

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA**

(1) BARBARA BARRICK, as Special
Administrator of the ESTATE OF
BOBBY DALE BARRICK, deceased,

Plaintiff,

v.

(2) BOARD OF COUNTY
COMMISSIONERS OF MCCURTAIN
COUNTY, OKLAHOMA,

(3) MCCURTAIN COUNTY SHERIFF
KEVIN CLARDY,

(4) DEPUTY MATTHEW KASBAUM,

(5) DEPUTY QUENTIN LEE,

(6) DEPUTY KEVIN STOREY,

(7) WARDEN MARK HANNAH,

Defendants.

Case No. CIV-23-129-GLJ

Magistrate Judge Gerald Jackson

**REPLY AND BRIEF IN SUPPORT OF DEFENDANT HANNAH'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff's Response to Defendant Hannah's Motion for Summary Judgment turns entirely upon her unsupported allegations that Barrick (1) did not resist or fight officers and (2) did not pose any threat to the safety of the officers or public. *See* Plaintiff's Facts at ¶¶ 16-61. Doc. 203. However, "[u]nsubstantiated allegations carry no probative weight in summary judgment proceedings. To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004) (citation omitted). Plaintiff attempts to create a morass of confusion to obscure the immateriality of her "additional facts" and mischaracterizes snippets of testimony to misconstrue the short altercation between Barrick and the Officers. Accordingly, Plaintiff's claim of excessive force fails. "[T]estimony which is grounded on speculation does not suffice to create a genuine issue of material fact to withstand summary judgment." *Id.* at 876. For the foregoing reasons, Plaintiff's reliance upon

unsubstantiated and fictitious allegations and opinions - particularly with regard to whether Barrick resisted (i.e., fought) the officers' and posed any threat - to the officers, first responders, or broader public - should be disregarded, because they are not supported by admissible evidence.

I. DEFENDANTS DID NOT CAUSE BARRICK'S DEATH.

Since the inception of this suit, Plaintiff has baldly alleged that “[p]laintiff unnecessarily suffered pain and death as a direct and proximate result of the force used by Defendants Kasbaum, Lee, Storey, and Hannah.” *See* Complaint, Doc. 2, ¶ 92. However, it remains undisputed that the Defendant Officers’ acts did not cause Barrick’s death. In fact, Plaintiff nearly ignores the issue in her response but does include a footnote baldly stating that Hannah’s argument surrounding causation “lacks merit.” Doc. 203, pg. 32. However, it is well known that the courts employ general tort principles of causation in § 1983 cases to determine whether a defendant’s constitutional violation caused a plaintiff’s damages. *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (“§ 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions”), overruled in part on other grounds by *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978); *see also* *Cty. of Los Angeles v. Mendez*, 581 U.S. 420, 430-31 (2017) (“[P]laintiffs can—subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment violation”). The Plaintiff must prove that these Defendants were both the cause-in-fact and the proximate cause of Barrick’s death. *See Trask v. Franco*, 446 F.3d 1036, 1046 (10th Cir. 2006). Here, Plaintiff has wholly failed to prove either. Therefore, Defendant Hannah should be granted summary judgment on the issue of whether he caused Barrick’s death.

II. DEFENDANT HANNAH’S MATERIAL FACTS REMAIN UNDISPUTED.

Plaintiff admits that the majority of Defendant’s facts are undisputed, and she has produced no evidence contradicting the facts that she alleges are disputed. To satisfy its burden at summary judgment, the nonmovant must point to competent summary judgment evidence creating a genuine dispute of material fact; conclusory statements based on speculation, conjecture, or subjective belief are insufficient. *See Bones v. Honeywell Int’l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004). “Conclusory, self-serving assertions, devoid of factual support, do not create a genuine issue of material fact.” *Li Zu v. Avalon Health Care, Inc.*, 806 F. App’x 610, 617 (10th Cir.) (unpublished). This standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

UMF Nos. 42, 43, 47, 49, 51: Plaintiff denies that Barrick was combative, fighting, and “offered any meaningful resistance” with the officers. But Plaintiff provides no *particular*¹ evidentiary materials supporting such denials and instead vaguely cites to **over twenty-five (25)** of her additional “facts”. Notably, **all** EMTs and Officers on the scene declared in their written statements and testified that Barrick resisted, was combative, and fought the officers. *See* Doc. 195-1, pgs. 86: 11, 101: 19-21, 103: 11-25, 104: 5-13, 105: 14-16, 263:23-264:3, 272: 2-6 ; *See* Doc. 195-2, pgs.1-2; *See* Doc. 195-3, pg. 3; *See* Doc. 195-4, pgs. 53:8-54:2; *See* Doc. 195-5, pg.1; *See* Doc. 195-6, pgs. 3, 7 ; Doc. 195-7, pg.67:2-6; *See* Doc.195-8, pg.1, *See* Doc.195-9, pgs. 76: 6-9, 158: 11-16, 159: 2-18, 163:10-16, 177:12-14, 199: 14-15, 235:8-19; *See* Doc.195-10, pgs.1-2, *See* Doc. 195-11, pgs. 19:10-11, 26: 19-25, 27: 1-24, 28: 13-14, 29: 10-23, 44: 2-13, 131: 14-20; *See* Doc. 195-12, pg. 1; *See* Doc. 195-14, pgs. 13:22-14:25, 23: 12-20, 25: 10-22, 40: 12-15, 42: 6-10 (“[Barrick] was fighting, he was fighting hard.”); *See* Doc. 195-15, pgs. 1-2; *See* Doc.195-16, pg.1. Plaintiff fails to show a genuine dispute of material fact.

UMF No. 44: Plaintiff purports to deny fact No. 44. But Plaintiff only disputes *the time* at which Barrick kicked Defendant Hannah. She **does not deny the fact that Barrick kicked Defendant Hannah**. In simplest terms, the exact moment at which Barrick kicked Hannah is not material to the claims against Defendant Hannah. The record is clear that Hannah was kicked in the face by Barrick during the short altercation. *See* Response to PAMF #38; Doc. 195-2, pg. 2; Doc. 195-3, pg.9; Doc. 195-4, pg. 195:14-21; Doc. 195-10, pgs. 1-2. Plaintiff fails to show a genuine dispute of material fact.

UMF No. 45: Plaintiff purports to deny this fact. However, it’s not an actual denial as Plaintiff is denying something that is not contained in the fact. Plaintiff denies that “Barrick spontaneously dropped” but does not deny that Barrick dropped to the ground. Notably, an EMT on the scene (Kaytlynn Lane) who witnessed and saw Barrick drop to the ground testified that, “[Barrick] dropped to the ground, and he immediately started trying to climb under the police officer's cruiser”. *See* Doc.195-14, 17:17-25. This so-called “denial” does not create a genuine dispute.

UMF No. 46: Plaintiff purports to deny this fact, but it is not an actual denial. She baldly denies “that Barrick was ever under the truck.” In support of her denial, she cites solely to her “additional fact No.5”. But her very own “facts” explicitly state that “Hannah pulled Barrick from under Lee’s truck.” *See* Pl’s facts No. 5, 7, and 9. This so-called “denial” by Plaintiff does not create a genuine dispute of material fact. In addition, whether Barrick was under the truck at some point is immaterial.

¹ “[A] party asserting that a fact is genuinely disputed must support the assertion by citing to *particular* parts of materials in the record, such as depositions, documents, electronically stored information, affidavits, or declarations.” *See* FRCP 56 (e) (emphasis added).

UMF No. 66: Plaintiff baldly denies that Barrick's death **was not** caused or contributed to by asphyxia. She cites solely to her "additional facts Nos. 90 & 91" to support her alleged dispute. But both of her "facts" contain **no citations to evidentiary materials or records**. Conclusory responses without citations to *particular* evidentiary materials are inadequate to dispute facts. *See* FRCP 56 (e). "Conclusory, self-serving assertions, devoid of factual support, do not create a genuine issue of material fact." *Li Zu v. Avalon Health Care, Inc.*, 806 F. App'x 610, 617(10th Cir.) (unpublished). Plaintiff has wholly failed to produce evidentiary material disputing this fact. Therefore, no genuine dispute has been established. There remains no medical testimony, no medical record, nor medical finding of any kind showing Barrick died of asphyxia as opposed to meth intoxication.

The facts remain undisputed, and the plaintiff has wholly failed to establish a genuine dispute of material fact.

III. RESPONSE TO PLAINTIFF'S ALLEGED FACTS.

As Defendant Hannah is the moving party, he is not required by Fed. R. Civ. P. 56 or LCvR 56.1 to reply to Plaintiff's statement of "facts." In any event, none of the additional facts alleged by Plaintiff preclude summary judgment for Defendant in this matter. Hannah does not concede the veracity or relevance of Plaintiff's statement of facts, but does respond to the following:

PAMF² Nos. 1³, 2, 4, 6, 7, 20-23, 48, 49, 50, 53-55, 60-61⁴, 82-84, 96, 99-126: These "facts" are not relevant or material⁵ to the claims against Defendant Hannah and are directed towards other Defendants.

a. At no point during the encounter with Barrick were two or more deputies supporting their body weight on Barrick and pressing him against the ground.

PAMF Nos. 8, 10, 47, 57, 62: Disputed that "two or more deputies were lying on top of Barrick" at any point during the rapid encounter. To support these "facts," Plaintiff cites to EMT Wyatt's testimony. However, Plaintiff mischaracterizes and leaves out vital portions of EMT Wyatt's testimony. First, EMT Wyatt testified that it was *only* Deputy Lee that was allegedly on top of Barrick, **not "two or three deputies"** as Plaintiff alleges. Doc. 195-11, 24:5-25:11 ("**I want to say it was Quentin**

² Plaintiff's additional material facts.

³ Relevant to Nos.1 and 2, Defendant Hannah **did not** arrive on the scene until Barrick was already in Deputy Lee's truck. *See* Kasbaum bodycam video, Doc. 195-36,

⁴ This "fact" appears to be a clerical error/mistake by Plaintiff. Nonetheless, it is not material to this suit.

⁵ "An issue of fact is material if under the substantive law it is essential to the proper disposition of the claim." *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013).

Lee was on top of the patient.”). Second, Wyatt goes on to testify that she actually does not remember which officer it was (**“I’m not 100 percent sure now at this time that it was Quentin Lee”**). Doc. 195-11, 24:5-25:11. Third, EMT Wyatt then confirms that all she can remember is that Deputy Lee was trying to keep Barrick still. (**“he was trying to keep him still, that's all I remember”**). Doc. 195-11, 25:22-25, 26:1-17. Wyatt testifies that at this time Barrick was still resisting and fighting the officers and bit one of the officers. (“He just kept fighting.”, “He bit one of the officers”, “he did bite one of the officers.”) *Id.* at 26:12-25.

PAMF No. 13: Disputed. Lee and Storey were to the side of Barrick and not lying on top of him. Plaintiff again blatantly mischaracterizes and misphrases testimony. Defendant Hannah explicitly testified: “I think Quentin was pretty much on his head trying to control his head and his upper shoulders and I think Kevin was below him. They weren't in a full mount, but they were to the side.” Doc.195-9, Pgs. 182:23-183:7. Plaintiff also cites to paragraph 17 of Mr. Wallentine’s Expert Report for support of her “fact.” However, Mr. Wallentine states: “No evidence in the record supports Plaintiff’s claim that three deputies were supporting their body weight on Barrick and pressing him against the ground.” Doc.195-20, pg.20, ¶ 17. This completely contradicts Plaintiff’s allegation. Plaintiff wholly fails to support her bald allegation that Deputy Lee and Kasbaum were lying on top of Barrick.

b. The undisputed material facts show that Barrick fought and resisted officers until the moment he went non-responsive.

PAMF No. 18: Disputed. Plaintiff’s “fact” is devoid of any citations to *particular* evidentiary materials. Instead, she points to over *forty* (40) of her own conclusory “facts”, many of which have no relevancy to No. 18. **All** Officers and EMT’s on the scene testified that Barrick fought and resisted officers until the moment Barrick went non-responsive. *See* Doc. 195-1, pgs. 263-264 (**“[Barrick] goes from fighting us and struggling to instant shutoff.”**); *See* Doc.195-2, pg.2; *See* Doc. 195-4, pgs.53:8-54:2; pg.130:17-21; *See* Doc.195-5, pg.1; *See* Doc. 195-7, pg.38:10-13; *See* Doc. 195-7, pg.67:2-6; *See* Doc. 195-8, pg.1; *See* Doc. 195-9, pgs.247:25-248:4; *See* Doc. 195-11, pg. 29: 20-23; *See* Doc. 195-11, pgs. 26: 19-25, 28:13-14; *See* Doc. 195-14, pg. 23: 12-20; *See* Doc. 195-15, pg.1; *See* Doc.195-16, pg.1.

c. The record clearly shows that Barrick resisted the officers.

PAMF No. 19: Disputed. Barrick fought the officers in other ways. For example, he bit Officer Lee. *See* below. Plaintiff manipulates Deputy Kasbaum’s testimony to narrow the scope of the precise ways in which Barrick fought against all the officers. Kasbaum’s testimony omitted by Plaintiff is that, “[Barrick] continued to fight.” and “Mr. Barrick moved all over this area forwards, backwards, left and

right. He was rolling, tossing, kicking. He's moving. He is slothering all over” Doc. 195-1, pgs. 79: 20-23, 104:10-13. “[Barrick] was actively trying to do whatever he could to get us away from him. Cause injury to us. Whatever he thinks he needed to do. You know, it was a fight.” Doc. 195-4, pg.104: 14-19. Notably, Barrick was also biting Deputy Lee, and Lee sustained a bite in his arm. *See* Doc.195-1, pg. 104: 1-13, pg. 108:2-4, pg. 128:3-6, pg.228:5-6; *See also* Doc. 195-14, pg.94:21-95:2; *See also* Doc.195-15, pgs.1-2 (“He bit one of the officers at this point.”); *See also* Doc.195-16, pgs.1-2 (“The patient [Barrick] then bit an officer”); Doc.195-11, pg. 26: 12-25 (“[Barrick] did bite one of the officers”), (“[Barrick] just kept fighting. He bit one of the officers”).

d. The record clearly indicates that Barrick was kicking at the officers and kicked Defendant Hannah in the face

PAMF Nos. 24-46 (“kicking” section): Disputed. Plaintiff attempts to create a morass of confusion to obscure the immateriality of her “facts.” Plaintiff also self-manufactures a messy web of who saw who get kicked from an encounter that occurred years ago. However, the record is clear that (1) Barrick was kicking at all the officers and (2) Barrick kicked Defendant Hannah in the face. First, **both** EMT’s on the scene testified that Barrick was kicking at the officers. *See* Doc. 195-11, pgs.18:8-10, 19:10-11, 27:5-6, 89: 17-19; *See* Doc. 195-14, pgs. 13:22-14:8, 19:22-23, 22:14-22, 107:22-23. Additionally, **all officers** on the scene wrote in their written statements and testified that Barrick was kicking at them during the encounter. *See* Doc. 195-1, pgs. 79: 20-25, 96:2-97:16, 104: 10-13, 132:17-19, 137:3-5; 144:16-20, 165:3-8; *See* Doc. 195-2, pgs. 1-2; *See* Doc. 195-3, pg. 1; *See* Doc. 195-4, pgs. pg. 86:19-20, 87:21-23, 89:13-14, 91:10-14, 103:9-12, 104: 9-19, 195:14-21; *See* Doc. 195-8, pg. 1; *See* Doc. 195-9, pgs. 73: 1-3, 77: 2-4, 223:11-19, 231:21-23, 237:5-7 ; *See* Doc. 195-10, pgs. 1-2. **Second**, all Officers on the scene wrote in their written statements and testified that Defendant Hannah was kicked by Barrick and sustained an injury. *See* Doc. 195-1, pgs. 88: 12-24, 95: 12-15, *See* Doc. 195-2, pg. 2 (“At one point Mr. Barrick kicked past me and kicked Oklahoma State Game Warden Mark Hanna [sic] in the face injuring Warden Hanna.”); *See* Doc. 195-3, pg. 9 (“Barrick was kicking at deputies and kicked Game Warden Hanna in the face causing injury.”); *See* Doc. 195-4, pg. 195:14-21; *See* Doc. 195-5; *See* Doc. 195-8. Additionally, EMT Lane testified that, “Mark was kicked, I don't remember if it was before or after Mr. Barrick came out of the truck.” and “at one point, [Barrick] had kicked Mark Hannah in the face.” *See* Doc. 195-14, pg.19:19-20:10, 22:10-22. Further, Officer Kasbaum and Lee specifically testified they were kicked by Barrick as well. *See* Doc. 195-1, pg. 96:2-6; *See* Doc. 195-4, pg.107:12-24.

- e. **Plaintiff wholly fails to produce any evidentiary material to support her assertion that Barrick suffered a cardiac arrest.**

PAMF Nos. 76, 81, and 91: Disputed. Barrick did not suffer a cardiac arrest. Further, Plaintiff fails to produce any evidentiary materials to support Barrick suffered from cardiac arrest. Notably, the EMS Patient Care Report clearly indicates that Barrick did not suffer from cardiac arrest and his heart rate was regular. *See* Doc. 195-13, pgs. 4-5 (“**Cardiac Arrest: No**”) (“**Pulse...Regular**” at 7:59 pm, 8:09 pm, 8:19 pm, and 8:29 pm). Plaintiff completely misstates EMT Candice Wyatt’s (a.k.a., Sparkman) testimony as Wyatt testified that Barrick did not suffer a cardiac arrest, and that EMT’s did not have to do chest compressions, CPR, or resuscitate Barrick. *See* Doc. 195-11, pgs. 56:23-57:7, *See also* EMS Patient Care Report Doc. 195-13, pgs.3-8. In fact, EMT Wyatt testified that Barrick’s heart rate was regular. *See* Doc. 195-11, pgs. 58:18-59:10. Plaintiff provides no evidence in the record to support her bald contention that Plaintiff suffered from cardiac arrest, and these paragraphs are not “facts” but baseless and conclusory assertions. In any event, even if Barrick had suffered a cardiac arrest, there is no evidence that the cardiac arrest was caused by illegal use of force as opposed to methamphetamine toxicity or some other cause.

- f. **Plaintiff creates a fictitious timeline and wholly inaccurate narration of the Officers’ rapid encounter with Barrick.**

PAMF No. 88: Disputed, as this “fact” is wholly unsupported. EMT Wyatt testified it took **no longer than ten (10) seconds** for officers to release all use of force after she felt for Barrick’s pulse on the ground. *See* Doc. 195-11, pg. 149: 6-7. **In fact, EMT Wyatt testified that from the time she came forward, tried to take Barrick’s pulse, until the time that he is rolled over, cuffs taken off, they get him into the ambulance, and get leads on him is one minute.** *See* Doc. 195-11, Pgs. 57:20-58:4. Notably, EMT Lane testified and also confirmed that **“within the minute, Barrick was uncuffed, turned over, loaded into the gurney, put into the ambulance, and leads were attached”** and that it **“was very quick”**. *See* Doc. 195-14, pg. 28: 5-13, pg. 36:8-17. Further, the EMS Patient care report confirms that as well. At 7:58 p.m., EMT Wyatt took Barrick’s pulse and did an initial assessment while on the ground. One minute later, at 7:59 p.m., Barrick is in the ambulance and EMT’s have leads on him. *See* Doc. 195-13, pgs. 3-4; *See also* response to PAMF Nos. **8, 47, 57, 62.**

PAMF Nos. 86⁶, 90, 91: Disputed. These “facts” represent nothing more than Plaintiff’s conclusory assertions. Plaintiff fails to provide citations to *particular* evidentiary materials to support these “facts”. She points us to several of her previous “facts,” all of which do not support that Lee and Kasbaum were on top of Barrick for “between 3 minutes and 57 seconds and 4 minutes and 27 seconds”. *See* response to PAMF Nos. 8, 47, 57, 62.

IV: DEFENDANT HANNAH LACKED STATE LAW AUTHORITY OVER AN INDIAN IN INDIAN COUNTRY.

In her response, Plaintiff relies solely on case law that is inapposite to the legal issue presented to the Court for resolution here. Nearly all the cases⁷ Plaintiff cites pertain to the legal analysis of determining private v. state conduct (i.e., private v. police authority), which is **not** the legal issue before this court. To clarify, the question before the Court is whether Defendant Hannah was acting under state or tribal law enforcement authority. Here, it is undisputed that Defendant Hannah wholly lacked state law enforcement authority over Barrick (an Indian) in Indian Country.

In support of her contention that Defendant Hannah was acting under color of state law, Plaintiff raises immaterial facts pertaining to what clothing Defendant Hannah was wearing and what vehicle he showed up in. Plaintiff argues that “these foregoing facts preclude summary judgment on Hannah’s argument that he was not acting under the color of state law”. *See* Doc. 203, pg. 9. However, these facts are not material. For the past 33 years, it has been clearly established that state law enforcement officers have no law enforcement jurisdiction whatsoever over “Indians in Indian country.” *Ross v. Neff*, 905 F.2d 1349, 1353 (10th Cir. 1990). It is also well-known that state and tribal police work under cross-deputation agreements. Under these circumstances, a state officers’ actions

⁶ **PAMF No. 86:** Plaintiff’s “fact” (regarding Defendant Hannah) is wholly devoid of any citation to *particular* evidentiary materials. Plaintiff fails to cite to any evidentiary materials and is non-compliant with the requirements of both Fed. R. Civ. P. 56(e) and LCvR 56.1(d). Failure to comply with these requirements can lead to the court deeming the movant’s facts as admitted and potentially granting summary judgment in favor of the movant. *See Stonebarger v. Union Pacific R.R. Co.*, 76 F.Supp.3d 1228 (2015).

⁷ These cases include: *Jackson-Gilmore v. Dixon*, 2005 WL 3110991 *10 (E.D.Pa.); *Hall v. Witteman*, 569 F.Supp.2d 1208, 1222 (D.Kan. 2008); *Azua v. Overman*, 2001 WL 37124914 *2 (D.N.M.); *Redwood v. Ferry*, 2006 WL 8445016 *8 & n. 5 (C.D.Ill.); *Screws v. U.S.*, 325 U.S. 91, 111 (1945); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Griffin v. State of Maryland*, 84 S.Ct. 1770, 1772-73 (1964); *Norton v. Liddel*, 620 F.2d 1375, 1379-80 (10th Cir. 1980); *Monroe v. Pape*, 365 U.S.167, 172 (1961); *Rivera v. La Porte*, 96 F.2d 691, 696 (2^d Cir. 1990); *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980).

are taken pursuant to tribal authority and are not actions taken “under color of state law” for the purpose of maintaining an individual capacity suit against that defendant under § 1983. *see Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir.2006); *McKinney v. State of Oklahoma*, 925 F.2d 363, 365 (10th Cir.1991) (the Court held that actions of tribal officials were not under color of state law.); *Chapoose v. Hodel*, 831 F.2d 931, 934 (10th Cir.1987). While there is no question that tribal and federal officers may exercise law enforcement authority over Indians in Indian country, there is no authorization for state law enforcement officers to do the same. *See Neff*, 905 F.2d at 1353 (“states [lack] independent authority to enforce their own laws over Indians on Indian land.”). “Indian country is subject to *exclusive federal or tribal* criminal jurisdiction.” *Id.* at 1352 (citing 18 U.S.C. § 1152) (emphasis added).

Here, the **undisputed** material facts are that (1) Barrick is an Indian and (2) the encounter occurred in Indian country. Thus, it is indisputable that Defendant Hannah lacked state law enforcement authority over Barrick (an Indian) in Indian Country. But for his tribal commission, it would have been unlawful for Hannah to act as a law enforcement officer vis-à-vis Barrick. Accordingly, Plaintiff has wholly failed to provide proof that a deprivation was committed by Defendant Hannah “under color of state law at the time of the challenged conduct.” Therefore, the § 1983 claims against Hannah must fail as a matter of law.

V: DEFENDANT HANNAH IS ENTITLED TO QUALIFIED IMMUNITY.

“[A]t summary judgment, we must grant qualified immunity unless the plaintiff can show (1) a reasonable jury could find facts supporting a violation of a constitutional right, which (2) was clearly established at the time of the defendant's conduct.” *See Saucier v. Katz*, 533 U.S. 194, 201–02, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

As Defendant anticipated, Plaintiff argues that the following published Tenth Circuit cases are similar to the facts of this present case. However, that is incorrect. Defendant Hannah has already previously distinguished the facts of *Estate of Booker v. Gomez* and *Weigel v. Broad* from this present case. *See* Doc. 167, pgs. 31-32. In Plaintiff's response, she also raises *Cruz v. City of Laramie* and attempts to argue it is factually similar to the present case. 239 F.3d 1183 (10th Cir. 2001). In *Cruz*, the officers placed the subject into a hog-tie restraint and “arrestee's tied ankles were bound to his handcuffed wrists behind his back”. *Id.* at fn. 12. In *Cruz*, the court characterized the hog-tie restraint to involve the **binding of the ankles to the wrists** behind the back. *Id.* at 1188. Here, Barrick was not hog-tied by officers at any point during the encounter with officers. In fact, when Officer Kasbaum arrived on the scene and saw that Barrick had been hog-tied **by local citizens**, Kasbaum immediately removed all straps to release Barrick from the hog-tie restraint he was in. Plaintiff now attempts to allege that

officers had Barrick in a hog tie restraint. At no point were Barrick's ankles bound to his wrists. The only hog-tie that Barrick was placed in was by local citizens **before any of the officers arrived on scene.**

As to *Estate of Booker v. Gomez*, the facts are wholly distinct. 745 F.3d 405 (10th Cir. 2014). In *Booker*, the officers waited nearly three (3) minutes **to seek medical care after the arrestee** went limp and unconscious as a result of the officer's use of force. *Id.* at 434. Distinctly, here: (1) Officer Kasbaum called EMS as he was heading to the scene. (2) EMS arrived minutes later while the subject was still in the back of the deputy's truck. (3) EMS was on the scene and prepared to administer immediate medical care to Barrick the moment he stopped resisting officers' and went unresponsive. Plaintiff baldly argues that officers "casual inaction during the critical minutes" was "constitutionally impermissible". Doc. 203, pg. 32. However, the voluminous record clearly indicates otherwise. For example, both EMT's on the scene testified to the immediate action that was taken after Barrick went non-responsive. EMT Lane confirmed that "within the minute, Barrick was uncuffed, turned over, loaded into the gurney, put into the ambulance, and leads were attached" and that it "was very quick". *See* Doc. 195-14, pg. 28: 5-13, pg. 36:8-17. EMT Wyatt testified that from the time she came forward, tried to take Barrick's pulse, until the time that he is rolled over, cuffs taken off, they get him into the ambulance, and get leads on him **is one minute.** *See* Doc. 195-11, Pgs. 57:20- 58:4. Notably, the EMS Patient Care Report confirms that as well. At 7:58 p.m., EMT Wyatt took Barrick's pulse and did an initial assessment while on the ground. One minute later, at 7:59 p.m., Barrick is in the ambulance and EMT's have leads on him. *See* Doc. 195-13, pgs. 3-4. In any event, the portion of *Booker* Plaintiff cites in her response pertains to the court's analysis of Booker's Due Process claim for denial of medical care. But here, Plaintiff has not alleged a denial of medical care. Thus, Plaintiff's citation to *Booker* is inapposite.

Therefore, Plaintiff has wholly failed to meet her burden to show that the officers violated clearly established law.

Respectfully submitted,

/s/ Alejandra J. Brigida

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CERTIFICATE OF SERVICE

I certify that on this 4th day of February 2025, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to all counsel of record

/s/ Alejandra J. Brigida

Alejandra J. Brigida