *see, e.g.*, *Smith*, 781 F.3d at 104; *Wilson v. Painter*, No. 21-1083, 2021 WL

5851070, at *1 (4th Cir. Dec. 9, 2021) (unpublished) (officer "gave [man] just 15 seconds to comply with his commands to exit the vehicle").

Officers may not escalate an encounter because a motorist does not immediately respond to their command or argues with them, nor are they justified in using force because they did not hear them verbally submit. *Valladares v. Cordero*, 552 F.3d 384, 390 (4th Cir. 2009); *Hayes v. City of Seat Pleasant, Md.*, 469 F. App'x 169, 173-74 (4th Cir. 2012) (unpublished). As one U.S. District Court recently noted, "Even if [someone] pulled away, Fourth Circuit precedent is clear that pulling away from being suddenly grabbed by an officer does not justify escalatory use of force." *Reid v. W. Virginia State Police*, No. 2:21-CV-00647, 2022 WL 17083399, at *5 (S.D.W. Va. Nov. 18, 2022).

That court observed that multiple published Fourth Circuit cases, "*Jones* [*v. Buchanan*], *Rowland* [*v. Perry*], and *Smith* [*v. Ray*] . . . involve[d] an officer violently slamming a generally compliant suspect to the ground, causing serious injuries, when no such force was needed to gain physical control of the suspect." *Id.* In each case, the Court of Appeals denied officers' claims to qualified immunity. *Smith*, 781 F.3d

95, 106 (4th Cir. 2015); *Jones*, 325 F.3d 520, 535 (4th Cir. 2003); *Rowland*, 41 F.3d 167, 174 (4th Cir. 1994).

Defendants cite just one case, *Dalton v. Liles*, in the section of their brief entitled, "The Decision to Pull Bottom from her Vehicle." The Plaintiff in *Dalton* was a suspect in a home invasion, had multiple outstanding arrest warrants at the time of the encounter, was in possession of several firearms, and had stated he would "'shoot it out' with law enforcement" if they attempted to apprehend him. [8] *Dalton v. Liles*, No. 5:19-CV-00083-MR, 2021 WL 3493150, at *2 (W.D.N.C. Aug. 9, 2021). Here, Plaintiff was a woman in her late 60s, suspected—evidence suggests mistakenly—of committing a low-level speed limit violation. Prior to using force against her, officers openly discussed over their radio that she appeared to be confused about what was happening.

[8] Similarly, the Defendant cites an out-of-circuit case, *Hennings v. Milone*, as the only authority to support the assertion that the "claim that Barkalow's hair pull constituted excessive force necessarily fails" Def. Br. at 15 (citing 2021 WL 5412336, at *2 (7th Cir. 2021)). The Plaintiff in *Hennings* drove a car that "matched one just seen in an armed robbery, [and] led police on a high-speed car chase" that "injur[ed] several people, [before] trying to flee on foot." *Id.* at *1.

The Search of the Purse and Vehicle

After Plaintiff was secured away from her vehicle, Bouk "looked through the contents of [her] purse and also removed an item from inside the Toyota's driver's door map before putting it back[.]" Def. Br. at 17. The Defendants expressly characterize his actions as a "search." Def. Br. at 2, 10. Bouk's bodycam also depicts him emptying Plaintiff's purse, sorting through its contents, and flipping through a journal. In defense of his actions, Defendant points to the brevity of the search, invokes an inventory exception to the warrant requirement, and cites to confusion on the scene about whether Plaintiff was or would be arrested.

These arguments are unavailing. The U.S. Supreme Court has foreclosed the argument that the slight or brief movement of a person's private possessions does not amount to a search for purposes of the Fourth Amendment, *see Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987), and warrantless vehicle searches are "presumptively unreasonable." *United States v. Holmes*, 376 F.3d 270, 274 (4th Cir. 2004)). Here, Defendant Bouk has not articulated a lawful basis for searching Plaintiff's vehicle and purse, and he is unable to demonstrate that he obtained Plaintiff's consent. *See, e.g.*, *United States v. Neely*, 564 F.3d

346, 350 (4th Cir. 2009) (stating "the Government's burden is heavier where consent is not explicit, since consent is not lightly to be inferred"); *Pegg v. Klempa*, 651 F. App'x 207, 213 (4th Cir. 2016) (unpublished) (denying qualified immunity for search of purse during traffic stop; officer could not articulate reasonable basis for search).

Nor were the searches authorized under the search-incident-to-arrest exception articulated in *Arizona v. Gant*. *See* 556 U.S. 332, 344 (2009). Bottom was handcuffed and away from her vehicle at the time Defendant Bouk searched her vehicle and purse. She was stopped for suspicion of a speed limit violation and a failure to heed blue lights. The officers had no "reason to believe that [her] vehicle contain[ed] 'evidence relevant to the crime of arrest.'" *Davis v. United States*, 564 U.S. 229, 234-35 (2011) (quoting *Gant*).

Nor, as Defendants suggest, was the search of Plaintiff's property warranted by an inventory exception to the Fourth Amendment. In fact, Defendants appear to concede that Bouk was not acting pursuant to the inventory exception when he conducted the searches; but rather, "[k]nowing that Bottom's vehicle was being towed and an inventory

search *would be conducted*, Bouk picked up, and then immediately put back, an object . . . ." Def. Br. at 2 (emphasis added).

Bouk admitted he was looking for drugs and contraband, and "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." *Fla. v. Wells*, 495 U.S. 1, 4 (1990). With respect to the purse, the law requires that "standardized criteria, or established routine, must regulate the opening of containers found during inventory searches,"[9] *see id.*, and the criteria "must sufficiently limit a searching officer's discretion." *United States v. Matthews*, 591 F.3d 230, 235 (4th Cir. 2009). Defendants have produced nothing to indicate Bouk was acting pursuant to such a policy. Moreover, the Supreme Court has said the "policy or practice governing inventory searches should be designed to produce an inventory," *see Wells*, 495 U.S. at 4, and Defendants have produced no inventory. On brief, Bouk is characterized as confused and distracted, *see* Def. Br. at 18-19, but his rationale for searching Plaintiff's property has no relevance to the court's Fourth

[9] Moreover, "[a]n inventory search is the search of property *lawfully seized and detained*[.]" *Whren v. United States*, 517 U.S. 806, 811 n.1 (1996) (emphasis added). Here, Plaintiff has alleged she was unlawfully stopped and that her seizure was unlawful in that it was accomplished with excessive force.

Amendment analysis. *See Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006) (holding that an officer's subjective motivation for conducting a search is irrelevant in the Fourth Amendment context).

Conclusion

For the foregoing reasons, Defendants are not entitled to qualified immunity or summary judgment in their favor with respect to the decision to stop Plaintiff, their use of force, or the searches of Plaintiff's purse and vehicle.

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CERTIFICATE OF WORD COUNT

We hereby certify that this document contains 6,244 words, exclusive of caption, signature lines, and this Certificate, and therefore complies with Local Rule 7.3(d).

Dated: February 9, 2023

/s/ Ian A. Mance
/s/ C. Scott Holmes

CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing Plaintiff's Response to Defendant's Motion for Summary Judgment was filed electronically with the Clerk of Court using CM/ECF system, which will send notification of such filing to the following:

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This 9th day of February 2023

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/s/ C. Scott Holmes