IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Case No. 18-cv-02076-DDD-SKC

HOLLIS ANN WHITSON, as guardian ad litem for Peatinna Biggs,

Plaintiff,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SEDGWICK,
SHERIFF CARLTON BRITTON,
FORMER SHERIFF THOMAS HANNA, and
LARRY NEUGEBAUER,
in their individual and official capacities,

Defendants.

ORDER

Defendants Sheriff Carlton Britton and Deputy Larry Neugebauer have moved to dismiss the Plaintiff's claims[1] against them. (Doc. 40.) Defendant Board of County Commissioners of the County of Sedgwick ("Sedgwick County") also filed a motion to dismiss on similar grounds. (Doc. 22.) For the reasons that follow, the Court **GRANTS** the Motion filed by Sedgwick County, and **GRANTS** the Motion filed by Sheriff Britton and Deputy Neugebauer.[2]

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[1] The Court substituted Ms. Hollis Ann Whitson, as the guardian ad litem of former-Plaintiff Peatinna Biggs, as Plaintiff in this action on February 27, 2020. (Doc. 88). But because Ms. Whitson is acting on behalf of Ms. Biggs, and for the sake of simplicity, the Court will refer to the Plaintiff as Ms. Biggs in this Order.

[2] This matter was reassigned to the undersigned upon Judge Daniel's

BACKGROUND

On August 10, 2016, Peatinna Biggs was an inmate at the Sedgwick County Jail, which at that time was run by Defendant Thomas Hanna as Sheriff of Sedgwick County. On that day, Mr. Hanna informed Deputy Larry Neugebauer that he, Mr. Hanna, would himself be transporting Ms. Biggs to the Logan County Jail using his personal vehicle. Am. Compl., ¶¶ 21–22.[3] Mr. Hanna gave Ms. Biggs her street clothes and ordered her to change into them before being transferred. *Id.* ¶ 24. Ms. Biggs alleges that Mr. Hanna drove her to his home, ordered her inside, and sexually assaulted her. *Id.* ¶¶ 31, 41.

Sedgwick County Sheriff's Department policy forbade the transportation of prison inmates in personal vehicles or bringing an inmate into an officer's home. *Id.* ¶¶ 23, 30. The Department also had a policy committed to "zero tolerance" of any form of sexual abuse and sexual harassment of inmates. *Id.* ¶ 54.

Before the alleged assault, at approximately 12:15 that afternoon, Deputy Neugebauer witnessed Mr. Hanna placing Ms. Biggs, who was wearing street clothes, into his personal vehicle. *Id.* ¶¶ 26-27. Deputy Neugebauer knew it was highly unusual to have an inmate change into street clothes for a transfer. *Id.* ¶ 25.

Driving home for a lunch break, Deputy Neugebauer noted as he drove past Mr. Hanna's house that Mr. Hanna's personal vehicle was parked in front. *Id.* ¶ 46. When he drove back to the station after his break, he noted

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passing. (Doc. 58.)

[3] The facts described herein are drawn from the allegations in the Amended Complaint, which the Court must treat as true when considering a motion to dismiss. *Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013).

that the vehicle was still parked in the same place. *Id.* ¶ 49. The vehicle appeared to be empty each time. *Id.* ¶¶ 47, 49.

At approximately 12:51 p.m., Mr. Hanna called dispatch to report that he was taking Ms. Biggs to the Logan County Jail. *Id.* ¶ 51.

On August 22, Deputy Neugebauer reported to the Logan County District Attorney's Office what he had witnessed. *Id.* ¶ 80. The District Attorney opened an investigation, and eventually Mr. Hanna was criminally charged in state court on several counts, including sexual assault on an at-risk adult and sexual misconduct in a correctional institute. *Id.* ¶ 82. He was later convicted of official misconduct and removed from office. *Id.* ¶¶ 83–84.

Ms. Biggs through her guardian ad litem brings multiple civil rights claims under 42 U.S.C. § 1983, as follows:

- Claim 1: Excessive Force (against Mr. Hanna);
- Claim 2: Outrageous Conduct/Intentional Infliction of Emotional Distress (against Mr. Hanna);
- Claim 3: False Imprisonment (against Mr. Hanna);
- Claim 4: Sexual Assault and Battery (against Mr. Hanna);
- Claim 5: Violation of Equal Protection (against Mr. Hanna and Deputy Neugebauer);
- Claim 6: Violation of Substantive Due Process (against Mr. Hanna and Deputy Neugebauer);
- Claim 7: Violation of the Right to Privacy (against Mr. Hanna);
- Claim 8: Municipal Liability (against Sedgwick County and Sheriff Carlton Britton)
- Claim 9: Failure to Intervene (against Mr. Hanna and Deputy Neugebauer); and

- Claim 10: Conspiracy to Interfere with Civil Rights (against Mr. Hanna and Deputy Neugebauer).

Sedgwick County and Sheriff Britton filed motions to dismiss the municipal liability claim. Deputy Neugebauer joined the motion filed by Sheriff Britton, seeking dismissal of the four claims asserted against him.[4]

ANALYSIS

The legal sufficiency of a pleading is a question of law. *Dubbs v. Head Start, Inc.*, 1194, 1201 (10th Cir. 2003). At this stage all allegations of material fact in the Amended Complaint must be accepted as true. *Wilson v. Montano*, 715 F.3d at 850 n.1. Still, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility means that the pleader set forth facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[L]abels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Twombly*, 550 U.S. at 545.

I. Statute of Limitations

In an action brought pursuant to 42 U.S.C. § 1983, state law governs issues of the statute of limitations and tolling. *Fratus v. DeLand,* 49 F.3d 673, 675 (10th Cir. 1995). And under Colorado law, the plaintiff bears the burden of demonstrating that the statute of limitations should be tolled. *See Lake Canal Reservoir Co. v. Beethe,* 227 P.3d 882, 886 (Colo. 2010).

Ms. Biggs does not appear to dispute that this action accrued on August 10, 2016. Because "the statute of limitations for § 1983 actions brought in

[4] Mr. Hanna has withdrawn his motions to dismiss and is not a party to any of the motions addressed in this Order.

Colorado is two years from the time the cause of action accrued," *Fogle v. Pierson,* 435 F.3d 1252, 1258 (10th Cir.2006), the limitations period expired on August 10, 2018. Hence this action, which was filed on August 15, 2018, is subject to dismissal unless tolling applies. *Braxton v. Zavaras*, 614 F.3d 1156, 1159-60 (10th Cir. 2010); *Graham v. Teller County*, 632 F. App'x 461, 462 (10th Cir. 2015) ("If the plaintiff doesn't plead sufficient factual matter to plausibly establish entitlement to tolling, a district court can properly dismiss the action under Rule 12(b)(6).").

Ms. Biggs points out that pursuant to Colo. Rev. Stat. § 13-81-103, the statute of limitations does not run against a person who is mentally incompetent and without a legal guardian. Colorado law defines an individual as mentally incompetent in a variety of ways. One is "determinat[ion] by a community-centered board" that a person has an intellectual and developmental disability. Colo. Rev. Stat. § 25.5-10-202(26)(b); *see also* Colo. Rev. Stat. § 25.5-10-237 (defining "mentally incompetent" by cross-referencing § 25.5-10-202). And an "intellectual and developmental disability" means a disability

> that manifests before the person reaches twenty-two years of age, that constitutes a substantial disability to the affected person, and that is attributable to mental retardation or related conditions, which include cerebral palsy, epilepsy, autism, or other neurological conditions when those conditions result in impairment of general intellectual functioning or adaptive behavior similar to that of a person with mental retardation.

Colo. Rev. Stat. § 25.5-10-202(26)(a); *see also Southard v. Miles*, 714 P.2d 891, 898-99 (Colo. 1986) (relying on predecessors to §§ 25.5-10-202 to define "mentally incompetent" for purposes of the tolling provision).

As described more fully in the Court's orders surrounding the appointment of a guardian ad litem (Docs. 63, 65), Ms. Biggs is developmentally

disabled. *See* Am. Compl. ¶¶ 9, 14 (Doc. 16). Ms. Biggs makes the following additional allegations in support of her assertion that she is developmentally disabled: that Ms. Biggs underwent IQ and adaptive testing as a child and was placed in special education classes throughout her schooling; *id.* ¶ 11; that she tested cognitively and functionally below grade average and was designated as special needs, *id.*; that she obtained a "special diploma" and was not included in the class rankings with other students who received "general diplomas," *id.* ¶ 12; and that since childhood she has received disability payments from the Social Security Administration based on her learning and cognitive disabilities, *id.* ¶ 13. After the Amended Complaint was filed, a community-centered board ("CCB") determined Ms. Biggs is developmentally disabled. Plaintiff's Memorandum in Opposition to Defendant's Fed. R. Civ. P. 12(b)(6) Motion to Dismiss, Ex. B (Doc. 35-2). In addition, Ms. Biggs notes that during the criminal trial of Mr. Hanna, the prosecution introduced into evidence childhood education records reflecting Ms. Biggs' placement into "Educable Mentally Handicapped" classes.[5]

Defendants argue that § 13-81-103 allows tolling only if the person is "under disability *at the time such right accrues*" (emphasis added), and that because the CCB determination was made twenty-seven months after Ms. Biggs' cause of action accrued, she does not qualify as disabled within the meaning of the statute. Defendants are correct that a claimant must be disabled at the time such right accrues. *See Pearson v. Federal Express Corp.*, No. 90-A-279, 1990 WL 126192, at *7 (D. Colo. Aug. 24, 1990). While one

[5] The Court takes judicial notice of the trial exhibit, which is a matter of public record. *See, e.g., Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1205 n.5 (D. Utah 2004). It is less clear to the Court that the CCB determination is a matter of public record of which the Court may take judicial notice, but even in the absence of that determination, Ms. Biggs' allegations are sufficient to survive a motion to dismiss.

definition of disability under Colorado law requires that a CCB make that determination (*see* Colo. Rev. Stat. § 25.5-10-202(26)(b)), and while that determination is relevant evidence of disability, the Court does not believe it is required for the tolling provisions of Section 103 to apply. The Amended Complaint alleges sufficiently that Ms. Biggs was developmentally disabled long before the cause of action accrued or that anything material to that question changed prior to the CCB's determination. Consistent with the Court's prior order, then, the Court finds that Ms. Biggs was disabled at all times relevant to this action, (Doc. 63 at 4), and there is no suggestion in the record or otherwise that she was any more or less disabled at that time.

Since she was incompetent under Colorado law, the statute of limitations did not run against Ms. Biggs until she was appointed a legal guardian, which did not occur until December 17, 2019. Her claims are timely.

II. Municipal Liability Claims against Sedgwick County and Sheriff Britton

The County and Sheriff Britton, on behalf of the Sheriff's Department, argue that Ms. Biggs' claims against them must be dismissed because (1) the Department's policies were not the "moving force" behind the alleged injury as required by *Monell v. Department of Social Servs. of City of N.Y.*, 436 U.S. 658 (1978); (2) the Amended Complaint failed to plead facts showing that the Department was deliberately indifferent to her constitutional rights; and (3) the allegations in the Amended Complaint fail to establish that Mr. Hanna's deplorable conduct was a "policy decision" of the Department. Finally, the County gives an additional reason why the complaint must be dismissed as it applies only to the County: that it is a separate legal entity not responsible for the acts of the Sheriff's Department.

A. The "moving force" behind Ms. Biggs' injuries

A municipal entity, such as this Sheriff's Department, may be held liable under 42 U.S.C. § 1983 for civil rights violations that resulted from the "execution of that government's policy or custom." *Monell*, 436 U.S. at 694. In other words, the municipality must have been "the moving force" behind the injury alleged. *Id.* To make this showing, a plaintiff must establish (1) the existence of a department policy or custom, and (2) that there is a direct causal link between the policy or custom and the injury alleged. *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993). Sheriff Britton argues that Ms. Biggs' Amended Complaint does not plausibly establish either of these elements. The Court agrees that there is no causal link between the Department's policies and Ms. Biggs' alleged injuries.

Ms. Biggs asserts that the Sheriff's Department had established policies against transporting inmates in personal vehicles and bringing an inmate into an officer's home, and further that the Department had a policy of "zero tolerance of any form of sexual abuse and sexual harassment" of inmates. Am. Compl., ¶¶ 23, 30, 54 (Doc. 16). But, as the Amended Complaint itself recognizes, it was the *violation* of these policies that caused Ms. Biggs' injuries. *Id.* ¶ 150 ("Sedgwick County's 'zero tolerance' policies against sexual assault of inmates by employees was not followed."); ¶ 151 ("Sedgwick county's policies ensuring the equal protection of the laws for those suffering from disabilities . . . was not followed."); ¶ 152 ("Sedgwick County's policies prohibiting the transport of inmates in officer's personal vehicles, and to their residences, was not followed."). "By deciding to blatantly defying [sic] lawful municipal policy or custom, Defendant Hanna . . . caused [Ms. Biggs] severe emotional distress, caused her cruel and inhumane treatment, all in violation of her equal protection rights." *Id.* ¶ 153.

If Mr. Hanna's violations of Department policies were the cause of Ms. Biggs' injuries, then the policies cannot have been the "moving force" behind

the injuries. Because the Complaint cannot show a direct causal link between the policies and Ms. Biggs' injuries, it does not state a valid claim against the Department under *Monell* and *Hinton*.

B. Final policymaker

Ms. Biggs argues that the Department is still responsible for the decisions of Mr. Hanna, including "one-time" decisions such as his actions toward Ms. Biggs, because Mr. Hanna was the "final policymaker" with respect to decisions about movement, treatment, and safety of inmates. Ms. Biggs cites *Randle v. City of Aurora*, 69 F.3d 441, 448 (10th Cir. 1995), in support of the argument. But *Randle* makes clear that for municipal liability to attach based on the "final policymaking authority" of an individual, "the challenged conduct must have been taken pursuant to a policy adopted by the official or officials." *Id.* at 447–48. Again, as discussed above, Mr. Hanna's actions were not "pursuant to" Department policies, but in direct contravention of them. On Ms. Biggs' reading, every action taken by a "final policymaker" would amount a policy that could lead to municipal liability, even if it is contrary to actual, adopted policy. That is not the law. As Defendants correctly point out, to impose liability on the Department under these facts would be indistinguishable from *respondeat superior* liability, which section 1983 does not authorize. *See Monell*, 436 U.S. at 692 (A "municipality cannot be held liable under § 1983 on a *respondeat superior* theory.").

C. Deliberate indifference

Ms. Biggs also contends that the Department is liable because it failed to "have any policy in place to oversee and internally monitor the actions of [the Sheriff]." Am. Compl., ¶¶ 90, 143–44, 150–52. This "failure to act" allegation requires the plaintiff to "demonstrate that the [entity's] inaction was the result of deliberate indifference to the rights of its inhabitants."

Hollingsworth v. Hill, 110 F.3d 733, 745 (10th Cir. 1997). A municipality is deliberately indifferent when it "deliberately or consciously fails to act when presented with an obvious risk of constitutional harm which will almost inevitably result in constitutional injury of the type experienced by the plaintiff." *Id.*

But a municipality cannot be deliberately indifferent to a risk it does not know exists. Ms. Biggs has not alleged any facts showing that before this incident there was an "obvious risk" that would "almost inevitably result" in the type of injury she experienced. There is no allegation, for example, that Mr. Hanna had a known history of such conduct, that such allegations had previously been made against him, or that the Department failed to remediate any such similarly behavior. *Cf. Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 409 (1997) (pattern of similar conduct is "ordinarily necessary" to state claim for deliberate indifference for claims like failure-to-train). Even if there were, as the Amended Complaint itself shows, the Department did not fail to act, because it had established policies that were intended to prevent exactly the type of conduct of which Mr. Hanna now stands accused. In the absence of any such allegations that would have put the Department on notice that Sheriff Hanna was likely to sexually assault inmates, the Department cannot be liable for deliberate indifference.

D. Sedgwick County

Sedgwick County makes one additional argument that applies only to the County—that it is not a proper defendant in this case. Pursuant to the Colorado Constitution, the County is a separate and distinct entity from the Sheriff's Department. *See Barrientos-Sanabria v. Lake County, Colo.*, No. 11-cv-00838-KLM, 2012 WL 1642285, at *2 (D. Colo. May 10, 2012) (citing Colo. Const. art. XIV, §§ 6, 8); *see also Tunget v. Board of County Comm'rs of Delta County*, 992 P.2d 650, 651-52 (Colo. App. 1999) ("Under both the

Colorado Constitution and applicable statutes, sheriffs and boards of county commissioners are treated as separate public entities having different powers and responsibilities."). Accordingly, the County "does not have the legal authority to control or supervise the Sheriff and the Sheriff's deputies." *Barrientos-Sanabria*, 2012 WL 1642285, at *2. Yet even if the County were an appropriate defendant in this case, Ms. Biggs' claims against it must be dismissed for the same reasons discussed above concerning her claims against Sheriff Britton.

III. Claims Against Deputy Neugebauer

Deputy Neugebauer moves to dismiss the four claims against him on qualified immunity grounds. Each of those claims arises from the same factual allegation: that Deputy Neugebauer conspired with Mr. Hanna to cover up Mr. Hanna's misconduct, and failed to report Mr. Hanna's conduct for twelve days, thus hindering the subsequent investigation of the case.

The doctrine of qualified immunity "shields government officials performing discretionary functions from liability for damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Boles v. Neet*, 486 F.3d 1177, 1180 (10th Cir. 2007) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "When qualified immunity is raised in a [Rule 12] motion, the plaintiff must carry the burden of establishing that the defendant violated clearly established law." *Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ.*, 232 F.3d 1334, 1337 (10th Cir. 2000). "Thus, the plaintiff must 'identify a clearly established statutory or constitutional right of which a reasonable person would have known, and then allege facts to show that the defendant's conduct violated that right.'" *Id.* Ms. Biggs must satisfy both prongs of this two-part test in order to for her claims to survive Deputy Neugebauer's qualified immunity defense. *Pearson*, 555 U.S. at 236.

A. Equal protection

"Equal protection is essentially a direction that all persons similarly situated should be treated alike." *Grace United Methodist Church v. City of Cheyenne*, 427 F.3d 775, 792 (10th Cir. 2005). "In order to assert a viable equal protection claim, plaintiffs must first make a threshold showing that they were treated differently from others who were similarly situated to them." *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998).

Here, Ms. Biggs alleges that "Defendant Hanna intentionally treated Ms. Biggs differently than other similarly situated inmates on account of her sex and mental disability … ." Am. Compl., ¶ 117 (Doc. 16). The Amended Complaint says nothing about Deputy Neugebauer's treatment of any other inmates. *See Brown v. Montoya*, 662 F.3d 1152 (10th Cir. 2011) (conclusory allegations are inadequate); *see also Matthews v. Wiley*, 744 F. Supp. 2d 1159, 1175 (D. Colo. 2010) (dismissing equal protection claim where plaintiff had not "specifically identified any similarly situated prisoners in his pleadings"). Because Ms. Biggs has failed to plausibly support her equal protection claim with "specific details about other inmates," and "specific differences in Defendant's treatment of other inmates," the claim is properly dismissed. *Matthews*, 744 F. Supp. 2d at 1175.

B. Failure to intervene

Deputy Neugebauer also argues that Ms. Biggs' failure-to-intervene claim against him should be dismissed because her allegations are conclusory, and that he is entitled to qualified immunity because there is no clearly established law holding that an officer must intervene under similar factual circumstances.

"In order to be liable for failure to intervene, the [defendant] must have observed or had reason to know of a constitutional violation and have had a realistic opportunity to intervene." *Jones v. Norton*, 809 F.3d 564, 576

(10th Cir. 2015). The Tenth Circuit has also quoted with approval the Second Circuit's general description of failure to intervene doctrine:

> all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence. An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know: (1) that excessive force is being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement official.

Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994). The Circuit has said this is "clearly established" law. *Vondrak v. City of Las Cruces,* 535 F.3d 1198, 1210 (10th Cir. 2019).

Mr. Hanna's sexual assault of Ms. Biggs certainly qualifies as a constitutional violation by another law enforcement official.[6] And to be sure, if it were alleged here that Deputy Neugebauer observed the actual sexual assault, or that it took place in his presence, the Court would have no trouble concluding that he could be liable. An officer cannot stand idly by while he

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[6] *See, e.g.*, *Rogers v. City of Little Rock*, 152 F.3d 790, 796 (8th Cir.1998) ("No degree of sexual assault by a police officer acting under color of state law could ever be proper."); *Doe v. Claiborne County, Tenn.,* 103 F.3d 495, 507 (6th Cir. 1995) (Sex abuse under color of law "is so contrary to fundamental notions of liberty and so lacking of any redeeming social value that no reasonable individual could believe that sexual abuse by a state actor is constitutionally permissible under the due process clause."); *Maslow v. Evans*, No. 00-CV-5660, 2003 WL 22594577, at *27 (E.D. Pa. 2003) ("It is beyond question that when Plaintiffs' claim arose it was a clearly established principle of law that a state actor violates another's constitutional rights when he sexually assaults that person in the course of an arrest, or transports a person to her house and then forcibly performs oral sex, or otherwise uses his authority as a state official to force himself sexually upon an unwilling victim. Even if no case had ever proclaimed it so, it would be manifestly clear to any reasonable officer that such conduct is unlawful.").

knows a fellow officer is violating the constitution. *See Vondrak*, 535 F.3d at 1210. But the Amended Complaint makes no such allegations. Nor does it allege, for example, that Mr. Hanna told Deputy Neugebauer of his unconstitutional plans, or that Deputy Neugebauer knew Sheriff Hanna did such things. While the Amended Complaint does allege that after the assault the two conspired to cover it up for twelve days, as noted above those allegations are too conclusory to support a claim under Section 1983. And notably, there aren't even such conclusory allegations about Deputy Neugebauer joining any such conspiracy before the fact.

Ms. Biggs does not attempt to argue otherwise. She pins her argument against the deputy on the assertion that there are adequate facts alleged to allow a jury to conclude that he had "reason to know" Mr. Hanna was violating her rights. And while it is certainly established that an officer who knows or is present for another's unconstitutional action has a duty to intervene, when presence or actual knowledge isn't alleged, the question is much more difficult to answer. *See Tanner v. San Juan Cnty. Sheriff's Office*, 864 F. Supp. 2d 1090, 1152 (D.N.M. 2012) ("The law is more complex than the general proposition that officers have a duty to intervene when they see a constitutional violation … .").

Ms. Biggs alleges that Mr. Hanna told Deputy Neugebauer that he was going to personally transfer Ms. Biggs to the Logan County Jail, and that Deputy Neugebauer specifically asked Mr. Hanna if he was going to transport Ms. Biggs in his personal vehicle, to which Mr. Hanna replied, "yes." Am. Compl. ¶¶ 21–22 (Doc. 16). Ms. Biggs further alleges that later that day, at approximately 12:15 p.m., Deputy Neugebauer was driving toward the Sedgwick County Combined Court, and saw Mr. Hanna placing Ms. Biggs, wearing street clothes and in handcuffs, into his private vehicle. *Id.* ¶ 26. Ms. Biggs also alleges that Deputy Neuegebauer knew Mr. Hanna's actions were violations of department policy, and that he knew it

was "highly unusual" to have an inmate change into street clothes before being transferred. *Id.* ¶¶ 23, 25. Ms. Biggs asserts that as he drove home for lunch, Deputy Neugebauer saw Mr. Hanna's vehicle parked outside Mr. Hanna's home, and saw the vehicle still parked there as he returned to work after lunch. *Id.* ¶¶ 46–49. These allegations, she says, are sufficient to allow jurors to infer that Deputy Neugebauer had enough "reason to know" that Mr. Hanna was violating Ms. Biggs' rights.

But in response to a qualified immunity defense, that is not enough to meet the plaintiff's difficult burden. To do so she cannot just show that reasonable people, or even reasonable officers could disagree, but must establish that "*any* reasonable official" would know he had to intervene. *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (emphasis supplied). *See also Ashcroft*, 563 U.S. at 743 (Qualified "immunity protects all but the plainly incompetent or those who knowingly violate the law") (internal quotation marks omitted)). Unlike *Vondrak*, for example, there is no real dispute here about the underlying facts. The dispute is whether those facts made it "clear to a reasonable officer that his conduct was unlawful in the situation." *Vondrak*, 535 F.3d at 1205 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). This is therefore a question appropriate for determination on summary judgment. *Id.* ("Summary judgment based on qualified immunity is appropriate if the law did not put the officer on notice that his conduct would be clearly unlawful."). The Tenth Circuit has described the clearly established duty as requiring the officer "to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers *in their presence*." *Vondrak*, 535 F.3d at 1210 (emphasis added) (quoting *Anderson,* 17 F.3d at 557). What happened in Deputy Neugebauer's presence was not a constitutional violation. And there is no case making clear that a deputy is required to investigate suspected or potential wrongdoing that is not occurring in his presence or that he knew

about. This is the import of the "clearly established" prong of the qualified immunity inquiry. And the usual way of showing it is to provide binding caselaw that is sufficiently on-point that it provides notice to all such reasonable officers that they had a duty to act in a particular way in particular circumstances. Ms. Biggs has not done so here.

While, as she points out, the Tenth Circuit has indeed said that it is clearly established that an officer who fails to intervene where he has reason to know of another's constitutional violation, *see Vondrak*, 535 F.3d at 1210, that is not enough to resolve the question here, s*ee D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018) ("We have repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." (internal quotations omitted)). Indeed, "a rule is too general if the unlawfulness of the officer's conduct 'does not follow immediately from the conclusion that [the rule] was firmly established.'" *Id.* "The dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix*, 136 S. Ct. at 308 (emphasis in original; quotations omitted). Although there need not be a case directly on point, an "officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it." *Sheehan*, 135 S. Ct. at 1774 (internal brackets and quotation omitted). Beyond the general statement of the right reiterated in *Vondrak*, Ms. Biggs points to no cases similar to this one that would help put an officer on notice as to when he or she was required not just to try to prevent an observed constitutional violation, but to investigate a potential or suspected one.

The most Ms. Biggs offers is that "the secondary officer does [not] have to observe the constitutional violation, so long as they 'have reason to know

that the primary officer is engaging in improper conduct.'" Pl. Resp. Br. at 12–13 (Doc. 42). The initial flaw with this is that the case it purports to quote, the Tenth Circuit's *Hall v. Burke* decision, does not contain this language. The case actually quoted is a District of New Mexico case, *Tanner v. San Juan County. Sheriff's Office.* While, to be fair, *Tanner* does cite *Hall* for that proposition, counsel's misciting cases in this way is not helpful to the Court, which must chase down the actual source of the statement, or to the Plaintiff.

More significantly, neither *Hall* nor *Tanner* provide the on-point precedent required to clearly establish the right to intervention in this case. In fact, as, noted above, *Tanner* explains the problem that persists here: "The Tenth Circuit does not appear to have squarely addressed how liability for failure to intervene operates when the officer who allegedly should have intervened does not necessarily have all the information in the possession of the other officer who allegedly acts unlawfully." 864 F. Supp. 2d 1090, 1120; *id.* at 1152 ("The law is more complex than the general proposition that officers have a duty to intervene when they see a constitutional violation . . . ."). And *Tanner*, relying on Sixth and Eleventh Circuit precedents, ended up adopting a narrow rule of "secondary" officer liability for failure to intervene, recognizing that a broad reading would run afoul of Supreme Court and Tenth Circuit law that an officer should be liable only when his "own individual actions . . . violate[] the constitution." *Id.* at 1121 (quoting *Ashcroft*, 556 U.S. at 676).

Ms. Biggs has provided nothing more recent or more specific clarifying the law since *Hall* or *Tanner*. This lack of on-point authority is enough to defeat Ms. Biggs' claim. *T.D. v. Patton*, 868 F.3d 1209, 1220 (10th Cir. 2017) ("A plaintiff may show clearly established law by pointing to either a Supreme Court or Tenth Circuit decision, or the weight of authority from other courts, existing at the time of the alleged violation."); *see also Ashcroft v. al-*

Kidd, 563 U.S. 731, 741 (2011) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.").

Considering the allegations in hindsight, it is easy to say that Deputy Neugebauer should have investigated more or intervened sooner than he did. But the question before the Court is not what the deputy could have or should have done. It is whether he had a constitutional duty to do so that was clearly established in the particular circumstances he faced. And courts are required to make that assessment "viewing the situation from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Zia Tr. Co. ex rel. Causey v. Montoya*, 597 F.3d 1150, 1154 (10th Cir. 2010) (internal quotation omitted). *See also Cortez v. McCauley*, 478 F.3d 1108, 1139 (10th Cir. 2007) (Gorsuch, J., concurring in part) ("We have never previously imposed upon officers a duty to investigate certain leads we think, in retrospect and with the benefit of hindsight, might have been warranted or wise..."). There simply is no case Plaintiff has provided explaining that an officer has a duty to investigate when it sees a fellow officer undertaking what might be "highly unusual" and prohibit actions, but that are not constitutional violations themselves, on the basis that he might discover a violation of clearly established law. What the Court wishes Deputy Neugebauer would have done and what the law clearly established he was obligated to do in the moment are not the same thing. Since it is only the latter that can give rise to liability, the claim against him must be dismissed.

C. Conspiracy

Ms. Biggs asserts a conspiracy claim against Deputy Neugebauer under 42 U.S.C. §§ 1985 and 1086, alleging that he conspired with Mr. Hanna to violate Ms. Biggs' civil rights by covering up Mr. Hanna's violations of department policy and alleged sexual assault of Ms. Biggs. In support of that

claim, however, Ms. Biggs makes only conclusory allegations, unsupported by any specific facts. The only allegation suggesting a conspiracy is that the two "had an express and/or implicit agreement to conspire with each other." *See* Am. Compl. ¶¶ 57–79. But this is precisely the scenario the Supreme Court rejected in *Twombly*: "A bare assertion of conspiracy will not suffice." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *see also, e.g., Durre v. Dempsey*, 869 F.2d 543, 545 (10th Cir. 1989) ("Conclusory allegations of conspiracy are insufficient to state a valid § 1983 claim."); *Afola v. Corrections Corp. of Am.*, No.1:12-cv-02394-JLK, 2013 WL 2477126, at *4 (D. Colo. Jun. 10, 2013) (same). Accordingly, Ms. Biggs' conspiracy claim against Deputy Neuegebauer must be dismissed.

D. Substantive due process

Substantive due process claims must clear a very demanding hurdle. The standard for determining whether there has been a substantive due process violation "is whether the challenged government action shocks the conscience of federal judges." *Moore v. Guthrie*, 438 F.3d 1036, 1040 (10th Cir. 2006). Substantive due process protections are accorded primarily to matters relating to marriage, family, procreation, and the right to bodily integrity. *Albright v. Oliver*, 510 U.S. 266, 272 (1994).

The substantive due process claim against Deputy Neugebauer is based on the allegation that he conspired with Mr. Hanna to delay reporting the policy violations he witnessed, which "hindered the Logan County District Attorney's Office investigation of the case." Am. Compl., ¶ 134 (Doc. 16). As explained above, though, the Amended Complaint's conclusory allegations of conspiracy are insufficient to state a valid Section 1983 claim. And Defendants correctly point out that the resulting harm from that delay has nothing to do with Ms. Biggs' bodily integrity. That harm had already been done. Instead, the harm was that the subsequent prosecution of Mr. Hanna was impeded by the resulting difficulty of collecting necessary evidence.

These factual allegations place Ms. Biggs' allegations outside of the typical substantive due process framework. *Albright*, 510 U.S. at 272. And more importantly, the allegation of a twelve-day delay in reporting policy violations does not shock the judicial conscience. It doesn't, in other words, exhibit a "high level of outrageousness." *See Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995).[7] There are no allegations, say, that Deputy Neugebauer intended to harm Ms. Biggs. *See id.* at 576.

In her response to Sheriff Britton's and Deputy Neugebauer's motion to dismiss, Ms. Biggs also asserts that her substantive due process claim is based on Deputy Neugebauer's alleged failure to intervene and prevent Mr. Hanna from falsely imprisoning and sexually assaulting Ms. Biggs. Pl. Resp. Br. at 12-13 (Doc. 42). As to Ms. Biggs' conspiracy and failure-to-intervene theories, the Supreme Court "has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Albright*, 510 U.S. at 271–72. The Supreme Court therefore has instructed that "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Id.* at 273. Ms. Biggs identifies the Fourth, Eighth, and Fourteenth Amendments as the textual bases for her failure to intervene claim against Deputy Neugebauer. *See* Am. Compl., ¶ 166. She cites 42 U.S.C. §§ 1985 and 1986 in support of her

[7] Ms. Biggs also argues that Deputy Neugebauer's delay in reporting to the District Attorney violated Ms. Biggs' substantive due process right to access the courts. This allegation is not contained in her Amended Complaint and would be subject to dismissal for that reason. Regardless, she points to no authority for the proposition that a delay in reporting an apparent crime amounts to such a due process claim, and the pendency of this case contradicts the idea that Ms. Biggs has been denied access to the courts.

conspiracy claims. These claims are more properly analyzed under those provisions rather than attempting to create a new kind of substantive due process claim as the Court has done above.

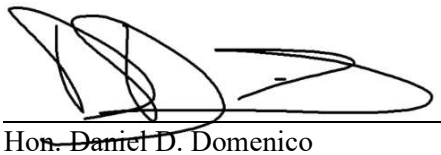
The Court holds that the Amended Complaint has not plausibly established a claim for substantive due process against Deputy Neugebauer, and the claim therefore must be dismissed.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss filed by the Board of County Commissioners of Sedgwick County (Doc. 22) is **GRANTED**, and the claim against the Board of County Commissioners of Sedgwick County (Eighth Claim) is **DISMISSED**.

The Motion to Dismiss filed by Sheriff Britton and Deputy Larry Neugebauer (Doc. 40) is **GRANTED**. Ms. Biggs' claim against Sheriff Britton (Eighth Claim) is **DISMISSED**. Her Fifth, Sixth, Ninth, and Tenth Claims against Deputy Larry Neugebauer are **DISMISSED**.

DATED: April 17, 2020 BY THE COURT:



Hon. Daniel D. Domenico

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Case No. 1:18-cv-02076-DDD-SKC

HOLLIS ANN WHITSON, as guardian ad litem for Peatinna Biggs,

Plaintiff,

v.

THOMAS HANNA,

Defendant.

ORDER ON POST-TRIAL MOTIONS

Plaintiff Hollis Ann Whitson is the court-appointed guardian *ad litem* for Peatinna Biggs. Ms. Biggs brought this case alleging that Defendant Thomas Hanna sexually assaulted her when he was the elected Sheriff of Sedgwick County. Her Amended Complaint asserted ten claims against Mr. Hanna, a deputy sheriff, the Sedgwick County Sheriff's Department, and Sedgwick County itself. (Doc. 16.) All the defendants other than Mr. Hanna filed motions to dismiss, and after a variety of procedural steps, I granted those motions. (Doc. 89.) The case against Mr. Hanna proceeded to trial, and the jury found in favor of the plaintiff and awarded $8.25 million in damages. (Doc. 153.)

Three post-trial motions are the subject of this Order. The plaintiff has filed both a Motion to Clarify (Doc. 154) and a Motion to Alter or Amend the Judgment (Doc. 155) that seek essentially the same thing: amendment of the judgment to explicitly bind the County and/or the Sheriff's Office to the judgment against Mr. Hanna. The County and the

Sheriff's Office (collectively, "the Entity Defendants")[1] move for the opposite: amendment of the judgment to clarify that they are not liable. (Doc. 156.)

LEGAL STANDARDS

The Entity Defendants' motion (Doc. 156) seeks to amend the judgment under Federal Rule of Civil Procedure 60(a), if inclusion of the official-capacity claims against Mr. Hanna in the judgment was simply a mistake arising from oversight, or, if it was not due to oversight, under Rule 59(e). The plaintiff's Motion to Clarify (Doc. 154) does not explain the authority it relies on for that relief, and her Motion to Alter or Amend (Doc. 155) cites both Rule 59(e) and Rule 60(b)(1). But those "two rules are distinct; they serve different purposes and produce different consequences," and a litigant who seeks reconsideration by the district court of an adverse judgment may "file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b)." *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). Since all of these

[1] The plaintiff's Amended Complaint named "The County of Sedgwick" and "Sedgwick County Sheriff's Department" as defendants. (Doc. 16.) After the Amended Complaint was filed, the parties stipulated to amend the case caption to substitute the Board of County Commissioners in place of Sedgwick County and then-sitting Sheriff Carlton Britton, in his official capacity, in place of the Sheriff's Department. (Doc. 28; Doc. 41.) These substitutions addressed technicalities regarding the proper designation of the Entity Defendants under Colorado law but did not alter the actual entities being sued. For simplicity in this Order and to avoid confusion of the issues, I will use "the County" to refer to Defendant Board of County Commissioners and "the Sheriff's Office" to refer to Defendant Britton in his official capacity.

motions were filed within the time specified in Rule 59(e), that rule applies, *see id.*, although in this case the result would be the same under either rule.

"Grounds warranting a motion to alter or amend the judgment pursuant to Rule 59(e) 'include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.'" *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187, 1203 (10th Cir. 2018) (quoting *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). "A motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Paraclete*, 204 F.3d at 1012. But "it is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id.*

DISCUSSION

The question behind all these motions is whether the Entity Defendants are liable for Mr. Hanna's actions and the judgment against him. The plaintiff's motions put forward three related arguments for the affirmative answer. The first is a fairly technical syllogism: official-capacity claims against municipal officials are generally treated as claims against the entity of which the official is an agent, Mr. Hanna was sued in both his individual and official capacities, and the official-capacity claims against him were not dismissed. Thus, the jury's verdict already should be viewed as including the Entity Defendants, despite my having previously granted their motions to dismiss. The second argument is more substantive: that my decision granting those motions to dismiss was based on a misreading of the law and should be reconsidered. Both of these arguments, the plaintiff contends, demonstrate that clarification or amendment of the judgment is needed to correct clear error and

prevent manifest injustice. Finally, the plaintiff says that newly discovered evidence also warrants amendment of the judgment and permission to amend her pleadings.[2] The Entity Defendants dispute all these points, but seek amendment of the judgment to remove any doubt that they are not liable to Ms. Biggs.

Though I am sympathetic to the plaintiff's position, and frustrated by the Entity Defendants' decision to leave their former sheriff without legal representation and their failure to directly address the official-capacity claims before judgment was entered, I conclude they are correct as a legal matter. The plaintiff's motions are therefore denied, and the Entity Defendants' is granted.

I. The Official-Capacity Claims Did Not Survive the Motions to Dismiss

The plaintiff's argument that the official-capacity claims were never subject to the motions to dismiss and were presented to the jury and thus properly part of the judgment is made in both the Motion to Clarify (Doc. 154) and the Motion to Amend (Doc. 155). It is quite tempting to agree with her argument that the Entity Defendants' decision not to move to dismiss any claims against Mr. Hanna, including the official-capacity claims, should be held against them. Both the legal and factual premises of the plaintiff's syllogism are accurate: official-capacity claims are "only another way of pleading an action against an entity of which an offic[ial] is an agent." *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690 n.55 (1978). And despite that, the Entity Defendants' motions to dismiss ignored the official-capacity claims against Mr. Hanna.

[2] The plaintiff asserts that if relief is granted under the first two arguments, no further trial would be necessary, but granting relief on the basis of the last would entail amendment of the pleadings and at least a partial trial on the municipal-liability question. (Doc. 155 at 13 n.19.)

The Entity Defendants provided no defense to their former sheriff, leaving him to proceed without any attorney (and the Court without an advocate on the defense side) for much of the case. The Entity Defendants did not object to the dismissal order's failure to mention the official-capacity claims against Mr. Hanna, and once their motions to dismiss were granted, they no longer participated in the case. They made no objection when the Final Pretrial Order, jury instructions, and verdict form named Mr. Hanna in both his official and individual capacities,[3] but were quick to reenter the case once final judgment was entered. It is appealing to make them sleep in the messy bed this left, especially when that is likely the only way Ms. Biggs could collect a significant portion of the damages the jury found she is entitled to.

Nevertheless, the plaintiff's conclusion does not follow. The converse of the legal premise that official-capacity claims are to be treated as claims against an entity is that because the claims against the Entity Defendants were held not legally viable, any official-capacity claims against Mr. Hanna must be, too. While the case caption on the jury instructions and verdict form did name Mr. Hanna in his official capacity, there was no evidence presented at trial about how that might affect the County or Sheriff's Office, the jury was not instructed on municipal liability, and the plaintiff's counsel never suggested at or before trial that they understood the case to be proceeding against the Entity Defendants despite the motions to dismiss having been granted.

The plaintiff does not point to, and my review of the record does not reveal, any claims that were asserted specifically against Mr. Hanna in

[3] Nor did Mr. Hanna or, once he got pro bono representation, did his attorney. But it was not their job, nor the Court's, to protect the Entity Defendants' interests.

his official capacity that were not and would not be subject to the same analysis and result as the claims against the Entity Defendants that were dismissed. Claim 8 of the Amended Complaint (entitled "Municipal Liability"), in fact, appears to be an effort to collect all the potential sources of liability against the Entity Defendants into a single claim. That claim was explicitly dismissed. (*See* Doc. 89 at 21.) Since, as explained below, I do not agree that that result was clearly erroneous, the conclusion that the claims against the Entity Defendants[4] were not legally viable applies to the claims against Mr. Hanna in his official capacity, too. The plaintiff's motions to amend or clarify the judgment in this regard therefore must be denied, and the Entity Defendants' granted.

[4] I acknowledge the ongoing confusion about which entity, exactly, is the proper defendant when a municipal-liability claim is brought against a Colorado sheriff in his or her official capacity. *See, e.g.*, *Coates v. Adams Cnty. Sheriff's Office*, — F. Supp. 3d —, No. 20-cv-01936-STV, 2022 WL 4493972, at *14 to *15 (D. Colo. Sept. 27, 2022) (some cases hold sheriff's office, some hold the county, and at least one has held both); *Chavez v. Bd. of Cnty. Comm'rs of Lake Cnty.*, 426 F. Supp. 3d 802, 808-14 (D. Colo. 2019) (analyzing issue). But that does not appear to be an issue I have to resolve here. The plaintiff brought claims against both the County and the Sheriff's Office, and the claims against both entities were dismissed. Whether the official-capacity claims against Mr. Hanna are construed as claims against the County, the Sheriff's Office, or both, they are redundant of the claims brought against the Entity Defendants. *See Stump v. Gates*, 777 F. Supp. 808, 816 n.3 (D. Colo. 1991) ("As the United States Supreme Court repeatedly has stated, a § 1983 action appropriately is pleaded against a municipality either by naming the municipality itself or by naming a municipal official in his or her official capacity. Naming either is sufficient. Naming both is redundant." (citations omitted)).

II. The Order Granting the Entity Defendants' Motions to Dismiss Was Not Clearly Erroneous

The plaintiff's argument that an elected sheriff's actions in carrying out duties like prisoner transport should be treated as official policy and thus held against the Entity Defendants again holds some appeal and is not without some persuasive legal authority.[5] But this argument is effectively a rehash of the arguments the plaintiff made in response to the motions to dismiss, and thus an insufficient reason to grant relief under Rule 59(e). A Rule 59 motion "is not appropriate to revisit issues already addressed," unless "the court has misapprehended the facts, a party's position, or the controlling law." *Paraclete*, 204 F.3d at 1012.

I do not agree that dismissing the claims against the Entity Defendants was error or based on a misapprehension of the law. While some of their present arguments may stretch things a bit beyond the state of the law, the Entity Defendants are correct that the plaintiff's position is difficult to square with the Supreme Court's well-established proposition that municipal entities like the County and the Sheriff's Office cannot be held liable for the actions of their agents, but only for their own malfeasance. *Monell*, 436 U.S. at 692 (noting the language of Section 1983 "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights," but liability does not attach when causation is absent).

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[5] *See, e.g.*, *Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir. 1996) (county liable for policymaker sheriff's rape of witness during attempted-murder investigation); *Bailey v. Davis*, No. 4:13-CV-496 (CDL), 2015 WL 4131778, at *7 (M.D. Ga. July 8, 2015) (collecting cases and noting circuit split exists "on the issue of whether a final policymaker acts within the scope of his policymaking authority when his conduct involved criminal or intentionally tortious acts").

It is true that a county can be liable for the actions of its policymakers, even when those actions violate a previously established policy. *Simmons v. Uintah Health Care Special Dist.*, 506 F.3d 1281, 1285 (10th Cir. 2007) ("An act by a municipality's final policymaking authority is no less an act of the institution than the act of a subordinate employee conforming to a preexisting policy or custom."). But not *every* action by a policymaker is attributable to the entity, which is the implication of the plaintiff's position. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 482 (1986) ("[W]e . . . emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action . . . ."); *Randle v. City of Aurora*, 69 F.3d 441, 448 (10th Cir. 1995) (municipality may be liable for one-time decision by final policymaker if "the policy decision purportedly made by the official [wa]s within the realm of the official's grant of authority"). In *Simmons*, hiring and firing of employees was undisputedly within the realm of the board's policymaking authority. Here, it is undisputed that transportation of prisoners is within the realm of the county sheriff's policymaking authority. But the Entity Defendants are not being sued because Mr. Hanna transported Ms. Biggs; they are being sued because he sexually assaulted her. That is not within the policymaking authority a county sheriff has.

The plaintiff's position would effectively mean that any time a sheriff takes an action in the course of performing his official duties, the County and/or the Sheriff's Office would be liable for that action. This, as other courts have recognized, would collapse the "under color of state law" and municipal-liability analyses, which are separate questions. *See, e.g., Roe v. City of Waterbury*, 542 F.3d 31, 40-41 (2d Cir. 2008). Even where a final policymaker acts under the color of law, the municipality cannot be

liable for that action unless the official had policymaking authority for the action in question. *Danielson v. Huether*, 355 F. Supp. 3d 849, 871 (D.S.D. 2018) (citing *Pembaur*, 475 U.S. at 482-83 & n.12). When determining whether a municipality is liable for a one-time decision of a final policymaker, courts should look to whether the "policy decision purportedly made by the official is within the realm of the official's grant of authority." *Randle*, 69 F.3d at 448. This guidance indicates that the official's action must be related to the official's grant of authority. An official acts "wholly outside" his grant of authority "when he misuses his power to advance a purely personal agenda." *Roe*, 542 F.3d at 41. Here, while Mr. Hanna's position of power was an enabling factor in his assault on Ms. Biggs, the assault was wholly unrelated to the realm of his grant of authority with respect to transportation of prisoners. "[E]ven if advancing an otherwise legitimate policy goal in an illegal or unauthorized manner can, under some circumstances, fall within official policymaking, advancing a purely personal agenda clearly cannot." *Roe*, 542 F.3d at 41.[6]

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[6] *See also Lankford v. City of Hobart*, 73 F.3d 283, 286-87 (10th Cir. 1996) (city not liable for official's sexual harassment of employees because "the defendant was committing private, rather than public, acts of sexual harassment"); *Starrett v. Wadley*, 876 F.2d 808, 819 (10th Cir. 1989) (county liable for policymaker's firing plaintiff "because [he] had final authority to set employment policy as to the hiring and firing of his staff," but not for his sexually harassing plaintiff because those "were private rather than official acts" and "were personal in nature without any indicia of being 'officially sanctioned or ordered'"); *Wooten v. Logan*, 92 F. App'x 143, 146-47 (6th Cir. 2004) (county not liable for policymaker sheriff's use of "the guise of a patrol officer making a traffic stop" to effectuate rape of mentally handicapped minor, because it was not "a matter of official business" but rather "a misuse of power to advance a private agenda"); *Danielson*, 355 F. Supp. 3d at 873 (city not liable for mayor's assault of citizen after city council meeting because mayor did not have "authority to alter or violate the law or to make policy authorizing the assault or intimidation of a citizen," and his actions

Plaintiff's position is again sympathetic. Though she goes too far in saying that refusing to impose municipal liability here would mean local governments can immunize themselves simply by adopting written policies their policymakers then ignore, she is right that local governments and other municipal entities can often escape liability for the misdeeds of individuals acting on their behalf. And individuals, including Ms. Biggs here, end up bearing the costs of those misdeeds—effectively she will subsidize the County whose sheriff violated her rights. The Fifth Circuit cases she relies on, however, are largely distinguishable, have not been adopted in this circuit, and are inconsistent with the precedent that has. *See supra* note 7. I therefore cannot conclude that granting the Entity Defendants' motions to dismiss was clear error.

III. The "Matron Program" Evidence Does not Warrant Amending the Judgment or a New Trial

The plaintiff also seeks to amend the judgment and reopen the case against the Entity Defendants on the basis of evidence about Sheriff Hanna's discontinuation of the so-called "matron program." Under the matron program, the Sheriff's Office used female employees or volunteers to ride along when a female detainee was being transported by a male sheriff or deputy. (Doc. 155 at 12.) Evidence at trial showed that when he was sheriff, Mr. Hanna discontinued this program. The plaintiff argues that "there is a triable issue regarding whether [Mr.] Hanna's cancellation of the matron policy was a moving force behind the constitutional violations" and asks to reopen the judgment to allow her "to amend her complaint to add this theory of *Monell* liability under Federal Rule of Civil Procedure 15(b)(2)." (Doc. 155 at 13.) Because I agree with the Entity Defendants that the plaintiff has no adequate explanation for

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were not related to legitimate job function or furthering legitimate policy goal of the city).

why information regarding the matron program was not uncovered long before trial, and that they would be unduly prejudiced by reopening the case at this stage, the plaintiff's motion is denied without addressing their additional argument that the proposed amendment to the plaintiff's complaint would be futile. *See Durham v. Xerox Corp.*, 18 F.3d 836, 840 (10th Cir. 1994).

As the Entity Defendants point out, the plaintiff has had an investigator's report discussing the matron program, and Sheriff Hanna's discontinuation of it, since at least April 2019. (*See* Docs. 160-1, 160-2.) The plaintiff acknowledges this but contends that "that report was third hand and not nearly as significant as the evidence that surfaced at trial." (Doc. 164 at 8.) Her explanation of the differences, however, is weak. She cites trial testimony that "[Mr.] Hanna *himself* discontinued the policy and he also testified that he was aware of the risks of his discontinuation." (*Id*. at 8-9.) But the fact that Mr. Hanna discontinued the policy himself is implied if not directly stated in the report the plaintiff obtained during discovery, and that Mr. Hanna might have been aware of the risks of doing so is hardly a surprise. If, as the plaintiff now contends, those facts warrant a new trial, they surely were important enough to pursue further during discovery. To the extent the evidence at trial was new, it could have been uncovered long before. Rules 59, 60, and 15 are not means for parties to go through trial, see how things turn out, and then add or amend their claims based on what they find out. *See Paraclete*, 204 F.3d at 1012 (Rule 59(e) relief may be warranted on the basis of "new evidence *previously unavailable*," but not, "[a]bsent extraordinary circumstances," on the basis of facts that could have been raised before (emphasis added)). The plaintiff's motion is denied.

CONCLUSION

The jury here found that Mr. Hanna abused the authority he had as Sedgwick County's sheriff in about as reprehensible a manner as could be imagined, and assessed the damage he caused at over $8,000,000. While Mr. Hanna owes Ms. Biggs that amount, it is hard to imagine he will be able to pay her any more than a tiny fraction of it. Thus, in reality, the person who has to bear the bulk of the financial burdens of Mr. Hanna's actions is the same one who has to bear the emotional and personal burdens: Peatinna Biggs. For the reasons explained above, Sedgwick County cannot be legally *required* to mitigate some of that imbalance, although it could, of course, do so voluntarily. Whether that is the right moral or ethical result is, for better or worse, not for this Court to say.

Plaintiff's motions for clarification and amendment of the final judgment (Docs. 154, 155) are DENIED. The Entity Defendants' motion to amend the final judgment (Doc. 156) is GRANTED. The Clerk of Court is DIRECTED to amend the final judgment to remove any references to Mr. Hanna in his official capacity.

DATED: March 6, 2023

BY THE COURT:

~~Daniel D.~~ Domenico
United States District Judge

ATTACHMENT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02076-DDD-SKC

HOLLIS ANN WHITSON, as guardian ad litem for Peatinna Biggs

Plaintiff,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SEDGWICK,
SHERIFF CARLTON BRITTON, in his official capacity;
THOMAS HANNA, in his individual and official capacities; and
LARRY NEUGEBAUER, in his individual and official capacities,

Defendants.

AMENDED FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to and in accordance with Fed. R. Civ. P. 58(a) and the Order, filed April 17, 2020, by the Honorable Daniel D. Domenico, United States District Judge, and incorporated herein by reference as if fully set forth, it is hereby

ORDERED that judgment is hereby entered in favor of Defendants, The Board of County Commissioners of the County of Sedgwick; Sheriff Carlton Britton, in his official capacity; and Larry Neugebauer, in his individual and official capacities, and against Plaintiff, Hollis Ann Whitson, as guardian ad litem for Peatinna Biggs, on Defendants' motions to dismiss.

THIS MATTER came before the Court and a jury of seven duly sworn to try the matter on October 3, 2022 the Honorable Daniel D. Domenico, United States District Judge, presiding. On October 4, 2022, the jury returned its verdict in favor of Plaintiff.

Pursuant to and in accordance with Fed. R. Civ. P. 58(a) and the Order on Post-Trial Motions, filed March 6, 2023, by the Honorable Daniel D. Domenico, United States District Judge, and incorporated herein by reference as if fully set forth, it is hereby

IT IS HEREBY

ORDERED that judgment is hereby entered in favor of Plaintiff, Hollis Ann Whitson, as guardian ad litem for Peatinna Biggs, and against Defendant, Thomas Hanna, in his individual capacity, on Plaintiff's claims of excessive force, cruel and unusual punishment, and false imprisonment in the total amount of $3,250,000.00 in compensatory damages. It is further

ORDERED that judgment is hereby entered in favor of Plaintiff, Hollis Ann Whitson, as guardian ad litem for Peatinna Biggs, and against Defendant, Thomas Hanna, in his individual capacity, on Plaintiff's claims of excessive force, cruel and unusual punishment, and false imprisonment in the total amount of $5,000,000.00 in punitive damages. It is further

ORDERED that post-judgment interest shall accrue on the total amount of $8,250,000.00 at the legal rate pursuant to 28 U.S.C. §1961 from the date of entry of original judgment. It is further

ORDERED that Plaintiff shall have her costs by the filing of a Bill of Costs with the Clerk of this Court within fourteen (14) days of entry of Judgment.

DATED at Denver, Colorado this 6th day of March, 2023.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

s/ Robert R. Keech
Robert R. Keech,
Deputy Clerk