IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-00891-RPM

MICHAEL YOUNG, an individual,

Plaintiff,

v.

THE CITY OF LOVELAND, a municipal corporation,
DEREK STEPHENS, individually; and in his official capacity as a Loveland Police Officer, and
CHRISTOPHER BROWN, individually and in his official capacity as a Loveland Police Officer,

Defendants.

DEFENDANTS' CITY OF LOVELAND AND CHRISTOPHER BROWN'S COMBINED MOTION AND MEMORANDUM BRIEF IN SUPPORT OF SUMMARY JUDGMENT

Defendant, **CITY OF LOVELAND** (hereinafter the "City"), and **CHRISTOPHER BROWN**, by their attorneys, **ERIC M. ZIPORIN** and **JENNIFER F. KEMP** of **SENTER GOLDFARB & RICE, L.L.C.**, and pursuant to Fed. R. Civ. P. 56, hereby submits their Combined Motion and Memorandum Brief in Support of Summary Judgment as follows:[1]

I. INTRODUCTION

This case arises out of the execution of a search warrant at Plaintiff's home and his subsequent arrest on April 25, 2014. Several days prior to Plaintiff's arrest, the Loveland Police Department ("LPD") responded to Michael Young's ("Plaintiff" or "Young") home for a welfare check after his ex-girlfriend called police expressing concern that he was not in his right state of

[1] Defendant Stephens does not move for summary judgment given disputed facts surrounding the force which was used or not used by him during the arrest.

mind. Young left his front living room curtains open and the lights on, allowing the officers to see a black handled, black bladed knife lying on the floor. The knife was approximately 18 to 24 inches long.

Officers knocked on the door and observed Young, shirtless, in the living room. He disappeared for a moment and returned wearing a dark shirt. He picked up the knife, and in doing so, caught one of the officers' eyes and motioned to indicate he would be out in a moment. Young left the room again, and officers retreated to a cover position away from the home and watched as Young returned to the room and appeared to hide a semi-automatic handgun in the waistband of his shorts. After this incident, the officers learned that Young was a convicted felon, and not allowed to possess firearms.

On April 22, Loveland police completed a search warrant for Young's home. A judge signed the warrant the next day. On April 25, at approximately 2:27 p.m., the Loveland SWAT team executed the search warrant. Young was not home at the time, so the SWAT team made a forced entry into the house. Two large swords were found in Young's bedroom. No firearms were found.

Later that evening, Young returned home and called 911 to report a break-in. An officer explained that the SWAT team searched the home and that they had a warrant for Young's arrest. Young was agitated throughout the conversation and relied on his grandmother, Alice Young, to communicate. Ms. Young told the officer that Young would turn himself in at the police department. She did not indicate that Young needed to make any stops on his way to the police station.

At approximately 6:00 p.m., Officers Christopher Brown and Derek Stephens, were positioned a short distance away from Young's home in an unmarked SUV to monitor his movements. They watched Ms. Young arrive, enter the house, and exit several minutes later with a black bag that she put in her trunk. Brown and Stephens then observed Young exit the home and walk underneath the garage door as it closed. Officers were both aware the search of the home did not result in the discovery of any firearm(s).

Young and his grandmother left the home in her car and Brown and Stephens followed. As soon as the car did not turn right on the street to go to the police department, the officers requested permission to stop the vehicle. Once permission was granted, the officers attempted to stop the vehicle. However, Young's vehicle did not stop immediately. Rather, Ms. Young proceeded slowly through an Albertson's parking lot.

The vehicle finally stopped in a parking space. Because the warrant for Young's arrest surrounded the illegal possession of firearms, and officers knew that no guns had been found at the home, Officers planned to conduct a felony stop with guns drawn and requiring Young to turn around and walk to the officer so that he could be handcuffed. Brown and Stephens ordered Young out of the car. Both officers believed Young could hear the orders clearly as his window was rolled down. Young was very slow in reacting to the orders to exit the vehicle. Eventually, Young exited the car holding a black cane. He appeared to be in severe pain at the time. Again, the officers knew no one had recovered any firearms in the course of executing the search warrant and they were concerned there may be a gun in the car or on Young's person. Once Young got out of the car, Stephens ordered him to place his hands on his head. Young did not comply right away, and he told the officers to "fuck off."

Because Young appeared to be injured and had complied with orders to get out of the car, officers modified their approach. Once Young finally turned around to face the direction opposite the officers, Stephens handcuffed him and led him back to the SUV. During his initial interview, Stephens denied the need to use any force, other than placing Young in handcuffs, during the course of the arrest.

Plaintiff now brings four claims for relief: (1) excessive and unreasonable force in executing the warrant in violation of the First Amendment against the City; (2) excessive force in violation of the Fourth Amendment against Stephens, Brown, and the City; (3) retaliation in violation of the First Amendment; (4) deliberately indifferent policies, practices, customs, training, and supervision in violation of the Fourth and First Amendments against the City. [Doc. No. 21]. The City and Officer Brown now respectfully move that this Court dismiss the claims against them. Plaintiff has no evidence of any custom or policy which was the moving force behind the alleged constitutional violations. Officer Brown had no physical contact with Plaintiff and, as such, Plaintiff cannot establish any violation of the First or Fourth amendment against him.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On April 25, 2014, Officer Christopher Brown was present on-scene with Officer Derek Stephens of the Loveland Police Department during the arrest of Michael Young. [**Affidavit of Christopher Brown, attached herewith as Exhibit A, ¶ 2**].

2. Young had an outstanding warrant for his arrest for possession of a weapon by a previous felony offender. [*Id.*].

3. That same day but prior to the arrest on April 25, 2014, Officers Stephens and Brown had followed Young from his residence with the expectation that he was headed to the LPD

in order to turn himself in on the outstanding warrant. Young was a passenger in a vehicle being driven by his grandmother, Alice Young. [**Ex. A**, ¶ 5].

4. Rather than turning in the direction of the LPD, the vehicle driven by Ms. Young instead went in a different direction. Officers Stephens and Brown at that time made a request to their supervisor to stop the vehicle. Upon receiving approval, they attempted to stop the vehicle using their lights and siren, but the vehicle continued into an Albertson's parking lot and proceeded slowly through the lot with officers directly behind it. [**Ex. A**, ¶ 6].

5. Officers' intent was to conduct a felony stop (by making commands to exit the vehicle with firearms drawn with commands that Young come to the position of the officers) given the information that Young was earlier seen with weapons and may have had a weapon on his person or in his vehicle. [**Ex. A**, ¶ 7].

6. The vehicle eventually stopped in a parking space at the end of the parking lot. Officers exited the vehicle and Officer Stephens gave orders for Young to exit the vehicle. Young was not originally cooperative with the commands. However, Young eventually exited the vehicle and told the officers to "fuck off". Ms. Young unexpectedly exited the vehicle at the same time as Young. [**Ex. A**, ¶ 8].

7. Officer Brown could see that Young appeared injured and had a cane. Given the apparent injury, the officers adjusted their strategy away from a felony stop to a modified version. This was also done given that Young had already been verbally non-compliant with the commands. Officer Stephens then approached Young and placed him into custody. [**Ex. A**, ¶ 9].

8. Officer Brown fell into the cover role which required that he ensure the safety of Officer Stephens while he placed Young into custody. As the cover officer, Officer Brown

maintained attention on Young from the passenger side of the police vehicle, but did not approach him. [**Ex. A**, ¶ 10].

9. Ms. Young had been ordered back into the driver's seat as she was getting out of the vehicle at the same time as Young. Pursuant to his training, Officer Brown maintained his cover position (on the passenger side of the police vehicle) until Young was placed into custody. He then left that position to speak with Ms. Young at her driver's side door. [**Ex. A**, ¶ 11].

10. At no point did Officer Brown have any physical contact with Young while on scene nor did he personally participate in placing him under arrest. [**Ex. A**, ¶ 12].

11. According to Plaintiff, Officer Brown screamed at Plaintiff to put his hands in the air and had his weapon pointed at his grandmother. [**Plaintiff's Responses to Defendants' Interrogatories and Requests for Production, attached herewith as Exhibit B,** p. 7].

12. Plaintiff admits his interaction with Brown was minimal. [*Id*.].

13. During the purported assault, Brown was detaining Plaintiff's grandmother. [**Deposition testimony of Michael Young, attached herewith as Exhibit C**, p. 168:12-16].

III. ARGUMENT

A. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "that will not bear the burden of persuasion at trial need not negate the nonmovant's claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998). Instead, the moving party "may make its prima facie demonstration simply by pointing out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." *Id.*

Upon a showing of an absence of evidence, the burden shifts to the non-moving party "to go beyond [his] pleadings and 'set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Id.* The non-moving party can meet this burden only with "reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.* (citations omitted). The failure to provide evidence in support of claims requires dismissal of the claims at the summary judgment stage. *See id.*

B. NO GENUINE DISPUTE OF MATERIAL FACT SUPPORTS PLAINTIFF'S CLAIMS FOR MUNICIPAL LIABILITY.

A cornerstone to § 1983 jurisprudence is that municipalities cannot face liability just because they employ tortfeasors. *Monell v. Dept. Soc. Servs. of New York*, 436 U.S. 658, 691 (1978). In place of *respondeat superior* or vicarious liability, municipalities "can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (emphasis included). The entity violation must result from "deliberate conduct . . ." by way of a "policy" or "custom" that is the "'moving force' behind the injury alleged." *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997). Under this frame work, when it is averred that "the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable for the actions of its employees." *Id.* at 405.

1. Plaintiff has no evidence of any custom or policy which led to the alleged constitutional violations.

Plaintiff appears to bring two claims against the City of Loveland. Claim One alleges "excessive and unreasonable force in executing the warrant in violation of the Fourth

Amendment." [Doc. No. 21, ¶¶ 100-115]. Claim Two alleges excessive force in violation of the Fourth Amendment and appears to rest on the alleged unconstitutional actions of Officers Stephens and Brown when they arrested Young. [Doc. No. 21, ¶¶ 116-137].[2]

Even assuming that Plaintiff has evidence establishing that the execution of the search warrant at Young's home was unreasonable and that officers' actions were unreasonable during the arrest, he has no evidence of any custom or policy of the City which was the moving force behind these alleged constitutional violations. As such, Plaintiff's claim against the City for executing the warrant and for his arrest must fail.

To prevail on a municipal liability claim, a plaintiff must establish: "(1) that a municipal employee committed a constitutional violation; and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation." *Myers v. Bd. of Cnty. Comm'n of Oklahoma Cnty.*, 151 F.3d 1313, 1316 (10th Cir. 1998).

The existence of a policy or custom can be established many different ways, including demonstrating the existence of: (1) A formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from "deliberate

[2] Plaintiff also brings a fourth claim against the City which alleges "deliberately indifferent policies, practices, customs, training and supervision in violation of the Fourth and First Amendments" related to "procedures in execution of warrant and arrest." [Doc. No. 21, ¶¶ 158-177]. This claim is duplicative of Claims One and Two and, as such, the City does not address it separately.

indifference" to the injuries that may be caused. *Bryson v. City of Okla. City*, 627 F.3d 784 (10th Cir. 2010).

Plaintiff has failed to establish a custom or policy of the City through any of the above avenues. His Amended Complaint contains only conclusory allegations that the City "acted pursuant to expressly adopted official municipal policies, longstanding custom and practices of the LPD." [Doc. No. 21, ¶ 103]. Plaintiff never identified the purported policies, customs, or practices. In attempt to identify same, Defendants served interrogatories on Plaintiff asking him to describe the allegedly unconstitutional custom or policy. Plaintiff responded that he did not yet have access to the City's specific written policies, memos, or meeting notes and did not supplement his response upon receiving same pursuant to his own discovery requests. *See* **Ex. B**, p. 14. The Tenth Circuit "require[s] a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury. *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 403 (1997). "That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a *direct causal link* between the municipal action and the deprivation of federal rights." *Id.* at 404 (emphasis added). *Monell* and its progeny clearly stand for the proposition that the very language of § 1983 provides for the imposition of liability where there exists an "affirmative" or "direct causal" link between a municipal person's adoption or implementation of a policy and a deprivation of federally protected rights, and that imposing liability upon such a basis does not implicate *respondeat superior*. *Dodds v. Richardson*, 614 F.3d 1185, 1202 (10th Cir. 2010).

Plaintiff fails to establish an "affirmative" or "direct causal" link. He claims only that he "believes" it is the City's custom and practice to treat him as a "second class citizen." [**Ex. B**, p.

15]. He also claims it "appeared" to be "their" custom and usual practice to "point loaded assault weapons at me" and officers' actions "appeared" to be "routine, customary practice." *Id*. These unsupported allegations related to Plaintiff's perceptions are not sufficient to overcome summary judgment.

In addition to Plaintiff's failure to identify any custom or policy, Plaintiff has no evidence which could establish that the City was deliberately indifferent. Tenth Circuit has held that "this deliberate indifference standard may be satisfied 'when the municipality has actual or constructive notice that its action or failure is substantially certain to result in a constitutional violation, and it consciously and deliberately chooses to disregard the risk of harm.'" *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1318 (10th Cir. 2002) (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir.1999)). Plaintiff has no facts which establish that the City was deliberately indifferent either with respect to the execution of the warrant or with respect to his arrest.

C. NO GENUINE DISPUTE OF MATERIAL FACT ESTABLISHES THAT OFFICER BROWN WAS INVOLVED IN PLAINTIFF'S ARREST.

1. Qualified Immunity.

The doctrine of qualified immunity shields government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Medina v. Cram*, 252 F.3d 1124, 1127 (10th Cir. 2001)(citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

After a defendant asserts qualified immunity, the burden shifts to the plaintiff to demonstrate that (1) defendant's actions violated a constitutional or statutory right, and (2) the

right was clearly established at the time of defendant's conduct. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). In order for the law to be considered clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Martinez v. Carr*, 479 F.3d 1292, 1295 (10th Cir. 2007) (citations omitted).

In analyzing questions of qualified immunity, courts are not required to address these inquiries in any specific order. *Pearson v. Callahan*, 555 U.S. 223, 234 (2009). If the plaintiff fails to carry either part of his two-part burden, the defendant is entitled to qualified immunity. *Medina*, 252 F.3d at 1128. This two-step analysis "is designed to 'spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.'" *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)).

"The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Saucier,* 533 U.S. at 205. "If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Id.*

2. Plaintiff does not sufficiently allege a claim against Brown for unreasonable arrest or retaliation.

To prevail on a claim for a constitutional violation pursuant to 42 U.S.C. § 1983, a plaintiff must establish the defendant acted under color of state law and caused or contributed to the alleged violation. *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996). The plaintiff must show the defendant personally participated in the alleged violation, *Bennett v. Passic*, 545 F.2d 1260, 1262–

63 (10th Cir. 1976), and conclusory allegations are not sufficient to state a constitutional violation, *Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981).

Here, Plaintiff has come forth with no evidence that Brown's involvement in the arrest was unconstitutional. It is undisputed that Plaintiff had an outstanding warrant and was believed to have a firearm. [**SUMF, ¶¶ 1, 2, 5**]. Officers expected that Plaintiff and his grandmother were on their way to the police department so that Plaintiff could turn himself in, but when he took a turn away from the PD, officers stopped Plaintiff and his grandmother to effectuate a felony stop. [**SUMF, ¶¶ 3, 4, 6**]. Officer Brown acted as the cover officer and maintained attention on Plaintiff from the passenger side, but did not approach him. [**SUMF, ¶¶ 8, 9**]. Plaintiff admits that he had minimal contact with Brown and that he was occupied with Plaintiff's grandmother. [**SUMF, ¶¶ 10, 12, 13**]. Brown had no physical contact with Plaintiff. [**SUMF, ¶ 10**].

In *Jenkins v. Wood,* the plaintiffs could give a general physical description of the officers who detained them, but could not identify the officers. 81 F.3d at 991-992. The Tenth Circuit rejected their excessive force claim against an officer at the summary judgment phase because the plaintiffs "brought forward no evidence indicating [that particular officer] participated in the use of excessive force against them personally." *Id*. at 994. Young's claim is even more tenuous. He has no evidence that Brown touched him. [**SUMF ¶¶ 8-13**]. At most, Brown screamed at Plaintiff and pointed his weapon at Ms. Young. [**SUMF, ¶ 11**]. Officers were executing an arrest warrant based on Plaintiff's suspected illegal possession of a firearm, and Brown was aware that Plaintiff was earlier seen with weapons and may have had a weapon on his person or in the vehicle. [**SUMF, ¶¶ 2, 5**]. Under these circumstances, Brown's use of his weapon to effect the arrest was not unreasonable. *See United States v. Perdue,* 8 F.3d 1455, 1462 (10th Cir. 1993)(holding that

officers acted reasonably when they ordered the occupants out of a car at gunpoint and forced them to lie on the ground when the police had information to suggest that the suspects might be armed, it was late at night in a remote area, and there were only two officers). Officers had reason to suspect that Plaintiff was armed and reasonably tailored their actions to a modified stop, rather than requiring Plaintiff to get on the ground given his appearance of being in pain and compliance with verbal commands to get out of the car. [**SUMF, ¶ 7**].

Plaintiff provides no other evidence supporting his theory that Brown's actions were a violation of the Fourth Amendment and, as such, his claim against Officer Brown should be dismissed. Plaintiff also claims that officers' treatment of him in retaliation for his statement telling them to "fuck off" was a violation of the First Amendment. Given that Officer Brown had no interaction with Plaintiff, this claim must also be dismissed.

3. No clearly established law put Officer Brown on notice that his actions were unconstitutional.

Plaintiff also fails at the second prong of the qualified immunity analysis. He has identified no Tenth Circuit or United States Supreme Court case which put Officer Brown on notice that pointing his weapon at Young's grandmother and yelling at Young to get out of the car was a violation of Young's constitutional rights. Indeed, established case law indicates that the use of weapons to effectuate a stop or arrest when it is believed that an individual is armed is reasonable. *See Perdue*, 8 F.3d at 1462. Given this, Plaintiff's claims against Officer Brown must be dismissed.

WHEREFORE, the City and Officer Brown respectfully request an order from this Court:

a. Dismissing Plaintiff's First, Second and Fourth claims against the City with prejudice;

b. Dismissing Plaintiff's Second and Third claims against Officer Brown;

c. Entering judgment against Plaintiff and in favor of the City and Officer Brown on Plaintiff's First, Second, and Fourth claims;

d. Granting the City and Officer Brown their reasonable attorneys' fees and costs; and

e. Granting the City and Officer Brown such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Eric M. Ziporin
Eric M. Ziporin
Senter Goldfarb & Rice, L.L.C.
3900 E. Mexico Avenue, Suite 700
Denver, CO 80210
Telephone: (303) 320-0509
Facsimile: (303) 320-0210
Email: eziporin@sgrllc.com

s/ Jennifer F. Kemp
Jennifer F. Kemp
Senter Goldfarb & Rice, L.L.C.
3900 E. Mexico Avenue, Suite 700
Denver, CO 80210
Telephone: (303) 320-0509
Facsimile: (303) 320-0210
Email: jkemp@sgrllc.com

Attorneys for Defendants City of Loveland, Christopher Brown, and Derek Stephens

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of June, 2016, I electronically filed a true and correct copy of the above and foregoing **DEFENDANTS' CITY OF LOVELAND AND CHRISTOPHER BROWN'S COMBINED MOTION AND MEMORANDUM BRIEF IN SUPPORT OF SUMMARY JUDGMENT**, with the Clerk of Court using the CM/ECF system which will send notification of such filing to the below email address.

Erik A. Johnson
325 East 7th Street
Loveland, CO 80537
lovelandlaw@gmail.com

s/ Cyndi Nichols
Cyndi Nichols, Legal Secretary
E-mail: cnichols@sgrllc.com