DOCKET NO. 18-55149

UNITED STAT

DOCKET NO. 18-55149

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAMELA FOX KUHLKEN

Plaintiff and Appellant,

v.

COUNTY OF SAN DIEGO, SHERIFF'S DEPUTY DARIN SMITH

Defendants and Appellees.

Appeal From The United States District Court,
Southern District of California, Case No. 3:16-cv-2504-CAB-DHB
Hon. Cathy Ann Bencivengo, District Judge

ANSWER BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

FEDERAL STATUTES, CODES AND RULES:

INTRODUCTION AND SUMMARY OF ARGUMENT

A simple Google search of "parking lot dispute" confirms that parking space disputes can quickly turn violent. The incident in this case arises from a parking lot dispute. San Diego County Sheriff's Deputy Darin Smith (Deputy Smith) arrived at the parking lot with reports that the fight escalated into an assault with a deadly weapon – the driver ran over a man's foot. Within moments of Deputy Smith arriving on scene with multiple people present, Mr. Platts reported that a woman ran over his foot and drove away. Pamela Fox Kuhlken (Fox) approached on foot and Mr. Platts identified her as *the woman*. Deputy Smith asked Fox for her identification. Fox refused and became defensive. Concerned about possible violent escalation without any back-up present, Deputy Smith moved to detain Fox in his patrol SUV pending investigation. Fox resisted and was taken to the ground. She continued to resist efforts to handcuff her despite the assistance of an off-duty police officer. The resistance continued until Fox was secured in the patrol SUV. Fox sued claiming her detention and arrest were unlawful and excessive force was used. She brought related state law claims.

This court should affirm the district court's grant of summary judgment in favor of Deputy Smith and the County. Deputy Smith had lawful grounds to detain Fox while he investigated, to arrest Fox based on her failure to provide identification, and to arrest Fox for delaying, obstructing and resisting Deputy

Smith's discharge of his duties in investigating the incident.[1] 1 EOR 11-12; Cal. Veh. Code, § 12951(b); Cal. Pen. Code § 148(a)(1). Undisputed video evidence shows Fox's active resistance. *Id.*, at 13.

The district court properly balanced the *Graham v. Connor*, 490 U.S. 386, 394-395 (1989) (*Graham*) factors in determining there was no excessive force used as a matter of law. 1 EOR 16-19. There is no dispute that Deputy Smith gave verbal commands for Fox's identification and Fox refused. Deputy Smith warned Fox she would be detained in the back of his SUV and might be tased if she did not comply. She still refused to produce her identification. She was taken to the

STATEMENT OF JURISDICTION

Appellees agree that federal jurisdiction exits under 28 U.S.C. § 1343(a)(3)

the parking lot over parking spaces, RP is unsure of the exact address. Unknown male. No further description at this time, P5."

2 EOR 67.

While driving to the location, Deputy Smith received an additional radio broadcast indicating that the dispute may have escalated. SEOR 8. The radio dispatcher advised:

"41T3 unit to cover 11-83, 13955 Stowe Drive, San Diego [sic] Volleyball Club. RP is advising her husband was standing in the parking lot waiting for his wife to pull in. And another vehicle ran over his foot. Suspect vehicle is a red Chevy Volt, license 7KCX685. T3."

2 EOR 67. The dispatcher confirmed that this was related Deputy Smith's call. *Ibid.*

This additional radio dispatch informed Deputy Smith that the situation escalated into a possible assault with a deadly weapon – the driver of a Chevy Volt running over a man's foot. SEOR 8. Deputy Smith believed he would also be investigating a possible violation of Cal. Pen. Code § 245(a)(1), assault with a deadly weapon or force likely to produce great bodily injury, when he arrived on scene. *Ibid.*

Deputy Smith was the first officer to arrive. SEOR 8, 119-120. As he pulled into the parking lot, he saw Cleon Platts sitting on a

to hold her ground and admitted this required Deputy Smith to use greater strength to move her. *Ibid.* Deputy Smith instructed Fox "to put her purse down and have a seat in the back of the patrol SUV. She refused to let go of her large purse and tried to spin around to face me." *Id.*, at 9. Fox admitted resisting efforts to remove her purse. *Id.*, at 97. Deputy Smith turned Fox back around bringing both of her wrists behind her back. *Id.*, at 9. When Deputy Smith let go of one wrist to radio for the status of back-up, Fox again tried to spin around and face him. *Ibid.*; and see 2 EOR 68. Fox physically resisted Deputy Smith's efforts to regain control, leading Deputy Smith to use "an Arm Bar Take Down maneuver to put Ms. Fox Kuhlken on the ground face first and apply handcuffs." SEOR 9. "I purposefully did the maneuver slower than usual to minimize the impact to Ms. Fox Kuhlken." *Ibid.*

Fox continued to resist while on the ground. SEOR 9, 22 - Exh. E – Video of Incident. Off-duty police officer, Sergeant Shank, came to the assistance of Deputy Smith. *Ibid.* Together, it took the efforts of both officers to overcome Fox's resistance and handcuff her. *Ibid.* Once handcuffed, Deputy Smith and Sergeant Shank raised Fox to her feet. *Ibid.* When Deputy Smith went to adjust the handcuffs, Fox pulled one arm free and physically resisted efforts of Deputy Smith and Sergeant Shank to re-handcuff her. *Ibid.* While trying to re-cuff Fox,

Deputy Smith instructed her to "Stop resisting, just relax." Exh. E; 2 EOR 53. Fox continued to resist. Exh. E.

Back in handcuffs, Fox physically resisted efforts to place her into the back of the patrol SUV. SEOR 9, 22 - Exh. E.

At the station, Fox was photographed – the only visible

violation of the Fourth Amendment. *Id*.

LEGAL DISCUSSION

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE UNDISPUTED FACTS DEMONSTRATED LAWFUL GROUNDS TO REQUEST FOX'S IDENTIFICATION, TO DETAIN FOX PENDING INVESTIGATION, AND TO ARREST FOX.

By abandoning her unlawful detention claim, Fox conceded Deputy Smith had grounds to detain her as part of his investigation into the 9-1-1 calls of a fight/disturbing the peace over a parking space which reportedly escalated into an assault with a deadly weapon. See 1 EOR 10; Doc. 25 at 22-23. There was no dispute Mr. Platts identified Fox as *the woman* who ran over his foot and drove away. SEOR 8, 89, 99-100. As correctly recognized by the district court, Deputy Smith had an obligation to investigate all claims arising out of the.ligai9(iga)12T3 -0.hems.1(te)

v. Ohio, 392 U.S. 1, 22 (1968). Grounds for an investigatory detention "can be supplied on the basis of a 9-1-1 call alone if it has sufficient indicia of reliability" and officers may rely on a dispatcher's radio alert of the report. *United States v. Cutchin*, 956 F.2d 1216, 1217-1218 (D.C. Cir. 1992). Grounds may also be supplied by an officer's independent corroboration of information initially supplied during a 9-1-1 call. *Ibid.*

Deputy Smith had reasonable grounds to detain Fox as part of his investigation. The radio dispatches from the 9-1-1 calls informed Deputy Smith that a male victim's foot was run over. 2 EOR 67; SEOR 8. Upon arriving at the scen(m)2112.15(a)0.6(l2.1tJ -19.71)3.7(r)1l9ih7d ov5(l)8.5(lM)4.5(s)8.4((e)12.e)12.1(n(m8f

Fox's statements confirmed her involvement in the incident. "I identified myself by saying, 'I called 9-1-1. Are you here in response to my car – call?'" 2 EOR 144. Fox knew that she and Mr. Platts' wife both called 9-1-1. *Id.*, at 145. She knew Deputy Smith was there to investigate the calls. *Ibid.*

It is undisputed that Deputy Smith requested Fox produce her identification. SEOR 8; 2 EOR 147. Investigative stops properly include determining the person's identity and briefly detaining the person "to maintain the status quo momentarily while obtaining more information." *Adams v. Williams*, 407 U.S. 143, 146 (1972); *and see People v. Long*, 189 Cal.App.3d 77, 83 (Cal.App. 1987) (superseded by statute on other grounds) .

an offense has occurred in the area." *See Michigan v. Summers*, 452 U.S. 692, 700 n. 12 (1981).

Deputy Smith had lawful grounds to demand Fox produce her driver's license. The "driver of a motor vehicle shall present his or her license for examination upon demand of a peace officer enforcing the provisions of this code." Cal. Veh. Code § 12951(b). Fox was thus obligated by state law to provide her license to Deputy Smith upon his demand. That obligation existed regardless of whether Fox, the driver of the car involved in the incident, was at fault Ib2(c)3.6.rs

front engine area (2 EOR 70-72). Fox was also aware Mr. Platt's wife screamed, "What are you doing? Are you trying to kill my husband? You're trying to run him over." *Id.*, at 72-74. Although though Fox thought it might be a staged accident (*ibid*.), she knew she was the driver of a car involved in an incident with contact between her car an

minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

With Fox's refusal to provide identification despite multiple commands to do so, Deputy Smith had the option of immediately arresting Fox based on her violation of Cal. Veh. Code § 12951(b) or detaining her pending the completion of his investigation. Deputy Smith elected to detain Fox until back-up arrived. SEOR 8-9.

The "right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. Cal. Pen. Code § 835 allows officers to use "such restraint as is reasonable for his arrest and detention." Cal. Pen. Code § 834a imposes an affirmative duty on all persons to "refrain from using force" to resist detention and arrest by a peace officer.

Fox admitted physically resisting Deputy Smith's efforts to detain her. SEOR 97, 102; 2 EOR 154-155. According to Fox, when Deputy Smith took hold of her wrist and said "give me your purse," Fox resisted by holding on to her purse. 2 EOR 154-155. Fox admitted that when Deputy Smith tried guiding her towards his patrol SUV, "I remained actively passively resisting. I just wanted to hold my person in tact," "I was just trying to hold my ground and keep my person in tact

and safe and unmolested." 2 EOR 158. Fox admitted that when Deputy Smith put her arms behind her back she continued "actively passively" resisting. *Id.*, at 156-158. The videotape evidence also showed Fox resisting efforts to handcuff her and place her into the back of the patrol SUV, even after Deputy Smith instructed Fox to "Stop resisting, just relax." SEOR 22 – Exh. E; 2 EOR 53, 177.

pending investigation; minor refused request to identify himself; held officer's grabbing of wrist to prevent minor from departing until investigation completed was reasonable and minor's resistance to grabbing of wrist and delay of officer's investigation violated Cal. Pen. Code § 148(a)(1)).

The arrest of Fox was lawful based on both Fox's refusal to provide her driver's license and her resistance to Deputy Smith's detention pending investigation. "Because the probable cause standard is objective, probable cause supports an arrest so long as the arresting officers had probable cause to arrest the suspect for any criminal offense, regardless of their stated reason for the arrest." *Edgerly v. City & Cty. of S.F.*, 599 F.3d 946, 954 (9th Cir. 2010).

on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight. *Ibid.*

The objective factors properly considered include: (1) whether the suspect posed an immediate threat to the safety of the officers or others; (2) the severity of the crime; and (3) whether the subject actively resisted arrest and/or attempted to evade arrest by flight. *Graham*, 490 U.S. at 396-397. The giving of a warning is also a factor to be considered. *Nelson v. City of Davis*, 685 F.3d 867, 882 (9th Cir. 2012).

As previously addressed, Deputy Smith had grounds to detain Fox pending investigation and to arrest Fox for her refusal to provide her driver's license. Deputy Smith was authorized to use physical force to effect Fox's detention. *Graham*, 490 U.S. at 396; Cal. Pen. Code § 835. Grabbing Fox's wrist to escort her to the back of Deputy Smith's patrol SUV to which Fox admitted resisting and Fox's refusal to let go of her large purse which Fox also admitted resisting, supported Deputy Smith's decision to take Fox to the ground and handcuff her. SEOR 9, 97, 102; *Jackson v. City of Bremerton*, 268 F.3d 646, 650, 652 (9th Cir.

practice even when officer was informed the suspect was "frail"). Fox continued to resist efforts to handcuff her and to place her into the back of Deputy Smith's patrol SUV. SEOR 9, 22 – Exh. E; 2 EOR 53. At various points, Deputy Smith gave verbal commands to comply and not resist, but Fox continued resisting. *Ibid*.

Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 921-922 (9th Cir. 2001) (*Arpin*) is virtually on point.

> Arpin refused to cooperate and provide her Transit Identification when requested. Officer Stone warned Arpin that she would be arrested if she did not cooperate. After Arpin refused to hand over her purse upon Officer Stone's request, Officer Stone grabbed Arpin's right hand and attempted to handcuff Arpin. Arpin stiffened her arm and attempted to pull free. In response, Officer Stone used physical force to handcuff Arpin. Stone then indicated that Arpin was handcuffed without injury. Under the circumstances described by Officer Stone, his use of force was reasonable. See *Forrester v. City of San Diego*, 25 F.3d 804, 806-07 (9th Cir. 1994) (finding the use of pain compliance techniques on nonresisting abortion protestors, that resulted in complaints of bruises, a pinched nerve and a broken wrist, was objectively reasonable); *Foster v. Metro. Airports Comm'n*, 914 F.2d 1076, 1082-83 (8th Cir 1990) (determining resistance justified

use of force in handcuffing suspect where force was not sufficient to create evidence of injury).

Arpin, 261 F.3d at 921-922.

Fox's version of the sequencing of events – that she was handcuffed and slipped out of the handcuffs be

III. SUMMARY JUDGMENT IS PROPERLY AFFIRMED ON QUALIFIED IMMUNITY.

The district court also granted summary judgment on grounds of qualified immunity. 1 EOR 13-16, 19-21. The district court found qualified immunity barred the claims consistent with the recent holding in *White*, 137 S.Ct. 548 and *S.B.*, 864 F.3d 1010. 1 EOR 20. Summary judgment in favor of Deputy Smith is properly affirmed on this ground.

Qualified immunity protects officers not just from liability, but also from suit entirely, and is properly decided at the summary judgment stage. *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987); and *see Scott v. Harris*, 550 U.S. at 379-380 (qualified immunity appropriate where video establishes type of force used was supported by circumstances confronting the officer). Qualified immunity protects government officials from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known... qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (*Pearson*).

Under Fourth Amendment standards, "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' [cite] violates the Fourth Amendment." *Graham*, 490 U.S. at 396; *Jackson v. City of Bremerton*, 268

F.3d at 651. The Supreme Court recently addressed a qualified immunity defense in the context of a Fourth Amendment excessive force claim in *White*, 137 S. Ct.

B. QUALIFIED IMMUNITY APPLIES TO THE FORCE USED TO EFFECT THE DETENTION AND ARREST.

Fox's inquiry into whether Deputy Smith's use of force was reasonable is misguided. Under *Graham*, "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396.

As the district court pointed out, "none of the cases cited by [Fox] regarding handcuffing involve a suspect who was accused of running over someone with her car, refused to provide identification, physically resisted being detained and slipped out of her handcuffs when they were first applied." 1 EOR 20. Under *Graham*

This resistance made taking Fox to the ground to handcuff her an objectively reasonable means to overcome the resistance, gain compliance and prevent access to potential weapons. *See Arpin*, 261 F.3d at 921-922; *Jackson v. City of Bremerton*, 268 F.3d at 650, 652; *accord*; *Hunt v. Massi*, 773 F.3d 361, 364-365, 370 (1st Cir. 2014) (affirming qualified immunity to peace officers who handcuffed arrest warrant suspect behind his back even though there was no resistance; arrestee resisted after officers refused request to handcuff in front); *cf. Morreale v. City of Cripple Creek*, 1997 U.S. App. LEXIS 12229, at 3, 17-18 (10th Cir. 1997) (handcuffing of traffic offender behind back was objectively reasonable use of force precluding excessive force claim).

Qualified immunity protections are not limited to lawful conduct; it establishes immunity recognizing that officers are often faced with making split second decisions, without complete facts – mistakes and misjudgments may occur. "It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Saucier v. Katz*, 533 U.S. 194, 205-206 (2001), overruled on other grounds in *Pearson*, 555 U.S. at 236.

Graham

C. FOX FAILS TO IDENTIFY ANY CLEARLY ESTABLISHED RIGHT PARTICULARIZED TO THE FACTS OF THIS CASE.

would be excessive." *S.B.*, 864 F.3d at 1015. General excessive force principles do not, by themselves, create clearly established law for purposes of qualified immunity. *Ibid*. Instead, Fox must "identify a case where an officer acting under similar circumstances as [Deputy Smith] was held to have violated the Fourth Amendment." *Id.* at 1015-1016.

Fox cites no case on point. If cases on point existed, she would cite and argue them. It is telling that Fox ignores this court's 2001 decision in *Jackson v. City of Bremerton*, *supra*, 268 F.3d at 650, 652, where it was concluded that an officer conducting an arrest for failure to disburse did not use excessive force in allegedly pushing a *nonresisting* suspect to the ground, kneeling on her back to handcuff her behind her back, and then aggressively pulling her up to a standing position even though the suspect voluntarily kneeled in submitting to arrest. The cases of *Hunt v. Massi*, 773 F.3d at 364-365, 370, and *Morreale v. City of Cripple Creek*, 1997 U.S. App. LEXIS 12229, at 3, 17-18, discussed above also demonstrate that taking Fox to the ground to handcuff her and handcuffing Fox were not excessive uses of force.

Fox tries to compensate for the lack of precedent by asking this court to view the issues at a high level of abstract contrary to the dictates of *White* and *S.B.* AOB at 44-49. However, framing the inquiry in such general terms misinterprets the 'exacting' nature of the applicable standard and overlooks the disparate facts of

the cases she cites. *White* distinctly held, "clearly established law should not be defined at a high level of generality." *White*, 137 S. Ct. at 552; *accord S.B.*, 864 F.3d at 1015. None of the cases cited by Fox meet the exacting standard required by *White*, 137 S. Ct. at 552 and *S.B.*, 864 F.3d at 1015.

None of Fox's cited cases involved someone who slipped out of the handcuffs thereby making tightening of the handcuffs during re-handcuffing reasonable. The indisputable videotape evidence shows Fox actively removing her wrist when Deputy Smith went to adjust the handcuffs after initially handcuffing Fox and Fox actively resisting Deputy Smith and the off-duty officer's efforts to re-handcuff her. Exh. E – videotape.

Fox's ow04 Tc -0.014Tc -0.006 Tw 16 0 Td [('sx a)3.6(c)e(e)12.1(qu)8s-0.006on0 Tw

court found no precedent establishing that "tight handcuffs alone, without any physical manifestation of injury ..., where the initial handcuffing was justified, constituted excessive force." *Sinclair v. Akins*, 696 Fed. Appx. 773, 776 (9th Cir. Unpub. 2017). The Ninth Circuit upheld the district court's grant of qualified immunity due to plaintiff's failure to identify sufficiently specific precedent. *Ibid.*

Cal. Mar. 28, 2017) (basing its decision on the "nature of the call, plaintiffs deteriorating emotional state, and [p]laintiff's active resistance").

Fox's admitted resistance when she had not been searched presented an objective threat to officer and bystander safety; objectively reasonable force was used to overcome Fox's active resistance. *See, e.g.*, *Hunt v. Massi*, 773 F.3d at 364-365, 370. Indeed, it is telling that it took the efforts of both Deputy Smith and an off-duty officer to overcome Fox's

(the same reasonableness standards for Fourth Amendment claims apply to battery); *Martinez v. County of Los Angeles*, 47 Cal.App.4th 334, 349-350 (1996) (applying *Graham* standard to police battery claim); *Munoz v. City of Union City*, 120 Cal.App.4th 1077, 1101-1103 (2004) (applying *Graham* to negligence claim).

California law authorizes a peace officer use reasonable force to effect a detention, an arrest, prevent escape, and overcome resistance. Cal. Penal Code § 835a; *Edson v. City of Anaheim*, 63 Cal.App.4th 1269, 1272-1273 (Cal.App. 1998). Use of force claims against peace officers are evaluated as seizures under the Fourth Amendment. *Graham*, 490 U.S. at 395; *Hayes*, 57 Cal.4th at 637-639. An officer is permitted to use such force as is "objectively reasonable" under the totality of the circumstances. *Graham*, 490 U.S. at 396-397.

Courts must determine whether, under all of the circumstances known to the officer at the scene, the use of force was objectively reasonable from the perspective of a reasonable peace officer. Factors include: (1) whether the suspect posed an immediate threat to the safety of the officers or others; (2) the severity of the crime; and (3) whether the subject actively resisted arrest and/or attempted to evade arrest by flight. *Graham*, 490 U.S. at 396-397. The giving of a warning is also a factor to be considered under the *Graham* balancing test. *Nelson v. City of Davis*, 685 F.3d at 882.

The same analysis supporting Fox's detention and the force used to detain and arrest her, discussed at length above, warranted the grant of summary judgment on Fox's related state law claims. Fox concedes that if her claims are barred under section 1983, then her state law claims are also barred. AOB 50; 1 EOR 21. Summary judgment on the state law claims should be affirmed.

V. SUMMARY JUDGMENT IS PROPERLY AFFIRMED ON THE BANE ACT CLAIM BECAUSE THERE WAS LAWFUL GROUNDS FOR THE ARREST AND NO EVIDENCE TO SHOW EXCESSIVE FORCE, OR THAT DEPUTY SMITH HAD A SPECIFIC INTENT TO VIOLATE FOX'S RIGHTS.

The California Bane Act is an enabling statute that allows a party to recover damages if that party can prove a violation of his or her federal or state constitutional rights. Cal. Civ. Code § 52.1. It is limited to instances where threats, intimidation or coercion is used to accomplish the constitutional violation. *Ibid.*

Fox repeats, virtually verbatim, her district court argument that if this court agrees her arrest was unlawful, then the force used to effect the arrest constituted a violation of Cal. Civ. Code § 52.1. AOB 51; Doc. 25 at 30, citing in part to *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1196 (9th Cir. 2015) and *Bender v. County of L.A.*, 217 Cal.App.4th 968, 978 (2013) ("the Bane Act applies because there was a Fourth Amendment violation – an arrest without probable cause

by the beating and pepper spraying of an unresisting plaintiff, i.e., coercion that is in no way inherent in an arrest, either lawful or unlawful."). As addressed above, the undisputed evidence established that Deputy Smith had probable cause to arrest Fox and that the force used was objectively reasonable in relation to Fox's admitted resistance. Summary judgment is properly affirmed on that ground alone.

Several recent decisions warrant additional discussion because they establish independent grounds to affirm summary judgment on Fox's Bane Act claim. As background, in *Allen v. City of Sacramento*, 234 Cal.App.4th 41, 67-69 (Cal.App. 2015) (*Allen*), the Third District observed that the California Supreme Court had not answered the question of whether an unlawful detention or arrest, without more, was sufficient to satisfy both elements of a Cal. Civ. Code § 52.1 claim. The *Allen* Court held that "a wrongful arrest or detention, without more, does not satisfy both elements of section 52.1." *Allen*, 234 Cal.App.4th at 69. In *Cornell v. City and County of San Francisco*, 17 Cal.App.5th 766, 799-802 (Cal.App. 2017), rev. denied 2018 Cal. LEXIS 1730 (Cal. 2018) (*Cornell*),[3] the First District distinguished *Allen* and held that where "an unlawful arrest is properly pleaded and proved, the egregiousness required by Section 52.1 is tested by whether the circumstances indicate the arresting officer had *a specific intent* to violate the

[3] *Cn ld*

arrestee's right to freedom from unreasonable seizure, not by whether the evidence shows something beyond the coercion ‘inherent’ in the wrongful detention.” *Cornell*, 17 Cal.App.5th 766, 801-802 (emphasis added); *accord B.B. v. County of L.A.*, 25 Cal.App.5th 115, 133 (Cal.App. 2018).

The *Cornell* Court adopted the specific intent standard first enunciated in Justice Douglas's plurality opinion in *Screws v. United States*, 325 U.S. 91, 101 (1981) which was in turn adopted by the California Supreme Court in *In re M.S.*, 10 Cal.4th 698, 713 (Cal. 1995) in interpreting criminal statutes adopted in conjunction with the Bane Act.

instance, the use of force was in response to Fox's own admitted resistance and non-compliance.

Now, according to Fox, the take-down to the ground occurred after the handcuffs slipped off her wrist and she showed Deputy Smith her now un-cuffed hands. *Id.*, at 169. Fox's own description admitted that Deputy Smith turned to find a previously handcuffed suspect un-handcuffed and that he responded by grabbing both of her hands, using his legs to place her on the ground to re-handcuff her. *Ibid.* Fox's speculation that "he seemed to really delight in using force" is inadmissible. *Id.*, at 165; *Alexis v. McDonald's Rests.*, 67 F.3d 341, 347 (1st Cir. 1995) (deponent's inference of racial animus based on personal observation of defendant's tone of voice, and perceptions of defendant as unfriendly properly excluded under Fed. R. Evid. 701(a) on summary judgment); *Hester v. BIC Corp.*, 225 F.3d 178, 184 (2d Cir. 2000) (observations of harsh management style and demeaning conduct did not permit lay opinion that demeanor was racially motivated). Further, it does not demonstrate that Deputy Smith had the required specific intent to use excessive force against Fox, particularly where the indisputable videotape evidence shows Deputy Smith solely used that level of force necessary to overcome Fox's resistance. Indeed, it took the efforts of both Deputy Smith and Sergeant Shank to overcome Fox's resistance. Summary judgment should be affirmed on the Bane Act claim.

CONCLUSION

For the above stated reasons, the judgment in favor of all defendants should be affirmed.

Dated: August 31, 2018

Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

By: s/ Darin L. Wessel

Fernando Kish, Senior Deputy
Darin L. Wessel, Senior Deputy
Attorneys for Appellees County of San Diego and Deputy Sheriff Darin Smith

CERTIFICATION OF BRIEF FORMAT

Pursuant to Fed. R. App. 32(a)(7), I hereby certify that this Appellees' Answer Brief was produced using Word and that the brief contains 9412 words based on Word's word count.

Dated: August 31, 2018

Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

By: s/Darin L. Wessel
Fernando Kish, Senior Deputy
D(Ki)0.5(sh)c8 381.48 241.92 64. Q Rg

STATEMENT OF RELATED CASES

Counsel for Appellees is informed that there are no related appeals in the Ninth Circuit.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2018, I electronically filed the foregoing **ANSWER BRIEF and the SUPPLEMENTAL EXCERPTS OF RECORD** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Keith H. Rutman, Esq.
501 W. Broadway, Ste. 1650
San Diego, CA 92101
krutman@krutmanlaw.com

Counsel for Plaintiff and
Appellant Pamela Fox Kuhlken

I also certify the document and a copy of the Notice of Electronic Filing was served via mail on the following non-