UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

ROBERT FRANCIS HOWARD, CASE FILE 20 CV 1004 ECT/LIB

Plaintiff,

v.

BEN WEIDEMANN, Badge #820
in his individual capacity acting under color of law as a White Earth Tribal Police Officer,

and

BRANDON MEYER, Badge #806,
in his individual capacity acting under color of law as a White Earth Tribal Police Officer,

Defendants.

PLAINTIFF'S MEMORANDUM
IN OPPOSITION TO DEFENDANTS' RULE 56 MOTION

I. Introduction

Robert Howard stands as an honorably discharged, then-seventy-nine-year-old, severely hearing-disabled veteran, White Earth Band elder, and boarding school survivor. On 27 April 2018 in front of the White Earth Post Office within White Earth Reservation, and within Becker County, Defendant White Earth Tribal Police Officer Weidemann seized Mr. Howard for allegedly speeding and falsely accused him of drunk driving.

Weidemann and his cohort, Tribal Police officer Meyer, acted in accordance with their authority to issue citations for violations of Minnesota law in accordance with the White Earth—Becker County Cooperative Law Enforcement Agreement, and issued Mr. Howard

a "State of Minnesota" citation that identified the Becker County Attorney as the prosecutor. At the same time, Weidemann and Meyer had the status of Chapter 638 junior federal law enforcement officers on the reservation.

Weidemann had no objective proof of Mr. Howard's speeding. Weidemann had actual notice of Mr. Howard's deafness. Weidemann painfully handcuffed Mr. Howard and stuffed him into the back of his squad car in the folded-up 2 o'clock position; Weidemann caused Mr. Howard's wrists to swell up, as shown in a photo, and painfully aggravated a chronic condition of Mr. Howard his White Earth Health Center physician identified as a potential chronic left shoulder rotator cuff tear.

The speeding ticket was disposed of in a continuation for dismissal and ultimate dismissal.

Weidemann and his cohort, Meyer, inflicted not one, not two, but *four* preliminary breath tests upon Mr. Howard – each one of which came up 0.0. Weidemann, with Meyer' help, exceeded the bright line of constitutional reasonableness for seizing Mr. Howard for speeding and purported drinking and driving.

In the unreasonably prolonged, causeless continued detention of Mr. Howard, Weidemann humiliated Mr. Howard, handcuffed him so tightly as to cause visible swelling in his wrists, and stuffed him into the narrow confines of his police cruiser in a cramped 2 o'clock position. In so doing, Weidemann inflicted unnecessary, unreasonable physical pain in Mr. Howard's left shoulder, manifesting as an aggravation of a possibly chronic left shoulder rotator cuff tear, according to the examination of Mr. Howard's White Earth Health Center physician on 2 May 2018, Dr. Charles Shaffer.

No question exists that Weidemann and Meyer acted under color of law in seizing Mr. Howard. They stand as junior federal law enforcement agents under Chapter 638. No doubt exists that White Earth waived its sovereign immunity and Officers Weidemann and Meyer are subject to tort liability under Chapter 466 of the Minnesota in accordance with the Comprehensive Law Enforcement Agreement (CLEA) between the White Earth Band and Becker County.

No question exists that Mr. Howard pleaded detailed facts supporting claimed Fourth Amendment violations against Weidemann and Meyer at Claims 1 and 3, even though he mentioned §1983 in the claims sections. *Thomas v. City of Shelby, Mississippi*, 574 U.S. 10, 10 (2014), reversed summary judgment in a Fourteenth Amendment due process violation case in which the Plaintiffs did not even mention "§1983"; the Court held that the correctness of a legal theory does not count so much as the specificity with which the Plaintiff pleads his theory of relief.

No doubt exists that Weidemann wrote out a citation captioned "State of Minnesota" that identified the Becker County Attorney as the prosecutor.

"Color of law" does not turn on the veracity of the defendant in the Eighth Circuit; "color of law" does not turn on the race or the ancestry of an arrestee. 42 U.S.C. §1983 and, alternatively, *Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), furnish remedies for Mr. Howard's constitutional violations; admittedly, 42 U.S.C. §1988 remedies do not exist for a *Bivens* case. Material, disputed facts over the initially lawful, but unreasonably prolonged seizure of Mr. Howard, and material, disputed

facts over the reasonableness of the force Weidemann applied to Mr. Howard for a mere speeding stop require jury trial.

II. Facts[1]

A. Introduction

Plaintiff Robert Francis Howard is an adult individual born in 1939. Mr. Howard domiciles at 37560 Spirit Lake Lane, Waubun, Minnesota 56689. Mr. Howard is a White Earth Band of Ojibwe Native American Elder [and boarding school survivor]. Mr. Howard earned an Honorable Discharge from the United States Army. Mr. Howard is retired from service in the Bureau of Indian Affairs as a realty officer. Verified Complaint (VC) ¶¶7-11; Amended Answers to Defendants' Interrogatories (AADI) #6(a).

B. Disabilities

Mr. Howard has a permanent, service-connected hearing disability that necessitates the use of hearing aids and, at all times relevant to this action, substantially impaired Mr. Howard's major life activity of hearing, by being unable to hear ordinary volume voices outdoors without hearing aids. Mr. Howard receives treatment for his service-connected hearing impairment at the United States Department of Veterans Affairs Health Administration's Veterans' Affairs Medical Centers. On the date of 27 April 2018, Mr. Howard's hearing aids were not functioning properly. Mr. Howard had a scheduled

[1] Plaintiff refers to the Verified Complaint by paragraph (VC¶xx); Amended Answers to Defendants' Interrogatories (AADI) by number (#) and reference; Plaintiff's Fed. R. Civ. P. 26(a)(a) Disclosures with reference to AADI and Plaintiff's Bates Number (P-000xxx); and Defendants' Video Recordings by identification of video and time stamp.

appointment for 11 May 2018 at the Fargo, ND Veterans Administration Medical Center for hearing examination and repair-or-replacement of his hearing aids; the VA upgraded his hearing disability to 40%.

Mr. Howard suffers the permanently disabling disease of diabetes, which he has suffered for more than twenty years, which substantially affects his major life activities of digestion, eating, and blood circulation. Mr. Howard suffers from the chronic disability of coronary artery disease, which slows Mr. Howard down by substantially his major life activities of breathing and blood circulation. VC¶¶12-17, AADI #6(a). Mr. Howard communicated to Defendant Weidemann that he was hard of hearing. Id., VC¶18.

C. Defendants

Defendant Ben Weidemann is an adult individual. At all times relevant to this lawsuit, Defendant Weidemann acted under color of law as a uniformed White Earth Reservation peace officer. At all times relevant to this lawsuit, the White Earth employed Defendant Weidemann as an active duty, uniformed peace officer. At all times relevant to this lawsuit, Defendant Weidemann acted in the course and scope of his employment as a uniformed White Earth Indian Reservation peace officer. VC¶¶19-22; AADI #6(a).

Defendant Brandon Meyer is an adult individual. At all times relevant to this lawsuit, Defendant Brandon Meyer acted under color of law as a uniformed White Earth Reservation peace officer. At all times relevant to this lawsuit, the White Earth employed Defendant Brandon Meyer as an active duty, uniformed peace officer. At all times relevant to this lawsuit, Defendant Brandon Meyer acted in the course and scope of his employment as a uniformed White Earth Indian Reservation peace officer. VC¶¶23-26;

AADI #6(a).

D. Incident of 27 April 2018

On 27 April 2018, Plaintiff drove to the Post Office in White Earth to check his wife's and his post office box for any mail deliveries. Plaintiff visits the post office as a daily routine since retirement; the trip occasionally includes a trip to the local MW Convenience Store for the daily newspaper. Id.; VC¶¶27-28. The Post Office lies in the portion of the White Earth Reservation found in Becker County, Minnesota.

Plaintiff exited his vehicle to enter the Post Office. Plaintiff faintly heard some yelling and turned around and noted a Police Officer, later identified as Ben Weidemann, looking in his direction. VC¶¶29-30; AADI #6(a). Mr. Howard told the officer, identified as Weidemann, that he was going inside the post office. Defendants' Video Axon 16-1; 27April2021; 1958:52.

At that point Plaintiff realized his hearing aid was again not working as it should. Plaintiff tried to explain his hearing aid dilemma to Weidemann, but Weidemann would not listen. Id.; VC¶¶31-32.

At all times Mr. Howard was peaceful and soft-spoken. AADI #6(a); VC¶33. Weidemann's body worn camera showed Weidemann accosting Mr. Howard, coming up on him aggressively, and Mr. Howard asked, "Who the f*ck are you?" Defendants' Video Axon 16-1; 27April2021; 1958:55.

The Fargo Veteran Administration Hospital Audiology Department, during that time period, was addressing Plaintiff's hearing aid issue. Plaintiff had a scheduled appointment to receive new hearing aids on May 11, 2018, at the Fargo VA, from follow-

up visits on April 9, and March 21, 2018. This appointment was due to a lost hearing aid for his left ear and the follow-up process in reference to the diminishment of Plaintiff's speech discrimination from 94% to 36% by the VA Staff Audiologist Jennifer Maershbecker. This was later addressed by the Chief Audiologist Doctor, John Jones, M.D., in a scheduled March 21, 2018, Otolaryngology consultation appointment who recommended that Mr. Howard prepare for a future MRI in reference to his diminished speech discrimination. At the time of the 27 April 2018 incident, Plaintiff was already received Veterans Administration permanent disability benefits for service-connected hearing loss, then rated at 10%; after 11 May 2018, the VA upgraded his hearing loss to 40%. AADI #6(a); VC¶¶34-38.

Weidemann falsely accused Plaintiff of drinking alcohol and smelling of alcohol. Defendants' AxonVideo2_16-1_27April2018_1959:36 ("Zulu" Time, also known as "Greenwich Mean Time"). At that point Weidemann called another police officer who showed up; the second officer was later identified as Brandon Meyer. VC¶¶39-40; AADI #6(a).

Together the Defendants gave Plaintiff an alcohol test that did not register on their test equipment, both officers attempted four times, but each reading came out zero alcohol. VC¶40, AADI #6(a). Plaintiff told them that he was diabetic and did not drink alcohol. Id.; VC¶41. Defendants' AxonVideo2_16-1_27April2018_1959:47 (last drink taken five years ago).

Plaintiff also demanded politely whether he was speeding, and, if so, how fast was he

going. VC¶42; AADI #6(a). Plaintiff reasonably believed he was clocked by radar. VC¶43; AADI #6(a). Weidemann answered Plaintiff that he was speeding. Id., VC¶43.

Weidemann handcuffed Mr. Howard for speeding. Defendants' Video Axon 16-1; 27April2021; 1959:01-02.

Weidemann issued Citation No. 001918001676 to Plaintiff. VC¶46; AADI #6(a); Plaintiff's Fourth Initial Disclosures, annotated to Plaintiff's Amended Answers to Interrogatories, identified as DEF000008-00009; Howard_v._Weidemann_et_al.,_20-cv-1004_P-000025.

The citation indicates an alcohol test was taken, but no speeding indicator reading. The speeding ticket listed the Becker County Attorney as the prosecutor, not the White Earth Solicitor General as prosecutor. Id. The speeding ticket plainly indicated it was a "State of Minnesota" ticket at the top of the form. Id.

The citation was dismissed on or about 28 December 2018. VC¶48; AADI #6(a). Defendants concur with continuation for dismissal.

Weidemann shoved Plaintiff against his car. VC¶50; Defendants' Video Axon 16-1; 27April2021; 1958:52-54.

Weidemann then forced Plaintiff into the rear of the police vehicle that appeared to have no room for passengers. Plaintiff was lodged between the front seats and back seat where the space was only about a foot-and-a-half in width. Plaintiff's body was wedged into at a two o'clock position. Defendants' Video Axon 16-1; 27April2021; 2000:30-2001:14; VC¶¶53-54; AADI #6(a).

Approximately 15 minutes elapsed before the Defendants extracted Plaintiff from

the vehicle. Id.; VC¶55.

Plaintiff could not move his hands because of the handcuffs. The handcuffs were painfully tight located behind his back and appeared to be caught on the seatbelt fasteners. The handcuffs left swelling and welts on both wrists. VC¶¶57-59; AADI #6(a); Howard_v._Weidemann_et_al.,_20-cv-1004_P-000005_through_000006.

Plaintiff's jean pocket was also torn. Plaintiff's left arm with the tight handcuffs was pulled in way that caused enormous pain to Plaintiff. Plaintiff believed that his left shoulder was pulled out of its socket because of the pain and the way his left shoulder did not move properly. VC¶¶57-61; AADI #6(a).

On Plaintiff's scheduled May 2, 2018, diabetic appointment, Doctor Schaffer, Plaintiff's Diabetic Team Doctor, indicated Plaintiff's health was generally good and that his diabetes was in check. It was then Mr. Howard explained about his shoulder and arm and the pain. Mr. Howard briefly told Dr. Schaffer about the 27 April 2018 incident with the White Earth Police. Dr. Schaffer recommended that Plaintiff have x-rays whereby, Dr. Schaffer contacted X-Ray, and the X-Ray results revealed a possible rotator cuff injury. Dr. Schaffer rendered his diagnosis, his recommendations for activity, and prescription medications due to the injury. VC¶¶63-67; AADI#6(a).

Subsequent medical examination revealed that Plaintiff suffered a painful injury aggravating a possible chronic torn left shoulder rotator cuff on 27 April 2018. VC¶68; AADI#6(a);AADI#1_with_incorporation_of_Plaintiff's_P-000158_through_000171; see P-000162, Plaintiff's White Earth Health Clinic Record, May 2, 2018, Dr. Charles Shaffer, "Patient with recent police altercation; ongoing left shoulder pain"; P-000163: Shoulder

pain; exam concerning rotator cuff tear; X-ray: P-000164-65: "Distance between the humeral head and acromion process appears narrowed, raising the possibility of chronic rotator cuff tear... degenerative change as noted above; possible chronic rotator cuff tear"; P-000166 (same).

Mr. Howard suffered the following physical injuries: injured left shoulder rotator cuff; extreme pain; bruises around both wrists; temporary immobility of his left arm; inability to do basic home chores, including sweeping; and inability to do home projects, including assembling a carport he had purchased before the 27 April 2018 incident. VC¶70; AADI#6(a).

Mr. Howard suffered psychological injuries, including recurrent nightmares; lingering pain; and severe emotional distress at the hands of the Defendants that required continued medical care. Id.; VC¶71. Mr. Howard received medical care from the Fargo Veterans Administration Medical Center and the White Earth Health Center on the White Earth Reservation. Id. at VC¶72; AADI#6(a).

The facts establish that Defendants Weidemann and Meyer operate as junior law enforcement agents of the United States Government under Chapter 638. Concomitantly, the White Earth Reservation Business Council waived the White Earth Band's sovereign immunity, waived the immunity of White Earth Tribal Law Enforcement Officers, subjected White Earth tribal officers to tort liability under Chapter 466 of the Minnesota Statutes, filed a certificate of insurance eligibility with the Minnesota Peace Officer Standards and Training Board ("POST Board), and subjected the White Earth Tribal Police to the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. §13.82

and other MGDPA provisions affecting law enforcement authorities, in consideration for enforcement of Minnesota criminal laws upon the territory of the White Earth Reservation laying in Becker County. See AADI #1(b) (incorporation of all documents within Plaintiff's Fed. R. Civ. P. 26(a)(1) Disclosures); P-000147 through P-000156, with focus upon 000147-000149 and 000155-000156 (map showing White Earth Reservation within Becker County):

> d. The Reservation files with the Minnesota Board of Peace Officer Standards and Training a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution.
>
> e. The Reservation agrees to be subject to Minnesota Statute Section 13.82 and any other laws of the State of Minnesota relating to data practices of law enforcement agencies.
>
> f. The execution of this agreement by all parties.
>
> IDENTIFICATION OF OFFICERS
> The Reservation shall provide to County, and the County to the Reservation, a current list of all of its duly licensed peace officers and shall at all times keep County advised of the names of officers exercising authority pursuant to this agreement. The Reservation shall provide to County, and the County to the Reservation, the Minnesota POST Board peace officers
> license number of all officers exercising authority under this is agreement. It is understood
> and agreed between the parties that no officer who is! not duly licensed as a peace officer by
> the Minnesota POST Board shall exercise authority under this agreement.
> . I
> RESERVATIONBOUNDARIES
> This agreement shall encompass that part of the White Earth Reservation located within the County of Becker, which is identified by the map attached hereto as Exhibit A.
>
> RETENTION OF COUNTY CRIMINAL JURISDICTION AND RESPONSIBILITY

> Nothing in this agreement shall be construed to limit or to release the County or Sheriff from Criminal jurisdiction or responsibility otherwise possessed by the County under applicable law. The Sheriff or officer in control of the Sheriff's Department shall have the authority to control any designated crime scene, and law enforcement officers of the Reservation will cooperate with the direction of the Sheriff or office in charge.
>
> ENFORCEMENT, INCARCERATION AND PROSECUTION
>
> a. Law Enforcement. If County officers stop a reservation member for a civil regulatory offense or are involved in a stop for a criminal offense, which also includes civil regulatory offenses, County officers shall take appropriate action, which may include writing a report and/or issuing a citation to Tribal Court. The chief law enforcement officer of the Reservation shall provide citation books and copies of the White Earth Code to the County to enforce civil regulatory laws under the Code.
> ...
>
> c. Prosecution. In any matter involving the citation of an individual by a Reservation law enforcement officer under the provisions of this agreement that occurs within that part of the White Earth Reservation that lies within County, the prosecution of such individual shall be by the Becker County Attorney pursuant to applicable Minnesota law.
>
> Paragraphs 6.b. and 6.c. shall not be construed to apply to the incarceration or prosecution of Reservation members for alleged violations of the laws of the Reservation.

III. Governing Law

A. Rule 56

Fed. R. Civ. P. 56(a) allows summary judgment if the record shows, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See *Ludwig v. Anderson*, 54 F.3d 465, 472 – 73 (8th Cir. 1995) (police misconduct wrongful death of emotionally disturbed veteran; summary judgment rev'd). The movant has the burden to show that no material, disputed,

triable facts exist. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

"Competent evidence" is that evidence of which the declarant has first-hand information. *Celotex*, 477 U.S. at 322 n. 3. A verified complaint comprises a Rule 56 affidavit. *Munz v. Michael*, 28 F.3d 795, 798 (8th Cir. 1994) (qualified immunity denial aff'd).

The court must review all the evidence in the record. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 547, 587 (1986). The court must leave credibility determinations, evidence weighing, and drawing of legitimate inferences of evidence to the jury. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 140, (2000) (ADEA; Rule 50 equated to Rule 56(c) standard; plaintiff's verdict reinstated), citing *Liberty Lobby*, supra at 250-51, 255).

The court must "disregard all evidence favorable to the moving party that that jury is not required to believe." *Reeves* at 140, citing 9A C. Wright & A. Miller, Federal Practice and Procedure, § 2529, p. 299. The court "should give credence to the evidence favoring the nonmovant as well as 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Reeves*, 530 U.S. at 140; *Henderson v. Munn*, 439 F.3d 497, 502 (8th Cir. 2006) (same; excessive force inflicted to plaintiff's leg after handcuffing; qualified immunity denied, notwithstanding conviction for misdemeanor

obstruction of legal process).

B. Summary Judgment and Qualified Immunity

Qualified immunity protects individual government officials from liability unless their conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Pagels v. Morrison*, 335 F.3d 736, 739-40 (8th Cir. 2003) (defense is not available to government entities).

Once an individual defendant raises qualified immunity, the court must launch a three-part examination. First, the court must determine whether the facts alleged show a violation of a constitutional right. See *Tolan v. Cotton*, 572 U.S. at ___, 134 S. Ct. 1861 at ___, 13-551 at p. 6 of 13 (2014) (qualified immunity denied and remanded in view of four material disputed facts between plaintiff and police). Second, the court must determine whether the right was then "'clearly established'... [that the contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right." Id., citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

The "state of the law" must give government actor(s) "fair warning" the alleged conduct is unconstitutional. Id. at 741, *Tolan* at ___, 13-551 at 6. Courts have discretion in the testing order. Id. at 6 – 7. Under neither prong may a court "resolve genuine disputes of fact in favor of the [movant]." *Tolan* at __, 13-551 at 7 (rev'd; no qualified immunity).

It is not necessary to find a case exactly on all fours; "but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 728,

740-44 (2002) (qualified immunity in 8th Amendment case denied; enumeration of Supreme Court and circuit precedents, governing law enforcement agency regulations, and relevant reports of government agencies as sources of clearly established law); and *Tennessee v. Garner*, 471 U.S. 1, 15 - 16 (1985) (consideration of prevailing rules in individual jurisdictions).

The movant bears the burden to prove all "predicate facts" for qualified immunity. *White v. McKinley*, 519 F.3d 806, 813 (8th Cir. 2008) (qualified immunity denial aff'd).

Defining "clearly established law" in the "specific context of the case" prohibits definition of "context" that "imports genuinely disputed factual propositions." *Tolan* at 1866, 13-551 at 7¶2. The court that defines "clearly established law" in a manner that ignores genuine, outcome-determinative factual disputes, incorporates the movant's proposed factual findings into the contours of "governing" law, ignores contradictory admissible evidence, improperly "weighs" evidence and commits reversible error. U.S. Const. amend. VII, *Tolan*, 572 U.S. at ___, 13-551 at 8¶1, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (*Tolan*; four material factual disputes in police shooting ignored by lower courts; rev'd and remanded).

It is reversible error to grant qualified immunity by construing an action as one that an officer can "reasonably interpret" as an unlawful act, when the plaintiff's evidence is contrary. See *Swiecicki v. Delgado*, 463 F.3d 489, 493 – 94 (6th Cir. 2006) ("interpretation" of plaintiff's arm movement; summary judgment rev'd); *Littrell v. Franklin*, 388 F.3d 578, 584 (8th Cir. 2004) (same); and *Johnson-El v. Schoemel*, 878 F.2d 1043, 1048 (8th Cir. 1989) ("The defendant bears the burden of proof with respect

to all the elements of the defense...").

See also, *Henderson*, 439 F.3d at 503 (factual dispute between plaintiff and officer; officer controlling plaintiff already with handcuffs; additional force unnecessary and accusations of minor offenses unavailing to officer):

> Urging us to adopt a contrary position, Officer Munn argues that "[i]n light of the fact that Henderson was resisting arrest, there is nothing `excessive' about using pepper spray to get [Henderson] under control." Such an interpretation ignores our duty at the summary judgment stage to view the evidence in the light most favorable to Henderson, the nonmoving party. Henderson denied resisting arrest.... Henderson was under control lying face down on the ground with both arms handcuffed behind his back.... Henderson posed little or no threat to the safety of the officers or others.... [A] reasonable jury could decide Henderson was no longer resisting arrest, even if he had resisted arrest before being subdued. Additionally, Officer Munn's reference to the offenses for which Henderson was arrested-obstructing governmental operations by giving a false name, resisting arrest, public intoxication, and the two outstanding warrants for failure to appear-fails to tip the scales of reasonableness in Officer Munn's favor.

See also, *Michael v. Trevena*, 899 F.3d 528, 532 17-1946 (8th Cir. 2018) (summary judgment rev'd; blurry video with 2-1 split amongst panel; plaintiff's version "not blatantly contradicted" by video, *Scott v. Harris,* 550 U.S. 372, 378-81 (2007); denying qualified immunity in case arising before 2017)

C. Color of Law: Definitions and Pleading

42 U.S.C. §1983 provides that any person or persons who, "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory," deprives another of any rights, privileges, or immunities secured by the Constitution or laws of the United States shall be liable to the injured party." See 8th Cir. Civ. Jury Inst. 4.01 (2020).

"Color of law" does not turn upon the veracity – or lack of veracity – of the defendant. See 8th Cir. Civ. Jury Inst. 4.20 (2020): "Acts are done under color of law when a person acts or [falsely appears] [falsely claims] [purports] to act in the performance of official duties under any state, county or municipal law, ordinance or regulation.]".

Individuals who act under color of federal law face suit for violations of Fourth Amendment prohibitions against unreasonable searches and seizures. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971):

> The Fourth Amendment provides that:
>
> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .."
>
> In *Bell v. Hood*, 327 U. S. 678 (1946), we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.

See, e.g., *Eyck v. U.S.*, 463 F.Supp.3d 969, 989 (D.S.D. 2020) (actions found under color of federal law; motion to dismiss denied in part). N.B. *Bivens* actions do not embrace relief under 42 U.S.C. §1988.

Failing to plead §1983 does not preclude an action under §1983 for an action that pleads a due process violation under the Fourteenth Amendment. See *Thomas v. City of Shelby, Mississippi*, 574 U.S. 10, 13-1318 (U.S. Nov. 10, 2014) (summary judgment vacated, reversed, and remanded):

> Charging violations of their Fourteenth Amendment due process rights, they sought compensatory relief from the city. Summary judgment was entered against them in the District Court, and affirmed on appeal, for failure to invoke 42 U. S. C. §1983 in their complaint.

> We summarily reverse. Federal pleading rules call for "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted [citations omitted].... In particular, no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke §1983 expressly in order to state a claim.

See *Viewpoint Neutrality Now! v. Regents of the University of Minnesota*, 20-cv-1055 (D. Minn. Feb. 2, 2021) (Schiltz, Patrick, J.) (denying motion to dismiss in part, citing *Thomas*; "*City of Shelby* was not a case about the *correctness* of a legal theory pleaded in a complaint; it was a case about the *specificity* with which a legal theory must be pleaded []").

Point 1

Defendants' §1983 Bar Argument Is Meritless.

The Defendants' §1983 bar argument is meritless.

A. *Bivens*

Mr. Howard's Claims 1 and 3 stated two separate Fourth Amendment claims against Weidemann and Meyer for actions under color of law. VC¶¶76-78; 82-84. Mr. Howard pleaded their actions under color of law as White Earth tribal law enforcement officers in the title, introduction, and VC¶¶19 and 23. Assuming for the moment that the Defendants' Chapter 638 status precludes conduct under color of state law, then they acted under color of federal law. Mr. Howard pleaded violations of his Fourth Amendment right to be free from unreasonable seizure by infliction of excessive, unreasonable force (Claim 1), and violation of his right to be free from unreasonable seizure of his person (Claim 3).

Mr. Howard set forth verified facts to support his theory of two discrete Fourth Amendment violations. VC¶¶26-70; 76-78 and 82-84. See *Munz,* 28 F.3d at 798 supra (verified complaint as Rule 56 affidavit: qualified immunity denial aff'd). Just as Johnson's failure to plead §1983 was not fatal to his constitutional due process claim, *Johnson*, 574 U.S. at 10-11, Mr. Howard's invocation of §1983 is not fatal to his claims. Weidemann and Meyer have more than adequate notice that Mr. Howard is suing them for violations of his federal Fourth Amendment rights. *Viewpoint Neutrality Now!,* ___ F.Supp.3d at ___, 20-cv-1055 at p. 5/18 (specificity of claim over correctness of claim).

Mr. Howard states a *Bivens* constitutional claim, 408 U.S. at 389, supra; *Eyck*, 463 F.Supp.3d at 989.

B. §1983

Eighth Circuit civil jury instructions show that false invocation of actions under state law comprise actions under color of state law. 8th Cir. Civ. Jury Inst. 4.20: "Acts are done under color of law when a person acts or [falsely appears] [falsely claims] [purports] to act in the performance of official duties under any state, county or municipal law, ordinance or regulation.]". Weidemann was operating in accordance with the Becker County–Whether Cooperative Law Enforcement Agreement when he wrote out a State of Minnesota citation to Mr. Howard that identified the Becker County Attorney as the prosecutor; Assuming for the moment (reading all factual ambiguities in the favor of nonmovant Robert Howard; *Celotex,* 477 U.S. at 322-24, that Weidemann did *not* know the enrollment status of the alleged speeder driving Mr. Howard's car to the Post Office, nor did he know the enrollment status of the driver with the purported drunk driver's breath [sic], then

Weidemann either (a) falsely appeared to; (b) falsely claimed to; or (c) purported to act under color of state law, when he seized Mr. Howard. The jury must resolve the factual dispute over color of law, per 8th Cir. Civ. Jury Inst. 4.20. *Celotex*, 477 U.S. at 322 (material, factual disputes as Seventh Amendment jury questions); *Reeves*, 530 U.S. at 140 (same).

Point 2

Material Disputed Facts Over the Reasonableness of the Defendants' Prolongation of Mr. Howard's Seizure Require Trial of Mr. Howard's Claim 3.

Material, disputed facts over the reasonableness of the Defendants' prolongation of Mr. Howard's seizure require trial of Mr. Howard's Claim 3.

The plain words of U.S. Const. amend. IV protect individuals from "unreasonable searches and seizures" of their "persons, places, papers, and effects." Warrantless searches are *per se* unreasonable, in the absence of an exception to the warrant requirement. *Minnesota v. Dickerson*, 508 U.S. 366, 372-73 (1993).

> One such exception was recognized in *Terry v. Ohio*, 392 U.S. 1 (1968), which held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . .," the officer may briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions. Id., at 30.
>
> See *De la Rosa v. White*, 852 F.3d 740, 743 (8th Cir. 2017):
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> A traffic stop is constitutionally reasonable "where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 809-10 (1996) []. A traffic stop may include inquiries incident to determining whether to issue a citation, and limited unrelated inquiries such as checking to determine if the vehicle occupants are wanted for prior offenses. See *Rodriguez v. U.S.*, ___ U.S. ___, 135 S. Ct. 1609,

> 1614-15[] (2015). However, extending the detention beyond the time needed to complete the traffic-ticketing process is unlawful unless additional investigation, such as a dog sniff of the vehicle's exterior, is warranted by the officer's reasonable suspicion that other criminal activity may be afoot. See *Rodriguez,* 135 S. Ct. at 1616 [conviction vacated and remanded;]; *U.S. v. Sokolow,* 490 U.S. 1, 7, 109 S. Ct. 1581 [] (1989).
>
> See *Rodriguez*, 135 S. Ct. at 1616-17:
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> [T]he question whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation, therefore, remains open for Eighth Circuit consideration on remand.... [T]he judgment of the United States Court of Appeals for the Eighth Circuit is vacated, and the case is remanded.

Weidemann had, at best, arguable probable cause to stop Mr. Howard for speeding; this was the lone charge against Mr. Howard; the band continued the ticket for dismissal and dismissed it finally. Weidemann's failure to specify a speed in excess of the posted limit on the ticket itself, DEF000009, or with some objective indicator, such as a printed radar gun read-out, calls his credibility into question.

Weidemann gratuitously asked Mr. Howard whether he had been drinking, without noting in any written report or the contemporaneous body-worn camera or squad videos the "usual suspects" of drunk driving indicia – bloodshot, watery eyes, slurred speech, and unsteady walk. Mr. Howard answered "no," stating he had not had a drink in five years, and did not drink, because of diabetes. Weidemann's credibility is no more and no less than the older brother who grabs his younger brother's hand, strikes him with his own hand, and asks, "Why are you hitting yourself?", or an all-too frequent occurrence in excessive force cases -- a police officer, who has subdued a nonresisting suspect and subjects him or her to physical abuse, implores the suspect, "Stop resisting! Stop resisting!"

At this stage, Mr. Howard has the benefit of the doubt. *Michael*, 899 F.3d at 532; *Celotex*, 477 U.S. at 322; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986); and *Tolan*, 134 S. Ct. at 1866 ("By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party," citing *Anderson*, 477 U.S. at 249.

More evidence manifests the unconstitutionally, unreasonable prolongation of principally Weidemann's and, in a supporting role, Meyer', seizure of Mr. Howard. Weidemann applied one preliminary breath test (PBT) to Mr. Howard; the result was 0.0%. The Defendants' body-worn cameras show Meyer administering a PBT: 0.0% again. Weidemann administered a "sitting" horizontal gaze nystagmus (HGN) test that proved nothing, except that Weidemann departed from protocol to harass Mr. Howard.

Mr. Howard testified in his verified complaint that he had four PBT's, all showing 0.0%. VC¶40. Mr. Howard's and the Defendants' stories do not "blatantly contradict" one another, Scott, 550 U.S. at 378. One PBT is reasonable; two would be reasonable if the first PBT were defective. Beyond two PBT's, Weidemann – with Meyer in a supporting role --unreasonably prolonged his seizure of Mr. Howard without new reasonable suspicion, let alone probable cause. *De la Rosa*, 852 F.3d at 743; *Rodriguez*, 135 S. Ct. at 1616; and *Terry*, 392 U.S. at 30.

De la Rosa and *Rodriguez* preceded the 27 April 2018 incident; the law requiring at minimum reasonable suspicion for incremental prolongation of an initially reasonable seizure was clearly established. *Tolan*, 134 S. Ct. at 1866; *Michael*, 899 F.3d at 532; and *Henderson*, 439 F.3d at 503. Qualified immunity to Mr. Howard's Fourth Amendment

Claim #3 does not protect Weidemann or Meyer. The court should deny summary judgment to the Defendants on Fourth Amendment Claim 3.

Point 3

**Weidemann Inflicted Unconstitutional,
Excessive, and Unreasonable Force upon Mr. Howard.
the Court Must Deny Qualified Immunity and Summary Judgment to Weidemann.**

Defendant Weidemann inflicted unconstitutional, excessive, and unreasonable force upon Mr. Howard for a mere speeding ticket. The court should deny qualified immunity and summary judgment on Claim 1.

> "[T]he test is whether the amount of force used was objectively reasonable under the particular circumstances." *Small v. McCrystal*, 708 F.3d 997, 1005 (8th Cir. 2013) (quoting *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009)). Objective reasonableness is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396[] (1989). The assessment "requires careful attention to the facts and circumstances of each particular case, including 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." Id. Applying these factors, we have previously "denied police qualified immunity in an excessive force case where ... (1) the arrestee's `alleged misconduct was neither violent nor serious,' (2) `there was little evidence to indicate that the arrestee posed a physical threat to anyone,' and (3) `there was a factual dispute as to whether the arrestee was "actively" resisting arrest.'" *Atkinson v. City of Mountain View*, 709 F.3d 1201, 1213 (8th Cir. 2013) (cleaned up) (quoting *Gainor v. Rogers*, 973 F.2d 1379, 1388 (8th Cir. 1992)). We have also held "that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." *Brown*, 574 F.3d at 499.

Michael v. Trevena, 899 F.3d at 532-33 (summary judgment rev'd; qualified immunity denied in case arising before *Howard v. Weidemann et al.* and remanded for trial).

"We now conclude that a citizen may prove an unreasonable seizure based on an excessive use of force without necessarily showing more than *de minimis* injury[.]" *Chambers v. Pennycook,* 641 F.3d 898, 901 (8th Cir. 2011) (clearly established Fourth Amendment excessive force law after *Chambers*).

"It was clearly established in 2009 that when a person is subdued and restrained with handcuffs, a 'gratuitous and completely unnecessary act of violence' is unreasonable and violates the Fourth Amendment." *Henderson v. Munn,* 439 F.3d 497, 503 (8th Cir. 2006); *Blazek v. City of Iowa City*, 761 F.3d 920, 925 (8th Cir. 2014) (qualified immunity denial aff'd).

Officer Weidemann seized Mr. Howard for an alleged speeding ticket, a minor civil regulatory infraction. Once Mr. Howard heard Weidemann, he made no move to flee. Mr. Howard made no aggressive act toward Weidemann, nor did he resist Weidemann's handcuffs. He patiently endured four 0.0% PBT tests. Weidemann had need for minimal force on the scene. *Graham*, 490 U.S. at 396; *Atkinson*, 709 F.3d at 1213 (qualified immunity denial aff'd).

If handcuffing were all that Weidemann inflicted, he might have walked. Without objective evidence that Mr. Howard actually exceeded the speed limit, in view of the ultimate dismissal of the ticket, and in view of four 0.0% PBT's, any post-initial-seizure force inflicted by Weidemann would be clearly unreasonable. *Johnson v. Courtois,* 17-cv-3608, p. 10/12 (D. Minn. Dec. 21, 2018)(Tostrud, Eric, J.), citing *Trang Nguyen v. Lokke,* No. 11-cv-3225 (PJS/SER), 2013 WL 4747459, at *3-4 (D. Minn. Sept. 4, 2013)(Schiltz, Patrick, J.)("Both before and after Chambers, the law was crystal clear that an officer does

not have the right to effect any seizure of a citizen — and thus does not have the right to use any force against a citizen — except when there is probable cause to believe that the citizen has committed a crime (or in the narrow circumstances when probable cause is not required)..

Weidemann could not resist insulting Mr. Howard further.

Rather than handcuff Mr. Howard by his own automobile and keep him there, junior federal agent Weidemann stuffed Mr. Howard into the 1½ foot crawl space of Weidemann's squad car passenger compartment, folding Mr. Howard into the cramped 2 o'clock position. In so doing, he tore Mr. Howard's jeans pocket and caught him on the shoulder straps on the back seat, inflicting pain in Mr. Howard's left shoulder that White Earth Clinic Center Dr. Shaffer diagnosed five days later as a suspected chronic left shoulder rotator cuff tear; Weidemann's intentional actions in exacerbating the unreasonably prolonged seizure of Mr. Howard aggravated a preexisting chronic condition – Mr. Howard's eggshell shoulder. VC¶¶53-62; Plaintiff's Annotated Amended Answers to Defendants' Interrogatories (AADI), Plaintiff's Bates Documents P-000162 through P-000166. Mr. Howard's continued to plague him for months, as noted in his 31 December 2018 White Earth Health Center chart at P-000172.

The parties dispute material facts in Weidemann's use of force on Mr. Howard, particularly in his prolonged, stress position detention in Weidemann's squad car. Weidemann at least, and Meyer in a supporting role, have no qualified immunity for infliction of excessive, unreasonable force upon Mr. Howard's person. *Chambers*, 641

F.3d at 901; *Henderson*, 439 F.3d at 503; *Blazek*, 761 F.3d at 925; and *Johnson*, p. 10/12, citing *Trang Nguyen* at *4. Rule 56 judgment does not lie; the jury must decide.

Conclusion

Whether they are in "Indian Country," whether they are Chapter 638 junior federal agents, or whether they are trans-jurisdictional, hermaphroditic CLEA officers issuing State of Minnesota citations in the name of the Becker County Attorney, Weidemann and Meyer are accountable under the United States Constitution for violations of Mr. Howard's clearly established Fourth Amendment right to be free from unreasonably prolonged, causeless seizure and infliction of excessive, unreasonable force. The court should deny summary judgment on Claims 1 and 3 and send this case to jury trial.

27 July 2021

Respectfully:

PETER J. NICKITAS LAW OFFICE

/s/ *Peter J. Nickitas* (electronically signed)

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