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 LIGONS & JOHNSON FOR PARTIAL SUMMARY JUDGMENT & BRIEF IN SUPPORT

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JOINT MOTION & BRIEF IN SUPPORT

Plaintiffs Jannie Ligons ("J.L.") and Carla Johnson ("C.J.") (collectively, "Plaintiffs"), pursuant to Fed. R. Civ. P. 56 and LCvR56.1, bring this Joint Motion for Partial Summary Judgment ("Motion"). In support, Plaintiffs present as follows:

INTRODUCTION

The Plaintiffs in this action seek to hold the Defendants accountable for violations of their civil rights, which occurred over a six-month time span during which Holtzclaw, then a patrol officer of the Oklahoma City Police Department ("OCPD"), used his power as a peace officer to prey on vulnerable Black women with impunity.

From December 2013 through June 2014, Holtzclaw illegally seized and searched and sexually assaulted more than a dozen women, including these Plaintiffs, while patrolling the streets of Northeast Oklahoma City.

In the latter part of 2014, Holtzclaw was formally charged with thirty-six counts alleging heinous offenses, ranging from procuring lewd exhibition to rape in the first degree, perpetrated against thirteen Black women. He was formally ultimately convicted of eighteen of the thirty-six offenses, and was sentenced to serve 263 years in prison. Holtzclaw, who has maintained his innocence, appealed to the Oklahoma Court of Criminal Appeals, which unanimously upheld his convictions and sentence in a scathing 52-page opinion handed down on August 1, 2019. On December 30, 2019, Holtzclaw filed a petition for writ of certiorari with the United States Supreme Court, which was denied on March 9, 2020.

After Holtzclaw was criminally charged, but before his case went to trial, the OCPD Department Review Board held a hearing to determine whether to sustain 29 allegations of

misconduct arising out of Holtzclaw's encounters with the women he assaulted, and, if so, what discipline he should receive. In accordance with OCPD procedures and the collective bargaining agreement ("CBA") between the City of Oklahoma City and the Oklahoma City Fraternal Order of Police ("FOP"), Holtzclaw was present and represented by counsel at the hearing, after which then-Chief of Police Bill Citty found all 29 allegations against Holtzclaw were sustained by clear and convincing evidence and terminated Holtzclaw's employment with OCPD.

Holtzclaw subsequently filed a grievance with the FOP concerning the findings and his termination—a choice out of three alternative means of appeal that were available to him. This appeal method, governed by the CBA, required Holtzclaw to waive his right to pursue the other alternative means of appeal, and left his fate in the hands of the FOP Grievance Committee, which had the exclusive discretion to determine whether a grievance should be submitted to arbitration.

The Grievance Committee, upon reviewing the evidence presented at Holtzclaw's predetermination hearing, found that Holtzclaw had no valid grievance which would warrant arbitration. And, in accordance with the CBA, the Grievance Committee's decision was final.

With this Motion, Plaintiffs seek to establish by way of issue preclusion that Holtzclaw committed the acts described in the Allegations which were sustained by the OCPD Department Review Board, Chief of Police Bill Citty, and the FOP Grievance Committee; that he perpetrated the offenses of which he was convicted; and that, in doing so, he violated Plaintiffs' Fourth Amendment right to be free of unreasonable searches and seizures and of the use of excessive force, infringed upon their Fourteenth Amendment substantive due process right to bodily integrity; and that his acts against J.L. constitute assault and battery as a matter of Oklahoma law.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Holtzclaw was employed by Defendant City of Oklahoma City ("City") from September 2011 through January 8, 2016, as a sworn police officer of the Oklahoma City Police Department ("OCPD"). [Docs. 16, ¶¶ 4-6; 288-1; and 288-2].

2. Patrol activities, such as field interviews, traffic stops, and cursory frisks (*i.e.*, pat searches) fell within Holtzclaw's assigned duties. [**Ex. 1**, § 524.00(D); **Ex. 2**].

3. Until June 18, 2014, Holtzclaw was assigned to work second shift (4:00 P.M. to 2:00 A.M.) on patrol in OCPD's Springlake Division. [**Exs. 3, 5-6**; **Ex. 4**, 121:1-4].

4. Around 2:00 A.M. on June 18, 2014, Holtzclaw had just ended his shift when he initiated a traffic stop with J.L. near N.E. 50th St. and N. Lincoln Blvd. in Oklahoma City. [**Ex. 7**, 253:1-254:19; **Ex. 8**, 477:11-480:12; **Ex. 4**, 109:15-21; Doc. 16, ¶¶ 32(a); Doc. 8, ¶¶ 41, 41(a)].

5. Holtzclaw's reason for pulling over J.L. was that he saw her swerve and suspected she may have been driving under the influence. [**Ex. 7**, 254:4-255:2; **Ex. 4**, 86:18-87:1, 109:22-25; **Ex. 8**, 480:1-23; **Ex. 9**, 7, 38].

6. During the 15- to 17-minute traffic stop [**Ex. 9**, 18; **Ex. 4**, 115:6-116:13; **Ex. 7**, 259:23-260:5; **Ex. 10**, 495:8-17; Doc. 16, ¶¶ 32(a); Doc. 8, ¶¶ 41, 41(a)], J.L. denied drinking [**Ex. 4**, 110:12-14], and Holtzclaw, too "tired," did not perform any sobriety tests on J.L. or seek assistance from an officer with a breathalyzer. [**Ex. 4**, 110:3-11].

7. In fact, Holtzclaw did not see any signs that J.L. was drunk [**Ex. 4**, 111:3-24], except that she said "juice," which "brought up a lot of red flags" to him. [**Ex. 4**, 111:8-16].

8. Nevertheless, he pat searched J.L. [**Ex. 4**, 110:15-16] and detained her in the backseat of his police car [**Ex. 9**, 10], not because he had any particularized suspicion that J.L. was

armed and dangerous, but because with "[e]veryone [he] come[s] in contact with male or female, due to the heightened area, the nature of being nighttime, everything," he has to "make sure there's no weapons on board . . . ." in order to protect his "officer safety"; because of the area he worked in, whenever he comes into contact with someone, he "automatically assume[s] that person might have weapons . . . ." [**Ex. 4**, 110:17-25, 112:17-25, 113:8-13; *see also* **Ex. 7**, 256:13-257:18; **Ex. 8**, 482:20-484:10; **Ex. 9**, 11; Doc. 16, ¶¶ 32(a); Doc. 8, ¶¶ 41, 41(a)].

9. As Holtzclaw pat searched J.L., he asked if she had anything illegal on her, which she denied. [**Ex. 7**, 256:8-257:18; **Ex. 8**, 481:12-483:3].

10. Holtzclaw did not find any contraband on J.L.'s person [**Ex. 4**, 113:8-13].

11. Holtzclaw then proceeded to lock J.L. in the backseat of his patrol car while he performed a "quick search" of J.L.'s car without obtaining her consent; again, Holtzclaw found no weapons or contraband. [**Ex. 7**, 257:15-259:25; **Ex. 10**, 484:22-486:2; **Ex. 4**, 113:14-17, 114:3-115:5; **Ex. 9**, 8, 10; Doc. 16, ¶¶ 32(a); Doc. 8, ¶¶ 41, 41(a)].

12. He returned to his patrol car approximately two minutes later and continued to question J.L. for somewhere between ten and fifteen minutes while she was still detained in the backseat of the patrol car. [**Ex. 4**, 115:6-116:13; **Ex. 7**, 259:23-260:5; **Ex. 10**, 495:8-17; Doc. 16, ¶¶ 32(a); Doc. 8, ¶¶ 41, 41(a)].

13. Shortly after Holtzclaw allowed J.L. to leave, she reported to OCPD that an officer had forced her to expose her breasts and to perform oral sex on him during a traffic stop, and an investigation was opened that led detectives to interview Holtzclaw on the afternoon of June 18, 2014. [**Ex. 11**; *see also* **Ex. 9**, 1; **Ex. 7**, 260:1-276:25; **Ex. 10**, 495:14-525:6].

14. Holtzclaw admitted he was the officer who stopped J.L. [**Ex. 9**; **Ex. 4**, 68:12-16].

15. A little less than a month before J.L. came forward to police, Holtzclaw stopped another woman—C.J.—while she was walking alone near the area of N.E. 16th Street and Jordan in Oklahoma City. [**Ex. 4**, 121:5-9; **Ex. 12**, 102:8-105:3; **Ex. 13**, 3506:13-3507:22].

16. Holtzclaw did not have any particularized reason to suspect that C.J. was involved in any criminal activity, but after recognizing her as someone he believed he had previously arrested, he placed C.J. in the backseat of his patrol car, shut the door, and ran her name to check to see if she had any active warrants, because "the area was high in crime, known for drug trafficking, so [he] probably was doing a traffic stop to just talk to her and to see if there was any drugs on board." [**Ex. 12**, 104:25-106:5; **Ex. 13**, 3506:13-3507:22; **Ex. 4**, 122:17-124:25; Doc. 8, ¶ 39(a)-(b); Doc. 16, ¶ 30].

17. Holtzclaw placed C.J. in the backseat of his patrol car, not because he had any particularized reason to believe she would flee or that she was dangerous, but because of "the nature of the area [he] work[ed] at [sic]," presenting a "heightened threaten [sic] of possible officer safety," due to the "risk of people around the neighborhood looking out for each other" and the need to eliminate some of those factors of possibly getting attacked." [**Ex. 4**, 125:1-21].

18. Holtzclaw, after finding C.J. had no warrants, searched her person and questioned her about whether she was in possession of drugs before letting her go. [**Ex. 4**, 123:25-124:25, 129:9-131:20; **Ex. 12**, 104:25-106:15, 107:13-21; **Ex. 13**, 3507:21-3508:15].

19. Holtzclaw does not dispute that he stopped C.J. [**Ex. 4**, 71:19-21].

20. When J.L. and C.J. were in the backseat of Holtzclaw's patrol vehicle, they were unable to exit the vehicle without being let out from the outside. [*See* Doc. 288-6, 132:16-24].

21. Approximately two months after J.L. came forward to police, C.J. told OCPD Sex Crimes detectives that she too had been victimized by an officer—that the officer had stopped her while she was walking near the area of N.E. 16th Street and Jordan and that he had touched her breasts and vagina while searching her for drugs. [**Ex. 14**].

22. Holtzclaw was later charged by information in the Oklahoma County District Court with 36 offenses he was accused of having committed against thirteen different women, including J.L. (Counts 15-16) and C.J. (Counts 13-14). [**Ex. 15**].

23. Count 13 alleged Holtzclaw [**Ex. 15**]:

WHILE ACTING UNDER THE AUTHORITY OF AN OKLAHOMA CITY POLICE OFFICER, KNOWINGLY AND INTENTIONALLY TOUCHED AND/OR FELT THE BODY OR PRIVATE PARTS OF C.J., IN A LEWD AND LASCIVIOUS MANNER AND IN A MANNER CALCULATED TO AROUSE AND EXCITE SEXUAL INTERESTS AND WITHOUT THE CONSENT OF C.J., TO-WIT: BY . . . TOUCHING THE BREASTS OF C.J. WITH HIS HAND AND UNDER HER CLOTHING, WITHOUT HER CONSENT, AFTER [HE] HAD DETAINED C.J. . . .

24. Count 14 alleged Holtzclaw [**Ex. 15**]:

WHILE ACTING UNDER THE AUTHORITY OF AN OKLAHOMA CITY POLICE OFFICER, KNOWINGLY AND INTENTIONALLY TOUCHED AND/OR FELT THE BODY OR PRIVATE PARTS OF C.J., IN A LEWD AND LASCIVIOUS MANNER AND IN A MANNER CALCULATED TO AROUSE AND EXCITE SEXUAL INTERESTS AND WITHOUT THE CONSENT OF C.J., TO-WIT: BY . . . TOUCHING THE VAGINA AND PUBIC AREA OF C.J. WITH HIS HAND UNDER THE CLOTHES, WITHOUT HER CONSENT, AND AFTER [HE] HAD DETAINED C.J. . . . .

25. Count 15 alleged Holtzclaw [**Ex. 15**]:

WHILE ACTING UNDER THE AUTHORITY OF AN OKLAHOMA CITY POLICE OFFICER, WILLFULLY AND LEWDLY EXPOSED, DIRECTED, PROCURED, AND/OR COUNSELED J.L., TO EXPOSE HER BARE BREASTS . . . FOR THE PURPOSE OF SEXUAL STIMULATION OF DANIEL K. HOLTZCLAW . . . .

26. Count 16 alleged Holtzclaw [**Ex. 15**]:

WHILE ACTING UNDER THE AUTHORITY OF AN OKLAHOMA CITY POLICE OFFICER, [] WILLFULLY, UNLAWFULLY, AND FELONIOUSLY . . . FORC[ED] J.L. TO ALLOW [HIM] TO PLACE HIS PENIS IN THE MOUTH OF J.L., WHILE BEING THREATENED WITH ARREST AND/OR PHYSICAL, EITHER EXPRESSLY OR IMPLIED, IF SHE DID NOT COMPLY . . . .

27. At trial, both C.J. and J.L. identified Holtzclaw as the officer who had assaulted them. [**Ex. 13**, 3516:19-3517:11; **Ex. 10**, 524:22-525:8].

28. J.L. testified that Holtzclaw made her expose her breasts to him to demonstrate she did not have anything hiding in her bra. [**Ex. 10**, 495:24-498:12].

29. Likewise, C.J. testified that Holtzclaw grabbed her breasts on top of her clothing and stuck his hand inside of her pants and touched the flesh of her vagina to check to see if she was hiding anything on her person. [**Ex. 13**, 3506:22-3510:25].

30. J.L. also testified that while she was in the backseat of Holtzclaw's car, he stood over her, unzipped his pants, pulled out his penis, and with his penis in J.L.'s face, told her, "come on." She testified that, "afraid for [her] life," she put his penis in her mouth "briefly" and said, "I can't do this," to which Holtzclaw responded, "come on, just for a minute . . . ." J.L. testified that she put his penis in her mouth "for another few seconds," and stopped again. [**Ex. 10**, 505:4-512:8].

31. When the time came for jury deliberations, the court instructed the jury as to the elements required to convict Holtzclaw of, *inter alia*, sexual battery (counts 13-14), procuring lewd exhibition (count 15), and forcible oral sodomy (count 16). [**Ex. 16**, Instrs. 8, 9, 14].

32. The jury was instructed that it could not convict Holtzclaw of sexual battery unless the State had proved each of the following elements of the offense beyond a reasonable doubt:

> First, the defendant intentionally; Second, touched, felt, or mauled; Third, in a lewd and lascivious manner; Fourth, the body or private parts; Fifth, of a person sixteen years of age or older; Sixth, without her consent; OR
>
> First, a municipal employee of a municipality; Second, intentionally; Third, touched, felt or mauled; Fourth, in a lewd and lascivious manner; Fifth, the body or private parts; Sixth, of a person sixteen years of age or older; Seventh, who was under the legal custody, supervision or authority of the municipality of Oklahoma.

The jury was also instructed that "the words 'lewd' and 'lascivious' . . . signify conduct which is lustful and which evinces an eagerness for sexual indulgence." [**Ex. 16**, Instr. 8].

33. The jury was also instructed that it could not convict Holtzclaw of procuring lewd exhibition unless the State had proven beyond a reasonable doubt each of the following elements:

> First, willfully; Second, procuring any person; Third, to expose herself to public view or the view of any number of persons; Fourth, for the purpose of sexual stimulation of the viewer. [**Ex. 16**, Instr. 9].

34. The court further instructed the jury that the State had to have proven beyond a reasonable doubt each element of the offense of forcible oral sodomy in order for Holtzclaw to be convicted of the offense, and listed the following elements as those that needed to be proven:

> First, penetration; Second, of the mouth of the victim; Third, by the penis of the defendant; Fourth, which is accomplished by means of force or violence or threats of force or violence that are accompanied by the apparent power of execution.
>
> OR
>
> Fourth, committed by a municipal employee upon a person who was under the legal custody, supervision or authority of a municipality of Oklahoma.

The court further instructed that "any sexual penetration, however slight, is sufficient to complete the crime." [**Ex. 16**, Instr. 14].

35. The jury found Holtzclaw guilty on counts 13 through 16, among others, and the court entered a judgment of conviction on such counts on January 22, 2016. [**Exs. 17, 18**].

36. On August 1, 2019, the Oklahoma Court of Criminal Appeals unanimously upheld Holtzclaw's convictions and his 263-year combined sentence. [**Ex. 19**].

37. Holtzclaw filed a petition for a writ of certiorari in the United States Supreme Court on December 30, 2019. [**Exs. 20, 21**]. On March 9, 2020, the petition was denied. [**Ex. 22**].

38. After Holtzclaw was charged, but before his trial, the OCPD Office of Professional Standards opened an administrative investigation of the allegations against Holtzclaw. [**Ex. 23**].

39. 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 regarding the Allegations and any discipline. [Doc. 288-4].

40. Allegations 22-23 alleged Holtzclaw "grabbed [C.J.'s] breast outside of her clothing" and "touched her vagina." [Doc. 288-4].

41. Allegations 28-29 alleged Holtzclaw "stopped [J.L.] on traffic," and, "[a]fter placing her in the backseat of [his] assigned police vehicle, [he] directed her to expose her breast . . ." and "forced [her] to perform oral sex on [him]." [Doc. 288-4].

42. The Notice advised Holtzclaw that he could face termination from OCPD if the Allegations were sustained. [Doc. 288-4].

43. On December 11, 2014, the OCPD Department Review Board ("Review Board") convened for a hearing to review evidence and testimony of the Allegations. [Doc. 288-5].

44. Holtzclaw observed the presentation of evidence and was represented by counsel, Jim Moore, through the Fraternal Order of Police ("FOP"). [Doc. 288-5].

45. After granting Holtzclaw a 12-day continuance following the presentation of evidence, the Review Board convened again to continue the proceedings. [Doc. 288-5].

46. 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 . . . ." [Docs. 288-4, 288-5, 288-3].

47. Holtzclaw did not address the Review Board or—even after a 12-day continuance—present any evidence or witnesses, but his attorney did question the witnesses who testified against him. [Docs. 288-5; 288-6, 181:13-184:6]

48. OCPD Sgt. Valari Homan presented evidence of Allegations 22-23, and Sgt. Rob High presented evidence of Allegations 28-29. [Doc. 288-5].

49. The Review Board found all 29 Allegations sustained on clear and convincing evidence, and Chief Citty accepted the findings and fired Holtzclaw. [Docs. 288-2, 288-5].

50. "Sustained" means, according to OCPD Procedure 143.0, *both* that the acts were committed *and* that they constituted misconduct. [Doc. 288-3].

51. Holtzclaw could appeal the findings through City's "Personnel Policy Grievance Procedure, the FOP [CBA], or the AFSCME [CBA]." [Docs. 288-3; 288-9].

52. Holtzclaw chose to appeal via the FOP grievance procedure. [Docs. 288-7; 288-8; 288-9].

53. In doing so, he affirmatively "waive[d] any right to process the grievance through the grievance procedures in the City Personnel Policies." [Doc. 288-9, § 8.6 (Step 2)].

54. The FOP Grievance Committee ("Grievance Committee") had exclusive discretion to decide whether Holtzclaw had a grievance warranting arbitration. [Doc. 288-9, § 8.6 (Step 4)].

55. It found he had no such grievance. [Docs. 288-7; 288-8; 288-9].

56. J.L. timely complied with the requirements of the Oklahoma Governmental Tort Claims Act prior to filing this action. [Doc. 8, ¶ 106; Doc. 16, ¶ 92].

57. Holtzclaw has been sued for police conduct before, in May 2013. [Doc. 288-14].

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 [she] is entitled to judgment as a matter of law." *Id.* If the movant can carry this burden, "the nonmovant must. . . '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, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (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 that a jury "could reasonably find for either" party on an "issue that might affect the outcome of the suit under the governing law," or else the court must enter judgment in the movant's favor. *Anderson*, 477 U.S. at 255.

When an issue of fact in a civil rights suit was decided by a jury in a prior state-court criminal proceeding resulting in conviction, there can be no genuine dispute as to such a fact to preclude summary judgment. The Supreme Court has held, "[I]ssues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Ed.*, 465 U.S. 75, 83, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984) (citing *Allen v. McCurry*, 449 U.S. 90 (1980)); *see also* 28 U.S.C. § 1738. Thus, when a plaintiff files a § 1983 suit based on facts that previously led to a criminal conviction of the defendant in state court, the federal court "must apply the state collateral estoppel rules" to determine "whether a prior state court judgment bars litigation of an issue" material to the § 1983 claim. *See Franklin v. Thompson*, 981 F.2d 1168, 1170 (10th Cir. 1992). In Oklahoma, issues actually litigated in a criminal proceeding that resulted in a final judgment of conviction are entitled to preclusive effect in a subsequent civil action arising out of the same events. *Lee v. Knight*, 771 P.2d 1003, 1005-06 (Okla. 1989); *Benham v. Plotner*,

795 P.2d 510, 513 (Okla. 1990) (final judgment of conviction "is conclusive evidence in a civil action."). Plus, collateral estoppel/issue preclusion bars re-litigation of an issue a litigant had a "full and fair opportunity to litigate" in a prior administrative proceeding, *Feightner v. Bank of Okla., N.A.*, 65 P.3d 624, 629-30 (Okla. 2003), as long as it "meets the standards for preclusive effect applicable to judicial decisions." *DOT v. Little*, 100 P.3d 707, 719-20 (Okla. 2004).

II. ISSUE PRECLUSION BARS RE-LITIGATING HOLTZCLAW'S ACTS AGAINST J.L. & C.J.

Litigation of several issues in this case is precluded by two prior, final decisions: Holtzclaw's criminal conviction, and his OCPD Pre-D Hearing. 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 demonstrate that "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.* When the prior decision was a jury verdict in a criminal case, each element of the offense of which the defendant was convicted has been "actually litigated." *See Aery v. Nuckolls*, No. 15-CV-0624-CVE-TLW, 2016 U.S. Dist. LEXIS 137563, *8-9 (N.D. Okla. Oct. 4, 2016). The fourth condition she must establish is that the issue "was determined by a final and valid decision." *Cities*, 980 P.2d at 126. If a convicted criminal defendant "perfects a direct appeal, final disposition is made and entered by the appellate court." *Pickens v. State*, 779 P.2d 596, 598 (Okla. Crim. App. 1989). Finally, "the party against

whom issue preclusion is interposed must have had a 'full and fair opportunity' to litigate the critical issue in the earlier case." *Id.* at 458. To decide whether that party had such a full and fair opportunity, courts consider:

> (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 the [party's] favor; and (3) whether the second action affords the [party] 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 the [party] at the time of the earlier proceedings; and ([6]) whether in the first proceeding the [party] had sufficient opportunity to be heard on the issue." *Id.*

A. Holtzclaw's OCPD Pre-Determination Hearing

Plaintiffs incorporate by reference the argument set forth in the Morris MSJ [Doc. 288] at § II(A), pages 7 through 14. *See also* **Fs. 38-55, 57**, *supra*.[1]

All factors required for operation of issue preclusion are met, so the findings of the Board, Citty, and the Committee, which sustained Allegations 22-23 and 28-29, have preclusive effect, and there can thus be no genuine dispute fact regarding the issues contained therein.

B. Holtzclaw's Criminal Convictions

Under *Lee v. Knight*, 771 P.2d 1003 (Okla. 1989) and *Benham v. Plotner*, 795 P.2d 510 (Okla. 1990) Holtzclaw's convictions also have preclusive effect and, in fact, are conclusive evidence of the issues Plaintiffs allege in this action. *See Aery*, *supra* at *8-9. He was convicted of forcible oral sodomy and procuring lewd exhibition for his actions against J.L., and of two counts of sexual battery for his actions against C.J. [**Fs. 23-26**, **35**]. This judgment could not have been

[1] Each time Plaintiffs cite to a statement of undisputed material fact herein, the citation is intended to encompass the evidentiary materials offered in support of such fact.

rendered but for the jury's determination that the State of Oklahoma had proven beyond a reasonable doubt that Holtzclaw touched C.J.'s breasts and vagina [**Fs. 23-24**, **32**], and that he procured J.L. to expose her breasts [**Fs. 25**, **33**] and forced her to perform oral sex [**Fs. 26**, **34**]. These acts, the evidence of which the jury at Holtzclaw's criminal trial left no reasonable doubt as to his guilt, are the same acts that form the basis for C.J.'s and J.L.'s claims in this case. [*Compare* **Fs. 23-26**, **32-34** *with* Doc. 8, ¶¶ 39(b) ("Holtzclaw groped Johnson under her clothes."), 41(a) ("Holtzclaw then made Ligons to expose her breasts and . . . to perform oral sex.")]. Additionally, the judgment of conviction resulting from these factual findings is final and valid. The appellate court affirmed on August 1, 2019, and the United States Supreme Court denied Holtzclaw's petition for writ of certiorari on March 9, 2020. [**Fs. 35-37**]. Accordingly, Holtzclaw's convictions thus act as conclusive evidence that Holtzclaw touched C.J.'s breasts and vagina, and that he procured J.L. to expose her breasts and forced her to perform oral sex.

Further, while City was not a party to the criminal prosecution, it should also be bound by the convictions. Should City seek to avoid giving the convictions preclusive effect on that basis, the particularly on-point opinion of the California Court of Appeals in *Miller v. Superior Court*, 168 Cal. App. 376, 214 Cal. Rptr.125 (Cal. Ct. App. 1985) should guide the Court's decision.

In *Miller*, the plaintiff sued a police officer and the city that employed him for damages after the officer was convicted of raping her after a traffic stop. *Id.* at 380. The city moved to sever the plaintiff's case against it from her case against the officer, arguing the officer's conviction was not admissible against it and that it should have the right to litigate the issue of whether the officer raped the plaintiff. *Id.* When the superior court granted the city's motion, the plaintiff petitioned for a writ of mandate, seeking to vacate the order granting the severance. *Id.* The appellate court,

siding with the plaintiff, issued the writ. *Id.* at 380-81. The court held collateral estoppel barred the city from re-litigating the issue of rape, which had already been actually and necessarily decided at the officer's criminal trial. *Id.* at 381-86. Recognizing that the city had not been a party to the criminal proceedings, the court nevertheless determined the city was collaterally estopped from re-litigating the rape issue because it was in privity with the State of California, *i.e.*, the plaintiff in the criminal prosecution. *Id.* at 383-84. The court reasoned:

> When their community of interest, substantial identity of interests and City's closeness to the criminal case are considered in the context of its responsibilities to the public, we think it clear that City was in privity with the People of the State of California. The interest of City was identical to that of the [People] in prosecuting [the officer], and it was successfully represented by the People in that case. Try as it may, City cannot divorce itself from the People in this context unless it wishes to deny on the record that it has an interest in obtaining a conviction of rape committed by one of its police officers while in the line of duty. Its interest in prosecuting [the officer] was every bit as strong as that of the [People]. [The officer] was prosecuted for a felony by the district attorney representing the [People] as plaintiff; had the offense been a misdemeanor the city attorney would have represented plaintiff therein. But whether it be the city attorney or the district attorney who pursues the conviction, each has goals which are the same—to seek justice on behalf of the People.

Id. at 384. Given the similarities between *Miller* and the case at bar, *Miller*'s reasoning readily applies here. City, through OCPD, and the Oklahoma County District Attorney had the same goal prosecuting Holtzclaw—to seek justice on behalf of the people of Oklahoma City. Accordingly, City was a "privy" to a party to Holtzclaw's criminal proceedings and should therefore be estopped from re-litigating the issues forming the bases of Holtzclaw's convictions.

III. 42 U.S.C. § 1983 UNREASONABLE SEARCH & SEIZURE

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 . . . committed by a person acting under color of state law." *West v.*

Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). "[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 assaulted J.L. and C.J., as he did so while acting and performing his duties as a commissioned police officer of OCPD. [**Fs. 1-3, 4-14, 15-21**].

B. Unreasonable Seizure

The Fourth Amendment confers a right to be protected against "arbitrary and oppressive interference . . . with [] privacy and personal security." *I.N.S. v. Delgado*, 466 U.S. 210, 215, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984) (quoting *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)), resulting from unreasonable searches and seizures. A seizure occurs when an "officer, by means of physical force or show of authority," restrains a citizen's liberty. *Delgado*, 466 U.S. at 215 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.6, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Whether a seizure is reasonable depends on "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 U.S. v. Sharpe*, 470 U.S. 675, 682 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985). However, while an arrest must be predicated upon probable cause, an investigative detention need only be based upon reasonable suspicion, *Brown v. Tex*, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), "supported by articulable facts that criminal activity 'may be afoot.'" *U.S. v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). But even a 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. Thus, an investigative detention "must

be temporary and last no longer than is necessary to effectuate the purpose of the stop," and "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." *Fla. v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). "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 the reasonableness of an investigative stop 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 and propositioning" by an officer during a seizure is "an abuse of power" and an "unreasonable intrusion[] into [the subject's] bodily integrity in violation of the Fourth Amendment." *Id.* at 880-81. Accordingly, courts have consistently held that seizures violate the Fourth Amendment when they involve sexual advances, explicit comments, or sexual assault 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 unwittingly" is "objectively unreasonable" and violates the Fourth Amendment.); *Wilson v.*

Wilkins, 362 Fed. App'x 440, 446 (6th Cir. 2010) (unpub.) (no qualified immunity because "[a] 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) (Soliciting sexual favors to make "tickets disappear" and sexual 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 . . ., imposing sexual humiliation on her as punishment . . .," jury could find there was no objectively reasonable basis for the search.).

1. The Undisputed Facts Show That Holtzclaw's Seizure of J.L. Was Unreasonable.

Holtzclaw pulled J.L. over because she was swerving. [**F. 5**]. J.L. denied drinking, but Holtzclaw instructed her to step out of her car and walk back to his patrol car, pat searched her (as he does with every person he places in the back of his patrol car), and, despite finding no contraband or weapons, locked her in the back of his patrol car while he searched her car. [**Fs. 6-11, 20**]. Again finding nothing, Holtzclaw returned to his car and conducted an unreasonably invasive and public search of J.L. without any cause whatsoever,[2] after which he continued to

[2] For more on this point, see §§ III(C)(2)-(3) *infra*, pp. 21-24.

question her for somewhere between 10 and 15 minutes. [**Fs. 11-14**]. Holtzclaw then forced J.L. to perform oral sex on him and allowed her to leave only after she complied. [**Fs. 11-14**].

Because he was "too tired," at no point did Holtzclaw perform a sobriety test on J.L. [**F. 6**]. Moreover, he did not smell alcohol on J.L. and did not see any signs that she was drunk (though he inexplicably noted that her saying the word "juice" "brought up a lot of red flags.") [**F. 7**].

Even if we were to assume that Holtzclaw's detention of J.L. began as a lawful stop, the stop became unlawful due to its intolerable duration and scope. Holtzclaw utilized a sexually invasive search tactic without justification and forced J.L. to perform oral sex on him, which could have served no possible legitimate police purpose. The seizure was unreasonable, and by conducting it, Holtzclaw violated J.L.'s Fourth and Fourteenth Amendment rights.

2. The Undisputed Facts Show That Holtzclaw's Seizure of C.J. Was Unreasonable.

All actions giving rise to C.J.'s claims occurred when Holtzclaw stopped C.J. on the street, questioned her, locked her in the backseat of his patrol car, and checked her for warrants, and searched her. [**Fs. 15-19**]. This occurrence was a "seizure" in accordance with the definition the courts have attached to the term, because no reasonable person in C.J.'s position would have felt she was free to leave. To the contrary, once C.J. was shut into the backseat of Holtzclaw's patrol car, it was *factually impossible for* her to leave. [**F. 20**]. For this kind of seizure to be reasonable, Holtzclaw needed to able to justify it, at a minimum, with articulable facts that reasonably suggested that she was engaged or about to be engaged in criminal activity, *Sokolow*, 490 U.S. at 7, *other than* C.J.'s presence in a high-crime area, *Tex*, 443 U.S. at 52, or her prior criminal history, *U.S. v. Archuleta*, 619 Fed. Appx. 683, 688-91 (10th Cir. 2015) (unpub.). Holtzclaw's only basis for believing C.J. was engaged in criminal activity was that she was merely present in an area

"known for drug trafficking," [**F. 17**; **Ex. 4**, 123:2-11] and that he believed he had arrested her before. [**F. 16**]. These factors, by themselves, are not enough to justify an investigative stop. *See, e.g.*, *id.*; *Sokolow*, 490 U.S. at 7. Accordingly, Holtzclaw's stop of C.J. was unconstitutional from its outset.

Even assuming, *arguendo*, that the stop had been reasonable at its outset, it certainly became unreasonable as it unfolded. There was simply no reason for Holtzclaw to lock C.J. in the backseat of his patrol car as he checked her for warrants [**Fs. 15-17**], and there was *certainly* no reason for him to perform a strip search of C.J. on the side of a public street [**Fs. 18, 21**; *see also* §§ III(C)(2), (4), *infra* pp. 21-24] in search of drugs which he had no probable cause to believe she possessed. Given the extent and severity of Holtzclaw's interference with C.J.'s liberty and bodily integrity, and the utter lack of public concern or interest served by the seizure and search, the stop was unreasonable, and it violated C.J.'s Fourth Amendment rights. *See Tex*, 443 U.S. at 50-51-52.

C. Unreasonable Search

1. Standards for Searches During Investigative Detentions Generally

It is well-settled that if, during a constitutionally valid investigative stop, an officer "harbor[s] an articulable and reasonable suspicion that the person is armed and dangerous," he may "conduct a limited search ["frisk"] for weapons for [the officer's] own protection." *U.S. v. King*, 990 F.2d 1552, 1557 (10th Cir. 1993). Before an officer "places a hand on . . . a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so." *Sibron v. New York*, 392 U.S. 40, 64, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). In this context, before an officer frisks a person during a detention, "he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." *Id.*

Further, even when an investigative stop or frisk is justified at inception, it may become unreasonable and therefore unconstitutional if it develops into "a more serious intrusion on [one's] personal liberty than is allowable on mere suspicion of criminal activity." *King*, 990 F.2d at 1557 (quoting *Royer*, 460 U.S. at 502). A protective frisk must be "reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer," and limited to "the suspect's outer clothing." *U.S. v. Harris*, 313 F.3d 1228, 1237 (10th Cir. 2002).

2. Standards for Strip Searches & Sexually Invasive Searches

By contrast, when a search requires a person to expose her breasts or genitalia, it is a strip search (full nudity is not necessary), *see Amaechi v. West*, 237 F.3d 356, 363 (4th Cir. 2001), *Shroff v. Spellman*, 604 F.3d 1179, 1191 (10th Cir. 2010), *Wood v. Hancock Cty. Sheriff's Dep't*, 354 F.3d 57, 63 n.10 (1st Cir. 2003), which is analyzed more stringently, as is well-settled that "the greater the intrusion, the greater must be the reason for conducting a search." *Levoy v. Mills*, 788 F.2d 1437, 1439 (10th Cir. 1986) (quoting *Blackburn v. Snow*, 771 F.2d 556, 565 (1st Cir. 1985)). The Tenth Circuit has noted that, without a doubt, "a strip search is an invasion of personal rights of the first magnitude," and that "[i]t is axiomatic that a strip search represents a serious intrusion upon personal rights." *Chapman v. Nichols*, 989 F.2d 393, 395-96 (10th Cir. 1993). Indeed, such searches are "demeaning, dehumanizing, undignified, humiliating, embarrassing, repulsive, signifying degradation and submission." *Id.* The Tenth Circuit has explained, "The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state . . . can only be seen as thoroughly degrading and frightening. Moreover, the imposition of such a search upon an individual detained for a [minor] offense is quite likely to take

that person by surprise, thereby exacerbating the terrifying quality of the event." *Id.* at 396 (quoting *John Does 1-100 v. Boyd*, 613 F. Supp. 1514, 1522 (D. Minn. 1985)).

In every case, for a strip search to be reasonable, there must have been a "legitimate need" for the search and there must have been no "less intrusive measures" that could have satisfied the need. *Levoy*, 788 F.2d at 1439. Beyond those factors, in determining the reasonableness of a particular strip search, a court must balance "the need for the particular search against the invasion of personal rights that the search entails," considering "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). Of course, a strip search is patently unreasonable when there was no justification whatsoever for an officer to require a woman to expose her breasts and genitalia. *See Shroff*, 604 F.3d 1179.

The Supreme Court "has expressly disavowed the right of an officer to disrobe an arrestee on the street . . . without the presence of justifying factors." *Amaechi*, 237 F.3d at 364 (citing *Illinois v. Lafayette*, 462 U.S. 640, 645 (1983)). Accordingly, recognizing "[p]olice conduct that would be impractical or unreasonable—or embarrassingly intrusive—on the street can more readily—and privately—be performed at the station," the Seventh Circuit has noted that courts uniformly condemn "intrusive searches performed in public." *See Campbell v. Miller*, 499 F.3d 711, 718-19 (7th Cir. 2007) (citing cases and quoting *Lafayette*, 462 U.S. at 645). Further, as the Fourth Circuit has explained, "The fact that . . . an officer is not allowed to strip an arrestee on a public street . . . necessarily means that an officer cannot go even further than . . . by actually touching and penetrating the arrestee's exposed genitalia on a public street." *Amaechi*, 237 F.3d at 364.

Even when the subject of the search consents to a search of their "person," such consent does not give the officer limitless authority to search in any manner he pleases; the scope of the consent must be construed in light of what a reasonable person would have understood he was consenting to under the circumstances. *See U.S. v. Blake*, 888 F.2d 795, 800 (11th Cir. 1989). "It cannot be said that a reasonable individual would understand that a [public] search of one's person would entail an officer touching [their] genitals." *Id.* at 800-01.

3. The Undisputed Facts Show That the Search of J.L. Was Unreasonable.

Even after Holtzclaw had already pat-searched J.L. *and* searched her car and found nothing, he proceeded to make J.L. expose her breasts on the side of a public street. [**Fs. 13**, **25**, **28**, **33**, **35**]. At no point during the traffic stop did Holtzclaw perform a sobriety test or a breathalyzer or any other alternative less intrusive than a strip search on the side of a public street in any attempt to dispel his suspicion that she was driving under the influence of alcohol. [**F. 6**]. Since Holtzclaw had no legitimate need to perform this search, and since the invasion of J.L.'s privacy was grave, the strip search was unreasonable and violated J.L.'s Fourth and Fourteenth Amendment rights.

4. The Undisputed Facts Show That the Search of C.J. Was Unreasonable.

In an effort to locate hidden contraband, which he had no particularized grounds to believe she possessed, Holtzclaw stuck his hands under C.J.'s clothes, groping her breasts and touching her bare vagina without her consent. [**Fs. 16-17**, **23-24**, **29**, **32**, **35**]. There was no objective basis, much less probable cause, for Holtzclaw to believe C.J. possessed contraband and no need for him to conduct the search, which was extremely invasive, degrading, and public, occurring on the side of the road, where anyone could see. [**F. 15**]. The search was patently unreasonable. *See Schroff,*

604 F.3d 1179. Nothing justified putting C.J. through such a "demeaning, dehumanizing, undignified, humiliating, embarrassing, repulsive" practice "signaling degradation and submission." *Chapman*, 989 F.2d at 395-96. Thus, the search violated C.J.'s Fourth and Fourteenth Amendment rights.

IV. 42 U.S.C. § 1983 EXCESSIVE FORCE

Summary judgment should also be granted in favor of J.L. on her § 1983 excessive force claim. In *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007), the Tenth Circuit noted that, although 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 police encounter, "it is necessary for the officers to consider both the justification the officers had for the [seizure] and the degree of force they used to effect it." *Id.* As explained above in § III(B), *supra* pp. 16-18, to prove an investigative stop was unreasonable, a plaintiff must prove only that the officer that detained her lacked reasonable suspicion that she was engaged in criminal activity. By contrast, to prove excessive force, a plaintiff must prove that "the officer[] used greater force than would have been reasonably necessary to effect a lawful [stop]." *See Cortez*, 478 F.3d at 1127. In other words, the excessive-force inquiry "evaluates the force used in a given . . . detention against the force reasonably necessary to effect a lawful . . . detention under the circumstances of the case." *Id.* at 1126.

Whether force was reasonably necessary is assessed using the standard set forth in *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed 2d 443 (1989), which "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

Holtzclaw used greater force than was necessary to lawful investigative stops of J.L. and C.J. Holtzclaw stopped J.L. after seeing her swerve, suspecting a D.U.I. [**Fs. 4-5**]. Throughout the traffic stop, J.L. was cooperative and polite [*see generally* **Exs. 4, 7-8, 10; Ex. 9,** 10], even when Holtzclaw took his search of her person beyond constitutional bounds. *See* § III(C)(3), *supra* p. 23. Holtzclaw had no particularized reason to believe J.L. was armed and dangerous, or that she would attempt to flee. Nevertheless, he conducted a pat search of her body and locked her in the backseat of his patrol car while he searched her vehicle. [**Fs. 6-11**]. Given the nature of the offense suspected and J.L.'s cooperation, Holtzclaw's actions in searching J.L. and locking her in his car exceeded the force necessary to accomplish the investigative stop and were unreasonable under *Graham*. Even so, Holtzclaw continued to escalate his use of force during the traffic stop when he forced J.L. to perform oral sex on him. [**Fs. 12-13, 25-28, 30-39, 41, 42-55, 57**]. Again, "there can be no 'countervailing governmental interest' to justify sexual misconduct." *Fontana v. Haskin*, 262 F.3d 871, 880 (9th Cir. 2001).

The force Holtzclaw used against C.J. was similarly unnecessary and excessive. Holtzclaw stopped C.J. for no apparent reason. [**Fs. 15-17**]. She was not suspected of engaging in any particular criminal activity, but rather was merely walking alone in a high-crime area at night. In fact, Holtzclaw himself claimed the stop was a voluntary contact, and that C.J. could have left at

any time. [Doc. 288-6, **Ex. 4,** 132:16-134:7]. Nevertheless, during this stop, Holtzclaw locked C.J. in the backseat of his patrol car and conducted a sexually invasive search of her body without any particularized reason to suspect, much less probable cause to believe, that C.J. was armed or dangerous. [**Fs. 16-17, 21**; **Ex. 4,** 110:19-111:2]. C.J. was cooperative, never threatened Holtzclaw, and never attempted to flee. By all indications, there was simply no reason that Holtzclaw could not have achieved the goal of the stop without resorting to using force by touching C.J.'s body in a sexually invasive manner and by locking her in the backseat of his patrol car.

These undisputed facts lead to one reasonable conclusion, and that is that the force Holtzclaw used against J.L. and C.J. was unreasonable and excessive as a matter of law.

V. ASSAULT & BATTERY – GOVERNMENTAL TORT CLAIMS ACT CLAIMS

A. City's Liability for Holtzclaw's Actions Not Constituting Sexual Assault

J.L. is entitled to judgment against City as a matter of law for her claims under the Oklahoma Governmental Tort Claims Act, Okla. Stat. tit. 51, §§ 151, *et seq*. ("OGTCA"). Under the OGTCA, a political subdivision of the state, such as a municipality, *see id.* § 152(11)(a), "shall be liable for loss resulting from . . . the torts of its employees acting within the scope of their employment subject to the limitations and exceptions specified . . . ." *Id.* § 153(A). "Scope of employment" is defined in the OGTCA as "performance by an employee acting in good faith within the duties of the employee's office or employment or of tasks lawfully assigned by a competent authority . . . ." *Id.* § 152(12). A municipality is therefore liable for acts done by its employee while he was "engaged in the work assigned," or "doing that which is proper, necessary and usual to accomplish the work assigned, or doing that which is customary within the particular trade or business." *Nail v. City of Henryetta*, 911 P.2d 914, 917. Moreover, it should be noted that

"not every intentional tort by an employee is outside the scope of employment." *Id.* at 917 n.8 (citing *Dryden v. State Accident Ins. Fund.*, 103 Ore. App. 76, 796 P.2d 397, 399-400 (1990)).

> As a general rule, it is not within the scope of an employee's employment to commit an assault on a third person. However, this . . . rule does not apply when the act is one which is fairly and naturally incident to the business, and is done while the servant was engaged upon the master's business and be done, although mistakenly or ill advised, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business. An employee's act is within the scope of employment if it is incident to some service being performed for the employer or arises out of an emotional response to actions being taken for the employer.

Id. at 917-918 (quoting *Rodebush v. Okla. Nursing Homes, Ltd.*, 867 P.2d 1241, 1254 (Okla. 1993) (internal quotations and alterations omitted)).

B. Assault & Battery

J.L. is entitled to judgment as a matter of law on her assault and battery claims. To prove assault, J.L. must show Holtzclaw "intend[ed] to cause a harmful or offensive contact with [her] person . . ., or an imminent apprehension" thereof, and that she was "thereby put in such imminent apprehension." Restatement (Second) of Torts § 21, *cited in Brown v. Ford*, 905 P.2d 223, 229 n.34 (Okla. 1995) (overruled on unrelated grounds). To prove battery,[3] she must prove Holtzclaw intended "to cause a harmful or offensive contact" with her person "or an imminent apprehension of such a contact," and that "an offensive contact with [her] person . . . directly or indirectly 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 (Second) of Torts § 19 (cited in *Fuerschbach v. Southwest Airlines Co.*, 439 F.3d 1197, 1209 (10th Cir. 2006)).

[3] "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)).

Moreover, the element of intent does not require J.L. to prove Holtzclaw intended that the contact harm or offend her—only that he intended to make the contact that in fact harmed or offended her. *See Keel v. Hainline*, 331 P.2d 397, 399 (Okla. 1958) (defendant liable for battery because, while he was "playing" and had no "intent to injure," he intended to do the wrongful act).

1. Pat Search

The undisputed facts demonstrate that J.L. is entitled to judgment as a matter of law against City on her assault and battery claim with respect to the pat search Holtzclaw conducted during the traffic stop on June 18, 2014. Holtzclaw conducted the pat search during a traffic stop [**Fs. 4-8**], which, although conducted while off duty, was an "enforcement action" he took once he suspected J.L. of violating D.U.I. laws [**Fs. 4-5**]—a task that fell squarely within his assigned duties as a patrol officer. [**Fs. 1-2**]. Holtzclaw testified that he pat searched J.L. to protect himself by ensuring she did not have any weapons on her that could be used to harm him during stop. [**Fs. 6-8**]. Thus, at the time Holtzclaw performed the pat search, he was acting within the scope of his employment with OCPD. Holtzclaw had no basis to place his hands on J.L. to search her because he lacked any *particularized* suspicion that she was armed. [**F. 8**]. *See* §§ III(C)(1)-(3) *supra* pp. 21-23. By subjecting J.L. to this unwarranted bodily intrusion, Holtzclaw intentionally made physical contact with J.L.'s person under circumstances that offended a reasonable sense of personal dignity, and thus committed an assault and battery on her. Since he was acting within the scope of his employment with OCPD, City is liable for damages for the pat search of J.L. Okla. Stat. tit. 51, § 153(A).

2. Forced Oral Sex

J.L. also seeks partial summary judgment to establish that Holtzclaw's act of forced oral sex constitutes assault and battery under Oklahoma law.[4] During the traffic stop on June 18, 2014, Holtzclaw stood over J.L. with his penis in her face and a loaded gun on his hip as she sat confined in the backseat of his patrol car, and said, "Come on," "I don't have all night," as J.L. begged him not to make her do what he was waiting for her to do. She told him, "You're not supposed to do this" and verbalized—over and over—her fear that he was going to shoot her. Terrified for her life, she did as Holtzclaw wanted and placed his penis in her mouth. [**Fs. 12-13;** *see generally* **Exs. 7-9**]. These facts lead to the inescapable conclusion that prior to the time Holtzclaw's penis made contact with J.L.'s mouth, J.L. imminently apprehended what was going to happen next. Further, unwanted, coerced sexual contact with a stranger wearing a badge and carrying a gun offends any reasonable sense of personal dignity. No reasonable jury could conclude otherwise. Accordingly, the contact at issue was "offensive." Finally, Holtzclaw's intent to make physical contact between his penis and J.L.'s mouth can be inferred from the circumstances and his conduct and statements leading up to such contact. Of course, it is not as if Holtzclaw pulled out his penis and stuck it in J.L.'s face during a traffic stop on a public street on accident. Intent must be inferred from the facts that he first made her expose herself, told her she had a "big ass," rubbed himself through his pants, and told J.L. to "Come on" with his penis in J.L.'s face. [*see* **Exs. 7-9**]. In light of the foregoing, these undisputed material facts establish that Holtzclaw committed assault and battery against J.L.

[4] At this time, J.L. does not seek a ruling on whether or not Holtzclaw was acting within the scope of his employment when he forced her to perform oral sex on him.

CONCLUSION

The undisputed facts show that Holtzclaw, while acting under color of state law and performing his duties as a police officer, illegally detained and searched Plaintiffs and subjected them to unwanted sexual behavior. These facts have been established twice, once by clear and convincing evidence during an administrative hearing, and again beyond a reasonable doubt after a trial by jury, with evidence put on by the State of Oklahoma in conjunction with OCPD's Sex Crimes Unit, which resulted in a guilty verdict for each offense of which these Plaintiffs were the victims.

WHEREFORE, premises considered, Plaintiffs respectfully request that the Court enter partial summary judgment in their favor against Defendants Holtzclaw and City and hold that, by way of issue preclusion, Holtzclaw's criminal convictions and the sustained findings at his Pre-D hearing conclusively establish and preclude re-litigation of the facts that Holtzclaw forced J.L. to perform oral sex on him and to expose her naked breasts to him, and that he touched C.J.'s breasts and vagina. Plaintiffs additionally request that the Court find that the undisputed facts prove, as a matter of law, that Holtzclaw violated Plaintiffs' Fourth and Fourteenth Amendment rights by committing these acts and by pat searching Plaintiffs and locking them in the backseat of his patrol car without any need or justification to do so.

Respectfully submitted,

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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*