IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29249

ANDREW PEARSON, MARK TOLAND, MARTIN HOFFMAN, individually; and the CITY OF SIOUX FALLS, SOUTH DAKOTA, a political subdivision acting by and through the SIOUX FALLS POLICE DEPARTMENT,

Defendants/Appellants,

vs.

NICHOLE A. BOGGS,

Plaintiff/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE DOUGLAS E. HOFFMAN

BRIEF OF APPELLANTS

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Order Granting Petition for Allowance of Appeal from Intermediate Order
filed March 9, 2020

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PRELIMINARY STATEMENT

Pages of the settled record will be cited as (SR ___.) References to the hearing transcript will be cited as (HT ___.) Documents included in the Appendix to the Appellants' Brief will be cited as (App. ___.)

JURISDICTIONAL STATEMENT

The circuit court's Memorandum Opinion and Order Denying Summary Judgment was signed and filed on January 30, 2020. (SR 272-300; App. 1-29.) Notice of Entry of Order was served and filed on February 3, 2020. (SR 301-31.) Appellants timely filed a Petition for Discretionary Appeal on February 11, 2020. On March 9, 2020, this Court entered its Order Granting Petition for Allowance of Appeal from Intermediate Order and stayed all further proceedings. (SR 332-33.)

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument on all of the issues set forth herein.

STATEMENT OF THE ISSUES

1. Qualified immunity protects officials from suit unless their conduct violated a clearly established constitutional right of which every reasonable official would have known. This means that existing law must be so clear that every reasonable official would interpret the precedent to preclude the official's conduct in the particular circumstances. The clearly established right must be defined with specificity, particularly in the Fourth Amendment context. Were Officer Toland, Officer Pearson, and Sergeant Hoffman entitled to qualified immunity for the warrantless entry into Boggs' apartment and the force used to detain her?

   The circuit court's qualified immunity analysis, particularly its analysis regarding the "clearly established" prong, was inconsistent with established law. The circuit court failed to identify a controlling case or "robust consensus of cases" establishing a Fourth Amendment violation in circumstances similar to those in the present case.

   City of Escondido v. Emmons, 139 S. Ct. 500 (2019)
   State v. Deneui, 2009 S.D. 99, 775 N.W.2d 221

Ehlers v. City of Rapid City, 846 F.3d 1002 (8th Cir. 2017)
Kelsay v. Ernst, 933 F.3d 975 (8th Cir. 2019)

2. Municipalities are persons subject to suit under 42 U.S.C. § 1983, but not on a theory of vicarious liability or respondeat superior. To establish liability, a plaintiff must demonstrate that there was a constitutional violation and that a municipal policy or custom caused it. Did the City of Sioux Falls have a policy or custom that caused Boggs' alleged constitutional violations?

   The circuit court's municipal liability analysis was flawed, particularly, whether a policy or custom led to Boggs' alleged injuries.

   Monell v. Dept. of Soc. Servs. of City of New York, 436 U.S. 658 (1978)
   City of Canton v. Harris, 489 U.S. 378 (1989)

STATEMENT OF THE CASE

On July 9, 2018, Nichole A. Boggs ("Boggs") brought a 42 U.S.C. § 1983 action against Sioux Falls Police Officers Andrew Pearson ("Pearson") and Mark Toland ("Toland"), and Sergeant Martin Hoffman ("Hoffman"), individually, under the Fourth and Fourteenth Amendment right to be free from unreasonable search and seizure and excessive force, and a § 1983 claim for negligent training, hiring, and supervision against the City of Sioux Falls ("the City"). (SR 1-7.) Boggs alleged that she was entitled to compensation for damages caused by law enforcement during their entry and search of her home, and the force used to detain her. (*Id.*)

On February 18, 2019, Pearson, Toland, Hoffman, and the City moved for summary judgment, raising two principal arguments. (SR 20-76.) First, Pearson, Toland, and Hoffman argued that they were entitled to qualified immunity under § 1983 because Boggs did not allege a violation of a clearly established constitutional right. (*Id.*) Second, the City argued that it could not be liable under § 1983 absent official policy or custom that caused a constitutional violation. (*Id.*)

On August 1, 2019, Boggs filed a motion for partial summary judgment. (SR 77-190.) A hearing was held on the motions on September 10, 2019. (HT 1.) On January 30, 2019, the circuit court issued a Memorandum Opinion and Order Denying Summary Judgment as to both motions. (SR 272-300; App. 1-29.)

STATEMENT OF THE FACTS[1]

In the early morning hours of August 19, 2016, Sioux Falls Police dispatch received an open-line 911 call from an unidentified caller. (SR 191 at ¶ 1; App. 38.) Dispatch heard yelling, screaming and someone yelling "no" in the background. (*Id.*) The call originated within a 25-meter radius of 4713 East Ashbury Place in Sioux Falls, South Dakota. (SR 274; App. 3.)

At approximately 3:30 a.m., Toland responded to East Ashbury Place. (SR 191 at ¶¶ 1-2; App. 38.) Upon arrival, a bystander directed Toland to an apartment located at 4517 East Ashbury Place, and stated that people were fighting. (*Id.* at ¶ 3.) In August of 2016, Boggs was leasing an apartment located at 4517 Ashbury Place. (SR 273; App. 2.)

As Toland approached Boggs' apartment, he heard a man yelling and also observed blood on the concrete outside the apartment. (SR 192 at ¶ 4; App. 39.) The man yelling was later identified as Brendan Conlon, one of Boggs' sons. (*Id.*) Brendan told Toland that he and his brother, Cody Boggs, had gotten into an argument and that their dog had bit him. (*Id.* at ¶ 5.) Brendan told Toland that the blood on the concrete

[1] Boggs admitted, or admitted but qualified, a majority of paragraphs in Defendants' Statement of Undisputed Material Facts (SR 39-46; App. 30-37) in her Response to Defendants' Statement of Undisputed Material Facts. (SR 191-99; App. 38-46.) The paragraphs that Boggs denies are insufficient to create a genuine issue of material fact. *See, e.g., Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶8, 817 N.W.2d 395, 398.

was his and lifted his shirt to reveal a small laceration on his abdomen. (SR 274-75, App. 3-4.)

Toland or Brendan knocked on the apartment door and Boggs answered. (SR 192 at ¶ 6; App. 39.) Toland explained to Boggs that there had been a 911 call and requested entry into the apartment to ensure that no one was injured. (SR 192-93 at ¶ 7; App. 39-40.) Boggs refused Toland's request. (*Id.*) Toland again explained that due to the 911 call and his department policy, he needed to enter the apartment. (*Id.*) Boggs continued to refuse to allow Toland to enter without a warrant. (*Id.*) During this time, Boggs' three other sons, Sebastian, Cody, and Jaden, came to the doorway from inside the apartment. (SR 275; App. 4.) Toland observed a fresh laceration on Cody's face. (*Id.*) Sebastian also told Toland that he could not enter the apartment and attempted to shut the apartment door on Toland. (SR 193 at ¶ 8; App. 40.)

Pearson then arrived at the apartment. (SR 275; App. 4.) Toland and Pearson attempted for a third time to explain to Boggs their need to enter the apartment. (SR 193-94 at ¶ 11; App. 40-41.) At some point, the officers ordered all occupants out of the apartment. (SR 275; App. 4.) Cody, Brendan, and Sebastian became increasingly confrontational and Cody attempted to push past Officer Toland to re-enter the apartment. (SR 194-95 at ¶¶ 13, 16, 17; App. 41-42.) Cody, Brendan, and Sebastian were placed into handcuffs. (SR 195 at ¶ 17; App. 42.) Boggs was not handcuffed. (SR 196 at ¶ 20; App. 43.) Several more officers then arrived at the scene, including Hoffman. (SR 195-96 at ¶¶ 18-20; App. 42-43.)

Toland then announced that he was entering Boggs' apartment and did so. (SR 276; App. 5.) Ignoring officers' commands to remain outside the apartment, Boggs

entered her apartment behind Toland. (*Id.*) Pearson grabbed Boggs' right arm to attempt to re-direct her back outside.[2] (*Id.*) Toland then grabbed Boggs' left arm, and at some point, Toland fell, bringing Boggs down to the ground with him. (*Id.*) After regaining their footing, the officers placed Boggs into handcuffs and escorted her out of the apartment. (*Id.*) During this entire interaction, Boggs' sons were screaming. (SR 197-98 at ¶ 27; App. 44-45.)

Paramedics were called to the scene to assess Boggs' injuries. (SR 198 at ¶ 29; App. 45.) Boggs did not receive any treatment at the scene and she was not transported to the hospital. (*Id.*) Boggs claims to have suffered a fractured arm and dislocated shoulder, for which she received pain medication and physical therapy, but not surgery. (*Id.* at ¶ 30.)

Boggs was charged with resisting arrest and obstruction. (SR 198-99 at ¶ 31; App. 45-46.) Boggs was acquitted of these charges after a two-day jury trial. (SR 199 at ¶ 34; App. 46.)

STANDARD OF REVIEW

The Court's standard of review on summary judgment is well-settled. "Whether the facts viewed most favorably to the nonmoving party entitle the moving party to judgment on the merits as a matter of law is a question of law. We review questions of law de novo." *Thornton v. City of Rapid City*, 2005 S.D. 15, ¶ 4, 692 N.W.2d 525, 528-29. Under the *de novo* standard of review, the Court "give[s] no deference to the circuit court's conclusions of law." *Benson v. State*, 2006 S.D. 8, ¶ 39, 710 N.W.2d 131, 145.

[2] Along with the officers' previous requests to enter her apartment to conduct a check, Boggs was twice advised that she was not allowed to enter the apartment while the officers searched. (SR 196-97 at ¶¶ 21, 24; App. 43-44.)

"Qualified immunity is a legal question to be decided by the court, it is particularly amenable to summary judgment." *Spenner v. City of Sioux Falls*, 1998 S.D. 56, ¶ 26, 580 N.W.2d 606, 612. Thus, the issues in the case should be reviewed *de novo*.

ARGUMENT

1. Toland, Pearson, and Hoffman are entitled to qualified immunity.

a. Qualified immunity shields officials in a § 1983 action unless the official's conduct violates a clearly established constitutional right of which a reasonable person would have known.

Qualified immunity has been described by some scholars as "the most important doctrine in the law of constitutional torts." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?* 62 Fla. L. Rev. 851, 852 (2010). At the nation's highest court, the doctrine of qualified immunity has been an "unquestioned principle of American statutory law." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1857 (2018). In one of the United States Supreme Court's most recent decisions addressing qualified immunity, the Court reiterated the requirement that "the clearly established right must be defined with specificity" particularly in "the Fourth Amendment context[.]" *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019).

Against this backdrop, the circuit court, in denying summary judgment, generally concluded that the warrantless entry into Boggs' apartment and Boggs' right to be free from excessive force were clearly established. (SR 284, 293; App. 13, 22.) The circuit court's analysis misapplied the "clearly established" prong and gave no credit to the doctrine or its application to the particular set of facts in this case. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (internal quotation marks omitted) ("This Court has

repeatedly told courts . . . not to define clearly established law at a high level of generality.").

i. Qualified immunity is a question of law and should be resolved at the earliest possible stage of litigation.

"Immunity is a legal question to be decided by the court and is particularly amendable to summary judgment." *Swedlund v. Foster*, 2003 S.D. 8, ¶ 12, 657 N.W.2d 39, 45. "Qualified immunity is not just a defense to liability but an entitlement not to stand trial or face the burdens of litigation." *Id.* The United States Supreme Court has repeatedly stressed, and this Court has repeatedly endorsed, the view that when qualified immunity is raised by motion, it should be resolved at the earliest possible stage in litigation. *Horne v. Crozier*, 1997 S.D. 65, ¶ 6, 565 N.W.2d 50, 52 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

ii. Qualified-immunity analysis is a two-step inquiry.

Qualified immunity "'shields government officials from suit unless their conduct violated a clearly established constitutional or statutory right of which a reasonable person would have known.'" *Thornton*, 2005 S.D. 15, ¶ 10, 692 N.W.2d at 530 (quoting *Littrell v. Franklin*, 388 F.3d 578, 582 (8th Cir. 2004)). This analysis breaks down into two parts: "[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established' at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018); *see Thornton*, 2005 S.D. 15, ¶ 10, 692 N.W.2d at 530 ("[T]he federal courts have clarified their qualified immunity analysis and now present it as a two part inquiry . . . for the sake of uniformity and clarity we apply the same analysis in its more

recent two part form, which controls."). A court has discretion to address either prong of the analysis first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

When an official asserts qualified immunity at the summary judgment stage, "the plaintiff must produce evidence sufficient to create a genuine issue of fact regarding whether the defendant violated clearly established law." *Chambers v. Pennycook*, 641 F.3d 898, 904 (8th Cir. 2011). Thus, a plaintiff bears some burden in responding to a motion based on qualified immunity. *Id.*

b. The facts do not establish a constitutional violation for the warrantless entry into Boggs' apartment.

Boggs alleged that her Fourth Amendment rights were violated when officers entered her apartment to search without a warrant. (SR 2-7.)

i. The warrant requirement of the Fourth Amendment is subject to reasonable exceptions.

The Fourth Amendment to the United States Constitution and Article IV, section 11 of the South Dakota Constitution protects individuals from unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST., amend IV; S.D. CONST. art. IV, § 11. While it is well-settled that "'searches . . . inside a home without a warrant are presumptively unreasonable[,]'" *State v. Hess*, 2004 S.D. 60, ¶ 22, 680 N.W.2d 314, 324 (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)), that presumption "may be overcome in some circumstances because the ultimate touchstone of the Fourth Amendment is reasonableness." *Kentucky v. King*, 563 U.S. 452, 459 (2011) (internal citations and quotations omitted). A reasonableness analysis "is not to be determined by any fixed formula[,]" *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950),

and instead courts look to all the facts and circumstances surrounding a given search and "balance[e] the need to search against the invasion which the search entails. *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 537 (1967). Accordingly, "the warrant requirement is subject to certain reasonable exceptions." *King*, 563 U.S. at 460 (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

The law excepts several types of searches from the warrant requirement, including where the purpose of the search is premised on the preservation or life and property. *State v. Deneui*, 2009 S.D. 99, ¶ 19, 775 N.W.2d 221, 231. Relevant exceptions include: the emergency doctrine, the emergency aid doctrine,[3] and the community caretaker doctrine. *Id.* ¶¶ 23-41, 775 N.W.2d at 232-239.

In order to adhere to Fourth Amendment principles, while also allowing officers to protect the public in emergencies, the following test applies for the emergency doctrine:

> (1) There must be grounds to believe that some kind of emergency exists that would lead a reasonable officer to act; and (2) the officer must be able to point to specific and articulable facts, which if taken together with rational inferences, warrant the intrusion.

Id. ¶ 27, 775 N.W.2d at 234. In applying the community caretaker doctrine,[4] the Court should consider the following:

> [T]he purpose of community caretaking must be the objectively reasonable independent and substantial justification for the intrusion; the police action must be apart from the detection, investigation, or acquisition

[3] In *Deneui*, this Court found no distinction between the emergency doctrine and the emergency aid doctrine. *Deneui*, 2009 S.D. 99, ¶ 32, 775 N.W.2d at 235. As such, these doctrines will be referred to together as "the emergency doctrine."

[4] In *Deneui*, this Court found that the community caretaker doctrine should not be limited to automobiles and expanded the doctrine to include both automobiles and homes. *Id.* ¶ 41, 775 N.W.2d at 239.

> of criminal evidence; and the officer should be able to articulate specific facts that, taken with rational inferences, reasonably warrant the intrusion.

Id. ¶ 41, 775 N.W.2d at 239.

ii. The officer's warrantless entry into Boggs' apartment was reasonable under the emergency and/or community caretaker doctrines.

By the time Toland and Pearson entered Boggs' apartment, the following facts and circumstances were known and present to the officers:

- A 911 call had originated within a 25-meter radius of Boggs' apartment with yelling, screaming, and someone shouting "no" in the background. (SR 191 at ¶ 1; App. 38; SR 274; App. 3.)
- It was approximately 3:30 a.m. (SR 191 at ¶¶ 1-2; App. 38.)
- When Toland arrived on scene, he was directed to Boggs' apartment by an independent bystander who told Toland that people were fighting. At the same time, Toland heard Brendan Colon, one of Boggs' sons, yelling. (SR. 191-92 at ¶¶ 3-4; App. 38-39.)
- As Toland approached Brendan and the apartment, he observed blood on the concrete outside the apartment. (SR 192 at ¶ 4; App. 39.)
- Toland was informed by Brendan that a physical altercation had occurred within and/or outside Boggs' apartment and that the blood on the concrete was his. (*Id.* at ¶ 5.)
- Brendan lifted his shirt and revealed to Toland a small laceration on his abdomen. (SR 274-75; App. 3-4.)
- After making contact with Boggs and some of the apartment's other occupants, Toland observed a fresh laceration on Cody Boggs' face. (SR 275; App. 4.)
- Boggs' sons became increasingly confrontational toward officers, and at one point, one of them tried to shut the apartment door on Toland. (SR 193-195 at ¶¶ 8, 13, 16, 17; App. 40-42.)

Under the emergency and community caretaker doctrines, these undisputed facts establish that it was reasonable for officers to believe that some type of emergency

existed, thus necessitating, and justifying, the warrantless entry into Boggs' apartment. Blood and injuries were visible on at least two of the sons. All of the apartment occupants became increasingly confrontational throughout the encounter, which ultimately resulted in three of the sons being detained in handcuffs. The contents, or other potential occupants, of the apartment were relatively unknown to officers. The circumstances presented to officers were tense, rapidly evolving, and relatively unknown. *See Ryburn v. Huff*, 565 U.S. 469, 476 (2012) ("[I]t is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture."). Thus, it was reasonable for officers to enter Boggs' apartment without a warrant. Boggs has not established a constitutional violation for the warrantless entry into her apartment.

c. The facts do not establish a constitutional violation in the force used to detain Boggs.

Boggs also alleged that her rights were violated through the officers' use of excessive force in detaining her. (SR 2-7.)

i. Claims of excessive force are analyzed under the Fourth Amendment reasonableness standard.

"Claims of excessive force are evaluated under the reasonableness standard of the Fourth Amendment." *Johnson v. Carroll*, 658 F.3d 819, 825 (8th Cir. 2011). To determine whether force was excessive, "the court considers whether it was objectively reasonable under the circumstances, relying on the perspective of a reasonable officer present at the scene rather than the 20/20 vision of hindsight." *Ehlers v. City of Rapid City*, 846 F.3d 1002, 1011 (8th Cir. 2017). At the summary judgment stage, the reasonableness of an officer's actions under the Fourth Amendment "is a pure question of

law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007); *see also Wenzel v. Bourbon*, 899 F.3d 598, 601 (8th Cir. 2018).[5]

In considering reasonableness, a court must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Johnson*, 658 F.3d at 826. Among the factors to be considered and balanced by the court are: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). This takes into consideration "the fact that police officers are often forced to make split-second decisions—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 397.

The Eighth Circuit case of *Ehlers v. City of Rapid City*, is instructive here. In *Ehlers*, an officer was called to the scene of a reported altercation outside the Rushmore Plaza Civic Center. 846 F.3d at 1007. A fellow officer at the scene directed him to arrest Ehlers, who was walking away from the officers toward the arena. *Id.* The officer twice verbally directed Ehlers to put his hands behind his back. *Id.* When Ehlers did not comply with the directive and continued walking toward the arena, the officer conducted

[5] This Court's contrary statement in *Thornton*, that "the objective reasonableness of the officer's actions under the first prong of the qualified immunity analysis, which determines whether a constitutional violation has occurred, is a jury question," is incorrect. 2005 S.D. 15, ¶ 13, 692 N.W.2d at 531. The United States Supreme Court's 2007 decision in *Scott* makes this clear and is controlling on federal constitutional questions. 550 U.S. at 381 n.8. Here, the circuit court erroneously cites to *Thornton* in support of the above-stated, erroneous proposition. (SR 281; App. 10.) Whether *Thornton* is good law on the questions of objective reasonableness was recently raised before this Court in *Hamen v. Hamlin County, South Dakota, et al.*, Appeal No. 28671, which is still pending with this Court.

a "spin takedown" of Ehlers.[6] *Id.* Ehlers brought an excessive force claim against the officer under 42 U.S.C. § 1983 and the officer moved for summary judgment on the basis of qualified immunity. *Id.* at 1008. The district court denied the officer's motion and the officer appealed. *Id.*

The Eighth Circuit Court of Appeals found that the officer did not violate Ehlers' constitutional rights by executing the takedown and granted the officer summary judgment on the basis of qualified immunity. *Id.* at 1011. In so finding, the Court highlighted that Ehlers failed to comply when the officer twice ordered him to place his hands behind his back: "Instead of complying, Ehlers continued walking towards the Civic Center, passing [the officer] closely as [the officer] gave the instruction a second time." *Id.* The Court found that "[a] reasonable officer . . . would interpret this behavior as noncompliant," and rejected Ehlers' argument that no force was appropriate because he was a nonviolent misdemeanant. *Id.*

ii. The officers' use of force against Boggs was objectively reasonable.

Along with the facts and circumstances present when officers arrived at Boggs' apartment, *see supra* Argument.1.b.ii., the following also occurred:

- Toland explained to Boggs that there had been a 911 call and requested entry into the apartment to ensure that no one was injured, and Boggs refused. (SR 192-93 at ¶ 7; App. 39-40.)
- Toland explained for a second time that due to the 911 call and his department policy, he needed to enter the apartment. (*Id.*) Boggs continued to refuse to allow Toland to enter without a warrant. (*Id.*)

[6] There was conflicting evidence that the officer used a Taser on Ehlers. *Id.* at 1008. For purposes of the motion for summary judgment, the Court assumed that the officer did use a Taser, and found that the use of a Taser also did not violate Ehlers' constitutional right. *Id.* at 1011.

- Pearson then arrived at Boggs' apartment and, along with Toland, attempted to explain to Boggs for a third time the need to enter the apartment. (SR. 193-94 at ¶ 11; App. 40-41; SR 275; App. 4.)

- Boggs was also twice advised that she was not allowed to enter the apartment while the officers searched. (SR 196-97 at ¶¶ 21, 24; App. 43-44.)

- Just prior to entering Boggs' apartment, Toland announced his intentions to enter. (SR 276; App. 5.)

- Ignoring officers' commands to stand down, Boggs entered her apartment behind Toland. (*Id.*) Pearson grabbed Boggs' right arm to attempt to re-direct her back outside. (*Id.*) Toland then grabbed Boggs' left arm, and at some point, Toland fell, bringing Boggs down to the ground with him. (*Id.*)

Under *Ehlers*, these undisputed facts establish that it was objectively reasonable for Toland and Pearson to use force against Boggs. The presence of blood outside the apartment, the injuries on two of the apartment occupants, the collective resistance by the apartment occupants, and Boggs' failure to heed officers' commands that she was not allowed to enter the apartment while they searched, demonstrates the potential seriousness of a crime and the "tense, uncertain, and rapidly evolving" circumstances that Toland and Pearson faced in those early morning hours. The Court can readily conclude, consistent with the Eighth Circuit's analysis in *Ehlers*, that Boggs has not established a violation of a constitutional right.

d. Toland, Pearson, and Hoffman's conduct did not violate clearly established law.

Even assuming that Boggs can satisfy the first prong of the qualified immunity analysis, the officers are still entitled to qualified immunity because it was not clearly established that their actions were unlawful.

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he was doing violates that right.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2016) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). "In other words, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Reichle*, 566 U.S. at 664 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Whether the law is clearly established is a legal question. *Ehlers*, 846 F. 3d at 1012 n.4.

The clearly established standard "protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can 'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" *Reichle*, 566 U.S. at 664 (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). It "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (per curium) (internal quotations omitted).

The standard "also requires that the legal principle clearly prohibit the officer's conduct *in the particular circumstances before him*." *Wesby*, 138 S. Ct. at 590 (emphasis added). This requires a "high degree of specificity," so that a court may not "define clearly established law at a high level of generality." *Id.*; *see also Kelsay v. Ernst*, 933 F.3d 975, 980 (8th Cir. 2019) (en banc) (finding that the court must consider the "specific facts at issue" and refer to authorities "squarely govern[ing]" those facts). The rule cannot be merely "suggested" by existing precedent. *Lane v. Nading*, 927 F.3d 1018, 1022 (8th Cir. 2019). Courts look for "either 'controlling authority' or a 'robust

consensus of cases of persuasive authority' that 'placed the statutory or constitutional questions beyond debate' at the times of the alleged violation." *Kelsay*, 933 F.3d at 979 (citing *al-Kidd*, 563 U.S. at 741-42). This is especially true in the Fourth Amendment context, where "'it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.'" *Ehlers*, 846 F. 3d at 1012 (quoting *Mullenix*, 136 S. Ct. at 308).

i. A warrantless search under the emergency or community caretaker doctrines has not been clearly established.

Whether, under the particular facts of this case, officers may gain entry into an individual's home based on the emergency or community caretaker doctrines has not been directly addressed or "clearly established" by this Court, the Eighth Circuit Court of Appeals, or the United States Supreme Court. In all of her briefing, Boggs does not cite to any such authority. Similarly, the circuit court failed to cite to controlling precedent and instead erroneously concluded that because the law defines these doctrines, the state of the law is "clearly established:"

> The Supreme Court of South Dakota clarified the state of law, however, regarding these doctrines.
>
> . . . .
>
> Defendants' motion for summary judgment regarding qualified immunity for Officer Pearson, Officer Toland and Sgt. Hoffman must be denied in full, because there are genuine disputes of material fact regarding whether . . . their entry into Plaintiff's home . . . w[as] objectively reasonable given clearly established legal precedents.

(SR 287-88, 293; App. 16-17, 22.)

Because no apparent precedent exists establishing settled law that *these particular circumstances* amounted to a Fourth Amendment violation, the alleged right was not so clearly established that Toland, Pearson, and Hoffman could be liable.

ii. The force used to detain Boggs.

In a recent qualified-immunity decision, the Eight Circuit Court of Appeals in *Kelsay v. Ernst* reversed the denial of qualified immunity under similar facts to those in the present case. 933 F.3d at 982. In *Kelsay,* officers were called to a pool complex for reports of a domestic assault. *Id.* at 978. When officers arrived, they encountered Kelsay[7] and her party, which included her male friend, Patrick Caslin. *Id.* Officers informed Caslin that he was under arrest for domestic assault and escorted him to a patrol car. *Id.* Kelsay, upset that Caslin was being arrested, stood in front of the patrol car door to prevent Caslin from being placed in the car. *Id.* Officers told Kelsay to move three times before having to escort her away. *Id.* A decision was then made to arrest Kelsay for her interference with the arrest of Caslin. *Id.* Around the same time, Kelsay's daughter was yelling at a fellow pool patron and Kelsay started to walk back toward her daughter. *Id.* Officer Ernst then ran up behind Kelsay, grabbed her arm, and told her to "'get back here.'" *Id.* Kelsay turned around to face Ernst and he released her arm. *Id.* Kelsay told Ernst that "'some bitch is talking shit to my kid and I want to know what she's saying[,]'" and continued walking away from Ernst. *Id.* Ernst then placed Kelsay "in a bear hug, threw her to the ground, and placed her in handcuffs." *Id.* As a result of the takedown, Kelsay momentarily lost consciousness and suffered a fractured collarbone. *Id.* at 978-79.

[7] Kelsay was approximately 5 feet tall and 130 pounds. *Id.* at 978.

Kelsay sued the officers alleging wrongful arrest, excessive force, and deliberate indifference to medical needs. *Id.* at 979. The district court ruled that Ernst was not entitled to qualified immunity on Kelsay's excessive force claim, reasoning that "where a nonviolent misdemeanant poses no threat to officers and is not actively resisting arrest or attempting to flee, an officer may not employ force just because the suspect is interfering with police or behaving disrespectfully." *Id.* at 980.

The Eighth Circuit, sitting *en banc*, defined the specific right at issue—whether an officer may use a takedown maneuver to arrest a suspect who ignored the officer's instructions to "get back here" and then continued to walk away from the officer—rather than the more general prohibition on employing force against a nonviolent misdemeanant who poses no threat to officers and is not actively resisting arrest or attempting to flee. *Id.* at 980. Citing *Ehlers* for support, the Eighth Circuit reversed the denial of qualified immunity reasoning that:

> [i]t was not clearly established in May 2014 that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored [his] instructions to 'get back here' and continued to walk away from the officer. None of the decisions cited by the district court or Kelsay involved a suspect who ignored an officer's command and walked away, so they could not clearly establish the unreasonableness of using force under the particular circumstances here.

Id. at 980-81.

Similarly, the Eighth Circuit held that the use of force was not unreasonable where law enforcement was trying to control a rapidly escalating situation. *See Rudley v. Little Rock Police Dep't*, 935 F.3d 651, 654 (8th Cir. 2019). In *Rudley*, the Eighth Circuit deployed a detailed factual analysis to distinguish precedent that, although similar to the particular facts in *Rudley*, did not adequately provide notice to the officers of the

constitutionality of their conduct. *Id.* The Court found that officers did not violate a plaintiff's clearly established right to be free from unreasonable force when they repeatedly tased her—despite her presenting no physical threat—because she had "physically inserted herself between" the officer and her son, "directed an expletive at" the officer, and "stepped toward [the officer], ignoring his command to stop." *Id.*

Finally, in *City of Escondido v. Emmons*, the United States Supreme Court held that it was error to deny officers summary judgment based on qualified immunity when the plaintiff was instructed not to close an apartment door and then "tried to brush past" the officer. 139 S. Ct. at 503-04.

Here, the circuit court erroneously cites to *Thornton* for the proposition that Boggs' right to be free from excessive force was clearly established. (SR 283-85; App. 12-14.) However, the facts in *Thornton* are not analogous. In *Thornton*, Rinard Yellow Boy, Jr. was walking calmly down the street when he was suddenly, and without warning, attacked from behind by an officer who believed him to be involved in a criminal disturbance. 2005 S.D. 15 ¶ 8, 692 N.W.2d at 530. The officer later admitted that he did not ask Yellow Boy to stop or otherwise warn him that he was approaching. *Id.* Ultimately, it was discovered that Yellow Boy was not involved in any of the reported crimes and was simply walking to the store. *Id.* This Court affirmed the circuit court's denial of the officer's motion for summary judgment. *Id.* at 528.

The circuit court failed to identify in its Memorandum Opinion and Order any controlling case or "robust consensus of cases" establishing a Fourth Amendment violation in circumstances similar to those in the present case. The circuit court failed to even consider the recent cases of *Kelsay*, *Rudley*, and *Emmons*, which vacated the denial

of qualified immunity for an officer who used force to detain an individual who posed no apparent danger, but disobeyed the officer's commands. No precedent exists establishing that these facts amounted to a Fourth Amendment violation. In fact, precedent exists which establishes the exact opposite. Toland, Pearson, and Hoffman were entitled to qualified immunity.

2. The City of Sioux Falls is not liable under 42 U.S.C. § 1983.

a. Municipalities are subject to suit under § 1983, but not on a theory of vicarious liability or respondeat superior.

Municipalities are "persons" subject to suit under § 1983, but not on a theory of vicarious liability or respondeat superior. *Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978) ("[W]e conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."). In order to establish municipal liability, a plaintiff must first show that the individual officer violated a constitutional right. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."). If a plaintiff is unable to show an underlying constitutional violation, then municipal liability cannot attach. *Id.* If a plaintiff is able to satisfy that threshold inquiry, municipal liability can be imposed if the municipality's policy or custom caused the constitutional violation. *Monell*, 436 U.S. at 694.

i. The facts do not establish a constitutional violation.

As argued above, the facts do not establish a constitutional violation. As such, no municipal liability can attach and summary judgment should be granted in favor of the

City. *See Heller*, 475 U.S. at 799; *see also Scully v. City of Watertown*, 2005 WL 1244838, at *12 (N.D.N.Y. May 25, 2005) ("Because Plaintiff has failed to establish that his constitutional rights were violated by any of the individual defendants' actions, the failure to train or supervise claims against the City . . . . are dismissed."). However, even assuming that a constitutional violation occurred, Boggs cannot show that the City had a policy or custom that was the "moving force" behind her alleged injuries.

ii. Boggs has failed to prove that the City had a policy or custom that was the "moving force" behind her alleged injuries.

To prove a municipal policy or custom, a plaintiff must show: (1) a written policy that has been formally adopted, such as an ordinance or regulation; (2) a single act or decision by a "policymaker," one whose edicts or acts create official policy; (3) inadequate hiring, training, supervision, or discipline, where municipal officials are "deliberately indifferent" to whether omissions in those areas will lead to constitutional violations; or (4) a custom, pattern, or practice of violations so pervasive that they will almost certainly lead subordinate officers to commit unconstitutional acts. *See Monell*, 436 U.S. 690-91; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986); *City of Canton v. Harris*, 489 U.S. 378 (1989); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (holding that municipal "policy" could not be inferred from a single incident of police misconduct). A plaintiff must also show that the municipality was the "moving force," or legal cause, behind the injury. *Bd of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 404 (1997) (explaining that the plaintiff must show that the municipality, "through its deliberate conduct . . . was the 'moving force' behind the injury alleged."); *see also City of Canton*, 489 U.S. at 385 (explaining that a municipality is not liable

under § 1983 unless there is a "direct causal link" between the municipal policy or custom and the plaintiff's constitutional deprivation).

Here, the circuit court found that the presence of seventeen police officers witnessing the incident is "standing alone . . . sufficient evidence of improper review of written policies, lack of training, and/or deliberate indifference to the policies themselves, such as to withstand the City's motion for summary judgment." (SR 296-97; App. 25-26.) Even conceding that a constitutional violation occurred, there is no evidence to suggest that the City created, adopted, or supported any policy or custom that would demonstrate municipal liability. To the contrary, the City and Sioux Falls Police Department policies on excessive force mirror the law on excessive force. It was not clearly established that an officer was forbidden to take down a suspect who repeatedly ignored and defied officer commands and physically interfered with officers' attempts to enter an apartment to conduct a wellness check. There is no evidence to support Boggs' claims of municipal liability. The City was entitled to summary judgment.

CONCLUSION

The doctrine of qualified immunity has been an "unquestioned principle of American statutory law." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1857 (2018). While the doctrine is a challenging one, the legal standard and its application to the undisputed facts here do not leave room for the Court to avoid deciding the legal questions presented: (1) Toland, Pearson, and Hoffman did not violate Boggs' Fourth Amendment rights because their entry into Boggs' home was reasonable under the emergency or community caretaker doctrines, and the force used against Boggs was objectively reasonable; and (2) the law was not clearly established that an officer in the particular circumstances of this

case acted unlawfully in entering the apartment and using force to detain Boggs. Similarly, there is no evidence to suggest that the City created, adopted, or supported any policy or custom that would demonstrate municipal liability.

Officer Toland, Officer Pearson, Sergeant Hoffman, and the City of Sioux Falls respectfully request that the Memorandum Opinion and Order denying summary judgment be reversed with instructions to dismiss Boggs' claims with prejudice.

Dated this 7th day of May, 2020.

WOODS, FULLER, SHULTZ & SMITH P.C.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2013, Times New Roman (12 point) and contains 6,331 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 7th day of May, 2020.

WOODS, FULLER, SHULTZ & SMITH P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2020, I served a true and correct copy of the foregoing Brief of Appellants via electronic mail on the following:

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Appendix

Appendix

STATE OF SOUTH DAKOTA :SS COUNTY OF MINNEHAHA	)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

NICHOLE A. BOGGS Plaintiff, vs. **ANDREW PEARSON, MARK TOLAND, MARTIN HOFFMAN, individually; and the CITY OF SIOUX FALLS, SOUTH DAKOTA, a political subdivision acting by and through the SIOUX FALLS POLICE DEPARTMENT,** Defendants.	49CIV18-2229 **MEMORANDUM OPINION AND ORDER DENYING SUMMARY JUDGMENT**

Plaintiff Nichole Boggs has sued the individually named police officers for unreasonable search and seizure and excessive force under 42 U.S.C. §1983. Her claim against the City of Sioux Falls alleges negligent hiring, supervision, and training of officers, leading to their having violated her clearly established civil rights. This matter is before the Court upon Defendants' motion for summary judgment dismissing the case against all Defendants upon the merits. Plaintiff has cross-moved for summary judgment on liability. The motions were heard on September 10, 2019, and taken under advisement, with the Court soliciting post-hearing supplemental briefing. The last brief was filed on October 29, 2019.

The individual Defendants contend that they are entitled to summary judgment dismissing them from the case because, upon the undisputed facts, they

are protected by the doctrine of qualified immunity as a matter of law. The City asserts that it should be dismissed from the case as well, because, even when viewing all the record evidence in the light most favorable to Plaintiff, it is insufficient as a matter of law to allege a colorable claim of negligent hiring, training, or supervision against the municipality under established principles. The Court, however, finds that genuine disputes of material fact exist regarding Defendants Andrew Pearson, Mark Toland, and Martin Hoffman's entitlement to qualified immunity. Further, the Court views the record as establishing a genuine issue of fact regarding Ms. Boggs' negligence claim against the City. Accordingly, the Defendants' motions for a summary judgment are denied.

The Court does not view the Plaintiff's pleadings to assert a stand-alone claim against the Sioux Falls Police Department as a distinct entity, which the caselaw clearly precludes. Therefore, to the extent that issue was briefed, it is considered by the Court to be a red herring.

The Court also concludes, conversely, that when the facts are viewed in the light most favorable to the Defendants, they preclude summary judgment in Plaintiff's favor on any of her claims, and therefore her motion for partial summary judgment is denied in its entirety.

The reasoning in support of these rulings is set forth below.

FACTUAL BACKGROUND

Plaintiff leased an apartment located at 4517 East Ashbury place, where she lived with her two minor sons, Cody and Jaden. Plaintiff is also the mother of two

adult children, Brendan and Sebastian. Cody drove Plaintiff home from work shortly after 2:00 AM on the morning of August 19, 2016. When Plaintiff arrived home at approximately 2:30 AM, seven people were present in the home: Plaintiff, Cody, Jaden, Brendan, Sebastian, Brittany Khal (Brendan's Girlfriend), and an unnamed friend of Sebastian's.

Cody and Brendan became embroiled in a dispute that poured outside of the home and into the apartment commons shortly after Cody and Plaintiff arrived. Plaintiff instructed Brendan to leave the apartment with Brittany. Brendan, Brittany, and Sebastian's friend left the premises thereafter. However, Brendan left his shoes in the apartment.

Sioux Falls Police dispatch received an open-line 911 call from an unidentified person at approximately 3:15 AM on August 19, 2016. Dispatch heard screaming in the background and a female voice yelling "no." The call originated within a 25-meter radius of 4713 East Ashbury Place. Sioux Falls Police Officer Mark Toland responded to 4713 East Ashbury Place at approximately 3:20 AM.

When Officer Toland arrived at 4713 East Ashbury Place, a bystander directed him to Plaintiff's apartment. As Officer Toland approached Plaintiff's apartment, Officer Toland heard a man yelling and observed a small amount of blood on the concrete in a common area. Upon further approach, Officer Toland came upon Brendan who explained the blood drop by informing Officer Toland that he and Cody had an argument and that their dog had bit him. Brendan told Officer Toland that the blood observed on the concrete was from the dog bite, and lifted his

shirt, showing Officer Toland a small laceration on his abdomen. Brendan had returned to the apartment to retrieve the shoes he had left earlier. Plaintiff asserts that Officer Toland proceeded to knock on the door of Plaintiff's apartment, whereas Defendants assert Brendan knocked on the door to the apartment. In any event, Plaintiff heard the knock, answered the door, threw the shoes to Brendan, and told him to leave.

Officer Toland informed Plaintiff that a 911 call had originated within the apartment and requested entry into the apartment to perform a search. Plaintiff refused Officer Toland's request to enter without a warrant. Officer Toland persisted, said that no warrant was required, and informed Plaintiff that if she did not allow him to enter that he would arrest her for obstruction. During this time, Sebastian, Cody, and Jaden had gathered around the entryway of the apartment. Officer Toland observed a fresh laceration on Cody's face. At some point Cody attempted to move past officer Toland, but Officer Toland lightly pushed Cody back by placing a hand on Cody's chest.

Next, Plaintiff contends, Officer Toland ordered all occupants out of the apartment and stood with his foot in the doorway to block the door for twenty minutes. Defendants assert that Officer Toland only did so for a short time. Plaintiff denies that any of the apartment occupants physically interfered with Officer Toland. Defendants claim that Sebastian attempted to shut the door but Officer Toland stopped it with his foot. At any rate, Sioux Falls Police Officer Andrew Pearson arrived shortly thereafter. Then, the officers allowed Plaintiff to

exit her apartment to gather her legal notes from a nearby garage. While she was gone, her sons became increasingly confrontational, and Officers Toland and Pearson placed them all in handcuffs. Legal notes in hand, Plaintiff returned to find Brendan, Cody, and Sebastian seated outside the apartment in handcuffs. The officers called for backup and several more officers responded to the scene.

According to Ms. Boggs, Officer Toland then announced that he was going to enter the apartment. This occurred approximately twenty minutes after Officer Toland had first arrived. As Officer Toland entered, Plaintiff followed behind him, grasping her legal papers. Officer Pearson entered behind Plaintiff. Defendants' version of the ensuing events is that Officer Pearson then grabbed Plaintiff's left arm and Officer Toland grabbed Plaintiff's other arm but fell, and Officer Pearson "guided" Plaintiff to the ground. Plaintiff asserts that Officer Pearson grabbed Plaintiff's left arm and Officer Toland attempted to grab her other arm but fell, whereupon Officer Pearson slammed Plaintiff into the tiled floor face first without warning. The parties disagree as to whether Plaintiff was actively resisting arrest at that moment. Plaintiff was arrested, placed in handcuffs and loaded into a patrol vehicle.

Plaintiff claims that she suffered a fracture to her left arm and joint separation of her right shoulder, requiring pain medication and physical therapy but not surgery. She also claims to have received superficial cuts and bruises in the incident. Ambulance personnel provided no treatment. Defendants took digital photographs of Plaintiff's injuries, but data corruption purportedly rendered them

unusable. Officers Toland and Hoffman searched the apartment, and found no trace of blood or other persons or evidence. Ms. Boggs was tried for resisting arrest and acquitted by a jury. She has now brought this civil rights action against Defendants for money damages, alleging that she sustained bodily injuries because of excessive force applied to her in connection with the illegal search of her home and seizure of her person on the morning in question.

Plaintiff asserts 42 USC § 1983 liability against Officer Toland, Officer Pearson, and Sergeant Hoffman for violating her federal constitutional rights while acting under color of law. She is suing the City of Sioux Falls for negligent hiring, training, and supervision of the individual defendants.

Plaintiff claims deprivation of her federal rights based on her allegations that she was injured due to excessive force being applied while her apartment was unlawfully searched and her person unlawfully seized without probable cause or warrant, contrary to clearly established Fourth Amendment jurisprudence. Her excessive force claims are predicated as unlawful under the Fourth Amendment, and as substantive due process violations under the Fifth and Fourteenth Amendments. Defendants argue that qualified immunity shields them from liability because their actions were deemed to be justified by them at the time of the occurrence by their objectively reasonable interpretation of the Emergency, Emergency Aid, and/or Community Caretaker Doctrines.

ANALYSIS

I. Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(c). "A disputed fact is not 'material' unless it would affect the outcome of the suit under the governing substantive law in that 'a reasonable jury could return a verdict for the nonmoving party.'" *Gul v. Center for Family Medicine*, 2009 S.D. 12, ¶ 8, 762 N.W.2d 629, 633 (citations omitted). "[T]he moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Johnson v. Matthew J. Batchelder Co., Inc.*, 2010 S.D. 23, ¶ 8, 779 N.W.2d 690, 693 (citations omitted). A court determining a summary judgment motion must view the facts, and all reasonable inferences drawn from the facts, most favorably to the nonmoving party. *North Star Mutual Ins. Co. v. Rasmussen*, 2007 S.D. 55, ¶ 14, 734 N.W.2d 352, 356.

Once the moving party has established its burden, the nonmoving party must "present specific facts showing that a genuine, material issue for trial exists" to evade the grant of summary judgment. *Johnson v. Hayman & Associates, Inc.*, 2015 S.D. 63, ¶ 11, 867 N.W.2d 698, 701 (internal citations and quotations omitted). These specific facts must be more than "mere speculation, conjecture, or fantasy." *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398. "Unsupported

conclusions and speculative statements do not raise a genuine issue of fact." *Dakota Indus., Inc. v. Cabela's.Com, Inc.*, 2009 S.D. 39, ¶ 20, 766 N.W.2d 510,516.

II. 42 U.S.C. § 1983

Section 1 of the Civil Rights Act of 1871, provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C.A. § 1983. Two elements must be established to recover: (1) someone deprived the plaintiff of a federal right; and (2) the person depriving was acting under color of law state. *Swedlund v. Foster*, 2003 S.D. 8, ¶ 15, 657 N.W.2d 39, 46 (quoting *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)).

III. Qualified Immunity

While "[s]overeign immunity is not a defense" to a § 1983 claim, qualified immunity may be available to avoid liability. *Swedlund*, 2003 S.D. 8, ¶ 16, 657 N.W.2d at 46.

> "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Saucier v. Katz*, 533 U.S. at 206, 121 S.Ct. 2151, 150 L.Ed.2d 272 (qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force'").

Thornton v. Ci. of Rapid Ci., 2005 S.D. 15, ¶ 15, 692 N.W.2d 525, 533. "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials

from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

The Supreme Court of the United States, the Supreme Court of South Dakota, and the United States District Court for the District of South Dakota, Southern Division all utilize a two-prong test to determine whether claims may survive a qualified immunity defense on summary judgment. *Pearson*, 555 U.S. 223 (2009); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Stormo v. City of Sioux Falls*, 2016 WL 7391980, at 1 ; *Thornton*, 2005 S.D. 15, ¶ 11, 692 N.W.2d 525, 530. The plaintiff must show: (1) the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation. *Id.* The test may be done in any order, but both prongs are required to avoid summary judgment. *Id. See generally Pearson v.* 555 U.S. 223 (2009) (overturning prior precedent that required a more rigid sequential two-step analysis). The first prong is a factual determination, whereas the second prong is a purely legal question. *Thornton*, 2005 S.D. 15, ¶ 13, 692 N.W.2d at 531 (finding that "the first prong of the qualified immunity analysis, which determines whether a constitutional violation occurred, is a jury question."); *Howard v. Kansas City Police Dep't*, 570 F.3d 984, 989 (8th Cir. 2009); *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 536 (8th Cir. 1999); (holding that once the facts are established the second prong is a question of law). A motion for summary judgment in favor of state actors on grounds of qualified immunity must be denied when there are disputed issues of material fact that are salient to the determination. *See Thornton*, ¶ 24, 692 N.W.2d at 537. *See also*

Kalina v. Fletcher, 118 S.Ct. 502, 505-06 (1997). I will focus initially on the excessive force aspect of the case, as that is the focal point of her damages claim.

IV. Fourth Amendment Excessive Force

A. Deprivation of Right

The test for a § 1983 action based on excessive force under the Fourth Amendment's protections from unlawful search and seizure, "is whether the officer's actions were 'objectively reasonable' considering the circumstances, 'without regard to [the officer's] underlying intent or motivation.'" *Horne v. Crozier*, 1997 S.D. 65, ¶ 13, 565 N.W.2d 50, 54 (citing *Graham v. Connor*, 490 U.S. 386, 397 (1989). However, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment . . .. [P]olice officers are often forced to make split-second judgments . . . about the amount of force that is necessary . . .. [Furthermore, only] a conscious choice to inflict force . . . implicates a constitutional infringement." *Horne*, 1997 S.D. 65, ¶ 13, 565 N.W.2d at 54. Gross negligence is insufficient. *Id.* Reasonableness is determined considering factors including (1) the severity of the crime; (2) the threat to the safety of officers or others; (3) whether the suspect was resisting arrest; and (4) the resulting injuries. *Thornton*, 2005 S.D. 15, ¶ 12, 692 N.W.2d at 531. The "objective reasonableness of the officer's actions . . . is a jury question." *See Thornton*, 2005 S.D. 15, ¶ 13, 692 N.W.2d at 531 (analyzing objective reasonableness under qualified immunity).

There is a genuine dispute of material fact regarding the amount of force that was applied by Officers Toland and Pearson, which informs the question of the

objective reasonableness of their actions within the context of this case. That said, the parties do not dispute the facts of the first prong of the objective reasonableness analysis, which is the severity of the crime for which Plaintiff was arrested leading to the force that was applied—the only crime charged was obstruction, and even for that alleged offense, Plaintiff was acquitted by a jury. The context of the alleged offense adds even more mitigation—a citizen resisting officers forcing a warrantless entry into her home during early morning hours over her clearly expressed assertion of a constitutional violation.

Second, the threat to the safety of officers in this case was *de minimis*. Defendants argue that there were multiple individuals involved and passions were high, weighing in favor of the need to enforce strict control over the environment for officer safety during the search of the premises. All but one of these individuals, however, were handcuffed and seated. Plaintiff, the homeowner, armed only with a folder of legal notes she had retrieved to preserve her rights, was the only person remaining unshackled. Plaintiff alleges that approximately seventeen police officers were present at the time Officer Toland entered Plaintiff's apartment. The "threat" posed to the officers by this lone, unarmed woman, if any, was inconsequential.[1]

Thirdly, Plaintiff denies that she resisted arrest at all; rather, under her version of the facts she merely followed the officers into her home, resulting in being forcibly tackled to the ground.

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[1] According to her Driver's License information provided through Odyssey, Plaintiff was 44 years old at the time and is diminutive in stature, measuring 5' 4" in height, and weighing 135 lbs.

Fourth, Plaintiff alleges that, as a proximate cause of the force that was applied to her in these circumstances, she suffered serious bodily injuries including bone fracture and joint dislocation.

Viewing these facts in the light most favorable to Plaintiff, as we must, a reasonable factfinder could certainly determine that the level of force which Plaintiff claims to have been applied against her in this case was not objectively reasonable. *See Thornton*, 2005 S.D. 15, ¶ 13, 692 N.W.2d at 532 (citation omitted) (finding that "if the evidence, viewed in a light most favorable to [the non-movant], is such that a reasonable jury could find the force used by the officers was not objectively reasonable under the circumstances, summary judgment as to the first prong of the qualified immunity analysis would be improper."). Plaintiff must satisfy both prongs, however, to defeat Defendants' qualified immunity defense. We pivot now to the issue of whether Plaintiff's right not to be subjected to excessive police force was clearly established at the time of the alleged deprivation.

B. CLEARLY ESTABLISHED

To be clearly established "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is not protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law the unlawfulness must be apparent." *Hart v. Miller*, 2000 S.D. 53, ¶ 14, 609 N.W.2d 138, 143 (citations omitted).

> The question is whether the law gave the officials "fair warning that their alleged conduct was unconstitutional." "[O]fficials can still be on

> notice that their conduct violates established law even in novel factual circumstances." The "salient question" is whether the law [at the time of the alleged violation] gave the officers fair warning that their alleged treatment of [Plaintiff] was unconstitutional.

Howard, 570 F.3d at 991 (8th Cir. 2009) (citations omitted). Although, when a "right which is alleged to have been violated is clearly established, the court assumes that the police officer in question knew of this right . . . qualified immunity will only be denied if a reasonable officer should have known that the challenged conduct violated that established right." *Hart*, 2000 S.D. 53, ¶ 59, 609 N.W.2d at 150 (citations omitted).

Plaintiff argues that, due to the Supreme Court of South Dakota's holding in *Thornton v. Rapid City*, 2005 S.D. 15, 692 N.W.2d 525, the Defendant officers should have known that their conduct violated Plaintiff's' clearly established right to be free from excessive force. Assuming, for purposes of this motion, as I must, that the facts are as she alleges, I agree.

In *Thornton*, according to the minor Plaintiff, Yellow Boy, he was calmly walking down a sidewalk, minding his own business. *Thornton*, 2005 S.D. 15, ¶ 8, 692 N.W.2d at 529-30. Without warning, a Rapid City Police Officer, mistaking Yellow Boy as one of a group of fleeing misdemeanants he was pursuing, violently tackled Yellow Boy from behind, breaking Yellow Boy's wrist. *Id.* Analyzing whether the officer was put on notice that his conduct would be clearly unlawful, the Court noted that "[a]gain, in a summary judgment action we must accept the version of facts given by the nonmoving party. If these facts show that 'the officers'

mistake as to what conduct the law required is reasonable, they are entitled to the immunity defense." *Id.* ¶¶ 15-17, 692 N.W.2d at 532-34 (citations omitted).

The *Thornton* Court explicitly found that "[p]ursuant to available caselaw and [South Dakota's method of arrest] statutes, an officer in this State clearly knows that *absent some exigent or exceptional circumstances*, the officer may not use force without first making a reasonable determination of what, if any, force is necessary." *Id.* ¶ 23, 692 N.W.2d at 536 (emphasis added). The Court further held "that reasonable officers would know without specific guidance from the courts that tackling a non-felony suspect to the ground from behind where no exigent circumstances exist without first giving him an opportunity to surrender peacefully is unconstitutional." *Id.*, ¶ 20, 692 N.W.2d at 535.

The Court recognized that Eighth Circuit Case law "clearly establish[es] that applying substantial force before any resistance at all is encountered is generally unconstitutional" and that "using substantial force without first providing the suspect an opportunity to peacefully surrender is a violation of clearly established law[.]" *Id.* The *Thornton* Court's cited authority regarding peaceful surrender was a United States District Court opinion, where the police, arresting a woman wearing a sheer nightgown at her home under a valid arrest warrant, "threw [the suspect] to the floor and applied substantial pressure to her back even though she responded with virtually no resistance and had given virtually no indication of fleeing. Clearly such force was excessive and a police officer would know that it was." *DuFour-Dowell v. Cogger*, 969 F.Supp. 1107, 1121 (N.D.Ill. 1997)). Although

extra-jurisdictional, the opinion was relied upon by the Supreme Court of South Dakota, most likely because it fortifies the common-sense understanding that, even during a justified arrest, violent physical dominance of an unarmed suspect who is not in flight or actively resisting is a clear violation of Fourth Amendment safeguards when no warning or opportunity for surrender is provided.

In the present case, the facts, viewed in the light most favorable to Plaintiff, indicate that she did not physically resist the officers before she was thrown to the floor headfirst without warning. Plaintiff made no physical resistance to Officer Pearson's warrantless entry of her home. Defendants argue that Plaintiff admitted she was told not to enter the apartment, but that appears to be debatable. Even if she was verbally denied reentry into her own home while it was searched by officers, their responding to her breach of that command by "using substantial force without first providing the suspect an opportunity to peacefully surrender is a violation of clearly established law." *Thornton*, 2005 S.D. 15, ¶ 23, 692 N.W.2d 525, 536. *See also* SDCL 23A-3-5 ("No person shall subject an arrested person to more physical restraint than is reasonably necessary to effect the arrest."). Considering these established precedents, no reasonable police officer could believe that the amount of force alleged to have been applied here was necessary to restrain a single, unarmed woman in the presence of many officers under the circumstances of this case. Accordingly, Defendants are not entitled to summary judgment on Plaintiff's excessive force claim by virtue of qualified immunity.

V. Warrantless Search

A. Exigent or Exceptional Circumstances

Defendants argue that exigent or exceptional circumstances support their warrantless entry into Plaintiff's apartment, and, therefore, their actions in that regard did not violate her clearly established right to be secure in her home against unreasonable search and seizure. That said, Defendants concede, as they must, that no probable cause existed to believe evidence of the commission of a criminal offense lay within the apartment, or that Plaintiff was harboring a fleeing suspect therein. Thus, their actions herein must find refuge within some other exception to the warrant requirement enshrined in the Fourth Amendment.

Defendants rely alternatively on three related concepts—the Emergency Doctrine, the Emergency Aid Doctrine, and the Community Caretaking Doctrine—to justify their forcible entry into her home to conduct a warrantless search. Defendants assert that, even if their actions fail to meet the technical requirements of any of these doctrines, the evolving and nebulous state of the law surrounding these doctrines render their actions objectively reasonable, and therefore immune from suit, because it was reasonable for them to misapprehend the law and believe that their actions were constitutional. Defendants claim that, because the South Dakota Supreme Court has recognized these doctrines, but failed to clearly define them, the officers' interpretation as revealed by the undisputed facts herein ought not be questioned. Accordingly, Defendants assert that qualified immunity should be granted to the officers as a matter of law.

The Supreme Court of South Dakota clarified the state of law, however, regarding these doctrines in *State v. Deneui*, 2009 S.D. 99, 775 N.W.2d 221. In *Deneui*, a third party smelled what he believed to be gas fumes in his neighborhood. *Deneui*, 2009 S.D. 99, ¶ 2, 775 N.W.2d 221, 227. Two Sioux Falls Police Officers responded to investigate, and the reporting party directed the officers to Deneui's home, and alerted them to the possibility that Deneui was stealing gas, as meters in the area appeared to have been tampered with. *Id.* ¶¶ 2-4, 775 N.W.2d at 227. One officer knocked on the door of Deneui's home, but nobody answered. *Id.* The officers noted several irregularities. *Id.* ¶ 4-5, 775 N.W.2d at 227. Among them were: (1) a glass storm door to the house was closed but unlocked; (2) the main door was open; (3) a faint odor of ammonia was detected; and (4) a freezer in the backyard was modified with a plastic tube jutting out from it. *Id.* The officers opened the glass storm door and yelled inside to see if anyone was home, and when they did so, the smell of ammonia became stronger. *Id.* ¶ 6, 775 N.W.2d at 227-28. The officers then entered the residence to determine whether someone was incapacitated inside, and, although no one was found in the house, the officers did encounter overwhelming chemical odors as well as other evidence of a methamphetamine lab in plain view. *Id.* ¶¶ 6-8, 775 N.W.2d at 227-28. On the strength of this evidence, Deneui was arrested and subsequently convicted of drug manufacturing. *Id.* ¶¶ 9-11, 775 N.W.2d at 228-29.

On appeal, Deneui argued that the officers' warrantless entry was unlawful. *Id.* In affirming, the Supreme Court of South Dakota analyzed the three separate

exigency doctrines justifying a warrantless intrusion of a person's home that are not motivated by criminal investigatory purposes: (1) the Emergency Doctrine; (2) the Emergency Aid Doctrine; and (3) the Community Caretaker Doctrine. *Deneui*, 2009 S.D. 99, ¶¶ 23, 28, 33, 775 N.W.2d at 232, 234, 235.

It must be emphasized that Defendants do not purport that the facts of this case justify a warrantless search under the traditional Exigent Circumstances Exception. That rule can justify warrantless entry into a home only when there is probable cause to believe criminal suspects and/ or evidence of crime are contained therein and circumstances are such that the delay of procuring a warrant would unreasonably risk destruction of evidence, escape, or endanger human life. *Id.* ¶16 775 N.W.2d at 230. None of such is alleged herein or supported by the record. Indeed, each of the three alternative theories put forth by Defendants has as an element that the search not be motivated by desire to investigate criminal activity. Rather, the Defendants contend that the exigency was the risk that some innocent third party could have been in emergent need of aid within Plaintiff's apartment, thus vitiating the need for a warrant under what the *Deneui* Court termed the "Aiding Persons in Need of Assistance Exceptions." Id. ¶ 19, 775 N.W.2d at 231.

Regarding the Emergency Doctrine, the Court adopted a clear test: "(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to

associate the emergency with the area or place to be searched." *Id.* ¶ 24, 775 N.W.2d at 233-34. It must be noted that the second prong relating to the purpose of the search must be applied as an objective standard. *Id.* The Court held that both the Emergency Doctrine and the Emergency Aid Doctrine were functionally indistinguishable, and that "[b]oth require, at their essence, an emergency." *Id.*, ¶ 32, 775 N.W.2d 221, 235.

The Court turned next to the Community Caretaker Doctrine, which, the Court recognized, the United States Supreme Court has failed to extend beyond the scope of automobile searches. *Id.* ¶ 33, 775 N.W.2d at 235. The Court noted that, "under the Fourth Amendment, the highest measure of protection is in the home" and concluded "that the constitutional difference between homes and automobiles counsels a cautious approach when the exception is invoked to justify law enforcement intrusion into a home." *Id.* ¶¶ 36, 41, 775 N.W.2d at 236, 239. Indeed, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* ¶ 13, 775 N.W.2d at 229 (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972). Nevertheless, the *Deneui* Court, on first impression, extended the Community Caretaker Doctrine to homes in cases where there is a need to "protect and preserve life or avoid serious injury," and created several factors to consider in its application: (1) "the purpose of community caretaking must be the objectively reasonable independent and substantial justification for the intrusion[;]" (2) "the police action must be apart from the detection, investigation, or acquisition of criminal evidence[;]" and (3) "the officer

should be able to articulate specific facts that, taken with rational inferences, reasonably warrant the intrusion." *Id.* ¶ 41, 775 N.W.2d at 239. The Court highlighted an important distinction unique to the Community Caretaker Doctrine—that it is "more akin to a health and safety check," whereas the former two exceptions implicate actual emergency. *Id.*

Ultimately, the *Deneui* Court upheld the trial court's ruling based on the community caretaker exception. *Id.* ¶ 54, 775 N.W.2d at 244. The Court held that the "officers adequately articulated their concerns," and that, despite the lack of a true emergency, their minimal intrusion into Deneui's unattended home involved merely "crack[ing] open the unlocked storm door to call inside, only then to discover that the smell of ammonia fumes became much stronger, thus warranting further inquiry." *Id.*

Construing the facts in favor of Plaintiff, none of these Aiding Persons in Need of Assistance Exceptions would justify uniformed officers of the law invading the Plaintiff's home without a warrant and against her expressed will. The totality of the circumstances indicate that Defendants had approximately twenty minutes to obtain a telephone warrant to search Plaintiff's apartment, yet none was sought. Rather, they spent this time disputing with Plaintiff and her sons their right to enter her home over her objection, and calling in reinforcements to assist with the ultimate entry. Any argument that an emergency existed here is belied by the twenty minutes that elapsed between the time of Officer Pearson's arrival, and the

warrantless entry of Plaintiff's home, spent disputing the legal ramifications of the officers intended actions.

Furthermore, any plausible suggestion of an emergency completely evaporates when the circumstances are evaluated apart from suspicion of criminality. Defendants point to the small amount of blood that was on the sidewalk in the common area as sufficient predicate for a reasonable belief supporting application of an Aiding Persons in Need of Assistance Exception. Defendants assert that it was reasonable for them to check out the apartment to make sure there were no wounded people inside, and that the intrusion was proportionate to this concern. However, the source of the blood was confirmed by Brendan to be his own. Plaintiff, as well as Cody and Brendan, declared unequivocally that there were no others in the apartment and that no one else was hurt. There was nothing beyond the level of conjecture to suggest the contrary. Cody and Brenden's superficial injuries adequately explained the small amount of blood in the common area. Under ordinary circumstances that explanation would be sufficient to dispel any reasonable concerns. The only reasonable interpretation of the facts explaining the officers' continued determination to breach the sanctity of Plaintiff's home in the wee hours over her clear invocation of civil rights would seem to be their speculation that any person in need of aid therein was a crime victim, triggering the warrant requirement.

There were no weapons involved in this situation, nor any cries for help, groans, or other indicia of a problem emanating from inside Plaintiff's residence

during the entire twenty-minute process, nor any blood trail leading to Plaintiff's unit. Nothing was visible to suggest any danger to persons or property within the home. Defendants point to no evidence that another person remained within the dwelling, nor that an injury had occurred to anyone else besides Cody and Brendan, who were already detained outside. Indeed, all of this was specifically denied by the apartment's occupants, and those denials were and remain uncontradicted by any credible evidence. In short, Defendants fail to articulate specific facts that, taken with rational inferences, reasonably justified the officers' warrantless intrusion into Plaintiff's home. The officers' suppositions as to hypothetical dangers or victims therein are at best speculation and at worst pretext to further a criminal investigation into Plaintiff's home under non-exigent circumstances with no warrant. They fail to meet the standards of either emergency or caretaking concerns that would otherwise allow circumventing the Fourth Amendment. Viewing the evidence in the light most favorable to the Plaintiff, the officer's warrantless entry into Ms. Boggs' home was not an objectively reasonable misapprehension of any of the Aiding Persons in Need of Assistance Exceptions.

Defendants' motion for summary judgment regarding qualified immunity for Officer Pearson, Officer Toland and Sgt. Hoffman must be denied in full, because there are genuine disputes of material fact regarding whether both their entry into Plaintiff's home, and their subsequent use of force, were objectively reasonable given clearly established legal precedents. Plaintiff's motion for summary judgment on liability against these defendants must also be denied for the same reasons.

VI. Supervising Officer's Liability

Plaintiff bases her claim against Sergeant Hoffman on *Hart v. Miller*, 2000 S.D. 53, ¶ 32, 609 N.W.2d 138. In *Hart*, the Court found that § 1983 liability does not attach to supervisors in their official capacity because they are not "persons," but part of an official office. *Hart*, 2000 S.D. 53, ¶ 32, 609 N.W.2d at 147. Additionally, to be sued in one's individual capacity:

> [t]here must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.

Hart, 2000 S.D. 53, ¶ 33, 609 N.W.2d at 148.

Sergeant Hoffman is sued as an individual and the allegations against him meet the *Hart* test. Therefore, he is not entitled to summary judgment herein for the same reasons that apply to his subordinate officers. Although Sgt. Hoffman did not enter the home or accost Plaintiff, he was the commanding officer present on the scene, and thus either directed, approved, or acquiesced in Officer Pearson and Toland's challenged conduct. It is further alleged that he subsequently ratified their conduct by approving the justifications set forth in the police report. In *Hart*, the Court held that "a § 1983 plaintiff must prove that the alleged policy of the superiors "was the moving force behind the constitutional violation." *Hart*, 2000 S.D. 53, ¶ 34, 609 N.W.2d at 148. Accepting all the facts provided by Plaintiff, a reasonable jury could find that as the supervising officer at the scene, Sgt. Hoffman was an essential moving force behind the alleged constitutional violations.

Accordingly, there is a genuine dispute of material fact regarding whether Sergeant Hoffman explicitly or implicitly authorized or approved, and/or knowingly acquiesced in or ratified Officers Pearson and Toland's purportedly unconstitutional conduct. Defendants' motion for summary judgment regarding Sergeant Hoffman's individual liability is denied for these reasons.

VII. ENTITY LIABILITY

The United States District Court for the District of South Dakota has concluded that police departments are not suable entities under § 1983. *See Shield v. Huether*, No. 4:17-CV-04095-LLP, 2018 WL 3651353, at *3 (D.S.D. Aug. 1, 2018) (granting summary judgment in favor of Sioux Falls Police Department because police departments are not juridical entities suable under § 1983); *Walker v. Shafer*, No. CV 16-5121-JLV, 2018 WL 813420, at *2 (D.S.D. Feb. 9, 2018) (finding the court must dismiss plaintiff's complaint against the Police Department because police departments are not suable entities); *Purchase v. Sturgis Police Dep't*, CIV. No. 13–5060, 2015 WL 1477733, at *12 (D.S.D. Mar. 31, 2015) (holding that "police departments ... are not suable entities"); *Larsen v. Minnehaha Cty. Jail*, No. CIV.08-4036 RHB, 2008 WL 4753756, at *2 (D.S.D. Oct. 24, 2008) (granting summary judgment in favor of the police department because police departments cannot be held vicariously liable for the actions of its employees). My interpretation of Plaintiff's Complaint is that it does not purport to lodge a claim against the SFPD as an entity. The claim is against the City of Sioux Falls only.

A. LIABILITY OF MUNICIPALITIES

> Plaintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury." *Connick,* 563 U.S. at 60 (quoting *Monell v. N.Y. City Dept. of Soc. Servs.*, 436 U.S. 658, 692 (1978)). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Id.* at 61. "These are 'action[s] for which the municipality is actually responsible.'" *Id.* (quoting *Pembaur*, 475 U.S. at 479–80). "A 'policy' is a 'deliberate choice to follow a course of action ... made from among various alternatives by the official or officials responsible [under state law] for establishing final policy with respect to the subject matter in question.'" *Russell v. Hennepin County*, 420 F.3d 841, 847 (8th Cir. 2005) (quoting *Hayes v. Faulkner County, Ark.*, 388 F.3d 669, 674 (8th Cir. 2004)).

Stormo v. City of Sioux Falls, No. 4:12-CV-04057-KES, 2016 WL 7391980, at *4. Plaintiff contends that the City of Sioux Falls is liable due to inadequate training, deliberate indifference, or policy relating to its police employees. Construing the facts in the light most favorable to her, Plaintiff makes a *prima facie* showing of deliberate indifference, inadequate training, or errant policies that are so persistent and widespread as to have the force of law.

Plaintiff addresses the SFPD written policies governing application of force, arguing that there was a violation of such by the officers. Indeed, viewing the evidence in the light most favorable to Ms. Boggs, seventeen Sioux Falls Police officers, including a police Sergeant, were on scene, witnessing or participating in the violation of her clearly established federal constitutional rights, with no objectively reasonable basis to support such actions, and no objections to such conduct raised by any officer. This, standing alone, is sufficient evidence of improper review of written policies, lack of training, and/or deliberate indifference

to the policies to themselves, such as to withstand the City's motion for summary judgment. Although at this point the evidence is only circumstantial, this alleged widespread ignorance of clearly established law, the deliberative actions that allegedly were pursued in the context of this prolonged incident, and the alleged wholesale disregard of written policies are highly suggestive of a lack of training and systemic indifference to established law. Accordingly, summary judgment for the City is denied. Because the facts are disputed, Plaintiff's motion for summary judgment against the City is likewise denied.

VIII. Stay of Discovery

Qualified immunity is not just a defense to liability but an entitlement not to stand trial or face the burdens of litigation. Therefore, immunity questions should be resolved as early as possible. *Swedlund v. Foster*, 2003 S.D. 8, ¶ 12, 657 N.W.2d 39, 45.

> Because qualified immunity is "an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis deleted). Indeed, we have made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' against government officials [will] be resolved prior to discovery." *Anderson v. *232 Creighton,* 483 U.S. 635, 640, n. 2, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Accordingly, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) *(per curiam).*

Pearson v. Callahan, 555 U.S. 223, 231–32, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009). The Court has evaluated the claims of qualified immunity herein and denied them. Therefore, stay of discovery on that basis is moot.

IX. Due Process

Plaintiff also seeks summary judgment on her claim that Defendants violated her right to due process under the Fifth and Fourteenth Amendments, which provide that, without due process of law, no state may deprive a person of the essential and explicitly enumerated rights to life, liberty, or property. To prevail in a § 1983 action based on the due process clauses Plaintiff must show a government official's "invidious discriminatory purpose" or "deliberate indifference". *See Horne v. Crozier*, 1997 S.D. 65, ¶ 12, 565 N.W.2d 50, 54 (citations omitted) (finding that "lack of due care by [an] official causing unintended injury does not implicate the due process clause). Plaintiff's claim must also "be predicted on deliberate action; negligence is not enough. Even gross negligence is not enough." *Swedlund*, 2003 S.D. 8, ¶ 15, 657 N.W.2d at 46 (citing *Horne*, 1997 S.D. 65, ¶ 12, 565 N.W.2d at 54.

Plaintiff argues that Defendants were deliberately indifferent based on the (1) improper training. (2) ratification of Officer Toland and Pearson's actions by Hoffman, a superior officer; and (3) excessive force. First, Plaintiff contends that Officer Pearson, Officer Toland, and Sgt. Hoffman were improperly trained. There is a genuine dispute of material fact regarding whether SFPD's training protocols or policy rise to the level of deliberate indifference, or that Officers Pearson, Toland, or Hoffman acted deliberately. Assuming, *arguendo*, that Officers Toland and

Pearson, and Sergeant Hoffman did not follow SFPD's policy, or were not trained properly, that does not, without more, prove deliberate indifference. Plaintiff argues that different training is needed to teach officers what they can and cannot do based on the holding in *Thornton*. *See Thornton*, 2005 S.D. 15, ¶ 9, 692 N.W.2d at 530. That may be true, but it cannot on its own establish and invidious disregard of established rights.

Defendant also alleges that ratification by Sgt. Hoffman shows deliberate indifference. Defendant points to her own affidavit, whereby she states Sgt. "Hoffman had access to the videos wherein Officer Toland tells Officer Pearson that Your Affiant did not touch him, yet accepted and approved Officer Pearson's report and arrest report where Officer Pearson reports the opposite and uses that for justification to arrest Your Affiant." This may be evidence, but it is not dispositive of deliberate indifference. The mere approval of an inaccurate report may have been negligent, or even grossly negligent, without having been a deliberate attempt to violate Ms. Boggs' civil liberties.

As explained in detail in previous sections of this opinion, there are material disputed facts in this case regarding the excessive force claim. In sum, there are many disputed facts in this case, each of which ultimately must be interpreted within the context of the others, demonstrating the need for a jury trial. Accordingly, Plaintiff's motion for summary judgment in its favor on its due process claims, like all the other motions by either side, is denied.

ORDER

Now, therefore,

IT IS ORDERED that:

Defendants' motion for summary judgment is DENIED, and

Plaintiff's motion for partial summary judgment is DENIED.

Dated this 30 day of January, 2020

BY THE COURT:

Douglas E. Hoffman
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By: _____
Deputy Clerk

FILED
JAN 30 2020
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

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49CIV18-002229

NICHOLE A. BOGGS,

Plaintiff,

v.

ANDREW PEARSON, MARK TOLAND, MARTIN HOFFMAN, individually, and the CITY OF SIOUX FALLS, SOUTH DAKOTA, a political sub division acting by and through the SIOUX FALLS POLICE DEPARTMENT ,

Defendant.

DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

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Defendants respectfully submit this statement of undisputed material facts in support of their motion for summary judgment:

1. On August 19, 2016, at approximately 3:19 a.m., officers were requested to respond to the area of 4517 East Ashbury Place, Sioux Falls, South Dakota, in reference to a 911 open line. Metro Communications had received a call with yelling, screaming, and someone saying "no" in the background. (Affidavit of Mark Toland ¶ 3); (Affidavit of Andrew Pearson ¶ 3); (Affidavit of Martin Hoffman ¶ 3).

2. Officer Mark Toland was the first officer to arrive on scene. (Affidavit of Mark Toland ¶ 3).

3. When Officer Toland arrived, he observed a male subject sitting outside and asked him if he had heard anything. The male subject pointed toward 4517 East Ashbury Place

and stated that people were fighting. While he was pointing, Officer Toland heard a male voice yelling. (Affidavit of Mark Toland ¶ 4).

4. Officer Toland walked up to the apartment and the male he heard yelling was standing outside Apartment 101. The male was later identified as Brendon Conlon. (Affidavit of Mark Toland ¶ 5).

5. Brendan informed Officer Toland that he and his brother had been in an argument and that their dog bit him. Brendan stated that he would knock on the door of the apartment so that Officer Toland could talk to everyone inside the apartment. As Officer Toland and Brendan walked to the door, Officer Toland observed blood on the concrete. (Affidavit of Mark Toland ¶ 6).

6. Brendan knocked on the door to Apartment 101 and a female answered. The female was later identified as Plaintiff Nichole Boggs. Ms. Boggs stated that she wanted Brendan gone and she threw his shoes in front of the door. Ms. Boggs wanted Brendan gone because he and Cody Boggs, Ms. Boggs other son, had gotten into a physical fight after Brendan had fallen asleep and left food cooking on the stove. The fight had taken place outside of Apartment 101 at approximately 3:00 a.m. (Affidavit of Mark Toland ¶7); (Nichole Boggs Depo., p. 11-12).

7. Officer Toland explained to Ms. Boggs that there had been a 911 call and that he needed to come into the apartment to ensure that no one was injured. Ms. Boggs stated that Officer Toland could not come into the apartment. Officer Toland again explained that due to the call and his department policy, he needed to enter the apartment. Ms. Boggs again stated that Officer Toland could not enter the apartment without a warrant. (Affidavit of Mark Toland ¶ 8); (Nichole Boggs Depo., p. 16-17).

8. As Officer Toland was conversing with Ms. Boggs, more people came to the inside apartment doorway, including Ms. Boggs' eldest son, Sebastian Boggs. Sebastian stated that Officer Toland could not enter the apartment. (Affidavit of Mark Toland ¶ 9); (Nichole Boggs Depo., p. 17).

9. Ms. Boggs than exited the apartment to go to her garage where she had a folder containing various federal and state statutes, legal articles, cases, amendments, and constitutional rights. (Affidavit of Mark Toland ¶ 10); (Nichole Boggs Depo., p. 17-19).

10. Ms. Boggs was freely allowed to go to her garage to retrieve her folder. (Nichole Boggs Depo., p. 17).

11. When Ms. Boggs returned to her apartment, she again stated that Officer Toland could not enter the apartment. Officer Toland explained for a third time that he needed to enter the apartment to make sure everyone was okay. Officer Toland also explained that if she would not let him enter the apartment that she could be arrested for obstruction. (Affidavit of Mark Toland ¶ 10).

12. Soon thereafter, Officer Andrew Pearson arrived on the scene. Officer Pearson observed Officer Toland speaking with Ms. Boggs, Brendan, and Sebastian, and as he walked closer to the apartment door, noticed blood on the concrete[1] in front of Apartment 101. (Affidavit of Andrew Pearson ¶¶ 4-5).

13. Officers Toland and Pearson again attempted to explain to Ms. Boggs, Brendan, and Sebastian why they needed to enter the apartment. All three individuals continued to deny the officers access to the apartment and became more and more agitated. At some point,

[1] When Brendan was questioned about the blood, he indicated that the blood was from him because he had been bitten by the family dog. Brendan lifted his shirt and showed the officers a small cut/laceration on his upper abdomen. (Affidavit of Andrew Pearson ¶ 6).

Sebastian attempted to shut the door on the officers, which Officer Toland stopped. (Affidavit of Mark Toland ¶ 11); (Affidavit of Andrew Pearson ¶ 7).

14. Three other individuals then came to the door from inside the apartment. These individuals were later identified as Cody and Jaden Boggs, Ms. Boggs' youngest sons, and Elijah Wilson, a family friend. These individuals told the officers that no one else was in the apartment and that they were not allowed to enter the apartment. (Affidavit of Mark Toland ¶ 12); (Affidavit of Andrew Pearson ¶ 8).

15. Officer Pearson noticed that Cody had a fresh laceration on his face. (Affidavit of Andrew Pearson ¶ 8).

16. Cody then attempted to push past Officer Toland and re-enter the apartment. Officer Toland put his right hand against Cody's chest and slightly pushed back while telling him that he was not allowed back into the apartment. (Affidavit of Mark Toland ¶ 13); (Affidavit of Andrew Pearson ¶ 9).

17. Cody, Brendan, and Sebastian then began yelling and becoming increasingly confrontational. Officer Toland placed Brendan and Sebastian into handcuffs and Officer Pearson placed Cody into handcuffs. (Affidavit of Mark Toland ¶14); (Affidavit of Andrew Pearson ¶ 10); (Nichole Boggs Depo., p. 20).

18. Once Cody, Brendan, and Sebastian were detained, more officers began arriving at the scene. These officers stood outside the apartment to watch the subjects while Officers Toland and Pearson entered the apartment. (Affidavit of Mark Toland ¶ 15); (Affidavit of Andrew Pearson ¶ 11); (Affidavit of Martin Hoffman ¶¶ 4-6).

19. Sergeant Martin Hoffman also arrived on the scene at this time. Sergeant Hoffman noticed blood on the concrete leading up to Apartment 101 and heard a lot of yelling. (Affidavit of Martin Hoffman ¶¶ 4-5).

20. When Sergeant Hoffman got inside the apartment building, he observed Ms. Boggs standing in the doorway of Apartment 101 near Officers Toland and Pearson. Ms. Boggs was not in handcuffs. (Affidavit of Martin Hoffman ¶ 6).

21. Sergeant Hoffman heard the officers tell Ms. Boggs that she was not allowed to enter the apartment while they performed the search. (Affidavit of Martin Hoffman ¶ 7).

22. Officer Toland entered the apartment first and Officer Pearson followed. (Affidavit of Mark Toland ¶ 15); (Affidavit of Andrew Pearson ¶ 11); (Nichole Boggs Depo., p. 21).

23. As the officers entered the apartment, Ms. Boggs followed. (Affidavit of Mark Toland ¶ 16); (Affidavit of Andrew Pearson ¶ 12); (Affidavit of Martin Hoffman ¶ 8); (Nichole Boggs Depo., p. 21).

24. Officer Pearson again instructed Ms. Boggs to wait outside, however she informed him that it was her house and she would be going inside. Officer Pearson attempted to re-direct her outside, and she pushed past him. (Affidavit of Mark Toland ¶ 16); (Affidavit of Andrew Pearson ¶¶ 12-13); (Affidavit of Martin Hoffman ¶¶ 7-8).

25. Officer Pearson then grabbed Ms. Boggs' left arm and Officer Toland grabbed Ms. Boggs' right arm. As Officer Toland grabbed Ms. Boggs, he fell backwards and landed on the ground. Officer Pearson then guided Ms. Boggs to the ground. Ms. Boggs actively resisted and struggled to get her hands free. (Affidavit of Mark Toland ¶ 17); (Affidavit of Andrew Pearson ¶¶ 14-15); (Affidavit of Martin Hoffman ¶ 9); (Nichole Boggs Depo., p. 21).

26. Eventually the officers were able to place Ms. Boggs into handcuffs and Officer Pearson escorted her out of the apartment and into his patrol vehicle. (Affidavit of Mark Toland ¶¶ 18-19); (Affidavit of Andrew Pearson ¶¶ 16-17); (Affidavit of Martin Hoffman ¶¶ 9-10); (Nichole Boggs Depo., p. 22).

27. During this interaction with Ms. Boggs, Sebastian and Brendan were screaming at the top of their lungs. (Affidavit of Andrew Pearson ¶ 16); (Affidavit of Martin Hoffman ¶ 9); (Nichole Boggs Depo., p. 22).

28. Officer Toland and Sergeant Hoffman finished the search of the apartment. No other individuals or blood were found inside the apartment. (Affidavit of Mark Toland ¶ 20); (Affidavit of Andrew Pearson ¶ 18); (Affidavit of Martin Hoffman ¶¶ 10-11).

29. Paramedics Plus was called to the scene in order to assess Ms. Boggs. Paramedics Plus advised that she did not need additional medical treatment and she was not transported to the hospital. (Affidavit of Mark Toland ¶ 21); (Affidavit of Andrew Pearson ¶ 19); (Affidavit of Martin Hoffman ¶ 12); (Nichole Boggs Depo., p. 23).

30. During her deposition, Ms. Boggs claimed that she suffered a fractured radius on her left arm and a dislocated right shoulder, for which she received pain medication and physical therapy, but not surgery. (Nichole Boggs Depo., p. 26-27).

31. Ms. Boggs, Sebastian, and Brendan were arrested and transported to the Minnehaha County Jail for booking. Ms. Boggs was charged with resisting arrest and obstruction, Sebastian was charged with disorderly conduct, and Brendan was charged with

disorderly conduct and domestic assault.[2] (Affidavit of Mark Toland ¶ 22); (Affidavit of Andrew Pearson ¶ 21); (Affidavit of Martin Hoffman ¶ 13).

32. At the jail, Sergeant Hoffman took photographs of Ms. Boggs. However, the photo card was corrupted and none of the photographs were useable. (Affidavit of Martin Hoffman ¶ 14); (Nichole Boggs Depo., p. 30).

33. A couple days later, Sergeant Hoffman traveled to Ms. Boggs' place of employment to take more photographs of her. When he visited her, he was in his police uniform and drove his patrol vehicle. (Affidavit of Martin Hoffman ¶ 15).

34. On November 17 and 18, 2016, a jury trial was held on Ms. Boggs' resisting arrest and obstruction charges, in which she was acquitted.

Dated this 18th day of February, 2019.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Gary P. Thimsen
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[2] Officer Pearson was informed that Brendan and Cody had been in a fight and Brendan had struck Cody in the face. Based on this information, Brendan was placed under arrest for domestic assault. (Affidavit of Andrew Pearson ¶ 20).

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2019, I served a true and correct copy of the foregoing *Defendants' Statement of Undisputed Material Facts* using the Odyssey File & Serve system which will automatically send email notification of such service to the following:

Jeff Beck
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/s/ Gary P. Thimsen
One of the Attorneys for Defendants

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT
**********		
NICHOLE A. BOGGS, Plaintiff, vs. ANDREW PEARSON, MARK TOLAND, MARTIN HOFFMAN, individually, and the CITY OF SIOUX FALLS, SOUTH DAKOTA, a political subdivision acting by and through the SIOUX FALLS POLICE DEPARTMENT, Defendants.	)	CIV 18-2229 PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS
**********		

Comes now Plaintiff, Nichole Boggs, in response to Defendant's Statement of Undisputed Material Facts and responses as follows:

1. On August 19, 2016, at approximately 3:19 a.m., officers were requested to respond to the area of 4517 East Ashbury Place, Sioux Falls, South Dakota, in reference to a 911 open line. Metro Communications had received a call with yelling, screaming, and someone saying "no" in the background. (Affidavit of Mark Toland ¶ 3); (Affidavit of Andrew Pearson ¶ 3); (Affidavit of Martin Hoffman ¶ 3).

Response: Admit.

2. Officer Mark Toland was the first officer to arrive on scene. (Affidavit of Mark Toland ¶ 3).

Response: Admit.

3. When Officer Toland arrived, he observed a male subject sitting outside and asked him if he had heard anything. The male subject pointed toward 4517 East Ashbury Place and stated that people were fighting. While he was pointing, Officer Toland heard a male voice yelling.

(Affidavit of Mark Toland ¶ 4).

Response: Admit.

4. Officer Toland walked up to the apartment and the male he heard yelling was standing outside Apartment 101. The male was later identified as Brendon Conlon. (Affidavit of Mark Toland ¶ 5).

Response: Admit.

5. Brendan informed Officer Toland that he and his brother had been in an argument and that their dog bit him. Brendan stated that he would knock on the door of the apartment so that Officer Toland could talk to everyone inside the apartment. As Officer Toland and Brendan walked to the door, Officer Toland observed blood on the concrete. (Affidavit of Mark Toland ¶

Response: Admit.

6. Brendan knocked on the door to Apartment 101 and a female answered. The female was later identified as Plaintiff Nichole Boggs. Ms. Boggs stated that she wanted Brendan gone and she threw his shoes in front of the door. Ms. Boggs wanted Brendan gone because he and Cody Boggs, Ms. Boggs other son, had gotten into a physical fight after Brendan had fallen asleep and left food cooking on the stove. The fight had taken place outside of Apartment 101 at approximately 3:00 a.m. (Affidavit of Mark Toland ¶7); (Nichole Boggs Depo., p. 11-12).

Response: Admit.

7. Officer Toland explained to Ms. Boggs that there had been a 911 call and that he needed to come into the apartment to ensure that no one was injured. Ms. Boggs stated that Officer Toland could not come into the apartment. Officer Toland again explained that due to the call and his department policy, he needed to enter the apartment. Ms. Boggs again stated that

Officer Toland could not enter the apartment without a warrant. (Affidavit of Mark Toland ¶ 8); (Nichole Boggs Depo., p. 16-17).

Response: Admit but qualify that Ms. Boggs requested Officer Toland's claim that a 911 call had originated from within her residence be verified.

8. As Officer Toland was conversing with Ms. Boggs, more people came to the inside apartment doorway, including Ms. Boggs' eldest son, Sebastian Boggs. Sebastian stated that Officer Toland could not enter the apartment. (Affidavit of Mark Toland ¶ 9); (Nichole Boggs Depo., p. 17).

Response: Admit.

9. Ms. Boggs than exited the apartment to go to her garage where she had a folder containing various federal and state statutes, legal articles, cases, amendments, and constitutional rights. (Affidavit of Mark Toland ¶ 10); (Nichole Boggs Depo., p. 17-19).

Response: Admit that Ms. Boggs went to her garage but deny that she left the apartment to specifically go to the garage. On the two occasions she went to the garage she was already outside as the officers had previously ordered Ms. Boggs, her four children, and one visitor from her home.

10. Ms. Boggs was freely allowed to go to her garage to retrieve her folder. (Nichole Boggs Depo., p. 17).

Response: Admit.

11. When Ms. Boggs returned to her apartment, she again stated that Officer Toland could not enter the apartment. Officer Toland explained for a third time that he needed to enter the apartment to make sure everyone was okay. Officer Toland also explained that if she would not let him enter the apartment that she could be arrested for obstruction. (Affidavit of

Mark Toland ¶ 10).

Response: Admit Ms. Boggs's told the officers she did not want them going into her house but deny that absent any physical interference Officer Toland's threat was to unlawfully arrest Ms. Boggs.

12. Soon thereafter, Officer Andrew Pearson arrived on the scene. Officer Pearson observed Officer Toland speaking with Ms. Boggs, Brendan, and Sebastian, and as he walked closer to the apartment door, noticed blood on the concrete[1] in front of Apartment 101. (Affidavit of Andrew Pearson ¶¶ 4-5).

Response: Admit.

13. Officers Toland and Pearson again attempted to explain to Ms. Boggs, Brendan, and Sebastian why they needed to enter the apartment. All three individuals continued to deny the officers access to the apartment and became more and more agitated. At some point, Sebastian attempted to shut the door on the officers, which Officer Toland stopped. (Affidavit of Mark Toland ¶ 11); (Affidavit of Andrew Pearson ¶ 7).

Response: Admit the three mentioned did give permission for the officers to enter but deny that anyone physically interfered as Officer Toland was holding the door with his foot in the door to prevent the door from closing.

14. Three other individuals then came to the door from inside the apartment. These individuals were later identified as Cody and Jaden Boggs, Ms. Boggs' youngest sons, and Elijah Wilson, a family friend. These individuals told the officers that no one else was in the apartment and that they were not allowed to enter the apartment. (Affidavit of Mark Toland ¶

[1] When Brendan was questioned about the blood, he indicated that the blood was from him because he had been bitten by the family dog. Brendan lifted his shirt and showed the officers a small cut/laceration on his upper abdomen. (Affidavit of Andrew Pearson ¶ 6).

12); (Affidavit of Andrew Pearson ¶ 8).

Response: Admit these persons were in the apartment but then ordered outside by Officer Toland.

15. Officer Pearson noticed that Cody had a fresh laceration on his face. (Affidavit of Andrew Pearson ¶ 8).

Response: Admit.

16. Cody then attempted to push past Officer Toland and re-enter the apartment. Officer Toland put his right hand against Cody's chest and slightly pushed back while telling him that he was not allowed back into the apartment. (Affidavit of Mark Toland ¶ 13); (Affidavit of Andrew Pearson ¶ 9).

Response: Admit.

17. Cody, Brendan, and Sebastian then began yelling and becoming increasingly confrontational. Officer Toland placed Brendan and Sebastian into handcuffs and Officer Pearson placed Cody into handcuffs. (Affidavit of Mark Toland ¶14); (Affidavit of Andrew Pearson ¶ 10); (Nichole Boggs Depo., p. 20).

Response: Admit.

18. Once Cody, Brendan, and Sebastian were detained, more officers began arriving at the scene. These officers stood outside the apartment to watch the subjects while Officers Toland and Pearson entered the apartment. (Affidavit of Mark Toland ¶ 15); (Affidavit of Andrew Pearson ¶ 11); (Affidavit of Martin Hoffman ¶¶ 4-6).

Response: Admit.

19. Sergeant Martin Hoffman also arrived on the scene at this time. Sergeant Hoffman noticed blood on the concrete leading up to Apartment 101 and heard a lot of yelling.

(Affidavit of Martin Hoffman ¶¶ 4-5).

Response: Admit Sergeant Hoffman was attendance but deny the blood was specific to Apartment 101 as it was in a common area between apartments and on a landing leading up to another floor of apartments.

20. When Sergeant Hoffman got inside the apartment building, he observed Ms. Boggs standing in the doorway of Apartment 101 near Officers Toland and Pearson. Ms. Boggs was not in handcuffs. (Affidavit of Martin Hoffman ¶ 6).

Response: Deny. Ms. Boggs was the first person to leave the apartment and once she was outside Officer Toland stood with his foot in the doorway to prevent the door from being closed.

21. Sergeant Hoffman heard the officers tell Ms. Boggs that she was not allowed to enter the apartment while they performed the search. (Affidavit of Martin Hoffman ¶ 7).

Response: Deny. Officer Toland does not claim to have told Ms. Boggs she could not enter her apartment.

22. Officer Toland entered the apartment first and Officer Pearson followed. (Affidavit of Mark Toland ¶ 15); (Affidavit of Andrew Pearson ¶ 11); (Nichole Boggs Depo., p. 21).

Response: Deny. Officer Toland entered first followed by Ms. Boggs.

23. As the officers entered the apartment, Ms. Boggs followed. (Affidavit of Mark Toland ¶ 16); (Affidavit of Andrew Pearson ¶ 12); (Affidavit of Martin Hoffman ¶ 8); (Nichole Boggs Depo., p. 21).

Response: Deny. Ms. Boggs entered her house after Officer Toland but before Officer Pearson.

24. Officer Pearson again instructed Ms. Boggs to wait outside, however she informed him that it was her house and she would be going inside. Officer Pearson attempted to re-direct her outside, and she pushed past him. (Affidavit of Mark Toland ¶ 16); (Affidavit of Andrew Pearson ¶¶ 12-13); (Affidavit of Martin Hoffman ¶¶ 7-8).

Response: Deny. Ms. Boggs was insider her house before she was grabbed by Officer Pearson.

25. Officer Pearson then grabbed Ms. Boggs' left arm and Officer Toland grabbed Ms. Boggs' right arm. As Officer Toland grabbed Ms. Boggs, he fell backwards and landed on the ground. Officer Pearson then guided Ms. Boggs to the ground. Ms. Boggs actively resisted and struggled to get her hands free. (Affidavit of Mark Toland ¶ 17); (Affidavit of Andrew Pearson ¶¶ 14-15); (Affidavit of Martin Hoffman ¶ 9); (Nichole Boggs Depo., p. 21).

Response: Deny that he Ms. Boggs resisted or put up any struggle with the officers after she was grabbed and thrown to tile floor where she landed on her face.

26. Eventually the officers were able to place Ms. Boggs into handcuffs and Officer Pearson escorted her out of the apartment and into his patrol vehicle. (Affidavit of Mark Toland ¶¶ 18-19); (Affidavit of Andrew Pearson ¶¶ 16-17); (Affidavit of Martin Hoffman ¶¶ 9-10); (Nichole Boggs Depo., p. 22).

Response: Deny that Ms. Boggs took or could take any action to prevent the officers from effecting an arrest as one arm was broken and the other a dislocated shoulder.

27. During this interaction with Ms. Boggs, Sebastian and Brendan were screaming at the top of their lungs. (Affidavit of Andrew Pearson ¶ 16); (Affidavit of Martin Hoffman ¶ 9); (Nichole Boggs Depo., p. 22).

Response: Admit that for the first time during this incident that Ms. Boggs raised her

voice was when she was slammed to the ground and believed the officers had punched her in the face. The boys reacted when they saw the officers slam their mother to a hard floor.

28. Officer Toland and Sergeant Hoffman finished the search of the apartment. No other individuals or blood were found inside the apartment. (Affidavit of Mark Toland ¶ 20); (Affidavit of Andrew Pearson ¶ 18); (Affidavit of Martin Hoffman ¶¶ 10-11).

Response: Admit.

29. Paramedics Plus was called to the scene in order to assess Ms. Boggs. Paramedics Plus advised that she did not need additional medical treatment and she was not transported to the hospital. (Affidavit of Mark Toland ¶ 21); (Affidavit of Andrew Pearson ¶ 19); (Affidavit of Martin Hoffman ¶ 12); (Nichole Boggs Depo., p. 23).

Response: Admit.

30. During her deposition, Ms. Boggs claimed that she suffered a fractured radius on her left arm and a dislocated right shoulder, for which she received pain medication and physical therapy, but not surgery. (Nichole Boggs Depo., p. 26-27).

Response: Admit.

31. Ms. Boggs, Sebastian, and Brendan were arrested and transported to the Minnehaha County Jail for booking. Ms. Boggs was charged with resisting arrest and obstruction, Sebastian was charged with disorderly conduct, and Brendan was charged with disorderly conduct and domestic assault.[2] (Affidavit of Mark Toland ¶ 22); (Affidavit of Andrew Pearson ¶ 21); (Affidavit of Martin Hoffman ¶ 13).

Response: Admit. However, Ms. Boggs was acquitted of her charges following a jury

[2] Officer Pearson was informed that Brendan and Cody had been in a fight and Brendan had struck Cody in the face. Based on this information, Brendan was placed under arrest for domestic assault. (Affidavit of Andrew Pearson ¶ 20).

trial, Sebastian acquitted following a court trial, and Brendan's charges were dismissed without trial.

32. At the jail, Sergeant Hoffman took photographs of Ms. Boggs. However, the photo card was corrupted and none of the photographs were useable. (Affidavit of Martin Hoffman ¶ 14); (Nichole Boggs Depo., p. 30).

Response: Deny. The photos of jail were produced it was the photos that Sergeant Hoffman went an took of Ms. Boggs at her workplace in the following days that were never produced.

33. A couple days later, Sergeant Hoffman traveled to Ms. Boggs' place of employment to take more photographs of her. When he visited her, he was in his police uniform and drove his patrol vehicle. (Affidavit of Martin Hoffman ¶ 15).

Response: Admit with additional in Response 32.

34. On November 17 and 18, 2016, a jury trial was held on Ms. Boggs' resisting arrest and obstruction charges, in which she was acquitted.

Response: Admit.

Dated this 30th day of July, 2019.

/s/ Jeffrey R. Beck

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Attorney for Plaintiff

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT
**********		
	)	
NICHOLE A. BOGGS,	)	
	)	
Plaintiff,	)	CIV 18-2229
vs.	)	
	)	
ANDREW PEARSON, MARK TOLAND, MARTIN HOFFMAN, individually, and the CITY OF SIOUX FALLS, SOUTH DAKOTA, a political subdivision acting by and through the SIOUX FALLS POLICE DEPARTMENT,	)	PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS
Defendants.	)	
	)	
**********		

Comes now the Plaintiff, by and through the undersigned attorney, and submits the following separate Statement of Undisputed Material Facts in support of her Motion for Summary Judgment.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff, Nichole Boggs, is a resident of Minnehaha County, South Dakota, and in August 2016 resided with her four children at 4517 E. Ashbury Place, apartment 101, Sioux Falls, South Dakota. (Affidavit of Nichole Boggs, ¶2).

2. Defendants Andrew Pearson, Mark Toland, and Martin Hoffman were, at all times relevant hereto, employed as a police officers and acting under the color of law for the Sioux Falls Police Department, hereafter "SFPD", in Sioux Falls, South Dakota. (Affidavit of Nichole Boggs, ¶¶ 3-5).

3. Defendant City of Sioux Falls is a political subdivision within the State of South Dakota, located in Minnehaha County, South Dakota. (Affidavit of Nichole Boggs, ¶ 6).

4. On or about August 19, 2016, at 0319 hours, Officers Mark Toland and Andrew Pearson were dispatched to investigate a 911 hang-up call at an unknown address at or near the area of area of 1500 E. 8th Street, Sioux Falls, South Dakota, with a caller name of Yquelin Ortega. (Affidavit of Nichole Boggs ¶8).

5. The dispatch log reflects that the officers were provided updated information that the 911 call had originated from the area Ashbury Place apartments and was within a 25-meter radius of the 4713 block E. Ashbury but had no name or unit number. (Affidavit of Nichole Boggs, ¶ 9).

6. The Ashbury Place apartment complex comprises multiple buildings and has at least 60 individual units. (Affidavit of Nichole Boggs ¶7).

7. Shortly after 2 a.m. on August 19, 2016 Nichole Boggs got off work and was provided a ride home by her 17-year old son, Cody; the two arrived home around 2:30 a.m. after first making a stop for food. (Affidavit of Nichole Boggs, ¶ 10).

8. When Nichole arrived home with her son Cody, now present in her house were her two adult children, Brendan and Sebastian, two adult friends of her children, and her youngest child, Jaden. (Affidavit of Nichole Boggs, ¶ 11).

9. Brendan and Cody got into an argument and Nichole instructed Brendan to leave her house and go home with his girlfriend who too was present. (Affidavit of Nichole Boggs, ¶ 12).

10. Brendan and his girlfriend left but Brendan came back to get his shoes and was outside knocking on the door when the officers arrived at the Ashbury apartment complex. (Affidavit of Nichole Boggs, ¶ 13).

11. Nichole was getting the shoes for Brendan when officers knocked on her door. (Affidavit of Nichole Boggs, ¶ 14).

12. Nichole answered officer Toland's knock at the door and officer Toland told Nichole someone had called 911 from inside the apartment and that Sioux Falls Police policy required that he enter and search her house to make sure everyone was ok. (Affidavit of Nichole Boggs, ¶ 15; Affidavit of Mark Toland, ¶ 8).

13. Nichole and her sons told the Officers that no one had called 911 from inside their house and requested the officers attempt to determine where the call was coming from and verify that a call did indeed come from their home. (Affidavit of Nichole Boggs, ¶ 16).

14. The SFPD has a policy on how to investigate 911 hang-up calls and the policy is founded on the officers knowing the residence or business from which the call originated. (Affidavit of Nichole Boggs, ¶ 18, Exhibit 1).

15. The Officers made no attempt to communicate with dispatch on the specific location or origin of the 911 call, to identify the 911 caller, or request dispatch call the phone number. (Affidavit of Nichole Boggs, ¶ 19).

16. Officers Pearson and Toland told Nichole they were going to search her residence although the officers did not have a warrant to do so. (Affidavit of Nichole Boggs, ¶ 21).

17. The officer made everyone exit the house and for approximately 20 minutes Officer Toland stood with his foot inside or held open Nichole's front door and prevented anyone from reentering the house. (Affidavit of Nichole Boggs, ¶¶ 22, 25).

18. Nichole and her sons did not consent nor want the officers to enter and search their home; all argued with the officers on whether the home could be searched without a warrant. (Affidavit of Nichole Boggs, ¶¶ 23-24).

19. The officers claimed to have seen blood on the sidewalk in a common area on a sidewalk that leads to Affiant and other tenant's respective units. (Affidavit of Mark Toland ¶ 6) (Affidavit of Andrew Pearson, ¶5).

20. The officers told Nichole and her sons they were going to enter their house to see if there was anyone hurt or possibly dead inside. (Affidavit of Mark Toland ¶ 8) (Affidavit of Andrew Pearson, ¶7).

21. Officer Toland told Nichole he did not need a warrant to enter the apartment but then told Nichole and her sons that if they did not let the officers in they would be arrested for obstruction, yet all were all outside and Officer Toland was standing in the doorway of the house controlling entry. (Affidavit of Mark Toland ¶ 10) (Affidavit of Nichole Boggs, ¶28).

22. The officers had placed three of Nicholes' sons in handcuffs and had them seated on the ground outside the apartment. (Affidavit of Mark Toland ¶ 14) (Affidavit of Nichole Boggs, ¶29).

23. Nichole was free to move about and twice went to her garage stall, located across the parking lot from the apartment complex, looking for paperwork she wanted to show the officers that she felt addressed warrantless search. (Affidavit of Nichole Boggs, ¶30).

24. The officers told Nichole they were going into the apartment and conduct a search irrespective of her wishes; Officer Toland was the first to go in and he entered the apartment approximately 20 minutes after having first arrived. (Affidavit of Nichole Boggs, ¶ 31).

25. The officers called for additional police and eventually 15 patrol cars were present containing 17 officers and a K-9 unit. (Affidavit of Nichole Boggs, ¶ 32).

26. Nichole was standing near her front door and was flipping through her folder of papers when Officer Toland announced and began to enter her house. (Affidavit of Nichole Boggs, ¶ 33).

27. Once Officer Toland stepped into the house Nichole, holding in her arms an open folder of papers, followed behind Officer Toland and entered her house. (Affidavit of Nichole Boggs, ¶ 34).

28. Officer Pearson then followed Nichole into the house and once inside, without any verbal command or warning, Officer Pearson seized Nichole's left arm and began to throw Nichole to the tiled floor inside her house. (Affidavit of Nichole Boggs, ¶¶ 35-36).

29. Officer Toland attempted to grab Your Affiant's right arm but Officer Toland fell backwards and landed on the ground, he was then able to get ahold of her right arm. (Affidavit of Mark Toland, ¶ 17).

30. Holding Plaintiff's arm to the side, Officer Pearson threw Nichole onto the ground where her head and face stuck the entryway floor. (Affidavit of Nichole Boggs, ¶ 38).

31. Immediately upon being grabbed by Officer Pearson and slammed face first into the floor without warning, Nichole screamed out in pain and initially believed the severe pain to her face was caused by one of the officers punching her. (Affidavit of Nichole Boggs, ¶ 39).

32. The amount of force used by the officers caused a fracture to the head of the radius on Your Affiant's left arm and a joint separation to Your Affiant's right shoulder, as well as several cuts and bruises to Affiant's face and body. (Affidavit of Nichole Boggs, ¶ 40).

33. The injuries were reported to the officers and ambulance personnel looked at Your Affiant but provided no treatment. (Affidavit of Mark Toland ¶ 21) (Affidavit of Nichole Boggs, ¶41).

34. Following this encounter, Officer Pearson arrested Affiant for Obstructing an Officer and Resisting Arrest. (Affidavit of Andrew Pearson, ¶21).

35. All of the police officers that responded to the call described herein were equipped with body microphones and recordings exists for most of the officers. (Affidavit of Nichole Boggs, ¶ 43).

36. Shortly after Nichole was tackled and arrested on the recordings Officer Pearson can be heard asking Officer Toland if Nichole had pushed or touched him which caused him to fall; Officer Toland said he was neither touched nor pushed by Nichole and that he had simply lost his balance. (Affidavit of Nichole Boggs, ¶ 44).

37. Officer Pearson knew Nichole had not used or threatened to use violence, force, physical interference, or obstacle when, without warning, when he grabbed and threw Nichole to the ground and caused her injuries. (Affidavit of Nichole Boggs, ¶ 45).

38. After Nichole and her sons had been arrested and were in patrol cars Officer Tolland was asked about who called 911 or where the call came from Officer Toland responded that he had "no idea." (Affidavit of Nichole Boggs, ¶ 46).

39. When one of Nichole's sons asked Officer Pearson why Nichole could not go into her house Officer Pearson responded, "because I told her not to." (Affidavit of Nichole Boggs, ¶ 47).

40. The SFPD policy on how to handle a 911 hang up does not instruct the officers to remove the occupants from the home prior to conducting a "cursory "search and the policy does not prohibit the residents from being present when then search is conducted. (Affidavit of Nichole Boggs, ¶ 18, Exhibit 1).

41. In addition to the arrest of Nichole, Sebastian was arrested for disorderly conduct and Brandon was arrested for disorderly conduct and simple assault. (Affidavit of Mark Toland ¶ 21) (Affidavit of Nichole Boggs, ¶49).

42. Nichole was acquitted at jury trial on all her criminal charges, which included obstructing an officer and resisting arrest. (Affidavit of Nichole Boggs, ¶ 50).

43. Sebastian was acquitted at court trial on his charge of disorderly conduct and the State dismissed Brendan's charges prior to trial. (Affidavit of Nichole Boggs, ¶ 51).

44. During Nichole's criminal trial, Officer Pearson provided sworn testimony regarding the policy and training received by the Sioux Falls Police Department which he used to justify his and other officers' actions, but later admitted that such an assertion was an untruthful statement and that no such policy existed. (Affidavit of Nichole Boggs, ¶ 52, Exhibit 2 at 12-13) (Affidavit of Nichole Boggs, ¶53).

45. Officer Pearson put in his arrest report and testified that Ms. Boggs pushed Officer Toland, which was contrary to what Officer Toland told him the night of the incident. (Affidavit of Nichole Boggs, ¶ 52, Exhibit 2 at 12-13) (Affidavit of Nichole Boggs, ¶54).

46. Officer Toland testified he was not pushed by Ms. Boggs. (Affidavit of Nichole Boggs, ¶55).

47. The jury acquitted Nichole of all charges and their decision was partially based on the untruthful sworn testimony of Officer Pearson and, in an unrelated jury trial the Monday following Nichole's trial, jurors reported the same to the Court which resulted the Court declaring a mistrial. (Affidavit of Nichole Boggs, ¶56).

48. Following the unrelated mistrial, the Minnehaha County State's Attorney reset numerous cases on the criminal court docket involving the officers from Nichole's arrest and

trial until such time after the jury pool rotation in order to prevent future mistrials or further contamination of potential jury pools by those that witnessed the untruthful testimony. (Affidavit of Nichole Boggs, ¶57).

49. Sgt. Hoffman was present at the scene, investigated the force used, and endorsed the actions of the officers and their use of force on Ms. Boggs. Sgt. Hoffman testified he was assigned to investigate the use of force and found it to be in compliance with the SFPD policy. (Affidavit of Nichole Boggs, ¶58).

50. The SFPD had a policy on the use of force and all officers must acknowledge having read and understood the policy. The of SFPD policies which govern use of force are numbered 601 and 602, and are respectively titled Responding to Resistance, General Guidelines/Options and Response to Resistance/Control to Active Resistance Reporting Requirements. (Affidavit of Nichole Boggs, ¶59).

51. Sgt. Hoffman had access to the videos wherein Officer Toland told Officer Pearson that Nichole did not touch him, yet Sgt. Hoffman accepted and approved Officer Pearson's case report and arrest report wherein Officer Pearson reports the opposite and uses that for his justification to arrest Nichole. (Affidavit of Nichole Boggs, ¶60).

52. Following Nichole's arrest Sgt. Hoffman took Nichole into an unrecorded room at the jail and acknowledged to her that the situation should not have happened to her. (Affidavit of Nichole Boggs, ¶61).

53. Sgt. Hoffman visited Nichole at her work in the days after the incident and took pictures, but then claimed the pictures did not turn out or the disc was corrupted. (Affidavit of Nichole Boggs, ¶62) (Affidavit of Martin Hoffman, ¶15).

54. Officers Toland, Pearson, and Sgt. Hoffman testified at trial that they received formal training at the police academy and ongoing training from the SFPD. (Affidavit of Nichole Boggs, ¶63).

55. As part of the certification process, a segment of the officer's formal training is dedicated to understanding an individual's constitutional rights and how an officer's actions of detention, arrest, search and seizure are handled to ensure the rights are not violated. (Affidavit of Nichole Boggs, ¶64).

56. In training the officers are provided case law to learn how the courts have interpreted the constitutional rights of citizens which then provides the officers with the certain bright-line rules to follow to keep from violating a citizen's constitutional rights. (Affidavit of Nichole Boggs, ¶65).

57. On August 19, 2016 both Officers Toland and Pearson, along with Sergeant Hoffman, were on-duty with the SFPD and acting under the color of law when Nichole was injured during an arrest effected by the officers. (Affidavit of Nichole Boggs, ¶66).

58. Nichole Boggs had rights guaranteed to her by both the State and Federal Constitution that were clearly established and known by the Defendants at the time the officers touched Ms. Boggs. (Affidavit of Nichole Boggs, ¶67).

59. A rule in South Dakota Case Law, established well before incident described herein, and one that the officers and SFPD would reasonably have known, provides that officers must provide a person with an opportunity to surrender prior to applying substantial force and that to forego giving such an opportunity is clearly unconstitutional. (Affidavit of Nichole Boggs, ¶68).

60. Another rule of law is that a reasonable officer could not believe it was lawful to take-down or physically assault a person who did not pose a threat, was not actively resisting, or attempting to escape and that force by an officer by an officer becomes unlawful when the amount is greater than necessary to carry out his duties. Affidavit of Nichole Boggs, ¶ 52, Exhibit 2 at §§4.4.2-3) (Affidavit of Nichole Boggs, ¶69).

61. The City of Sioux Falls and SFPD were responsible for training the officers or coordinating training with others to educate the officers on a person's constitutional rights. (Affidavit of Nichole Boggs, ¶70).

62. The City and SFPD were deliberately indifferent to the rights of Nichole Boggs by not providing training on how to safeguard the constitutional rights of those with whom the employee-officers contact. (Affidavit of Nichole Boggs, ¶71).

63. The SFPD trained Sgt. Hoffman to ignore the constitutional rights of Nichole Boggs and endorse the actions of Officer Pearson. (Affidavit of Nichole Boggs, ¶72).

64. The injuries inflicted upon Nichole Boggs required substantial medical care, the use of home medical equipment, x-rays, and outpatient rehabilitation. (Affidavit of Nichole Boggs, ¶73).

65. Nichole Boggs suffered pain at the time of the injury and continues to suffer mental anguish as result of the conduct of the officers. (Affidavit of Nichole Boggs, ¶74).

/s/ Jeffrey R. Beck

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STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

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NICHOLE A. BOGGS,	:	49CIV18-002229
Plaintiff,	:	
v.	:	
ANDREW PEARSON, MARK TOLAND, MARTIN HOFFMAN, individually, and the CITY OF SIOUX FALLS, SOUTH DAKOTA, a political sub division acting by and through the SIOUX FALLS POLICE DEPARTMENT,	:	**DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS**
Defendant.	:	

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Pursuant to SDCL § 15-6-56(c)(2), Defendants Andrew Pearson ("Officer Pearson"), Mark Toland ("Officer Toland"), Martin Hoffman ("Sgt. Hoffman"), and the City of Sioux Falls, South Dakota submit this Response to Plaintiff's Statement of Undisputed Material Facts in opposition to Plaintiff's Motion for Partial Summary Judgment.

1. Admit.

2. Admit.

3. Admit.

4. Admit that Officers Toland and Pearson were dispatched to the area of 1500 E 8th Street first. The information was updated two minutes later and the officers were ultimately dispatched to 4517 East Ashbury Place, Sioux Falls, South Dakota.

5. Admit.

6. Defendants are without sufficient information to admit or deny this Statement of Undisputed Material Fact.

Filed: 9/3/2019 2:53 PM CST Minnehaha County, South Dakota 49CIV18-002229

7. Admit

8. Admit.

9. Admit.

10. Admit.

11. Deny to the extent the officers knocked on the door. Brendan Conlon knocked on the door.

12. Deny to the extent that it was Officer Toland who knocked on the door.

13. Admit to the extent that is what Plaintiff and her sons told officers to do.

14. Admit to the extent that the SFPD has a policy on how to investigate 911 hang-up calls. The policy speaks for itself.

15. Deny. The dispatch log clearly shows attempted communication between dispatch and the officers regarding the 911 call, including identity and location of the caller.

16. Deny. Officer Pearson and Toland repeatedly explained to Plaintiff that the officers needed to go into the apartment to make sure everyone was okay.

17. Admit to the extent that the occupants of the apartment were told to come outside while the officers conducted a search of the apartment. Deny to the extent that Officer Toland stood with his foot inside the door for twenty minutes. At one point, Sebastian Boggs attempted to shut the apartment door on the officers and Officer Toland placed his foot in the doorway to prevent its closure.

18. Admit.

19. Admit that there was blood on the concrete sidewalk just outside of Plaintiff's apartment door at 4517 East Ashbury Place, Apt. 101.

20. Admit that officers explained that they needed to enter the apartment to make sure everyone was okay.

21. Admit.

22. Admit.

23. Admit.

24. Admit.

25. Admit that backup was called to secure the location.

26. Admit.

27. Admit.

28. Deny that Officer Pearson did not give Plaintiff any verbal command or warning. Officer Pearson told Plaintiff numerous times that she needed to stay outside. Deny Officer Pearson threw Plaintiff to the ground. Plaintiff was actively resisting and struggling to get her hands free.

29. Admit.

30. Deny that Officer Pearson threw Plaintiff to the ground.

31. Deny.

32. Deny that the amount of force used against Plaintiff was excessive. The nature and extent of Plaintiff's injuries, if any, have not been determined. It is undisputed that Paramedics Plus was called to the scene in order to assess Plaintiff and advised that Plaintiff did not need additional medical treatment and she was not transported to the hospital.

33. Admit that injuries were reported and paramedics were called to the scene to assess Plaintiff. Paramedics determined that no additional medical treatment was necessary at the time.

34. Admit.

35. Admit.

36. Deny to the extent that Plaintiff was tackled.

37. Deny.

38. Admit.

39. Admit.

40. Admit to the extent that the SFPD policy does not address that specific circumstance, however, the policy is not exhaustive and does not account for every possible circumstance officers may face when responding to a 911 hang up.

41. Admit.

42. Admit.

43. Admit.

44. Admit to the extent that Officer Pearson testified during Plaintiff's criminal trial regarding officer safety and, in certain situations, being allowed to refuse entry of occupants in their home while a search is being conducted.

45. Deny that Officer Pearson indicated in his arrest report that Plaintiff "pushed" Officer Toland. Officer Pearson indicated in his arrest report that Plaintiff attempted to "push past" Officer Toland and testified at trial that, from his angle, that's what he believed happened.

46. Admit.

47. Admit to the extent that Plaintiff was acquitted of all charges.

48. Defendants are without sufficient information to admit or deny this Statement of Undisputed Material Fact.

49. Admit.

50. Admit.

51. Admit to the extent that Sgt. Hoffman had access to the video/audio recordings.

52. Admit to the extent that Sgt. Hoffman took Plaintiff to a room at the jail to take photographs of her.

53. Admit.

54. Admit to the extent that SFPD officers receive formal training prior to becoming police officers and receive ongoing training.

55. Admit to the extent that SFPD officers receive formal training prior to becoming police officers and receive ongoing training.

56. Admit to the extent that SFPD officers receive formal training prior to becoming police officers and receive ongoing training.

57. Admit that Plaintiff did receive some injuries during the arrest. The nature and extent of Plaintiff's injuries, and the treatment sought thereafter, is unknown at this time.

58. Admit.

59. This is not a Statement of Undisputed Material Fact that warrants an admission or denial.

60. This is not a Statement of Undisputed Material Fact that warrants an admission or denial.

61. Admit to the extent that the SFPD is responsible for training officers prior to becoming police officers and providing ongoing training.

62. Deny.

63. Deny.

64. Admit that Plaintiff did receive some injuries during the arrest. The nature and extent of Plaintiff's injuries, and the treatment sought thereafter, is unknown at this time.

65. Admit that Plaintiff did receive some injuries during the arrest. The nature and extent of Plaintiff's injuries, and the treatment sought thereafter, is unknown at this time.

Dated this 3rd day of September, 2019.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Gary P. Thimsen
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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2019, I served a true and correct copy of the foregoing Defendant's Response to Plaintiff's Statement of Undisputed Material Facts using the Odyssey File & Serve system which will automatically send email notification of such service to the following:

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/s/ Gary P. Thimsen
One of the Attorneys for Defendants

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29249

NICHOLE A BOGGS,
Plaintiff and Appellee

vs.

ANDREW PEARSON, MARK TOLAND, MARTIN HOFFMAN, individually; and THE CITY OF SIOUX FALLS, SOUTH DAKOTA, A POLITICAL SUBDIVISION ACTING BY AND THROUGH THE SIOUX FALLS POLICE DEPARTMENT,
Defendants and Appellants

PETITION FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE DOUGLAS HOFFMAN

APPELLEE'S RESPONSE BRIEF

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Memorandum Opinion and Order Denying Summary Judgment Filed January 30, 2020
Notice of Entry of Memorandum Opinion and Order Served on February 3, 2020
Defendants Petition for Permission to Take Discretionary Appeal
Filed February 11, 2020

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TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

The trial court entered a Memorandum Opinion and Order Denying Summary Judgment on January 20, 2020 The Appellant filed a Petition for Discretionary Appeal on February 11, 2020 and this Court granted permission ion March 9, 2020. The matter is before this Court on the intermediate appeal.

PRELIMINARY STATEMENT

This brief will reference to the record ("R") followed by the specific page number. Example: (R:25). Should there be a specific paragraph of a document within the record the reference will be to the page number of the record and corresponding internal paragraph. Example: (R:25, ¶2).

STATEMENT OF THE ISSUES

In this appeal, Appellant provided notice of review and raised or presented two questions for the Court's consideration. This Response will follow those as noticed.

a) Whether the trial court erred in denying the summary judgment motions of Officer Toland, Officer Pearson, and Sergeant Hoffman regarding their requests for qualified immunity for their warrantless entry into Nichole' home and the subsequent use of force against her.

The trial court properly denied summary judgment and the officers' requests for qualified immunity when the trial court concluded that actions of the officers violated the clearly established constitutional rights of Nichole, which a reasonable officer would have known at the time, regarding both the entry into her home and in using force against her.

Horne v. Crozier, 1997 S.D. 65, 565 N.W.2d 50

Hart v. Miller, 2000 S.D. 53, 609 N.W.2d 138

Thronton v. City of Rapid City 2005 S.D. 15, 692 N.W.2d 525

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)

b) Whether the trial court erred in denying Defendant City of Sioux Falls' Motion for Summary Judgment when the trial court determined that the City of Sioux Falls had a custom or policy that caused the violation of Boggs' constitutional rights.

The trial court properly held that the City of Sioux Falls had a custom or policy that caused the violations of Nichole' constitutional rights.

City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)

Lassiter v. City of Bremerton, 556 F.3d 1049, 1055 (9th Cir. 2009)

Christie v. Iopa, 176 F3d 1231, 1239 (9th Cir. 1999)

STATEMENT OF THE CASE

On August 19, 2016 Officers Toland and Pearson of the Sioux Falls Police Department (hereafter "SFPD") entered Nichole Boggs's (hereafter "Nichole") home and arrested her. During the arrest, Nichole suffered a broken arm and a dislocated shoulder. Sgt. Hoffman was present at the time of the arrest. Nichole was acquitted of all criminal charges during a jury trial held November 17-18, 2016. On February 6, 2017, a Notice of Claim was served on the Mayor and Finance Director for the City of Sioux Falls informing the City, all employees, and Appellants of Nichole' claim against all for injuries she suffered.

On July 9, 2018, Nichole filed a claim against the City of Sioux Falls, Officer Mark Toland, Officer Andrew Pearson, and Sergeant Hoffman. (R:2). An Admission of Service was returned for all four Defendant parties on August 1, 2018. (R:13-16). The Complaint was brought as an action under 42 U.S.C. §1983, seeking damages against

Appellants for violations of Nichole' constitutional rights as protected by the Fourth and Fourteenth Amendments of the United States Constitution, and against the City of Sioux Falls for the negligent training, hiring, and supervision of police employees. (R:2-7).

On February 18, 2019, the officers and City filed a Motion for Summary Judgment claiming the officers were entitled to immunity from suit and that the City of Sioux Falls was not liable. (R:20) On August 1, 2019, Nichole filed a Motion for Partial Summary Judgment regarding the limited issue of liability. (R:180). The motions of both sides were heard before the trial court, the Honorable Douglas Hoffman presiding, on September 10, 2019. (R: 346-401). On January 30, 2019, the trial court issued a Memorandum Opinion and Order Denying Summary Judgment. (R:272-300). It was from the Memorandum Opinion and Order that Appellants' sought, and were granted, permission to bring an appeal from an intermediate order. Based on the grant of Appellant's Petition for Appeal from Intermediate Order, jurisdiction is properly before this Court.

STATEMENT OF FACTS

Nichole leased a ground-floor unit located at 4517 East Ashbury Place in Sioux Falls, where she lived with her sons. (R:181, ¶1). Nichole's apartment was in a larger complex of 11 building comprising over 60 units (R:182, ¶6).

At 3:14 a.m. on August 19, 2016, the dispatch center for the SFPD, Metro Communications, received an open 911 call with no information on the caller or location. (R:182, ¶4). The original dispatch sent the officers to 1500 East 8th Street, Sioux Falls, with the phone belonging to Yquelin Ortega. (*Id*. ¶4). Metro Communications pinged the phone to determine a better location. After the ping, the dispatch was updated to be

within a 25-meter radius of 4513 East Ashbury Place. (R:182, ¶5). SFPD initially dispatched were Officers Mark Toland and Andrew Pearson (hereinafter "Toland" and "Pearson"). (*Id*. ¶4).

Toland was the first officer to arrive at the complex located on East Ashbury Place. (R:39, ¶5). Toland saw nothing at 4513 building and then spoke to an unidentified couple outside the 4500 block east Sixth Street. (*Id*. ¶5). Toland was told someone was heard yelling area north of the 4513 East Ashbury Place apartments. (*Id*. ¶5). Toland went north to the 4517 building and found Nichole's adult son, Brendan Conlon, standing alone in front of the complex near the entryway. (*Id*. ¶5). Brendan knocked on the door of apartment 101. (R:39, ¶7).

Prior to Brendan knocking on the door, Nichole had been at work. Shortly after her shift ended at 2 a.m., Nichole was picked up by her 17-year old son Cody to be given a ride home. When Nichole arrived home with Cody, those already present in her house were her adult sons Sebastian and Brendan along with Brendan's girlfriend, Sebastian's friend Rashad Wilson, and Nichole's youngest son Jaden. (R:182, ¶8) Brendan and Cody got into an argument that became a shoving or wrestling match the went outside. Nichole told Brendan and his girlfriend to leave. (R:182, ¶9) Brendan and his girlfriend left the house. Sometime after Brendan and his girlfriend left, someone knocked on Nichole's door. (R:182, ¶10)

Nichole answered the knock and standing outside were Brendan and Toland. Brendan said he had come back because he forgot his shoes. Nichole told Toland she wanted Brendan to leave and that she would get his shoes. (*Id*. ¶10). Toland would not

let Nichole back into her house to get the shoes. Toland was joined at the house by Pearson.

Toland told Nichole there was a 911 call that had originated from inside her house and said the policy of the Sioux Falls Police Department was that he come in and search her house to make sure everyone was ok. (R:183, ¶12). Knowing that no one living in or visiting the house called 911, Nichole and her sons told the Officers that no one had called 911 from inside their house and requested the officers attempt to validate such a claim. The officers were told to verify that a call did indeed originate from inside the home before they could enter without a warrant. (R:183, ¶13).

The SFPD has a policy on how to investigate 911 hang-up calls and the policy is founded on the officers knowing the residence from where the call originated. (R:183, ¶14). Here the officers ignored the policy and made no attempt to communicate with Metro regarding the specific location or origin of the 911 call or to callback the phone number. (R:183, ¶15). Both officers continued to tell Nichole they were going to search her residence although the officers did not have a warrant to do so. (R:183, ¶16).

The officers made everyone exit the house and for approximately 20 minutes Toland stood with his foot inside or held open the front door and prevented anyone from reentering the house. (R:183, ¶17). Nichole and her sons did not consent nor want the officers to enter and search their home; all told the officers they needed a warrant to search. (R:183, ¶18). After some time the officers then claimed to have seen blood on the sidewalk in a common area on a sidewalk that leads to Nichole's and other tenant's respective units and told Nichole and her sons they were going to enter their house to see

if there was anyone hurt or possibly dead inside (R:184, ¶19-20). Brendan claimed the blood to be his and showed the officers a scratch on his chest.

Toland told Nichole he did not need a warrant to enter the apartment but then threatened Nichole and her sons that if they did not consent to entry they would be arrested for obstruction, yet all were all outside sitting on the ground and Toland was standing in the doorway controlling entry. (R:184, ¶21). The SFPD policy governing 911 hang up does not instruct the officers to remove the occupants from the home prior to conducting a "cursory "search and the policy does not prohibit the residents from being present when then search is conducted. (R:186, ¶40).

Because the boys argued with the officers about the ability to enter the house without a warrant, the officers had placed three handcuffs on all adults, with exception of Nichole, and had them seated on the ground outside the apartment. (R:184, ¶22). Nichole was free to move about and twice went to her garage located across the parking to retrieve a folder she felt addressed warrantless search. (R:184, ¶23). The officers told Nichole they were going into the apartment to conduct a search, irrespective of her wishes. (R:184, ¶24). The officers called for additional police and as time passed, eventually a total of 15 patrol cars, containing 17 police officers and a K-9 unit, were present at Nichole's apartment unit. (R:184, ¶25).

Toland was first to enter the apartment and he did so almost a half hour after the Metro received the unknown call (*Id*. ¶24). Nichole was standing at her front door flipping through her folder of papers when Toland entered her house. (R:185, ¶26). After Toland stepped into the house Nichole, while holding in her arms the open folder of papers, followed behind Toland. (R:185, ¶27). Pearson then entered behind Nichole.

Once inside, without any verbal command or warning, Pearson seized Nichole's left arm and began to throw Nichole to the tiled floor inside her house. (R:185, ¶28).

When Toland heard Nichole scream in pain, he turned and attempted to grab Nichole' right arm, but Toland slipped, fell backwards, and landed on the ground. He was then able to get ahold of Nichole's right arm. (R:185, ¶29). Holding Nichole's arm to the side, Pearson threw Nichole onto the ground where her head and face stuck the entryway floor. (R:185, ¶30). Immediately upon being grabbed by Pearson and slammed face first into the floor without warning, Nichole screamed out in pain. (R:185, ¶31). The amount of force used by the officers caused a fracture to radius on Nichole's left arm, a joint separation to her right shoulder, and several cuts and bruises to her face and body. (R:185, ¶32). The injuries were reported to the officers and ambulance personnel looked at Nichole but provided no treatment stating it was just a "face plant". (R:185, ¶33).

Pearson arrested Nichole for Obstructing Law Enforcement and Resisting Arrest. (R:186, ¶34). All responding police officers were equipped with body microphones and recordings exist for most of the officers. (R:186, ¶35). After Nichole was tackled and arrested, Pearson can be heard asking Toland if Nichole had pushed or touched him; Toland said he was neither touched nor pushed by Nichole and that he simply lost his balance and slipped on the rug. (R:186, ¶36). Pearson knew Nichole had not used or threatened to use violence, force, physical interference, or obstacle when, without warning, he grabbed and threw Nichole to the ground and caused her injuries. (R:186, ¶37).

After the arrest Toland was asked about who called 911 or where the call came from; Toland responded that he had "no idea." (R:186, ¶38). Pearson was asked why

Nichole could not go into her house, Pearson responded, "because I told her not to." (R:186, ¶39). Sebastian was arrested for disorderly conduct and Brandon was arrested for disorderly conduct and simple assault. (R:187, ¶41). Nichole was acquitted at jury trial on all criminal charges. (R:187, ¶42). Sebastian was acquitted at court trial on his charge and the State dismissed Brendan's charges prior to trial. (R:187, ¶43).

During Nichole's criminal trial, Pearson provided sworn testimony regarding policies and training received from the SFPD which he claim justified his and other officers' actions, but later admitted that such an assertion was an untruthful statement and that no such policy existed. (R:187, ¶44). Pearson said a policy existed which dictated that non-sworn persons could not be present during a building search, but later admitted that no such policy or training protocol existed. Additionally, after asking Toland whether Nichole had touched or pushed him, and having been told no, Pearson testified that Nichole had pushed Toland, which was contrary to what Toland told him on the night of the incident. (R:187, ¶45). Toland later testified he was not pushed by Nichole (R:187, ¶46).

The jury acquitted Nichole of all charges and their decision was partially based on the untruthful sworn testimony of Pearson and, in an unrelated jury trial the following Monday, jurors reported the same to the Court which resulted the Court declaring a mistrial in that case. (R:187, ¶47). Following the unrelated mistrial, the State reset numerous criminal cases involving the officers until such time after the jury pool rotated in order to prevent future mistrials or further contamination of potential jury pools by those who witnessed the untruthful testimony. (R:187-188, ¶48).

Sergeant Hoffman (hereafter "Hoffman") was present at the scene, investigated the force used, and endorsed the actions of the officers and their use of force. Hoffman testified he was assigned to investigate the use of force and found it to be in compliance with the SFPD policy. (R:188, ¶49). SFPD has a policy regarding the use of force and all officers must acknowledge having read and understood the policy. The SFPD policies governing use of force are numbered 601 and 602, and are respectively titled Responding to Resistance, General Guidelines/Options and Response to Resistance/Control to Active Resistance Reporting Requirements. (R:188, ¶50).

Hoffman was the police supervisor at scene, the third officer into Nichole's house, and had access to the videos wherein Toland told Pearson that Nichole did not touch him. Sgt. Hoffman accepted and approved Pearson's case and arrest reports wherein Pearson reported the opposite and used the fictional touch for his justification to arrest Nichole. (R:188 ¶51). Following Nichole's arrest, Sgt. Hoffman took Nichole into an unrecorded room at the jail and acknowledged to her that the situation should not have happened to her. (R:188, ¶52). Hoffman also visited Nichole, then a criminal defendant, at her work in the days after the incident and took pictures, but then claimed the pictures did not turn out or the disc was corrupted. (R:188, ¶53).

All officers testified about having received formal training at the police academy and ongoing training from the SFPD. (R:189, ¶54). During certification a segment of the officer's formal training is dedicated to understanding an individual's constitutional rights and how an officer's actions of detention, arrest, search, and seizure are handled to ensure rights are not violated. (R:189, ¶55). The officers are provided case law as a method to learn how the courts have interpreted the constitutional rights of citizens which

then provides the officers with the certain bright-line rules to follow to keep from violating a citizen's constitutional rights. (R:189, ¶56).

All officers were on-duty with the SFPD and acting under the color of law when Nichole was injured during an arrest effected by the officers. (R:189, ¶57). Nichole had rights guaranteed to her by both the State and Federal Constitution that were clearly established and known by the Defendants at the time the officers touched Nichole. (R:189, ¶58). Law established well before the incident described herein commanded that officers must provide a person with an opportunity to surrender prior to applying substantial force and that to forego giving such an opportunity is clearly unconstitutional. (R:189, ¶59). Another rule of law is that a reasonable officer should know it is not lawful to take-down or physically assault a person who does not pose a threat, is not actively resisting, or attempting to escape and such force by an officer becomes unlawful when the amount is greater than necessary to carry out his duties. (R:190, ¶60).

The City of Sioux Falls and the SFPD were responsible for training the officers or coordinating training with others to educate the officers on a person's constitutional rights. (R:190, ¶61). The City and SFPD were deliberately indifferent to the rights of Nichole by not providing training on how to safeguard the constitutional rights of those with whom the employee-officers contact. (R:190, ¶62). The injuries inflicted upon Nichole required substantial medical care, the use of home medical equipment, x-rays, and outpatient rehabilitation. (R:190, ¶64).

STANDARD OF REVIEW

The questions of this appeal involve the trial court's denial of summary judgment. In reviewing a denial of summary judgment under SDCL 15-6-56(c), the task of this

Court is to determine whether the moving party demonstrated the absence of any genuine issue of material fact and established entitlement to judgment on the merits as a matter of law. During the review, the evidence must be viewed most favorably to Nichole, the non-moving party, and reasonable doubts should be resolved against the Officers and the City of Sioux Falls, the moving party. The "task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied." *Citibank (S.D.), N.A. v. Hauff*, 2003 S.D. 99, ¶10, 668 N.W.2d 528, 532. "Whether the facts viewed most favorably to the non-moving party entitle the moving party to judgment on the merits as a matter of law is a question of law." Questions of law are reviewed de novo. *State v. Jensen*, 2003 S.D. 55, ¶8, 662 N.W.2d 643, 646.

ARGUMENT

1. The trial court properly denied the summary judgment motions of Toland, Pearson, and Hoffman regarding their requests for qualified immunity for their warrantless entry into Nichole' home and the subsequent use of excessive force against her.

A. The officers are not shielded by qualified immunity.

"Whether a given set of facts entitles the defendant to qualified immunity is a question of law which may be decided on summary judgment. However, if there is a dispute over facts that might affect the outcome of the suit under the law of qualified immunity, there can be no summary judgment." *Creighton v. Anderson*, 922 F.2d 443, 447 (8th Cir. 1990). Police officers are not entitled to qualified immunity if their conduct violates "a clearly established constitutional or statutory right of which a reasonable person would have known." *Thornton v. City of Rapid City*, 2005 S.D. 15, ¶10, 692 N.W.2d 525 (citing *Littrell v. Franklin*, 388 F.3d 578, 582 (8th Cir. 2004) (quoting *Yowell v. Combs*, 89 F.3d 542, 544 (8th Cir. 1996)). Summary judgment for

governmental actors based on qualified immunity should also be denied when there are material facts in dispute that are pertinent to the outcome. *Id. ¶24, 692 N.W.2d at 537.* Here the trial court properly denied Appellant's request for qualified immunity finding that their actions violated a clearly established right of Nichole that the officers knew or should have known and that disputed facts preclude disposition via summary judgment.

The conduct of Pearson, Toland, and Hoffman "violated clearly established statutory or constitutional rights a reasonable officer would have known at the time" and the officers are not entitled to qualified immunity. *Horne v. Crozier*, 1997 S.D. 65, ¶6, 565 N.W.2d 50, 52 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982) (citations omitted)). The vehicle by which Nichole is permitted to bring an action against defendants is found in 42 U.S.C. §1983, and the pertinent part provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except . . . .

The rights, privileges, and immunities belonging to Nichole, which are pertinent to this action, are secured in both the United States and South Dakota Constitutions. The Federal rights of particular importance here are those provided in the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution. The Fourth Amendment of the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

> seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (U.S. Const. Amend. IV).

And the Fifth and Fourteenth Amendments provide no state can deprive Nichole of her rights to "life, liberty, or property, without due process of law." (U.S. Const. Amend. XIV; U.S. Const. Amend. V).

B. Two-pronged test of qualified immunity.

There is a two-prong test or analysis used to determine whether the officers are entitled to qualified immunity. To survive the claim for qualified immunity, Nichole had to demonstrate that the actions of the officers caused a "deprivation of a constitutional or statutory right" and that "the right was clearly established at the time of the deprivation." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Here, the trial court properly held that actions of the officers constituted a deprivation of Nichole's constitutional rights and that the right was clearly established at the time of the deprivation. (R:283-85).

a) Nichole possessed clearly established constitutional protections.

"The right to be free from unreasonable searches and seizures and the right to be free from excessive force are both "clearly established rights of which a reasonable official would know." *Swedlund v. Foster*, 2003 S.D. 8, , 657 N.W.2d 39 (citing *Pray v. City of Sandusky*, 49 F.3d 1154, 1158 (6th Cir. 1995) (citing Graham, 490 U.S. at 392-93, 109 S.Ct. at 1969-70, 104 L.Ed.2d at 453 (1989)). There is no argument that can be made by Appellants to claim that Nichole was not protected by the constitutional guarantees or that the rights were not clearly established. The Appellants have conceded that Nichole possessed constitutional and statutory rights and that the constitutional and statutory rights were well established at the time. '"Law enforcement officers also know that they

may not use excessive force. SDCL 23A-3-5 provides, in part, that "No person shall subject an arrested person to more physical restraint than is reasonably necessary to effect the arrest." Use of "excessive force is impermissible even during a lawful arrest."' *Horne*, at ¶13, 565 N.W.2d at 54, citing *Weyant v. Okst*, 101 F.3d 845, 858 (2dCir 1996). "The specific right to be free from excessive force was clearly established." *Spenner*, at ¶¶27-28. The requirement that officers have a warrant to search a person's home is also well settled. Defendants have conceded that Nichole had clearly established rights and that the officers knew she possessed such rights. "If the right which is alleged to have been violated is clearly established, "the court assumes that the police officer in question knew of this right."' *Hart v. Miller*, 2000 S.D. 53, 609 N.W.2d 138.

The record reflects that the Officers acknowledged and knew of Nichole's clearly established rights but argue the amount of force was reasonable and that the warrantless entry in was governed by an exception to the warrant requirement. At the time of Nichole's arrest, the Court had previously heard and interpreted cases containing similar facts that provided guidance that individuals operating under the color of law must apply and follow to ensure a person's rights are not infringed. The officers here were trained in constitutional law and provided applicable case law on how the courts have interpreted the rights of protected persons. Both the officers and sergeant received training on constitutional rights during their academy attendance and certification through the State of South Dakota. All admittedly received additional training and updates through on-going in-service training with their employer, the SFPD. The inclusion of case law during the training on search and seizure is to provide the officers with the quintessential playbook on what actions are permissible as to not violate a clearly established right. By

studying case law, the officers are provided the facts and court holding to use as a rule for future decision making. A reasonable officer is expected to know and understand how the courts have interpreted prior factual situations and then use that knowledge to ensure their decisions do not violate a person's rights.

b) Violation of a Constitutional Right: Excessive Force

"To establish a constitutional violation under the Fourth Amendments right to be free from excessive force, the test is whether the amount of force used was objectively reasonable under the particular circumstances." *Rokusek v. Jansen,* 899 F.3d 544, 547 (8th Cir. 2018) (quoting *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009)). "When evaluating the reasonableness of an officer's use of force, a court considers "the totality of the circumstances and the severity of the crime at issue, the immediate threat the suspect poses to the safety of the officer or others, and whether the suspect is actively resisting or attempting to evade arrest by flight."' *Id.* (quoting *Smith v. Kan. City, Mo. Police Dep't,* 586 F. 3d 576, 581 (8th Cir. 2009)). Additional consideration is also given to the resulting injuries suffered during the arrest. *See Thornton,* 2005 S.D. 15, ¶13, 692 N.W.2d at 531. An important consideration when evaluating the reasonableness of the force that must be remembered is the fact that "force is 'least justified against nonviolent misdemeanants who do no flee or actively resist arrest and pose little or no threat to the security of the officers or the public."' *Id.* (quoting *Johnson v. Carroll,* 658 F.3d 819, 827-28 (8th Cir. 2011)).

An examination of the totality of the circumstances in this case illustrates the trial court was correct in denying summary judgment. First, the criminal violations claimed by Pearson were not severe. Nichole was arrested for the misdemeanor crime of

obstructing law enforcement. *See* SDCL §22-11-6. The charge was founded on Pearson's claim that Nichole had somehow physically interfered with the officers when she walked into her apartment holding her folder of papers. In examining this factor the trial court gave consideration to the fact that Nichole was inside her home at the time of her arrest and that the officers had entered her home without a warrant in opposition to her expressed violation of her constitutional rights. Nichole was subsequently arrested for the misdemeanor crime of resisting arrest. *See* SDCL §22-11-6. Although the resistance claimed by Pearson was Nichole trying to pull her hand away, it did not occur until after Nichole had been slammed into the ground and had her arm broken. Nichole was acquitted by a jury of both charges.

Second, Nichole did not pose a threat to the safety of the officers or others or any threat was, at the trial court found, de minimis. (R: 273). For over 20 minutes, Nichole freely walked around unencumbered and twice walked away from the apartment complex, entered her garage, rifled through tubs of papers, and did so without concern expressed by any of the 17 police officers on the scene. (R:184, ¶23). Nichole was unarmed, stood a mere 5'4" and weighed 135 pounds, whereas officers Toland and Pearson were both over six-feet tall and weighed over 200 pounds.

Nichole claims she did not resist. Pearson testified the resistance consisted of her pulling her hand back when he touched her. Taking the facts in favor of Nichole, the analysis must be viewed as no resistance. No claims were made by officers that she tried to use physical force to hurt them nor did she threaten to use any physical force or violence against the officers. Nichole simply followed Toland into her house and then was grabbed by Pearson and thrown to the ground.

Whether there were any verbal commands given by either Toland or Pearson at the time of the arrest are disputed. SDCL 23A-3-4 provides "[w]hen arresting a person without a warrant, the person making the arrest must inform the person to be arrested of his authority and the cause of the arrest, and require him to submit, except when the person to be arrested is engaged in the actual commission of an offense or when he is arrested on pursuit immediately after its commission." Nichole claims nothing was said to her from the time before she entered her house until after the arrest and the officers took her outside. Pearson claims he gave Nichole instructions to wait outside while the officers went in to search her house. For review, Nichole is given the benefit of her version, but she would like to refer to the criminal record wherein the recording from the officers body microphones tends to support her version of events and not the contrary as claimed by the officers. On the recording Toland is heard saying they are going into the house. Nichole says "No." Within seconds, the next thing heard is Nichole saying "Hey" when she is grabbed by Pearson followed by screams of pain after Nichole was thrown to the floor. Pearson grabbed Nichole from behind and never provided her any opportunity to comply or gave her any instructions.

The fourth and final factor is the resulting injuries suffered during the arrest. The injuries here were a fractured arm, dislocated shoulder, and contusions to the face. It is without debate that a broken arm and dislocated shoulder are more than de minimis. But for the amount of force used by the officers, Nichole would not have suffered the resultant injuries.

To support their actions officers rely on *Ehlers;* such reliance is misguided. In *Ehlers* the Defendant was noncompliant as he had been told by the officers first to leave

and then later twice to stop walking away. *Ehlers v. City of Rapid City*, 846 F.3d 1102, 1009 (2017). In regard to his arrest for obstructing law enforcement, Ehlers conceded he had interfered with the officers, but argued it was of short duration. *Id.* Here the opposite is true. Audio of the encounter supports her position, that she was never told she could not go in her house. Nichole was threatened with an arrest for obstruction if she would not consent to the officer's entering her house. Assuming the facts as most favorable to Nichole, she was compliant with the officers. Nichole was also not trying to flee as was Ehlers. Nichole was simply standing in her own home when seized by Pearson. The facts in *Ehlers* are distinguishable from those present her. In contrast to *Ehlers*, a review of factually similar cases illustrates that the violation and unlawfulness of the officers actions.

A number of cases that provide officers the necessary guidance to address the constitutional protections at issue here, one of particular importance and helpful here is *Thornton v. City of Rapid City*. *Thornton* was decided by the South Dakota Supreme Court over a decade before the SFPD officers placed their hands on Nichole. In *Thornton* the officer tackled and threw Thornton, who was putting up no resistance, to the ground without providing him any warning or opportunity to comply. (*Thornton v. City of Rapid City*, 2005 S.D. 15, ¶8 692 N.W.2d 525). Thornton was walking on a sidewalk and, without warning or providing an opportunity to comply, the officer tackled Thornton to the ground, breaking his wrist in the process. *Id.* The same was true for Nichole. It is clear from the audio of the incident that no officer provided any verbal commands to Nichole. (R:82, ¶5) Toland can be heard stating he was going in to search the house and then Nichole says "No." Neither officer says anything and within a second or two

Nichole can be heard saying "Hey" when Pearson grabs her and then she immediately screams in pain after she impacts the tile floor. *Id.* The facts are clear that Nichole was grabbed from behind by Pearson and thrown to the ground without warning and an opportunity to comply. *Id.* The Court provided the rule very clearly by holding that when officers decide to "forego giving [a person] an opportunity to surrender before applying substantial force [such action] becomes clearly unconstitutional." *(Thornton,* ¶24). There was no objectively reasonable basis for the officers to violate Nichole' constitutional and statutory rights. In *Thornton,* the Court denied the officer's attempt to be shielded by qualified immunity and based on the similar facts the same result should apply here. The initial seizure and custodial arrest of Nichole was unlawful and violated her rights. The subsequent force used to effect the arrest was too unlawful and in violation of her rights. The officers knew she had a clearly established rights and the actions were not objectively reasonable. As is *Thornton,* the officers actions are clearly unconstitutional and qualified immunity was properly denied.

Notwithstanding the fact that *Thornton* provided a bright line rule for officers to follow, a robust consensus of cases from other courts too have clearly established the actions of the officers violated Nichole constitutional rights. In *Small,* the Court held that officers used excessive force during the arrest of a non-violent misdemeanant. *Small v. McCrystal,* 708 F.3d 997, 1005, (8th Cir. 2013). Small was a non-violent misdemeanant who, without out warning, was tackled from behind and thrown to the ground. *Id.* Small did not fight or resist and suffered cuts to his face that required medical treatment but not stiches. *Id.* The Court found it was unreasonable for [the officer] to use more than de minimis force against Small by running and tackling him from behind without warning."

Id. In it holding on *Small* the Court reflects on *Shannon v. Koehler*, 616 F.3d 855, 863 (8th Cir.2010) and *Bauer v. Norris*, 713 F.2d 408, 412-13 (8th Cir.1983) wherein it was established "that no use of force was reasonable where the plaintiffs were charged with disorderly conduct, there was no evidence that any crime had been committed, and no evidence that the plaintiffs physically resisted or threatened the officer — even though the plaintiffs were "argumentative, vituperative, and threatened legal action."'

Additional cases too look at the injuries sustained in comparison to the crime for which the person was arrested because "the degree of injury suffered, to the extent "it tends to show the amount and type of force used," is also relevant to our excessive force inquiry." *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir.2011). In *Montoya* the Court found that officers performing a "leg sweep" on a non-violent misdemeanant and subsequently breaking her leg was an unconstitutional use force. *Montoya v. City of Flandreau*, 669 F.3d 867, 873 (8th Cir.2012). In *Brown* using a tazer during an arrest for an open container violation was excessive. *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009). In *Rohrbough* the court found excessive force when the officers punched and stuck a nonviolent Rohrbough causing three days hospitalization. *Rohrbough v. Hall*, 586 F.3d 582, 586-87 (8th Cir.2009). Nichole is not required to find a case where "the very action in question has previously been held unlawful," *Rokusek*, 899 F.3d at 548 (quoting *Rohrbough*, 586 F.3d at 587, so long as "existing precedent [has] placed the statutory or constitutional question beyond debate," *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. at 741, 131 S.Ct. 2014). Case law demonstrates that Pearson, Toland, and Hoffman had "fair warning" that [they] should not have thrown a nonviolent,

nonthreatening suspect who was not actively resisting face-first to the ground. *Id*. (citing *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)).

After comparing the facts to the case law it is obvious that the actions of the officer violated the clearly established rights of Nichole regarding the amount of force used to arrest her. Nichole was a non-violent misdemeanant, posed no threat to the officers, was provided no opportunity to comply with the officers, made no attempt to resist or evade arrest, and suffered more than de minimis injuries. The Circuit Court's denial of the officer's request for summary judgment based on qualified immunity was proper and should be affirmed.

c) Violation of a Constitutional Right: Unlawful Entry

The Fourth Amendment not only protects Nichole from the use of force but also from an unlawful search or entry into her home. "The Fourth Amendment of the Constitution guarantees citizens the protection from the unlawful searches and seizures by government actors. U.S. Const. amend. IV, SD Const., art VI, § 11. An individual must have a reasonable expectation of privacy in the place searched or the article seized before the Fourth Amendment will apply". *State v. Christensen*, 2003 S.D. 64, ¶11, 663 N.W.2d 691 (citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576). The entry into Nichole's home required a warrant based on probable cause, consent from Nichole, or some recognized exception to the warrant requirement. Here the officers did not have a warrant, Nichole did not consent, and the trial court properly held there was no exception which would have allowed the officers to enter the home.

1) No Exigent Circumstances or Emergency

The Fourth Amendment provides “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. “ (U.S. Const. Amend. IV). Although the Constitution requires a warrant, Nichole recognizes that exceptions to the warrant requirement have been carved out by the court. Here, no recognized exception to the warrant requirement applies.

In *Missouri v. McNeely*, the Supreme Court clarified, "[a] variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home . . . engage in “hot pursuit” of a fleeing suspect . . . or enter a burning building to put out a fire and investigate its cause." 569 U.S. 141, (2013). Here the officers claimed that an emergency existed which required entry into the house without a warrant. The officers claim that either of the emergency aid or community caretake doctrine supported their warrantless entry.

The emergency aid doctrine requires “an existing emergency to warrant the intrusion.” *State v. Deneui*, 2009 S.D. 99, ¶32, 775 N.W.2d 221. Whether it is labeled the emergency doctrine or the emergency aid doctrine, the Court has found “that no useful distinction can be made between the emergency doctrine and the emergency aid doctrine.” *Id* at ¶32. As, ‘both require, at their essence, an emergency.” *Id*. The “community caretaking function is more akin to a health and safety check.” *Id* at ¶41. Here there was neither an emergency that would lead a reasonable officer to intrude into

Nichole' home nor facts present that facilitated a "need to protect and preserve life or avoid serious injury." Id.

To argue an exception under emergency aid there must be an emergency. The "test for the emergency doctrine exception to the warrant requirement: (1) there must be grounds to believe that some kind of emergency exists that would lead a reasonable officer to act; and (2) the officer must be able to point to specific and articulable facts, which if taken together with rational inferences, reasonably warrant the intrusion" ." *Id* at 27. Here there was no emergency. The officers want to argue that a 911 call in the area of Nichole's home and the presence of what appeared to be a few drops of blood on the sidewalk in front of a multi-family townhouse development commanded an emergency to forego the warrant requirement and negate Nichole's constitutional rights.

The record is clear that the 911 call was never attributed to Nichole's home or anyone belonging to her house. The blood was claimed by Brendan Conlon as having come from him and he showed the officers a cut on his chest. Brendan was outside where the blood was located and the officers never saw Brendan inside the residence. All residents of the apartment were outside and there was no evidence to believe any person was unaccounted for. Nichole was the leaseholder of the property and told the officers that there were no other occupants in the apartment and that no one required emergency aid. The officers spent over twenty minutes talking with Plaintiff and her children and had ample time to acquire a warrant to search the apartment. Almost 30 minutes had expired from the unknown 911 call. There were no officers watching the backdoor to prevent any escape.

The purpose of the exception is that entry is needed and officer cannot spend time on a applying for a warrant because there is a reasonable belief that "a person within is in need of immediate aid." *Mincey v. Arizona*, 437 U.S. 385, 392-93, 98 S.Ct. 2408, 2414 (1978). Two recent Supreme Court cases, *Brigham City v. Stuart* and *Michigan v. Fisher*, lay the foundation for analyzing emergency aid. See 547 U.S. 398, 403 (2006) and 558 U.S. 45, 47 (2009). In both cases, the Court had to decide whether the police could make a warrantless entry into a home when they believed immediate action was necessary to provide aid or protect property. In *Brigham*, officers were notified of a loud, early morning party. *Brigham*, 547 U.S. at 403. Upon arrival, they heard shouting and observed two teens drinking in the backyard. *Id.* They also observed, through windows and a screen door, several adults attempting to restrain a teenager—who eventually broke free and assaulted one of the adults. *Id.* Having observed minors drinking alcohol and an ongoing assault, the officers decided that immediate action was necessary and entered the residence without a warrant. *Id.* The United States Supreme Court held that the specific facts and circumstances cited by the officers constituted an objectively reasonable basis to enter the home to stop imminent harm. *Id*. at 407.

In *Fisher*, police officers responded to a neighborhood disturbance. While investigating, officers observed a vehicle's smashed windshield, broken windows on a nearby house, and blood on both the vehicle and the door to the house. *Michigan v. Fisher*, 558 U.S. 45, 45–46 (2009) (per curiam). Through a window, officers observed the defendant screaming and throwing objects. *Id.* at 46. He had a laceration on his hand, and he would not let officers enter his home. *Id*. An officer did enter, however, and the defendant pointed a firearm at him. *Id.* The trial court suppressed the officer's

warrantless entry because it believed that the defendant's minor injuries failed to constitute an imminent emergency. *Id.* The United States Supreme Court reversed, indicating that the specific facts and circumstances cited by the officers constituted an objectively reasonable basis to enter the home to prevent imminent harm. *Id*. Both opinions explained that there were objectively reasonable basis for believing that injured parties needed help because officers were confronted with ongoing violence occurring within the home that they could see and hear. The warrantless entries under emergency circumstances require the government to establish that the police had an objectively reasonable basis to believe that a situation required their immediate intervention to prevent imminent harm. *Fisher*, 558 U.S. at 47; *Brigham*, 547 U.S. at 402. The exception requires an ongoing emergency and there was no emergency cited by the officers with regard for the need to enter Nichole' house.

Just as there was no emergency in Nichole's home there too was no reason to enter her home without a warrant under a claim of the community caretaker exception. Although the doctrine, as applying to a home, is not endorsed by the U.S. Supreme Court, the community caretaker exception was adopted in South Dakota as applied to homes in *State v. Deneui*, where the discussion was had on both exceptions as claimed by Appellants. *Deneui*, 2009 S.D. 99, ¶32, 775 N.W.2d 221. What distinguishes *Deneui* and the other cases from the facts of this case is the absence of facts to justify any emergency entry. In *Deneui* there was an open door, a strong odor of a chemical aroma, and no one could be found in or around the home. *Id*. at 47. Officers were allowed to enter to make sure no one inside had been overcome by the noxious fumes. *Id*. at 48. It this case the leaseholder and all occupants of the house present. All persons stated there

was no emergency and that no one needed aid. Any blood was outside as was the person from whom the blood was suspected. None of the concerns present in *Deneui* were present at the Boggs residence.

Other cases cited by the Court under the community caretaker exception that have upheld by other courts include "police entry into apartments without a warrant after receiving complaints that water was leaking into the apartments below". See *United States v. Boyd*, 407 F. Supp. 693, 694 (SDNY 1976); *State v. Dube*, 655 A.2d 338, 339 (Me 1995) and when "police responded to early morning complaints about excessive noise at the defendant's home." See *United States v. Rohrig*, 98 F.3d at 1519 (6th Cir. App. 1996). In these cases there were no responses to officers knocks at the door and the officers entered the homes without having first made contact prior to entry. Here the opposite was true. Nichole, the leaseholder of the townhouse, answered the door. She went outside and talked to the officers. Everyone exited the house and spoke to the officers outside. The officers had no facts to believe that any other person was inside the house and there were no facts present which could reasonably make the officers believe that someone remained in the home.

2) Ample time to secure a warrant

Both exceptions require the need to enter because there is no time to procure a warrant and that some emergency must exist. The lack of any emergency is clear from how long the officers spent talking with Nichole on why they needed to go into her house as opposed to immediately entering the house in response to the claimed emergency. The officers spent over twenty minutes talking to Plaintiff and the others outside the house. The officers did not have an officer positioned at the back of the residence and Nichole

was free to walk around wherever she wanted outside. Had there truly been an emergency the officers would have promptly entered the house upon arrival to "protect and preserve life or avoid serious injury." *Deneui,* 2009 S.D. 99, ¶41.

The trial court was correct in holding the officers had ample time to procure a warrant. This Court is cognizant of the fact that following the 2013 issuance of the opinion in *Missouri v. McNeely* that many circuits in South Dakota have shifted procedure and procure warrants prior to a blood draw following an arrest for Driving Under the Influence if the suspected violator will not consent to the removal. Second Circuit is one of those circuits. The volume of warrants has judges on a rotation to issue telephonic warrants every day. A fact the trial court raised with Appellant counsel. Very simply, with 17 officers present one of the officers could have taken a small time needed to request a warrant. Here the officers choose not to try for a warrant and simply entered Nichole's house against her expressed objection. Absent a warrant and lacking any emergency the search was illegal and a violation of Nichole constitutional protections. The trial court properly denied immunity to the officers for the warrantless entry into Nichole's house.

2. **The trial court properly denied Hoffman and the City of Sioux Falls's request for summary judgment when it held that City had a custom or policy that caused a violation of Nichole's constitutional right.**

Nichole understands that under a 42 U.S.C. §1983 the City of Sioux Falls and Hoffman are not automatically liable under the theories of vicarious liability or respondent superior and that a "policy or custom of the entity must be the moving force behind the constitutional violation." See *City of Canton, Ohio v. Harris,* 489 U.S. 378, 385, 109 S.Ct. 1197, 1202, 103 L.Ed.2d 412 (1989). Nichole also understands that *Hart*

v. Miller provides a test to determine if a supervision officer can be sued in their individual capacity. Here Hoffman was sued in his individual capacity. Here the trial court properly concluded that the City of Sioux Falls maintained a custom or policy that caused the constitutional violations and the Hoffman was not immune in his individual capacity.

In order to be successful in bringing suit against a supervisory officer:

> There must be a showing that the supervisor encouraged the specific incident or misconduct or in some other way directly participated in it. At a minimum, a §1983 plaintiff must show that a supervisory official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.

Hart v. Miller, 2000 S.D. 53, ¶33, 609 N.W.2d at 148. In this instant Hoffman is not entitled to summary judgment because, as the trial court properly found, he "directed, approved, or acquiesced in Pearson and Toland's challenged conduct." (R:295). Hoffman was present at the scene and watched the officer's actions from outside the open door of Nichole's house. Hoffman approved the all the reports including the arrest report authored by Pearson. Hoffman conducted an investigation regarding the use of force compliant and endorsed the behaviors when he determined that Officers Pearson and Toland had not used excessive force.

In *City of Canton* the Supreme Court outlined a three-part test to determine agency or municipal liability under §1983 in regards to a failure to train argument. The three-prong test includes: "(1) the training was inadequate; (2) [the entity] had notice that the training was inadequate and acted with deliberate indifference to that inadequacy; and (3) the policy was the moving force behind the constitutional violation." See *Liebe v. Norton*, 1997 DSD 33, ¶26 (citing *Canton*, 109 S.Ct. at 1204-05). "There must be a

showing that "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id*. "Additionally, there must be a conscious choice on behalf of policymakers to pursue a certain course of conduct before it can be considered a policy or custom." *Id*. "There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate. *Hart,* 2000 S.D. 53.

For starters the need for different training on what officers can and cannot do when presented with facts similar to this case is obvious. A deliberate indifference to the rights of citizens existed within the SFPD due to the inadequate training on how to effect an arrest when presented with facts similar to those which existed in this case and what responsibilities a supervisor has to investigate incidents where an officer's use of force is questioned. The inadequacies and deliberate indifference are what contributed to Nichole' injury and constitutional rights violation. As noted earlier, the case of *Thornton* occurred at least 10 years prior to the night officers were at Nichole' house in August 2016. *Thornton* has not been overturned and remains good law. The City and SFPD were deliberately indifferent to a person's rights for not adequately training the officers on when and how much force could be used under circumstances similar to those in *Thornton* and for not training Hoffman on how to investigate a use of force complaint or not ensure the department policies are followed.

In *Thornton* the Court provided that "when officers decide to "forego giving [a person] an opportunity to surrender before applying substantial force [such action] becomes clearly unconstitutional."" (2005 S.D. 15, ¶24). For the City and SFPD to fail to train officers on a bright-line rule is inadequate. Also inadequate was the training on how the use force was to be investigated. During trial Hoffman testified that he investigated the force applied to Nichole and found no violation of policy. However, the activities undertaken by both Officers at the time of arrest and Hoffman in investigating the use of force after did not follow the respective SFPD policies.

The SFPD policy governing the amount of force that officers are allowed to use is provided in Policy 601 – Response to Resistance, General Guidelines/Options. (R:84, ¶59, Exhibit 3). Policy 601 states that officers may use "only the force which is necessary to accomplish lawful objectives" and that "all force used must be objectively reasonable." *Id*. ¶2.1. Objectively reasonable is then defined for the officers as "the amount of force that would be used by other reasonable and well-trained officers when faced with the circumstances that the officer using the force is presented.' *Id*. ¶3.4. The determine the appropriate level of force the officers are directed to apply a three-factor test. *Id*. ¶4.2. The three factors are: 1) "How serious is the offense the officer suspected at the time the particular force used?"; 2) "What was the physical threat to the officer or others?"; and, 3) Was the subject actively resisting or attempting to evade arrest by flight?" *Id*. ¶¶4.2.1-4.2.3. An application of the factors to the facts present in this case illustrates that the amount of force used was unreasonable.

The factors listed in the policy are those as discussed earlier and contained in case law. The first factor addresses the seriousness of the offence. Nichole was charged with the misdemeanor obstructing charge.

The second factor assess the physical threat Nichole posed to the officers or others. The record is clear that for 20 minutes the officers let Nichole freely walk around and even let her travel unaccompanied to her garage a couple times. (R:81, ¶30). At the time Nichole was grabbed she was doing standing in the entryway of her home holding an open folder of papers in her hands. *Id*. ¶¶34-7. Nichole did not pose a physical threat to the officers or others.

The final prong of the assessment is whether Nichole was actively resisting or attempting to evade arrest by flight. (R:84, ¶59, Exhibit 3, ¶4.2.3). There was no attempt to flee or evade arrest as the record is clear that the officers did not tell Nichole she was under arrest nor did they provide her an opportunity to surrender. Because Nichole was not "using or threatening to use physical force or violence against the law enforcement officer or any other person" she was acquitted of resisting arrest. SDCL §22-11-4. Under the law Nichole may possibly have been entitled to defend herself and resist the unlawful arrest based on the unreasonable amount of force used by the Officers. *See.* SDCL §22-11-5.

The investigation regarding the amount of force used by the officers during the arrest was governed SFPD Policy 602 which contains a series of responsibilities for both officers and supervisors. (R:84, ¶59, Exhibit 3). The officers had duty to do a report and detail the actions of the person that required the officer to use force to overcome the resistance; the reason why force was required, and injuries of the person to whom force

was applied. *Id*. ¶¶4.1.3.1-.3. The supervisor has a list of seven items he must perform in conducting the investigation. *Id*. ¶4.2. The supervisor is required to take photographs of the involved officers and subjects; interview all witnesses; get the subject reviewed by a qualified medical professional; review all video of the incident prior to completing a report; review all officer's reports; and, complete the review prior to completing their shift and forward up the chain of command. *Id*. The supervisor who conducted the investigation into the force used during the arrest of Nichole was Hoffman.

The agency can not only be liable for ratifying the actions of the officers. In general, irrespective of the policy of the agency when a policymaker ratifies the subordinate's unconstitutional behavior then the potential for liability attaches. See *Christie v. Iopa*, 176 F3d 1231, 1239 (9th Cir. 1999). The liability of City and SFPD is the result of Hoffman being the commanding officer on the scene and allowing or approving the action, Hoffman approving the reports, and a departmental approval of the behaviors following Hoffman's investigation and corresponding ratification or endorsement of the unreasonable actions of Pearson and Toland. Hoffman was the policymaker for the SFPD on whether the force used by the officers was reasonable or not. Hoffman determined the force was reasonable and thereby endorsed and ratified unconstitutional behavior.

Liability can be attributed to the City for ratification by a single policy holder regarding a single incident even though the decision is not entitled to govern future situations. In order to bind the employer city the action or ratification must have been a "conscious, affirmative choice to ratify the conduct in question." See *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1055 (9th Cir. 2009). "Ratification requires both knowledge

of the alleged constitutional violation and proof that the policymaker specifically approved the subordinate's act." See *Lytle v. Carl,* 382 F.3d 978, 987-88 (9th Cir. 2004). In this case Hoffman had the policymaking authority on whether the force used on Nichole was reasonable or not. Hoffman knew what the alleged constitutional violation was and he specifically approved the actions of the officers. (R:84, ¶60).

The evidence is clear that no warning or verbal commands were given to Nichole when she walked into her house and was grabbed by Pearson. (R:81, ¶36). Toland can also be heard telling Pearson that he was never touched by Nichole. (R:82, ¶4. Hoffman had knowledge of the truth as he had a responsibility to review the tapes prior to the making his finding on the investigation. (R:84. ¶59, Exhibit 3, ¶4.2. The tapes were contrary to the reports submitted by Pearson. Id. ¶60. Hoffman approved the contrary and ratified the actions of the officers. *Id*. The trial court properly concluded that ratification by Hoffman places liability on the SFPD.

In addition to ratification issue the trial court properly held that the Nichole had made" a *prima facie* showing of deliberate indifference, inadequate training, or errant policies that are so persistent and widespread as to have the force of law." (R:297). In denying the officer request for qualified immunity the Court properly found the conduct of Pearson, Toland, and Hoffman "violated clearly established statutory or constitutional rights a reasonable officer would have known at the time." *Horne,* 1997 S.D. 65, ¶6 (citations omitted)). And,"[i]f the right which is alleged to have been violated is clearly established, "the court assumes that the police officer in question knew of this right."' *Hart,* 2000 S.D. 53. The law was clearly established at the time Nichole was arrested for standing inside her home. In *Thornton t*his Court had previously provided the rule very

clearly by holding that when officers decide to "forego giving [a person] an opportunity to surrender before applying substantial force [such action] becomes clearly unconstitutional." *Thornton*, 2005 S.D. 15, ¶24. Such was the case here. Without warning or an opportunity to comply Nichole was grabbed by the officers and thrown to the ground. The law was clearly established and there was no objectively reasonable basis for the officers to violate Nichole' constitutional and statutory rights.

The trial court properly denied summary judgment for the City of Sioux Falls. The trial court examined the policies and procedures of the department along with the actions of the officers and supervisors. The strength of the language used by the trial court in its opinion is quite telling when the court stated that:

> [S]eventeen Sioux Falls Police Officers, including a police Sergeant, were on scene, witnessing or participating in the clear violation of [Nichole's] clearly established constitutional rights, with no objectively reasonable basis to support such actions, and no objections to such conduct raised by any officer. This, standing alone, is sufficient evidence of improper review of written policies, lack of training, and/or deliberate indifference to the policies themselves . . . . [T]his alleged widespread ignorance of clearly established law, the deliberative actions that allegedly were pursued in the context of this prolonged incident, and the alleged wholesale disregard of written policies are highly suggestive of a lack of training and systematic indifference to established law.

(R:297-98). The denial of the City's motion for summary judgement was proper and should be affirmed.

Conclusion

For the forgoing, this Court should affirm the trial court's denial of all Defendant's motions for summary judgment and requests for qualified immunity.

Additionally, this Court should grant Nichole's motion for attorney fees for having been compelled to defend this intermediate appeal.

Respectfully submitted this __22nd___ day of June, 2020.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12-point type. Appellant's Brief contains 9,965 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 22nd day of June, 2020.

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CERTIFICATE OF MAILING AND ELECTRONIC FILING

The undersigned attorney hereby certifies that on the 22nd day of June, 2020 a true and correct copy of the above Appellee's Brief, submitted on behalf of Appellee, was emailed to counsel for Defendants at:

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And the electronic original of Appellant's Brief was emailed to the Clerk of the South Dakota Supreme Court at SCCLerkBriefs@ujs.state.sd.us, and the original and two correct copies of the brief were mailed to the same at:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29249

ANDREW PEARSON, MARK TOLAND, MARTIN HOFFMAN, individually; and the CITY OF SIOUX FALLS, SOUTH DAKOTA, a political subdivision acting by and through the SIOUX FALLS POLICE DEPARTMENT,

Appellants,

vs.

NICHOLE A. BOGGS,

Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE DOUGLAS E. HOFFMAN

APPELLANTS' REPLY BRIEF

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Order Granting Petition for Allowance of Appeal from Intermediate Order
filed March 9, 2020

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The brief filed by Appellee Nichole A. Boggs misunderstands the doctrine of qualified immunity, particularly the clearly-established standard. The clearly-established standard requires a high degree of specificity and prohibits a court from defining the right at a high level of generality, especially in the Fourth Amendment context. Established law under the Fourth Amendment, subject to qualified immunity, protects Officer Pearson, Officer Toland, and Sergeant Hoffman from unreasonable search and seizure and excessive force claims. Affirming the circuit court's order would effectively erode the doctrine of qualified immunity.

ARGUMENT

1. Boggs misconstrues the law of qualified immunity, particularly the clearly established standard.

Qualified immunity is a two-part analysis: "[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established' at the time." *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The Court may address either of these issues first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

To satisfy the "clearly established" prong, the law must be "'sufficiently clear that *every reasonable official would understand that what he is doing is unlawful*.' In other words, existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'" *Wesby*, 138 S. Ct. at 589 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (emphasis added). To be clearly established, "a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be 'settled law,' which means it is dictated by 'controlling authority' or 'a robust consensus of cases of persuasive authority.'" *Id.* at 589-90 (quoting *Hunter v. Bryant*, 502 U.S. 224, 228

(1991); *al-Kidd*, 563 U.S. at 741-42). A qualified immunity analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

In her response brief, Boggs cites *Swedlund v. Foster*, 2003 S.D. 8, ¶ 22, 657 N.W.2d 39, 49, for the proposition that "'The right to be free from unreasonable searches and seizures and the right to be free from excessive force are both clearly established rights of which a reasonable official would know.'" (Appellee's Brief at 13.) Boggs fails to read the *Swedlund* Court's subsequent analysis a few paragraphs later: "The United States Supreme Court noted in *Saucier* that the 'relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*.'" *Swedlund*, 2003 S.D. 8, ¶ 25, 657 N.W.2d at 49 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (emphasis added). As the *Swedlund* Court aptly noted, and consistent with long-standing authority, whether a constitutional right is clearly established cannot be defined generally, but must be determined at a high level of specificity, especially in cases involving the Fourth Amendment. *See Wesby*, 138 S. Ct. at 590 (finding that the clearly established standard "requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him"); *Kelsay v. Ernst*, 933 F.3d 975, 980 (8th Cir. 2019) (en banc) (finding that the court must consider the "specific facts at issue" and refer to authorities "squarely govern[ing]" those facts); *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (rejecting as "far too general" the Ninth Circuit's formulation that "the right to be free from excessive force" was clearly established); *Rudley v. Little Rock Police Dep't*, 935 F.3d 651 (8th Cir. 2019) (quoting *Kisela v. Hughes*, 138 S. Ct.

1148, 1153 (2018) ("Because '[u]se of excessive force is an area of the law in which the result depends very much on the facts of each case, . . . police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.'")

The cases Boggs cites in support of her excessive force claim are distinguishable from the facts of the present case, and thus are not controlling. (*See* Appellee's Br. at 13-21.) Further, Boggs fails to even analyze the "clearly-established" prong in the context of the warrantless entry into her apartment and instead erroneously relies on the general proposition quoted above in *Swedlund* as support. (*Id.* at 13, 21-27.)

2. The cases Boggs cites in support of her excessive force claim are not analogous to the facts of the present case.

Boggs cites to *Thornton v. City of Rapid City*, 2005 S.D. 15, 692 N.W.2d 525, for the proposition that Boggs' right to be free from excessive force was clearly established. (Appellee's Br. at 19.) This reasoning is misapplied. In *Thornton*, Rinard Yellow Boy, Jr. was walking calmly down the street when he was suddenly, and without warning, attacked from behind by an officer who believed him to be involved in a criminal disturbance. *Id.* ¶ 8, 692 N.W.2d at 530. The officer did not ask Yellow Boy to stop or otherwise warn him that he was approaching. *Id.* This Court affirmed the circuit court's denial of the officer's motion for summary judgment based on qualified immunity. *Id.* at 528.

Here, based on Boggs' own brief, Officers Toland and Pearson advised Boggs on four separate occasions of their need and intent to enter the apartment to search:

- "Toland told Nichole there was a 911 call that had originated from inside her house and said the policy of the Sioux Falls Police Department was that he

come in and search her house to make sure everyone was ok." (Appellee's Br. at 5.)

- "Both officers continued to tell Nichole they were going to search her residence . . . ." (*Id.*)
- "[T]he officers . . . . told Nichole and her sons they were going to enter their house to see if there was anyone hurt or possibly dead inside." (*Id.* at 5-6.)
- "The officers told Nichole they were going into the apartment to conduct a search, irrespective of her wishes." (*Id.* at 6.)

Unlike in *Thorton*, where Yellow Boy was attacked without warning, the undisputed facts here demonstrate that Boggs was repeatedly advised as to why officers needed to search, and was repeatedly warned to stand down. While Boggs argues that, in addition to *Thorton*, a "robust consensus of cases" exist that show the officers' actions violated Boggs' clearly established constitutional rights (Appellee's Br. at 19), these cases are also distinguishable from the facts of the present case.

Boggs cites *Small v. McCrystal*, 708 F.3d 997 (8th Cir. 2019), to support her argument that Officer Toland and Officer Pearson used excessive force in the takedown of Boggs. (Appellee's Br. at 19-20.) In *Small*, deputies responded to a 911 call regarding a disturbance at a golf course. 708 F.3d at 1002. When the deputies arrived, there was no disturbance and the 30-50 people in attendance were not acting violently. *Id.* Deputy McCrystal entered the clubhouse, told the bartender to stop serving alcohol, and left. *Id.* Plaintiff Small had been in the clubhouse during this time, but did not exchange words with McCrystal. *Id.* Minutes after McCrystal exited the clubhouse, Small also exited. *Id.* Small exited in the opposite direction of McCrystal and toward his trailer. *Id.* Without warning or provocation, McCrystal ran and tackled Small from behind. *Id.*

Small's face landed in the gravel parking lot, resulting in three lacerations above his eye that covered his face in blood. *Id.* at 1005.

Small sued McCrystal alleging, among other things, that McCrystal used excessive force against him in violation of the Fourth Amendment. *Id.* In affirming the district court's denial of summary judgment based on qualified immunity, the Eighth Circuit found the following in Small's favor: he was a non-violent misdemeanant, he did not pose an immediate threat to the safety of the officers or others, he was walking away from the officers not towards them, he was not in flight or resisting arrest, Small was never advised he was under arrest, and it was unreasonable to tackle Small from behind without warning. *Id.*

The events in the present case are distinguishable from those in *Small*. The following relevant facts are undisputed:

- A 911 call had originated within a 25-meter radius of Boggs' apartment with yelling, screaming, and someone shouting "no" in the background. (SR 191 at ¶ 1; App. 38; SR 274; App. 3.)
- It was approximately 3:30 a.m. (SR 191 at ¶¶ 1-2; App. 38.)
- When Toland arrived on scene, he was directed to Boggs' apartment by an independent bystander who told Toland that people were fighting. At the same time, Toland heard Brendan Colon, one of Boggs' sons, yelling. (SR 191-92 at ¶¶ 3-4; App. 38-39.)
- As Toland approached Brendan and the apartment, he observed blood on the concrete outside the apartment. (SR 192 at ¶ 4; App. 39.)
- Toland was informed by Brendan that a physical altercation had occurred within and/or outside Boggs' apartment and that the blood on the concrete was his. (*Id.* at ¶ 5.)
- Brendan lifted his shirt and revealed to Toland a small laceration on his abdomen. (SR 274-75; App. 3-4.)

- After making contact with Boggs and some of the apartment's other occupants, Toland observed a fresh laceration on Cody Boggs' face. (SR 275; App. 4.)

- Boggs' sons became increasingly confrontational toward officers, and at one point, one of them tried to shut the apartment door on Toland. (SR 193-195 at ¶¶ 8, 13, 16, 17; App. 40-42.)

- Toland explained to Boggs that there had been a 911 call and requested entry into the apartment to ensure that no one was injured, and Boggs refused. (SR 192-93 at ¶ 7; App. 39-40.)

- Toland explained for a second time that due to the 911 call and his department policy, he needed to enter the apartment. (*Id.*) Boggs continued to refuse to allow Toland to enter without a warrant. (*Id.*)

- Pearson then arrived at Boggs' apartment and, along with Toland, attempted to explain to Boggs for a third time the need to enter the apartment. (SR 193-94 at ¶ 11; App. 40-41; SR 275; App. 4.)

- Boggs was also twice advised that she was not allowed to enter the apartment while the officers searched. (SR 196-97 at ¶¶ 21, 24; App. 43-44.)

- Just prior to entering Boggs' apartment, Toland announced his intentions to enter. (SR 276; App. 5.)

- Ignoring officers' commands to stand down, Boggs entered her apartment behind Toland. (*Id.*) Pearson grabbed Boggs' right arm to attempt to re-direct her back outside. (*Id.*) Toland then grabbed Boggs' left arm, and at some point, Toland fell, bringing Boggs down to the ground with him. (*Id.*)

It was not clearly established in August 2016 that an officer was forbidden to takedown a suspect who repeatedly ignored and defied his commands and then physically interfered with the officers' attempts to enter the apartment to conduct a health and wellness check.

Notwithstanding that Boggs may be characterized as a nonviolent misdemeanant, the Eighth Circuit in *Kelsay*, and the Supreme Court in the *City of Escondido v. Emmons*, both recently vacated the denial of qualified immunity for an officer who executed a takedown of an individual who posed no apparent danger, but disobeyed the officer's

commands. In *Kelsay*, the Court held that it was not clearly established that a deputy was forbidden to use a takedown maneuver to arrest Kelsay—clad in a bathing suit and measuring 5'0 and 130 pounds—who ignored the officer's instructions and walked away from the officer. 933 F.3d at 980. Likewise, in *Emmons*, the individual was instructed not to close an apartment door and then "tried to brush past" the officer. 139 S. Ct. 500, 503-04 (2019) (per curiam). The *Emmons* Court found that it was error to deny officers summary judgment based on qualified immunity. *Id.*

No precedent exists establishing that the facts in the present case amounted to an excessive force violation. In fact, precedent exists that establishes the exact opposite.

3. Boggs fails to analyze the clearly-established standard regarding the warrantless entry into her apartment.

In her brief, Boggs spends nearly seven pages discussing the alleged constitutional violation based on the warrantless entry into Boggs' apartment. (Appellee's Br. at 21-27.) Boggs fails again, however, to analyze the clearly-established prong of the qualified-immunity analysis. (*Id.*)

Even assuming that Boggs can establish a constitutional violation for the warrantless entry into her apartment—which Appellants do not concede—whether officers may gain entry into an individual's home based on the emergency or community caretaker doctrines has not been directly addressed or "clearly established" by this Court, the Eighth Circuit, or the United States Supreme Court. Because no apparent authority exists that these particular facts amounted to a Fourth Amendment violation, Officers Toland and Pearson and Sergeant Hoffman cannot be liable.

CONCLUSION

Based on the foregoing arguments, as well as those outlined in Appellants' initial brief, Appellants respectfully request that the circuit court's judgment be reversed and Boggs' claims against them be dismissed.

Dated this 16th day of July, 2020.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2013, Times New Roman (12 point) and contains 2,147 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 16th day of July, 2020.

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