IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JANNIE LIGONS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Case No. CIV-16-184-HE
CITY OF OKLAHOMA CITY,	)	
a municipal corporation, et al.,	)	
	)	
Defendants.	)	

JOINT MOTION OF PLAINTIFFS MORRIS, HILL & LYLES FOR PARTIAL SUMMARY JUDGMENT & BRIEF IN SUPPORT

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JOINT MOTION & BRIEF IN SUPPORT

Plaintiffs Terri Morris ("T.M."), Kala Lyles ("K.L."), and Shardayreon Hill ("S.H."), (referred to collectively herein as "Plaintiffs"), pursuant to Fed. R. Civ. P. 56 and LCvR56.1, bring this Joint Motion for Partial Summary Judgment against Defendants Daniel Holtzclaw ("Holtzclaw"), Bill Citty, Rocky Gregory, and the City of Oklahoma City ("City"). In support, Plaintiffs present as follows:

INTRODUCTION

Plaintiffs filed suit against Defendants to hold them accountable for violations of their civil rights, which arose out of a series of sexual assaults perpetrated over a six-month time span by Holtzclaw, then an officer of the Oklahoma City Police Department ("OCPD"). Holtzclaw, who sexually violated at least thirteen vulnerable Black women while patrolling the streets of Northeast Oklahoma City, was placed on administrative leave nearly one month after the first of his victims to report having been sexually assaulted by an OCPD officer came forward to police.

That brave victim was T.M. On May 24, 2014, T.M. reported to OCPD officers that an OCPD officer had forced her to expose her naked breasts and vagina to him while she was detained in the backseat of his patrol car, and that the officer had also forced her to perform oral sex on him before ultimately letting her go.

Holtzclaw was placed on administrative leave on June 18, 2014, after another of his victims—Ms. Jannie Ligons—came forward with a similar report. OCPD opened a criminal investigation, which ultimately revealed Holtzclaw engaged in a pattern of serial sexual predation beginning in December 2013, and ending in June 2014, when he was finally taken off the streets.

In December 2014, the OCPD Department Review Board held a predetermination hearing to decide whether to sustain twenty-nine allegations of misconduct ("Allegations") arising out of Holtzclaw's encounters with the women he violated, and if so, to recommend discipline. In accordance with OCPD procedures, Holtzclaw received advance notice of the hearing, which he attended represented by counsel through the Fraternal Order of Police ("FOP"). After the hearing, at which evidence of the Allegations was presented and subject to challenges advanced by Holtzclaw's counsel, it was found that each Allegation was sustained by clear and convincing evidence. Holtzclaw was then terminated by then-Chief of Police Bill Citty.

Pursuant to personnel policies of Defendant City of Oklahoma City ("City"), the policies and procedures of the OCPD, and the collective bargaining agreement ("CBA") between City and the FOP, Holtzclaw was entitled to choose one of three ways to appeal the Department Review Board's findings and his termination. Holtzclaw chose to file a grievance with the FOP. This appeal process, governed by the CBA, required Holtzclaw to waive his right to appeal using the other two alternative processes that were available to him, and it left his fate subject to the sole discretion of the FOP Grievance Committee. The Grievance Committee reviewed the evidence considered by the Department Review Board and determined that Holtzclaw had no valid grievance to warrant arbitration under the CBA. That decision, pursuant to the CBA, was final.

Plaintiffs submit this Motion to establish by way of issue preclusion that Holtzclaw committed the acts described in the Allegations which resulted in his termination from OCPD, and that the acts he perpetrated against them violated their Fourth Amendment right to be free of unreasonable searches and seizures and excessive force, and their Fourteenth Amendment

substantive due process right to bodily integrity. In addition, S.H. seeks to establish that Holtzclaw's acts against her constitute assault and battery as a matter of Oklahoma law.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Holtzclaw was an OCPD officer from 2011 to 2015. [Doc. 16, ¶¶ 4, 6; **Exs. 1, 2**].

2. On October 27, 2014, Holtzclaw received a Pre-Determination ("Pre-D") Hearing Notice ("Notice") that listed 29 allegations of misconduct ("Allegations") and information about a hearing to be conducted by OCPD regarding the Allegations and any discipline. [**Ex. 4**].

3. Allegations 1-4 alleged Holtzclaw, "touched [S.H.'s] breast," "placed her hand on the exterior part of [his] pants on [his] crotch area," "placed [his] penis in her mouth," and "inserted [his] finger into her vagina." [**Ex. 4**].

4. Allegations 18-21 alleged Holtzclaw, "forced [T.M.] to perform oral sex on [him]," "directed her to expose her breast," and "genitalia area . . ." and "moved the zipper of her pants with [his] hand to expose her genitalia area." [**Ex. 4**].

5. Allegations 24-27 alleged Holtzclaw, "directed [K.L.] to expose her breast," "touched her breast," "forced her to perform oral sex," and "vaginally raped her . . . ." [**Ex. 4**].

6. The Notice advised Holtzclaw that he could face termination from OCPD if the Allegations were sustained. [**Ex. 4**].

7. On December 11, 2014, the OCPD Department Review Board ("Review Board") convened for a hearing to review evidence and testimony of the Allegations. [**Ex. 5**].

8. Holtzclaw was present for the presentation of evidence and witnesses and was represented by counsel, Jim Moore, through the Fraternal Order of Police ("FOP"). [**Ex. 5**].

9. After granting Holtzclaw's counsel a twelve-day continuance following the

presentation of evidence, the Review Board convened again to continue the proceedings. [**Ex. 5**].

10. Pursuant to OCPD procedures, at the hearing, Holtzclaw was "allowed to ask questions of the witnesses and/or to respond to any evidence presented," and to "present witnesses, documentation and other relevant evidence in his[] own behalf." [**Exs. 4, 5, 3**].

11. Holtzclaw did not address the Review Board or—even after being granted a twelve-day continuance to prepare his defense—present any evidence or witnesses, but his attorney did question the witnesses who testified against him. [**Ex. 5**; **Ex. 6**, 181:13-184:6].

12. Sgt. Rocky Gregory presented evidence of Allegations 1-4 and 18-21, and Sgt. Valari Homan presented evidence of Allegations 24-27. [**Ex. 5**].

13. The Review Board found all twenty-nine Allegations sustained on clear and convincing evidence, and Chief Citty accepted the findings and terminated Holtzclaw. [**Exs. 5, 2**].

14. "Sustained" means, according to OCPD Procedure 143.0, *both* that the acts were committed *and* that they constituted misconduct. [**Ex. 3**].

15. Holtzclaw could appeal the findings through City's "Personnel Policy Grievance Procedure, the FOP [CBA], or the AFSCME [CBA]." [**Exs. 3, 9**].

16. Holtzclaw chose to appeal via the FOP grievance procedure. [**Exs. 7, 8, 9**].

17. In doing so, he affirmatively "waive[d] any right to process the grievance through the grievance procedures in the City Personnel Policies." [**Ex. 9**, § 8.6 (Step 2)].

18. The FOP Grievance Committee ("Grievance Committee") had exclusive discretion to decide whether Holtzclaw had a grievance that warranted arbitration. [**Ex. 9**, § 8.6 (Step 4)].

19. The Grievance Committee determined he had no such grievance. [**Exs. 7, 8, 9**].

20. During the same encounter between T.M. and Holtzclaw that gave rise to

Allegations 18-21, Holtzclaw, acting as an on-duty police officer, stopped T.M., placed her in the backseat of his patrol car, questioned her, checked her for warrants, and drove her approximately one block away from the location of the initial stop. [**Ex. 10**, 6:24-7:18, 8:12-9:15, 15:13-17:7].

21. During the same encounter between K.L. and Holtzclaw that gave rise to Allegations 24-27, Holtzclaw, acting as an on-duty police officer, stopped K.L., placed her in the backseat of his patrol car, questioned her, checked her for warrants, and drove her several blocks away from the location of the initial stop. [**Ex. 11**, 3602:19-3620:24].

22. During the encounter between S.H. and Holtzclaw that gave rise to Allegations 1-4, S.H. was an arrestee in Holtzclaw's custody and was handcuffed to a hospital bed. [**Ex. 12**, 1251:15-22, 1254:17-1255:7].

23. Holtzclaw does not dispute that he stopped T.M., K.L., S.H., or any of the Plaintiffs. [**Ex. 6**, 71:12-72:7, 263:20-264:11].

24. Holtzclaw also does not dispute that he searched T.M. and K.L., nor that he placed them in the backseat of his patrol car while he checked them for warrants, as that was his common practice. [**Ex. 6**, 71:19-72:7, 73:19-74:19].

25. When T.M. and K.L. were placed in the backseat of Holtzclaw's patrol vehicle, they were unable to exit the vehicle without being let out from the outside. [*See* **Ex. 6**, 132:16-24].

26. Plaintiffs did not consent to the acts that Holtzclaw committed against them. [**Ex. 10**, 14:18-15:5 **Ex. 13**, 93:22-24, 98:6-8; **Ex. 12**, 1268:1-21, 1276:2-5, 1276:23-1277:3].

27. Holtzclaw has been sued for police conduct before, in May 2013. [**Ex. 14**].

28. S.H. timely complied with the requirements of the Oklahoma Governmental Tort Claims Act. [Doc. 8, ¶ 106; Doc. 16, ¶ 92].

ARGUMENT & AUTHORITIES

I. SUMMARY JUDGMENT STANDARD

Motions for summary judgment are authorized by Fed. R. Civ. P. 56(a). When such a motion is filed, the movant must "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* If the movant can carry this burden, "the nonmovant must then . . . 'set forth specific facts' that would be admissible in evidence and show a genuine issue for trial." *Powell v. Miller*, No. CIV-2010-01294-D, 2015 U.S. Dist. LEXIS 40211, *12 (W.D. Okla. Mar. 30, 2015) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); and *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998)); Fed. R. Civ. P. 56(c)(1)(A). The nonmovant must convince the court a jury "could reasonably find for either" party on an "issue that might affect the outcome of the suit under the governing law"; otherwise, the court must enter judgment in the movant's favor. *Anderson*, 477 U.S. at 255.

Moreover, when issue preclusion bars re-litigation of an issue which a litigant had a "full and fair opportunity to litigate" in a prior state-court or administrative proceeding, *Feightner v. Bank of Okla., N.A.*, 65 P.3d 624, 629-30 (Okla. 2003), there can be no genuine dispute of material fact with respect to that issue so as to preclude summary judgment in a subsequent civil action if "the [prior] proceeding . . . meets the standards for preclusive effect applicable to judicial decisions." *State ex rel. Dep't of Transp'n v. Little*, 100 P.3d 707, 719-20 (Okla. 2004).

II. ISSUE PRECLUSION SHOULD BAR RE-LITIGATION OF THE FACT THAT HOLTZCLAW COMMITTED THE ACTS ALLEGED IN ALLEGATIONS 1-4, 18-21, AND 24-27.

The Court should preclude Defendants from re-litigating the issue of whether Holtzclaw

committed the acts described in Allegations 1-4, 18-21, and 24-27 of the Pre-D Notice. Under Oklahoma law, for a litigant to rely on issue preclusion to establish a fact previously decided in a separate proceeding to which she was not a party, she must establish five conditions. First, she must prove that "the precluded issue [is] the same as that involved in the earlier action." *Cities Serv. Co. v. Gulf Oil Corp.*, 980 P.2d 116, 126 (Okla. 1999). Second, she must show "the issue was actually litigated" and third, that it was "necessarily determined," in the prior proceeding, *id.*; *Nealis v. Baird*, 996 P.2d 438, 458 (Okla. 1999) —that is, that "it [was] properly raised in the pleadings or otherwise, submitted for determination, and in fact determined," and that "judgment would not have been rendered but for the determination of that issue." *Id.* The fourth condition she must establish is that the issue "was determined by a final and valid decision." *Cities*, 980 P.2d at 126. Finally, the party against whom the doctrine will be applied must have had a "full and fair opportunity" to litigate the issue in the earlier case, *Nealis*, 996 P.2d at 458, which depends on:

> (1) whether the [party] had ample incentive to litigate the issue fully in the earlier proceeding; (2) whether the judgment or order for which preclusive effect is sought is itself inconsistent with one or more earlier judgments in [his] favor; and (3) whether the second action affords [him] procedural opportunities unavailable in the first that could readily produce a different result[,] ([4]) whether the current litigation's legal demands are closely aligned in time and subject matter to those in the earlier proceedings; ([5]) whether the present litigation was clearly foreseeable to [him] at the time of the earlier proceedings; and ([6]) whether in the first proceeding [he] had sufficient opportunity to be heard on the issue." *Cities*, 980 P.2d at 126.

A. The Court Should Bar Defendants from Re-Litigating the Findings Resulting from Holtzclaw's OCPD Pre-Determination Proceedings.

Issue preclusion should bar Defendants from re-litigating the Allegations sustained at Holtzclaw's Pre-D Hearing. First, the issues herein are the same as the issues involved in the Pre-D Hearing. T.M. seeks to prevent re-litigating that Holtzclaw: (1) forced T.M. to perform oral sex on him; (2) directed her to expose her breasts; (3) directed her to expose her vagina; and (4) moved

the zipper of her pants to view her vagina. K.L. seeks to preclude litigation over the fact that Holtzclaw (1) directed her to expose her breasts; (2) touched her breast; (3) forced her to perform oral sex; and (4) vaginally raped her. And S.H. requests that the Court bar re-consideration of the fact that Holtzclaw: (1) touched her breast; (2) placed her hand on the exterior part of his pants on his crotch; (3) placed his penis in her mouth; and (4) penetrated her vagina with his finger. These are the same acts in Allegations 18-21, 24-27, and 1-4 (respectively) which were sustained by clear and convincing evidence. [**Facts ("Fs.") 3-5, 13-14**][1].

Second, these issues were actually litigated at the Pre-D Hearing. They were included in the Notice Holtzclaw received on October 27, 2014 [**F. 2**], evidence of these issues was presented at the hearing by Sgts. Rocky Gregory and Valari Homan [**Fs. 7, 12**], and the Allegations were sustained by the Review Board, whose findings were accepted by Chief Citty ("Citty") [**Fs. 13-14**].

Third, the issues were "determined by a final and valid decision." When the Allegations were sustained [**F. 13-14**], Holtzclaw appealed by filing a grievance with the FOP. [**Fs. 15-16**]. That grievance procedure, once chosen, became the exclusive avenue by which he could appeal; in accordance with the CBA, when Holtzclaw filed his grievance, he had to waive his right to use the grievance procedures in City's personnel policies. [**F. 17**]. The Grievance Committee, after reviewing the evidence from the Pre-D Hearing, found Holtzclaw did not have a grievance. [**F. 19**]. A contrary finding was a condition precedent to submitting the grievance to arbitration [*see* **Ex. 9**, § 8.6 (Step 4)], and the Grievance Committee has exclusive discretion to make this

[1] Each citation to an undisputed fact herein is intended to incorporate the evidentiary materials offered in support of the fact.

determination. [**F. 18**]. Since it found no grievance, its decision to accept the sustaining of the Allegations became final. *Voss v. City of Okla. City*, 618 P.2d 925 (Okla. 1980).

Finally, both Holtzclaw and City had a full and fair opportunity to litigate the Allegations. The requirement that a party must have had a full and fair opportunity to litigate an issue decided in an earlier proceeding in order for the doctrine of issue preclusion to apply embodies the fundamental spirit of due process—that is, that "[a] person may not be bound by a judgment unless the person has had reasonable notice of the claim and an opportunity to be heard in opposition to that claim," 3 Moore's Manual – Fed. Practice & Proc. § 30.74, or if "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in the prior litigation," *see Montana v. U.S.*, 440 U.S. 147, 164 n.11 (1979). The Defendants have already had their chance to fully and fairly litigate these Allegations.

The United States Supreme Court has held that where a court is "bound by the statutory directive of [28 U.S.C.] § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause" in order to satisfy "the requirement that the first adjudication offer a full and fair opportunity to litigate," *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982), *see also Debry v. Noble*, 1993 U.S. App. LEXIS 20181, *12-13 (10th Cir. Aug. 3, 1993) (unpub.). Thus, "[a] refusal to give the first judgment preclusive effect should not occur without a compelling showing of unfairness . . . ." Restatement (2d) of Judgments, § 28 cmt. J.

Several factors inform courts' decisions on the issue of whether the prior proceeding afforded the party against whom the doctrine of issue preclusion is sought to be imposed—the one most critical to the Court's determination of the issue in this case being whether there were

significant procedural limitations in the prior proceeding that are not present in the present proceeding. Examples of such disparate procedural opportunities include: (1) when the party to be precluded "was forced to defend in an inconvenient forum" or (2) when the party was "unable to engage in full scale discovery or call witnesses." *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 n.15 (1979). However, the Supreme Court has expressly noted that "the fact that [a litigant] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Kremer*, 456 U.S. at 485; *see also Barr v. Runyon*, 2000 U.S. App. LEXIS 13918, *17-18 (10th Cir. Jun. 13, 2000) (unpub.) ("[A]lthough Barr failed to appeal . . . there is no evidence that she was prevented from taking an appeal.").

Holtzclaw had ample incentive to defend himself at the Pre-D Hearing because he faced possible termination from OCPD. [**F. 6**]. His career and livelihood hung in the balance. Plaintiffs anticipate Holtzclaw will argue, as he did in his Response to Plaintiff's [sic] Motion for Partial Summary Judgment in *Ellis v. Holtzclaw* et al., No. CIV-16-019-HE (W.D. Okla. Feb. 20, 2020) [Doc. 118], that the fact that he was awaiting trial on the criminal charges he faced in connection with the Allegations prevented him from actively participating in the Pre-D Hearing because doing so would "give the state a litigation advantage . . . and force Holtzclaw to give up constitutional rights and litigation strategy." *Id.* at 6-7. This argument is without merit. Whether Holtzclaw's counsel deliberately omitted controlling adverse authority or merely overlooked it, in any event, the law is clear and well-established that a police officer cannot be forced into the dilemma of choosing between losing his job and waiving his Fifth Amendment privilege against self-incrimination. In *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), the Supreme Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements

prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." Indeed, the Pre-D Notice Holtzclaw received clearly stated that "statements, information or other evidence obtained solely from [the Pre-D hearing] cannot be used against [him]" in his criminal prosecution. [**Ex. 4**]. Thus, Holtzclaw was free to respond to the evidence offered against him and even to offer his own evidence and call his own witnesses without fear of incriminating himself. He was not forced to choose between giving up his liberty and losing his job, so the pending charges against him could not reasonably have diluted his incentive to fight to keep his job and clear his name. While, theoretically speaking, Holtzclaw *could* have been deterred from putting forth every effort to prove his innocence at the Pre-D Hearing by the fear of revealing his litigation strategy in advance of his criminal trial, reality leads to a contrary conclusion. Even *without* presenting his own evidence, offering his own witnesses, or responding to the evidence with his own version of the facts, he *still* revealed the defense strategy he would ultimately employ during his criminal trial; in both proceedings, the focus was on the victims' supposed lack of credibility and the lack of direct evidence. *See, e.g.*, **Ex. 5**, *Holtzclaw v. State*, 448 P.3d 1134, 1140 (Okla. Crim. App. 2019).

City also had ample incentive to fully litigate the issues at the Pre-D hearing. Had the Allegations not been sustained, Holtzclaw could have retained his badge along with the opportunity to continue preying on vulnerable Oklahoma City women. This would have posed a continued risk of civil liability to City as well as a risk of reputational harm and trust between OCPD and the Oklahoma City community. By the time Holtzclaw's Pre-D Hearing was held, his case had garnered national attention. [**Exs. 15-17**]. Had City failed to hold Holtzclaw responsible for his offenses at the department level, it would have risked giving off the impression that it was

covering up Holtzclaw's misconduct and prioritizing an abusive police officer over public safety. Not to mention, if the Allegations against Holtzclaw had been found unfounded or not sustained, City could have faced a malicious prosecution lawsuit in the event Holtzclaw was acquitted. Moreover, there have been no inconsistent findings in any other proceeding.[2]

Furthermore, this action does not afford Holtzclaw or City any procedural opportunities that were both unavailable at the Pre-D Hearing and "that could readily produce a different result," *Pickens v. State*, 779 P.2d 596, 598 (Okla. Crim. App. 1989). In the earlier proceeding, both were entitled to be represented by counsel, to call and cross-examine witnesses, and to present and respond to evidence. [**F. 10**; **Exs. 4, 5, 3** (Proc. 160.10)]. Further, OCPD had the power of decision [*see* **Exs. 5, 2**], and Holtzclaw had a choice between three appeal avenues. [**F. 15**]. Although the evidentiary standards were more lax in the previous proceedings such that much of the evidence considered was hearsay, such evidence does not pose a reliability problem because Holtzclaw, who could have called his accusers to cross-examine them in person [**F. 10**; **Ex. 3** (Proc. 160.10)], did not make an attempt to do so. [**F. 11**; **Ex. 5**] Even after receiving a twelve-day continuance to prepare a defense following the presentation of evidence against him [**F. 9**; **Ex. 5**], Holtzclaw chose to rely on the evidence already presented to point to his accusers' supposed lack of

[2] Although Holtzclaw was acquitted of the charges he faced for the acts alleged in Allegations 1-4, 18-21, and 24-27, "No acquittal proves that the defendant is innocent; it merely reflects that there was a reasonable doubt in the jury's mind as to his guilt." *Price v. Reed*, 725 P.2d 1254, 1257-58 (Okla. 1986). "The difference in the relative burdens of proof in the criminal and civil action precludes the application of the doctrine of [issue preclusion]." *Walling v. Walling*, 727 P.2d 586, 591 (Okla. 1986) (quoting *State Mut. Life Assur. Co. of Am. v. Hampton*, 696 P.2d 1027, 1036 (Okla. 1985)). Thus, while Holtzclaw was acquitted of the charges involving Plaintiffs' allegations, that fact has no bearing in this action, in which the burden of proof is less stringent.

credibility. [**F. 9**; **Ex. 5**]. It is not as if Holtzclaw attempted to call any of his accusers as witnesses to cross examine them in person (and since he knew their identities [*see* **Ex. 4**] and generally their geographic location, he certainly could have) and failed to secure their cooperation. There is no indication that his accusers were unavailable—only that they were not present to testify.

In short, while the hearsay issue might have warranted hesitation to apply the preclusion doctrine in the event Holtzclaw had *tried* and *failed* to cross-examine his accusers in person, the fact that he chose not to even try to call them himself or otherwise offer some scintilla of evidence probative of his claims of innocence [**Ex. 5**], leads only to the conclusion that he did not want his accusers to testify and that he had no evidence to offer to clear his name of even a single one of the twenty-nine Allegations against him.

Additionally, the current litigation's legal demands are closely aligned in subject matter; in fact, the allegations which form the bases for Plaintiffs' claims against Holtzclaw in this case are the same as the Allegations sustained at the Pre-D Hearing. [*Compare* Doc. 8 *with* **Ex. 4**]. Notably, the burden of proof utilized at the Pre-D Hearing (clear and convincing evidence [**Ex. 5**]) was *more stringent* than the burden of proof Plaintiffs carry in this case (preponderance of the evidence), and the Pre-D Hearing was not bound by the constraints of the Federal Rules of Evidence and Civil Procedure that apply here. [*See* **Exs. 3** (Proc. 160.10)**, 5**].

Another factor demonstrating that Holtzclaw and City had a full and fair opportunity to litigate these matters is that the present litigation was foreseeable at the time of the Pre-D Hearing.

At that time, Holtzclaw was facing criminal charges for the Allegations,[3] and both Holtzclaw and City were well aware of the potential for civil liability for conduct Holtzclaw engaged in on the job; City faces lawsuits for police misconduct all the time, and Holtzclaw had been sued in his capacity as a police officer once before. [**F. 27**].

Finally, both had ample opportunity to be heard on the issues at the Pre-D Hearing. Both were entitled to question witnesses and to respond to and offer evidence. [**Fs. 10, 12**; **Exs. 3** (Proc. 160.10), **5**]. The fact that Holtzclaw elected as a matter of strategy not to exercise these rights does not change that he had the *opportunity* to do so. [**Fs. 11**]. Further, Holtzclaw had the opportunity to appeal the determination, a right which he did in fact exercise, albeit unsuccessfully. [**Fs. 15-19**]. City, on the other hand, *did* exercise its right to present evidence and witnesses, and Sgts. Gregory and Homan offered evidence and testimony in regards to the Allegations involving Plaintiffs. [**Fs. 12**].

Since all factors required to apply issue preclusion are met, the findings of the Review Board, Citty, and the Grievance Committee, which sustained the Allegations at issue herein, have preclusive effect; thus, there can be no genuine dispute fact regarding the issues therein.

III. HOLTZCLAW VIOLATED PLAINTIFFS' CONSTITUTIONAL RIGHTS AND IS LIABLE UNDER 42 U.S.C. § 1983.

A. Standards for Liability Under § 1983

A plaintiff in a § 1983 action must prove a "violation of a right secured by the Constitution and laws of the United States," and "that the alleged deprivation was committed by a person acting

[3] *See* Docket, *State v. Holtzclaw*, CF-2014-5869 (Okla. Cty. Dist. Ct. filed Aug. 29, 2014), https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-2014-5869&cmid=3167778 (last visited Apr. 21, 2020 10:18 A.M.).

under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). "It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State." *Id.* at 48. Holtzclaw acted under color of state law when he committed the above-described acts against Plaintiffs, as he did so during investigative detentions [**Fs. 4-5, 20-21**] and an arrest [**Fs. 3, 22]** he conducted while acting in his capacity as a commissioned police officer of OCPD. [**Fs. 1**; *see also* **Ex. 6**, 71:19-72:7].

B. Unreasonable Seizure

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . ." U.S. Const. Am. IV. It "is designed to prevent arbitrary and oppressive interference" with individuals' "privacy and personal security.'" *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

Even "brief detention[s] short of arrest" may . . . implicate the Fourth Amendment." *Id.* When an "officer, by means of physical force or show of authority, has restrained the liberty of a citizen," a "seizure" has occurred. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.6 (1968)). Even if an encounter between a police officer and a citizen starts out consensual, it "can be transformed into a seizure . . . 'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Id.* (quoting *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980)).

The Fourth Amendment does not protect individuals from all seizures—only those that are unreasonable. *U.S. v. Sharpe*, 470 U.S. 675, 682 (1985). "[I]n determining whether [a] seizure . . . w[as] 'unreasonable,' [the] inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the

interference in the first place." *Terry*, 392 U.S. at 19-20. The Fourth Amendment protects against both unreasonable arrests and unreasonable seizures amounting to less than a traditional arrest, *i.e.*, investigative detentions, or "*Terry* stops." *See Sharpe*, 470 U.S. at 682. However, with the two categories of seizures come two different analytical standards for determining reasonableness. While an arrest requires probable cause, an investigative detention need only be based on reasonable suspicion. *Brown v. Tex*, 443 U.S. 47, 51 (1979). The rationale for the lesser standard "is that law enforcement interests warrant a limited intrusion on the personal security of the suspect." *Fla. v. Royer*, 460 U.S. 491, 500 (1983).

To be reasonable, every investigative stop must first be justified by "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *U.S. v. Sokolow*, 490 U.S. 1, 7 (1989). Generalized suspicions, and inarticulate hunches, do not suffice; the facts available to the officer at the time must be capable of warranting "a man of reasonable caution" to believe the stop was appropriate. *Terry*, 392 U.S. at 21-22. While the inquiry is necessarily fact-dependent, prior case law provides guidance. For example, presence "in a neighborhood frequented by drug users, standing alone," cannot suffice as an appropriate basis for reasonable suspicion. *See Tex*, 443 U.S. at 52. Nor could a person's criminal history, or presence in a "high-crime area" late at night. *U.S. v. Archuleta*, 619 Fed. Appx. 683, 688-691 (10th Cir. 2015) (unpub.).

Further, even an investigative stop that was "reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry*, 392 U.S. at 17-18. The stop must be temporary and last no longer than is necessary to effectuate [its] purpose" and its scope "must be carefully tailored to its underlying justification . . . . Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the

officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *Sharpe*, 470 U.S. at 686-87. Ultimately, determining reasonableness requires "a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Tex*, 443 U.S. at 50-51. Without "any basis for suspecting [someone] of misconduct, the balance between the public interest and [the] right to personal security and privacy tilts in favor of freedom from police interference." *Id.* at 52.

Importantly, "no countervailing governmental interest [can] justify sexual misconduct" during a seizure; "[w]here there is no need for force" in effecting a seizure, "*any* force used is constitutionally unreasonable." *Fontana v. Haskin*, 262 F.3d 871, 880 (9th Cir. 2001) (emphasis in original). Thus, "non-consensual, inappropriate touching" by an officer during a seizure is "an abuse of power" and an "unreasonable intrusion[] into . . . bodily integrity in violation of the Fourth Amendment." *Id.* at 880-81. Accordingly, courts have consistently found seizures unconstitutional when they involve sexual conduct by the involved officer. *See, e.g.*, *Arias v. Allegretti*, No. 05 C 5940, 2008 U.S. Dist. LEXIS 4352, *9 (N.D. Ill. Jan. 22, 2008) (Use of police authority and threat of prosecution to coerce plaintiffs "to expose themselves and engage in sexual acts" violates the Fourth Amendment.); *Wilson v. Wilkins*, 362 Fed. App'x 440, 446 (6th Cir. 2010) (unpub.) (no qualified immunity because "reasonable officer would have known that he was not free to make sexual overtures and repeatedly touch a citizen in his control in a moving vehicle"); *Love v. Town of Granby*, No. 3:03CV1960 (EBB), 2004 U.S. Dist. LEXIS 14196, *12-14 (D. Conn. Jul. 12, 2004) (Officer's grabbing person's scrotum during pat search and using homophobic slurs and

threats could state Fourth Amendment violation); *Johnson v. Cannon*, 947 F. Supp. 1567 (M.D. Fla. 1996) (Allegation that deputy sexually assaulted plaintiff at her home after traffic stop could state Fourth Amendment claim.); *Stidham v. Jackson*, No. 2:07cv00028, 2009 U.S. Dist. LEXIS 27053, *7-8 (W.D. Va. Mar. 24, 2009) (Solicitation of sexual favors to make "tickets disappear" and sexually assault violated Fourth Amendment.); *cf. Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997) (No summary judgment on Fourth Amendment claim, because, if officer "ordered the strip search in retaliation" or "impos[ed] sexual humiliation on her as punishment," jury could find there was no objectively reasonable basis for the search.).

The actions giving rise to S.H.'s claims occurred while she was under arrest and in Holtzclaw's custody [**Fs. 3, 22-23**]., and all actions giving rise to T.M.'s and K.L.'s claims occurred when Holtzclaw stopped them on the street, questioned them, locked them in the backseat of his patrol car, checked them for warrants, and searched them. [**Fs. 4-5, 20-21, 23-24**]. These occurrences were "seizures," because no reasonable person in S.H.'s, T.M.'s or K.L.'s position would have felt she was free to leave. To the contrary, S.H. was physically restrained to her hospital bed [**F. 22**], and once T.M. and K.L. were shut into the backseat of Holtzclaw's patrol car, it was *factually impossible* for them to leave. [**F. 25**]. However, these seizures, even if short of an arrest (in the cases of T.M. and K.L.), constituted the sort of brief investigative stop contemplated by *Terry v. Ohio*. 392 U.S. 1. Accordingly, Holtzclaw must have been able to justify them with articulable facts, *Sokolow*, 490 U.S. at 7, other than T.M.'s or K.L.'s presence in a high-crime area, *Tex*, 443 U.S. at 52, that reasonably suggested that T.M. and K.L. were engaged or about to be engaged in criminal activity at the time they were stopped by Holtzclaw. Holtzclaw's only basis for believing T.M. and K.L. were engaged in criminal activity was their mere presence in an area

"known for drug trafficking," [*see* **Ex. 6**, 123:2-11]. This factor, by itself, is not enough to justify an investigative stop. *See, e.g.*, *id.*; *Sokolow*, 490 U.S. at 7. Holtzclaw's stops of T.M. and K.L. were therefore unconstitutional from the outset. He violated T.M.'s and K.L.'s Fourth Amendment rights before he even perpetrated the acts described in Allegations 18-21 and 24-27 by stopping them and detaining them in the backseat of his patrol car without reasonable suspicion to believe they were engaged in criminal activity.

Even if the seizures initially had been reasonable, they *certainly* became unreasonable as they unfolded. There was simply no reason for Holtzclaw to lock T.M. and K.L. in the backseat of his patrol car as he checked them for warrants [**Fs. 20-21**], or for him to require them to expose their breasts and vaginas to him [**Fs. 4-5**]. And there was *certainly* no legitimate reason for him to force Plaintiffs to perform oral sex on him [**Fs. 3-5**], for him to rape K.L. [**Fs. 5**], or for him to touch S.H.'s breast, place her hand on his crotch, and penetrate her vagina with his finger. [**F. 3**].

Given the extent and severity of Holtzclaw's interference with Plaintiffs' liberty and bodily integrity, and the complete lack of public interest served by Holtzclaw's actions, the seizures were unreasonable, and they violated Plaintiffs' Fourth Amendment rights. *See Tex*, 443 U.S. at 50-52.

C. Excessive Force

Summary judgment should also be granted in Plaintiffs' favor on their § 1983 excessive force claims. In *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007), the Tenth Circuit noted that, while the proof may overlap, claims for unreasonable seizure and excessive force are separate and distinct. *See id.* at 1127. "The plaintiff might succeed in proving the unlawful arrest claim, the excessive force claim, both, or neither." *Id.*

When a plaintiff alleges both an unlawful seizure and excessive force in connection with

the same incident, a court must consider "both the justification the officers had for the [seizure] and the degree of force they used to effect it." *Id.* To prove excessive force, a plaintiff must prove that "the officer[] used greater force than . . . reasonably necessary to effect a lawful [stop]." *See Cortez*, 478 F.3d at 1127. In short, the inquiry "evaluates the force used . . . against the force reasonably necessary to effect a lawful . . . detention under the circumstances . . . ." *Id.* at 1126.

Again, "there can be no countervailing governmental interest to justify sexual misconduct," during a seizure, and "[w]here there is no need for force" in effecting a seizure, "*any* force used is constitutionally unreasonable." *Fontana v. Haskin*, 262 F.3d 871, 880 (9th Cir. 2001) (emphasis in original). There was no need for force in effecting the seizures of Plaintiffs, but Holtzclaw used force in forcing Plaintiffs to perform oral sex on him, [**Fs. 3-5**], in raping K.L. [**F. 5**], and in touching S.H.'s breast, placing her hand on his crotch, and inserting his finger into her vagina. [**F. 3**]. No government interest could justify this conduct. The force Holtzclaw used against Plaintiffs was, by any measure, greater than necessary to effect a lawful investigative stop or arrest. Accordingly, the force was excessive in violation of Plaintiffs' Fourth Amendment rights.

IV. HOLTZCLAW'S ACTS AGAINST S.H. CONSTITUTE ASSAULT & BATTERY.

Applying issue preclusion, S.H., having complied with the notice requirements of the Oklahoma Governmental Tort Claims Act [**F. 28**], is entitled to judgment as a matter of law on her assault and battery claims. To prove assault, S.H. must show Holtzclaw "intend[ed] to cause a harmful or offensive contact with [her] person . . ., or an imminent apprehension" thereof, and that she was "put in such imminent apprehension." Restatement (2d) of Torts § 21, *cited in Brown v.*

Ford, 905 P.2d 223, 229 n.34 (Okla. 1995) (overruled on unrelated grounds). To prove battery,[4] she must prove that an intentional "offensive contact with [her] person . . . result[ed]." Restatement (Second) of Torts § 18, *cited in Brown*, 905 P.2d at 229 n.34. Contact is "offensive" if "it offends a reasonable sense of personal dignity." Restatement (2d) of Torts § 19 (cited in *Fuerschbach v. Southwest Airlines Co.*, 439 F.3d 1197, 1209 (10th Cir. 2006)). Moreover, the element of intent does not require proof of intent to harm or offend—only intent to make the contact that ultimately harmed or offended. *Keel v. Hainline*, 331 P.2d 397, 399 (Okla. 1958).

Holtzclaw made contact with S.H.'s person when he touched her breasts, forced her to perform oral sex on him, and inserted his finger into her vagina. [**F. 3**]. Further, no reasonable jury could find that he lacked intent when he committed these acts. Finally, no reasonable jury could find that these nonconsensual acts [**F. 26**] would not offend a reasonable sense of personal dignity. S.H. was conscious for the acts, [*See generally* **Ex. 12**], and therefore imminently apprehended the offensive contact. Thus, S.H. is entitled to judgment on her assault and battery claims.

CONCLUSION

Defendants should be precluded from re-litigating the issue of whether Holtzclaw committed the acts outlined in the Allegations. Both the OCPD Department Review Board and the FOP Grievance Committee found there was clear and convincing evidence that Holtzclaw committed the acts [*see* **Fs. 13, 18-19**], and Holtzclaw did nothing to refute the Allegations except to point to his accusers' supposed lack of credibility, just like he did at his criminal trial. [**Ex. 5**; *Holtzclaw*, 448 P.3d at 1140; **F. 11**]. This conclusion was formed after a hearing at which

[4] "Every battery necessarily includes an assault." *Courtney v. Dep't of Pub. Safety*, 722 F.3d 1216, 1228 n.7 (10th Cir. 2013) (citing *Hall v. State*, 309 P.2d 1096, 1100 (Okla. Crim. App. 1957)).

Holtzclaw was present and represented by counsel and entitled to question witnesses, and even to present his own evidence and call his own witnesses [**Fs. 10**], even though he declined to do so. [**F. 11**; **Ex. 5**]. Moreover, Defendant City's assistant municipal counselor elicited the testimony at the hearing [**Ex. 5**], Defendant Gregory presented the evidence regarding Allegations 1-4 and 18-21 [**F. 12**; **Ex. 5**], and Defendant Citty adopted the Review Board's findings and terminated Holtzclaw as a result of such findings [**F. 13**; **Ex. 2**]. It would be patently unfair to permit Defendants re-litigate the issue of whether Holtzclaw engaged in the acts described in the Allegations now, given that they took the stance that he did in the prior proceeding, which resulted in Holtzclaw's termination. Likewise, it would be unfair to permit Holtzclaw to re-litigate the issue now, when he had an opportunity to do so in the prior proceeding and chose not to as a matter of strategy. The issue is whether the party had a full and fair *opportunity* to litigate the issue—not whether they took advantage of that opportunity.

There is no genuine dispute of any fact material to the issues Plaintiffs have placed in front of the Court in this Motion, and the weight of the authority—controlling and persuasive—compels the conclusion that Holtzclaw committed the acts alleged in Allegations 1-4, 18-21, and 24-27 against S.H., T.M., and K.L., respectively, and that such conduct violated Plaintiffs' Fourth and Fourteenth Amendment rights. [**Ex. 4**].

WHEREFORE, premises considered, Plaintiffs respectfully request that the Court enter summary judgment in their favor against Holtzclaw and partial summary judgment against the remaining Defendants and find as follows:

1. That issue preclusion bars Defendants from re-litigating whether Holtzclaw committed the acts described in Allegations 1-4, 18-21, and 24-27;

2. That there is no genuine dispute as to the material facts outlined in Allegations 1-4, 18-21, and 24-27;

3. That such undisputed material facts entitle Plaintiffs to judgment as a matter of law against Holtzclaw and partial judgment against the other Defendants on the issues of whether Holtzclaw violated their clearly established Fourth and Fourteenth Amendment rights to be free of unreasonable searches and seizures, excessive force, and unwarranted intrusions into bodily integrity by committing the acts described in Allegations 1-4, 18-21, and 24-27;

4. That the undisputed facts outlined in Allegations 1-4 entitle S.H. to judgment as a matter of law on her assault and battery claims;

5. That Holtzclaw further violated T.M.'s and K.L.'s Fourth Amendment right to be free of unreasonable seizures when he stopped them and detained them in the backseat of his patrol car without reasonable suspicion to believe either was engaged in criminal activity.

Respectfully submitted,

RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2020, I filed the above document with the Clerk of Court. Based on the records currently on file in this case, the Clerk of Court will transmit a Notice of Electronic Filing to those registered participants of the Electronic Case Filing System.

s/ *Kymberli J. M. Heckenkemper*