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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION**

Cyrus Andrew Sullivan,
Plaintiff,
v.
Multnomah County, et al.,
Defendants.

No. 3:19-cv-00995-JGZ

ORDER

Plaintiff Cyrus Andrew Sullivan brought this action pursuant to 42 U.S.C. § 1983 and Oregon state law. Pending before the Court is Defendants’ Motion for Summary Judgment, which Plaintiff opposes.¹ (Docs. 40, 48.)²

I. Background

In his First Amended Complaint, Plaintiff alleged (1) a § 1983 claim of unconstitutional treatment relating to his medical needs against Defendants Multnomah County, Multnomah County Sheriff’s Office (MCSO), the Multnomah County Health Department, and individual Defendants Brook Holter, Michael Seale, and Angelina Platas; (2) a § 1983 excessive force claim against Defendants Multnomah County, MCSO, Sherriff Mike Reese, Timothy Barker, Matthew Ingram, Phillip Hubert, Paul Simpson, David Kovachevich, Timothy Moore, Gary Glaze, and Kurtiss Morrison; (3) state law assault and

¹ The Court provided notice to Plaintiff regarding the requirements of a response (Doc. 47). *See Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc).

² After review of the briefing, the Court finds that the decisional process will not be aided by oral argument. *See* LR 7-1(d).

1 battery claims against Multnomah County, MCSO, Reese, Timothy Barker, Ingram, Hubert,
2 Simpson, Kovachevich, Moore, Glaze, and Morrison; (4) state law medical negligence
3 claims against Defendants Multnomah County, MCSO, Reese, Timothy Barker, Ingram,
4 Wendy Muth, Hubert, Simpson, Uwe Pemberton, Moore, Glaze, Morrison, Kovachevich,
5 Erica Barker, and Holter; and (5) state law defamation claims against Defendants Multnomah
6 County, MCSO, Reese, Timothy Barker, Ingram, Muth, Hubert, Simpson, Pemberton,
7 Moore, Glaze, Morrison, Kovachevich, Erica Barker, and Holter. (Doc. 38 at 1, 31-32, 40,
8 44.)

9 Defendants seek summary judgment arguing they are entitled to qualified immunity
10 as to the § 1983 claims, there is no evidence supporting a *Monell* theory against Multnomah
11 County for excessive force or inadequate medical care, and, with regard to the state law
12 claims, the officers' conduct was justified under Oregon law, the County's medical care met
13 the standard of care, and a defamation suit is barred by the statute of limitations and because
14 any statements made in furtherance of public duties are absolutely privileged.

15 **II. Summary Judgment Standard**

16 A court must grant summary judgment "if the movant shows that there is no genuine
17 dispute as to any material fact and the movant is entitled to judgment as a matter of law."
18 Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The
19 movant bears the initial responsibility of presenting the basis for its motion and identifying
20 those portions of the record, together with affidavits, if any, that it believes demonstrate the
21 absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

22 If the movant fails to carry its initial burden of production, the nonmovant need not
23 produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099,
24 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts
25 to the nonmovant to demonstrate the existence of a factual dispute and that the fact in
26 contention is material, i.e., a fact that might affect the outcome of the suit under the governing
27 law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could
28 return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250

1 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The
2 nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l*
3 *Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however, it must “come
4 forward with specific facts showing that there is a genuine issue for trial.” *Matsushita Elec.*
5 *Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted);
6 *see Fed. R. Civ. P. 56(c)(1).*

7 At summary judgment, the judge’s function is not to weigh the evidence and
8 determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477
9 U.S. at 249. In its analysis, the court must believe the nonmovant’s evidence and draw all
10 inferences in the nonmovant’s favor. *Id.* at 255. The court need consider only the cited
11 materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

12 **III. Applicable Legal Standard for § 1983 Claims**

13 As a preliminary matter, Defendants assert that Plaintiff’s § 1983 claims are properly
14 analyzed under the Eighth Amendment. In *Kingsley v. Hendrickson*, 576 U.S. 389, 397
15 (2015), the Supreme Court determined that the Fourteenth Amendment’s Due Process
16 Clause, and not the Eighth Amendment, applies to the use of excessive force against pretrial
17 detainees. The Ninth Circuit has extended the holding in *Kingsley* to analysis of § 1983
18 medical care claims asserted by pre-trial detainees and § 1983 claims based on failure to
19 protect, asserted by pre-trial detainees. *See Castro v. Cnty. of Los Angeles*, 833 F. 3d 1060,
20 1069 (9th Cir. 2016) (failure to protect); *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124–
21 25 (9th Cir. 2018) (medical care).

22 At the time of the incidents giving rise to Plaintiff’s claims, Plaintiff was in the
23 custody of the MCSO on a United States Marshal’s hold associated with a probation or
24 supervised release violation. (Doc. 41 ¶ 5.) Defendants assert that the Eighth Amendment
25 analysis should apply to Plaintiff’s § 1983 claims because Plaintiff was a convicted prisoner.
26 In Response, Plaintiff argues that the Fourteenth Amendment should apply because he was
27 not sentenced on his supervised release violation until July 7, 2017. (Doc. 48 at 2.)

28 Although there are some conflicting opinions, the majority of courts within the Ninth

1 Circuit that have addressed this issue have found that the Fourteenth Amendment’s analysis
2 applies to a person detained on a suspected probation or supervised released violation, and
3 the only Ninth Circuit case to address the issue (pre-*Kingsley*) applied the Fourteenth
4 Amendment. *See Ressay v. King Cnty.*, 520 Fed. App’x 554, 554-55 (9th Cir. May 22, 2013);
5 *Rosenblum v. Blackstone*, No. SA CV 18-966-JVS(E), 2020 WL 1049916, at *10 (C.D. Cal.
6 Jan. 22, 2020) (citing cases discussing whether Fourteenth Amendment or Eighth
7 Amendment should apply to claims regarding jail conditions when person was incarcerated
8 due to ongoing probation violation proceedings); *Davies v. Espinda*, No. CV 20-00174
9 DKW-RT, 2020 WL 4340939, at *2 (D. Haw. July 28, 2020) (“Because Plaintiff is awaiting
10 a decision on the revocation of probation, the Court reviews his claims under the Fourteenth
11 rather than the Eighth Amendment.”); *McCamey v. Am. Behav. Health Sys. Inc.*, No.
12 219CV00812RBLJRC, 2020 WL 3848051, at *3 (W.D. Wash. May 20, 2020) (“it would
13 appear that plaintiff’s claims fall under the more
14 protective, Fourteenth Amendment standard since at the time, plaintiff was not incarcerated
15 but was under supervised release.”), *report and recommendation adopted*, No.
16 219CV00812RBLJRC, 2020 WL 3839636 (W.D. Wash. July 8, 2020).

17 Indeed, as a practical matter, Plaintiff was detained while awaiting a resolution of a
18 petition to revoke supervised release; he was not automatically guilty of the supervised
19 released violation and is thus properly treated as a pretrial detainee. For the foregoing
20 reasons, the Court will apply the Fourteenth Amendment standards when analyzing
21 Plaintiff’s § 1983 claims.

22 **IV. Excessive Force and Failure to Protect**

23 Defendants assert that they are entitled to summary judgment on Plaintiff’s excessive
24 force and failure to protect claims because there is no evidence supporting Plaintiff’s *Monell*
25 theory and the individual Defendants are entitled to qualified immunity.

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1 **A. Facts**³

2 Prior to his incarceration, Plaintiff maintained a website that exposed “law
3 enforcement activities that have a negative impact on people.” (Doc. 38. at 1.) Plaintiff
4 asserts that during his incarceration and prior to June 28, 2017, Plaintiff had several
5 interactions with jail and/or prison staff, which resulted in disciplinary charges based on
6 partially true and partially false information. (*Id.* at 4-6.)

7 On June 28, 2017 at 8:30 p.m., Multnomah County Sheriff’s Deputy Pemberton
8 requested that Plaintiff report to medical to take his medication. (*Id.* at 8.) While at medical,
9 Medical Technician Erica Barker was handing out medication. (*Id.*) Another inmate handed
10 Plaintiff a Gatorade packet to add to his water, and Barker demanded that Plaintiff give her
11 the Gatorade, but Plaintiff refused the order and mixed the Gatorade with water and drank it
12 anyway. (*Id.*; Doc. 44 ¶¶ 3-4.) Pursuant to MCSO policy, failure to follow an order is a major
13 violation subject to discipline, and an inmate charged with a major rule violation can be
14 moved out of their dorm to the disciplinary housing unit on the fourth floor pending hearing.
15 (Doc. 44 ¶ 8; Doc. 41 at 23-24.)

16 Defendant Pemberton then ordered Plaintiff to report to sally port, but Plaintiff instead
17 went to his cell on the fifth floor to dispose of contraband. (Doc. 38 at 8; Doc. 44 ¶ 7.) As he
18 left, Plaintiff told Barker that he would be posting information about her on his website and
19 told Pemberton “fuck you, come get me.” (Doc. 38 at 8-9; Doc. 44 ¶¶ 7-8.) Pemberton
20 radioed for assistance and Sergeants Tim Barker and Ingram and Deputies Simpson, Hubert,
21 and Muth, and (non-Defendant) Deputy Dilger responded to Pemberton’s request for
22 assistance. (Doc. 44 ¶ 8.)

23 Once in his cell, Plaintiff flushed the contraband down the toilet and saw a group of
24 guards approaching his cell. (Doc. 38 at 9.) Simpson and Hubert arrived first and ordered
25 Plaintiff to gather his belongings and come to the door to be handcuffed through the food
26 port. (Doc. 45 ¶¶ 3-5.) Plaintiff told them to “fuck off.” (Doc. 38 at 9; Doc. 45 ¶ 5.) Plaintiff

27 ³ While some of the Parties’ stated facts differ slightly, the Court only sets forth
28 disputes of *material* fact and the facts included are materially undisputed unless otherwise
noted.

1 then started looking around for something to throw at the guards when they entered. (Doc.
2 38 at 9.) Plaintiff found a bag of Cactus Annie’s Scorchin Chips and began to eat as many
3 as he could before the guards entered. (*Id.*)

4 Ingram arrived next and tried to establish a rapport and give Plaintiff options for
5 moving voluntarily, but Plaintiff continued to decline. (Doc. 43 ¶¶ 4-5.) Barker told Plaintiff
6 to turn away from the door and place his hands behind his back to show compliance and
7 ordered the deputies out of Plaintiff’s direct line of sight in an effort to minimize risks of
8 entering the cell. (Doc. 42 ¶ 7; Doc. 43 ¶ 8.) Barker and Ingram also made sure that Simpson
9 had a Taser ready in case Plaintiff further resisted and was able to get out of the cell
10 unrestrained. (Doc. 42 ¶¶ 7-8; Doc. 43 ¶¶ 7-9; Doc. 45 ¶ 6.) Plaintiff told the guards he did
11 not deserve to go to disciplinary, threatened to post information about MCSO Deputies
12 Hubert, Simpson, and Ingram on his website, and told the Deputies to “leave.” (Doc. 38 at
13 9.) Simpson then pulled out his Taser and debated with others, including Barker and Muth,
14 whether to use it. (*Id.*) Barker told Plaintiff that deputies were entering the cell to handcuff
15 him and Plaintiff responded with a nod. (Doc. 42 ¶ 5.)

16 Pemberton then remotely opened Plaintiff’s cell door from the officer station. (Doc.
17 44 ¶ 10.) Ingram moved into the cell first, with Barker behind him and Muth, Hubert, and
18 Simpson standing outside the cell. (Doc. 42 ¶¶ 7-9; Doc. 45 ¶ 6; Doc. 43 ¶ 9.) When Ingram
19 entered the cell, Plaintiff turned and threw a red, powdered substance⁴ into Ingram’s face.
20 (Doc. 43 ¶ 9; Doc. 42 ¶ 9; Doc. 45 ¶ 7; Doc. 44 ¶ 10.) Plaintiff asserts that when the deputies
21 entered the cell, Plaintiff grabbed the biggest handful of chips that he could and threw it into
22 Defendant Ingram’s face. (Doc. 38 at 9.) Plaintiff asserts that Ingram then struck Plaintiff in
23 the face, and when Plaintiff turned away and grabbed the bunk, the other guards slammed
24 into Plaintiff, punched him several times, and cuffed him behind his back, while Plaintiff
25 verbally claimed he was cooperating. (*Id.*)

26 Defendants assert that Ingram blocked Plaintiff’s punch, spun him, and grabbed for
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28 ⁴ Plaintiff appears to dispute the consistency of the chips he threw, but this dispute is immaterial to the resolution of the Motion before the Court.

1 Plaintiff's right arm while Tim Barker grabbed for Plaintiff's left arm, both men pushing
2 Plaintiff against the low counter to the right side of the cell. (Doc. 43 ¶ 11; Doc. 42 ¶ 11.)
3 Defendants assert that Plaintiff struggled violently, kicking back at Ingram and pulling both
4 his arms away while ignoring repeated directions to stop resisting. (Doc. 43 ¶ 11; Doc. 42 ¶
5 11.) Defendants assert that Simpson, Muth, and Hubert moved to grab Plaintiff's legs, while
6 Plaintiff continued to resist, pulling Ingram's right arm down underneath Plaintiff's body
7 and pinning it against the counter. (Doc. 43 ¶ 11; Doc. 45 ¶¶ 7-8; Doc. 42 ¶¶ 11-12.)
8 Defendants assert that Ingram was able to free Plaintiff's right arm and to pull his own arm
9 out, ordered Plaintiff to put his arm behind his back, and was ultimately able to pull
10 Plaintiff's right arm behind him to the small of Plaintiff's back and handcuff his right wrist.
11 (Doc. 43 ¶ 12.)

12 Defendants assert that while this was going on, Plaintiff struck back at Sergeant
13 Barker with his left elbow and, once Barker got a firm grasp on Plaintiff's left arm, Plaintiff
14 continuously strained against Barker's attempt to pull Plaintiff's arm back for cuffing. (Doc.
15 42 ¶ 12; Doc. 43 ¶13.) Defendants assert that during this struggle, Barker and Ingram heard
16 a popping sound as Barker was trying to pull Plaintiff's left arm back against Plaintiff's
17 violent resistance, though neither initially perceived Plaintiff reacting as if he had been
18 injured. (Doc. 42 ¶ 12; Doc. 43 ¶14.) Defendants assert that after hearing the popping sound,
19 Barker was immediately able to pull Plaintiff's arm behind his back and secure it. (Doc. 42
20 ¶ 12; Doc. 43 ¶14.)

21 As the deputies attempted to remove Plaintiff from his cell, Plaintiff deliberately
22 "went limp" to force Ingram and Barker to carry him; Plaintiff states that he did this "as
23 punishment." (Doc. 38 at 10; Doc. 42 ¶ 13; Doc. 43 ¶¶15-16; Doc. 44 ¶¶11-12; Doc. 45 ¶ 9.)
24 Plaintiff asserts that when he began to get a wedgie, he stopped going "limp," but the officers
25 continued to give Plaintiff wedgies and pushed Plaintiff's head down and verbally insulted
26 him as they brought him to a different cell on the fourth floor. (Doc. 38 at 10.) Defendants
27 assert that once the three reached Plaintiff's assigned cell, Sergeants Barker and Ingram
28 walked Plaintiff into the cell and lowered him, face down onto the mattress in the middle of

1 his cell. (Doc. 43 ¶ 17.)

2 Plaintiff asserts that once in the cell, he was placed face down on the mattress and
3 Ingram kneeled on Plaintiff's upper back while Barker got on the top of Plaintiff's middle
4 and lower back, and Plaintiff could barely breathe and stated that he could not breathe. (Doc.
5 38 at 10.) Plaintiff asserts that Ingram said "if you couldn't breathe, you couldn't talk," and
6 shoved Plaintiff's face into the mattress. (*Id.*) Plaintiff asserts that Kovachevich, Moore, and
7 Hubert were also present. (*Id.* at 30.) Plaintiff asserts that the deputies then cut Plaintiff's
8 clothes off and removed his handcuffs. (*Id.*)⁵

9 Defendants assert that Sergeant Ingram was concerned that taking handcuffs off and
10 leaving Plaintiff's arms unsecured during this visual strip search and dressing in would create
11 a safety risk. (Doc. 43 ¶ 19.) Defendants assert that Sergeant Ingram decided to cut Plaintiff's
12 clothing off his body, visually strip search him while Plaintiff remained handcuffed, and
13 remove the handcuffs at the last moment before the sergeants left the cell for Plaintiff to get
14 dressed. (*Id.*) Defendants assert that while waiting for the clothes cutters and a white
15 jumpsuit, Plaintiff said that he could not breathe. (*Id.* at ¶ 20.) Defendants assert that Sergeant
16 Ingram rolled Plaintiff slightly to his right side to check on him. (*Id.*) Defendants assert that
17 Plaintiff appeared to be inhaling and exhaling without effort while raising his voice at the
18 deputies. (*Id.*) Defendants assert that they told Plaintiff their plan, and were able to cut the
19 clothing without incident. (*Id.*)

20 The Parties' version of what happened next is largely disputed so the Court will set
21 forth the remainder of events from each Parties' asserted facts.

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26 ⁵ All inmates on level three disciplinary status or higher are subject to a strip search
27 before celling into their new dormitory cell, as inmates of this status generally have exhibited
28 behavior suggesting a heightened threat to safety of staff or other inmates, and staff use the
visual-only search to ensure the inmate has not secreted contraband to the new cell. (Doc. 43
¶ 18.) Level 3 and above inmates also wear a white jumpsuit as their jail-issued clothing,
which is different than the clothing Plaintiff was wearing. (*Id.*)

1 **1. Plaintiff’s Version**⁶

2 Plaintiff was ordered to put his right hand under his stomach, but he could not because
3 he could not lift his body and Barker then grabbed Plaintiff’s left arm, pulling it away from
4 his body, and kept pulling, even after the arm snapped. (Doc. 38 at 11.) Ingram then shoved
5 Plaintiff’s head down one last time. (*Id.*) After the deputies left, Plaintiff could not move his
6 left arm and Plaintiff lay there in shock until Ingram returned with a nurse, who determined
7 Plaintiff’s arm was broken; Plaintiff was then transported to the hospital. (*Id.*)

8 At the hospital, Plaintiff was diagnosed with a left humerus fracture, his arm was
9 placed in a sling, he was prescribed oxycodone for pain, and was told to return for follow-
10 up in one week. (*Id.* at 11.) The doctor also recommended that Plaintiff be given a sarmiento
11 brace after one week, which would have been less painful than a sling. (*Id.* at 15.)

12 Pemberton then wrote Plaintiff up for failure to do as ordered, disruptive behavior,
13 and threatening staff, and Ingram wrote Plaintiff up for physically assaulting staff and
14 possessing contraband and converting a food item into a weapon to throw at staff. (*Id.*)
15 Plaintiff “got six days in the hole.” (*Id.* at 12.) Plaintiff was later questioned about the
16 incident by a detective, but Defendants lied to the detective about what happened. (*Id.* at 12,
17 16-17.)

18 **2. Defendants’ Version**

19 After giving the visual strip search to ensure Plaintiff did not have any contraband
20 anywhere under his clothing, staff told Plaintiff they would be removing Plaintiff’s
21 handcuffs. (Doc. 43 ¶ 18.) Plaintiff told deputies he understood, and Sergeant Barker stepped
22 in to remove the handcuffs. (*Id.* ¶ 20.) Barker removed the right cuff first, telling Plaintiff to
23 put his right hand under Plaintiff’s body while Barker uncuffed Plaintiff’s left wrist. (Doc.
24 42 ¶ 15.) After Plaintiff did not move his right arm, Barker rolled Plaintiff a few inches to

25 ⁶ Plaintiff’s version of events is mostly based on the facts alleged in his First Amended
26 Complaint. (Doc. 38.) “[A] verified complaint may be treated as an affidavit to oppose
27 summary judgment[.]” *See Keenan v. Hall*, 83 F.3d 1083, 1090 n.1 (9th Cir. 1996); *Jones v.*
28 *Blanas*, 393 F.3d 918, 923 (9th Cir. 2004) (Where the nonmovant is a pro se litigant, the
Court must consider as evidence in opposition to summary judgment all the nonmovant’s
contentions set forth in a verified complaint or motion.).

1 the left, physically placing Plaintiff’s right arm underneath Plaintiff’s body, and rolled
2 Plaintiff back onto his belly. (*Id.*) Barker then removed Plaintiff’s left cuff and told Plaintiff
3 to place his left arm under his body, and Plaintiff said that he could not move his left arm,
4 and he believed his left arm was broken. (Doc. 42 ¶ 16; Doc. 43 ¶ 21.) After Plaintiff said he
5 thought his arm was broken, deputies immediately called for medical help, helped him to a
6 seated position, and covered him with a jumpsuit and a sheet to keep him warm while waiting
7 for medical staff to arrive. (Doc. 42 ¶ 16; Doc. 43 ¶ 21.) Jail medical staff checked Plaintiff,
8 and Ingram arranged for an ambulance when medical personnel determined Plaintiff needed
9 hospital attention. (Doc. 43 ¶ 21.)

10 A federal grand jury later returned a five-count indictment associated with the June
11 28, 2017 incident, and the United States filed a superseding information charging Plaintiff
12 with one count of assaulting Sergeant Barker, identified as “T.B.,” a Multnomah County
13 Sheriff’s Officer assisting the United States Marshal, in violation of 18 U.S.C. §111(a)(1).
14 (*United States v. Cyrus Sullivan*, District of Oregon Case No 3:17-CR-00306-JGZ, Docs.1,
15 118.) Plaintiff submitted a petition to enter a guilty plea affirmatively representing that “On
16 June 28th, 2017, I assaulted a federal officer, and in so doing made physical contact with that
17 officer.” (*Id.* at Doc. 122.) The Court accepted the plea, entered judgment, and imposed
18 sentence on the count charged in the information. (*Id.* at Doc. 128.)

19 **B. Legal Standard**

20 Under the Fourteenth Amendment, force is considered excessive if the officers’ use
21 of force was “objectively unreasonable” in light of the facts and circumstances confronting
22 them, without regard to their mental state. *Kingsley*, 576 U.S. at 397 “[O]bjective
23 reasonableness turns on the facts and circumstances of each particular case.” *Id.* (quoting
24 *Graham v. Connor*, 490 U.S. 386, 396 (1989)). The reasonableness of a particular use of
25 force must be made “from the perspective of a reasonable officer on the scene, including
26 what the officer knew at the time, not with the 20/20 vision of hindsight.” *Id.*

27 In determining whether the use of force was reasonable,
28 a court should consider factors including, but not limited to: the
relationship between the need for the use of force and the amount

1 of force used; the extent of the plaintiff's injury; any effort made
2 by the officer to temper or to limit the amount of force; the
3 severity of the security problem at issue; the threat reasonably
4 perceived by the officer; and whether the plaintiff was actively
5 resisting.

6 *Id.*

7 *Kingsley* also applies to claims that certain officers failed to intervene to protect
8 Plaintiff from the force used by other officers. *Castro*, 833 F. 3d at 1069. To prove that
9 Defendant officers failed to intervene to protect him from the force used by other officers,
10 Plaintiff must show that the decision not to intervene was intentional and that there were
11 reasonable and available measures that the officers did not take that caused the injury that
12 Plaintiff suffered. *Id.* Negligent actions or omissions by the Defendant officers are not
13 actionable under § 1983. *Id.* Plaintiff must show that it was objectively unreasonable for the
14 officers not to intervene. (*Id.*)

15 **C. Discussion**

16 **1. Claims Relating to Force Used on the Fifth Floor**

17 Plaintiff alleges that while he was repeatedly refusing to comply with Defendants'
18 orders and after he threw chips in Defendant Ingram's face, Ingram punched Plaintiff in the
19 face and "other guards slammed and punched him several times." Plaintiff further alleges
20 that as the deputies attempted to remove Plaintiff from his cell, Plaintiff deliberately "went
21 limp" to force Ingram and Barker to carry him, but even after he stopped "going limp,"
22 Ingram and Barker continued to give Plaintiff "wedgies."

23 With regard to the alleged force used on the fifth floor, each instance of force was in
24 response to Plaintiff's admitted non-compliance, Plaintiff does not allege that he sustained
25 any lasting injuries from these events, Plaintiff was posing a security problem as he was
26 deliberately and repeatedly disobeying orders, and the officers were responding to the threat
27 that Plaintiff posed. None of the instances of force alleged with regard to the fifth floor
28 suggest that the force used was extreme or that the force used was unreasonable in light of
Plaintiff's actions. Accordingly, summary judgment will be granted in favor of Defendants
as to Plaintiff's claims regarding excessive force on the fifth floor.

2. Claims Relating to Force Used on the Fourth Floor

Plaintiff claims that once in the cell on the fourth floor, he was placed face down on the mattress and Ingram kneeled on Plaintiff's upper back while Barker got on top of Plaintiff's middle and lower back, and Plaintiff could barely breathe and stated that he could not breathe, but Ingram said "if you couldn't breathe, you couldn't talk," and shoved Plaintiff's face into the mattress. Plaintiff asserts that the deputies then cut Plaintiff's clothes off and removed his handcuffs. (*Id.*) Plaintiff was ordered to put his right hand under his stomach, but he could not because he could not lift his body and Barker then grabbed Plaintiff's left arm, pulling it away from his body, and kept pulling, even after the arm snapped, and Ingram then shoved Plaintiff's head down one last time before exiting the cell.

(a) The Strip Search

Plaintiff appears to assert that officers' actions of cutting off his clothes without first ordering him to take his clothes off constituted excessive force. Plaintiff, however, does not allege any facts suggesting anything about cutting Plaintiff's clothes off was excessive or constituted force, and Defendants were reasonably concerned at that point that Plaintiff was repeatedly not complying with orders and that allowing Plaintiff room to remove his own clothes could pose a threat. Accordingly, to the extent the strip search is part of Plaintiff's excessive force claim, summary judgment will be granted in favor of Defendants as to that claim.

(b) Use of Force by Defendants Ingram and Barker

Defendants Ingram and Barker, citing their version of events,⁷ state that the force used on the fourth floor was necessary to keep Plaintiff on his stomach while removing handcuffs to minimize the risk of another assault and because Plaintiff was refusing to comply with directions. The Court must accept Plaintiff's version of events as true, however, when ruling on the Motion for Summary Judgment.

⁷ In their Reply in support of their Motion for Summary Judgment, Defendants concede that there are disputed issues of material fact precluding summary judgment in favor of Defendant Barker. (Doc. 49 at 6-10.)

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(1) The Relationship Between the Need for the Use of Force and the Amount of Force Used;

Plaintiff alleges that Defendant Ingram refused to take his weight off Plaintiff when Plaintiff stated that he could not breathe while Ingram was kneeling on top of him, Ingram and Barker ordered Plaintiff to move his arms from under his body, which he could not do because he was being crushed into the mattress, Barker gratuitously broke Plaintiff’s arm while removing the handcuffs, and Ingram gratuitously pushed Plaintiff’s head before exiting the cell. If a jury were to believe Plaintiff’s version of events, they could find that there was no need for any of these alleged uses of force. This factor favors Plaintiff.

(2) The Extent of Plaintiff’s Injury;

Plaintiff sustained a serious injury of a left humerus fracture. Although Defendants appear to contend that Plaintiff’s humerus was broken during the original handcuffing of Plaintiff, this is a disputed issue of material fact. This factor favors Plaintiff.

(3) Any Effort Made by the Officer to Temper or to Limit the Amount of Force;

According to Plaintiff’s version of events, the force used was gratuitous and unnecessary. This factor favors Plaintiff.

(4) The Severity of the Security Problem a Issue;

At the time Ingram and Barker allegedly used force in the fourth floor cell, Plaintiff was handcuffed, lying face down on a mattress, and surrounded by officers. Although Plaintiff’s actions leading up to this point were a severe security issue as Plaintiff repeatedly ignored the officers’ orders, a jury could find that while Plaintiff was lying on the mattress on the fourth floor surrounded by officers, the severity of the security problem had largely abated. Accordingly, this factor slightly favors Plaintiff.

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1 **(5) The Threat Reasonably Perceived by the Officer and**
2 **Whether Plaintiff was Actively Resisting**

3 Under Plaintiff's version of events, Plaintiff posed no threat at the time and was
4 attempting to comply with the officer's orders. These factors favor Plaintiff.

5 **(6) Disputed Issues of Fact**

6 Accordingly, the Court concludes there are disputed issues of material fact that must
7 be resolved by a jury on Plaintiff's excessive force claims alleged against Defendants
8 Timothy Barker and Ingram based on the force used on the fourth floor.

9 **(c) Qualified Immunity**

10 Defendants Ingram and Barker assert that they are entitled to qualified immunity on
11 Plaintiff's excessive force claim because the force used was "taken in the face of an
12 immediate threat to safety and security of a maximum security jail, and without evidence of
13 subjective intent to harm as opposed to a good faith effort to restore order in the facility."
14 (Doc. 40 at 21.)

15 A defendant in a § 1983 action is entitled to qualified immunity from damages for
16 civil liability if his conduct does not violate clearly established federal statutory or
17 constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*,
18 457 U.S. 800, 818 (1982).

19 The qualified immunity inquiry "must be undertaken in light of the specific context
20 of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001).
21 The plaintiff has the burden to show that the right was clearly established at the time of the
22 alleged violation. *Sorreles v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002); *Romero v. Kitsap*
23 *Cnty.*, 931 F.2d 624, 627 (9th Cir. 1991). For qualified immunity purposes, "the contours of
24 the right must be sufficiently clear that at the time the allegedly unlawful act is [under]taken,
25 a reasonable official would understand that what he is doing violates that right" and "in the
26 light of pre-existing law the unlawfulness must be apparent." *Mendoza v. Block*, 27 F.3d
27 1357, 1361 (9th Cir. 1994) (quotations omitted). Therefore, regardless of whether the
28 constitutional violation occurred, the officer should prevail if the right asserted by the

1 plaintiff was not “clearly established” or the officer could have reasonably believed that his
2 particular conduct was lawful. *Romero*, 931 F.2d at 627.

3 As noted, there are disputed issues of material fact as to whether Barker and Ingram
4 violated Plaintiff’s Fourteenth Amendment right to be free from excessive force. As
5 discussed above, a reasonable jury could find that this force went beyond what was necessary
6 to maintain order in the situation. Even under the more stringent Eighth Amendment
7 standard, the law is clearly established that an officer cannot use force solely to cause harm
8 maliciously and sadistically. Here, Plaintiff presents facts from which a jury could conclude
9 that Barker and Ingram’s use of force was gratuitous and went beyond what was necessary
10 to gain compliance with the officers’ orders and was inflicted to cause harm maliciously and
11 sadistically. The Court may not decide qualified immunity based on Defendants’ version of
12 the facts. *See, e.g., Wilkins v. City of Oakland*, 350 F.3d 949, 956 (9th Cir. 2003) (“[w]here
13 the officers’ entitlement to qualified immunity depends on the resolution of disputed issues
14 of fact in their favor, and against the non-moving party, summary judgment is not
15 appropriate”); *Lolli v. Cnty. of Orange*, 351 F.3d 410, 421 (9th Cir. 2003).

16 Moreover, at the time of the altercation, it was clearly established that a gratuitous
17 “unprovoked and unjustified” attack by a prison guard violates a prisoner’s clearly
18 established rights. *See, e.g., Lolli*, 351 F.3d at 421.

19 Accordingly, Barker and Ingram are not entitled to qualified immunity at this time
20 and the Motion for Summary Judgment will be denied as to Plaintiff’s claims that Barker
21 and Ingram used excessive force on the fourth floor.

22 **(d) Failure to Protect**

23 Plaintiff asserts that Defendants Kovchevich, Moore, and Hubert were also present
24 during the force used by Barker and Ingram on the fourth floor. Plaintiff does not make any
25 specific allegations about these Defendants’ actions and does not allege that these
26 Defendants could have taken reasonable and available measures to prevent the force used by
27 Ingram and Barker. Rather, it appears that the alleged force happened quickly, and there is
28 no evidence that Kovachevich, Moore, and Hubert had a chance to intervene, and failed to

1 intervene. Accordingly, summary judgment will be granted in favor of Kovchevich, Moore,
2 and Hubert to the extent Plaintiff alleges these Defendants failed to protect him from the
3 force used by Ingram and Barker on the fourth floor.

4 **(e) Excessive Force *Monell* Claim against Multnomah County,**
5 **Reese, Glaze, and Morrison**

6 Plaintiff alleges that, in addition to the individual officers who subjected him to
7 excessive force, Multnomah County is liable for “failing to properly train or supervise
8 deputies and nurturing a deviant culture that has existed at the MCSO and MCDC for many
9 years.” (Doc. 38 at 31.) Plaintiff also named the MCSO, Multnomah County Sheriff Mike
10 Reese, and two prison officials who conducted use of force reviews, Glaze and Morrison, as
11 defendants in this failure to train claim.

12 To prevail on a *Monell* claim, Plaintiff must demonstrate that (1) he was deprived of
13 a constitutional right; (2) the municipality had a policy or custom; (3) the policy or custom
14 amounted to deliberate indifference to Plaintiff’s constitutional right; and (4) the policy or
15 custom was the moving force behind the constitutional violation. *Mabe v. San Bernardino*
16 *Cnty., Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101, 1110-11 (9th Cir. 2001).

17 “Policies of omission regarding the supervision of employees . . . can be policies or
18 customs that create . . . liability . . . , but only if the omission reflects a deliberate or conscious
19 choice to countenance the possibility of a constitutional violation.” *See Gibson v. Cnty. of*
20 *Washoe*, 290 F.3d 1175, 1194 (9th Cir. 2002) (quotations omitted).

21 A “decision not to train certain employees about their legal duty to avoid violating
22 citizens’ rights may rise to the level of an official government policy for purposes of § 1983.”
23 *Connick v. Thompson*, 563 U.S. 51, 60 (2011). To support a *Monell* claim for failure to train
24 under § 1983, a plaintiff must allege facts demonstrating that the entity’s failure to train
25 amounts to “deliberate indifference to the rights of persons with whom the [untrained
26 employees] come into contact.” *Connick*, 563 U.S. at 61 (citing *City of Canton v. Harris*,
27 489 U.S. 378, 388 (1989)).
28

1 Deliberate indifference may be shown if there are facts to support that “in light of the
2 duties assigned to specific officers or employees, the need for more or different training is
3 obvious, and the inadequacy so likely to result in violations of constitutional rights, that the
4 policy-makers . . . can reasonably be said to have been deliberately indifferent to the need.”
5 *Clement v. Gomez*, 298 F.3d 898, 905 (9th Cir. 2002) (citing *Canton*, 489 U.S. at 390).

6 Multnomah County may not be sued under § 1983 solely because an injury was
7 allegedly inflicted by one of its employees. *Long v. Cnty. of Los Angeles*, 442 F.3d 1178,
8 1186 (9th Cir. 2006). Instead, a local government entity may be held liable only when
9 execution of its policy or custom inflicts the injury. *Id.* (citing *Monell v. Dep’t of Soc. Servs.*
10 *of New York*, 436 U.S. 658, 690–94 (1978)). Here, Plaintiff acknowledges that Multnomah
11 County’s written use of force policies are not unconstitutional. Rather, Plaintiff alleges that
12 Multnomah County failed to properly train its officers, resulting in the use of excessive force
13 against Plaintiff.

14 To support his contention that Multnomah County and Sheriff Reese “nurtur[ed] a
15 deviant culture” of routine excessive force violations, Plaintiff points to allegations from
16 sixteen prior actions filed in the District of Oregon between 2004 and 2016. None of those
17 suits resulted in liability for excessive force or deliberate indifference on the part of
18 Multnomah County or any employee. One case, arising out of an employment dispute,
19 resulted in a verdict for the plaintiff. *Traxler v. Multnomah Cnty.*, No. 3:06-CV-1450-KI,
20 2008 WL 2704445 (D. Or. July 1, 2008), *aff’d*, 596 F.3d 1007 (9th Cir. 2010) (jury verdict
21 for plaintiff on FMLA claim). The other fifteen were dismissed or settled.⁸

22
23 ⁸ See *Montoya v. Giusto*, No. 3:02-CV-00446-JE, 2004 WL 3030104 (D. Or. Nov. 24,
24 2004) (defendant’s motion for summary judgment granted); *Anthony v. Cnty. of Multnomah*,
25 No. 3:04-CV-00229-MO, 2006 WL 278193 (D. Or. Feb. 3, 2006) (defendant’s motion for
26 summary judgment granted); *Hall v. Multnomah Cnty.*, No. 3:04-CV-00921-JE, 2006 WL
27 1030175 (D. Or. Apr. 17, 2006) (defendant’s motion to dismiss granted); *Hurt v. Multnomah*
28 *Cnty.*, No. 3:06-CV-01024-PK, ECF Doc. 21 (D. Or. Sept. 25, 2006) (dismissed for failure
to file a complaint); *Lucke v. Multnomah Cnty.*, 365 F. App’x 793 (9th Cir. 2010) (district
court properly dismissed employment discrimination and retaliation claims because plaintiff
failed to demonstrate that County’s justifications were a pretext for discrimination); *Crane*
v. Allen, No. 3:09-CV-1303-HZ, 2012 WL 602432 (D. Or. Feb. 22, 2012) (defendant’s

1 Because Plaintiff has provided no evidence of a widespread pattern or practice of the
2 use of excessive force at MCDC, and has introduced no evidence demonstrating that
3 Multnomah County was on notice that its training program was so inadequate that it would
4 cause employees to violate detainees' constitutional rights, summary judgment on Plaintiff's
5 *Monell* claim will be granted.

6 **V. Claims Relating to Medical Care-§ 1983**

7 Defendants argue that Plaintiff received constant care while in Multnomah County
8 custody and cannot show a violation of his constitutional rights. Defendants further argue
9 that Plaintiff has not identified any policy, practice, or custom of County Health that violated
10 his constitutional rights.

11 **A. Facts**

12 Plaintiff went to Oregon Health Sciences University (OHSU) for initial evaluation
13 and treatment and received follow-up care from Multnomah County Corrections Health.
14 (Doc. 46 ¶ 7.) OHSU diagnosed Plaintiff with a fractured left humerus. (*Id.* ¶ 7.) Plaintiff
15 returned to County custody with a sling/swath as a medically adaptive device, along with a
16 plan of care including Norco for pain, icing as needed, and follow-ups with orthopedic
17 consults as needed. (*Id.*) Records indicate that Plaintiff requested or discussed a sarmiento

18
19 motion for summary judgment granted); *Dinan v. Vetter*, No. 3:12-CV-00615-PK, 2013 WL
20 9235331 (D. Or. Apr. 10, 2013) (jury verdict for the defendant, finding that he did not use
21 excessive force); *Evans v. Multnomah Cnty.*, No. 3:07-CV-01532-BR, 2013 WL 1700940
22 (D. Or. Apr. 17, 2013) (defendant's motion for summary judgment granted); *Webster v.*
23 *Aramark Corr. Servs.*, No. 3:14-CV-00652-AC, 2014 WL 7405656 (D. Or. Dec. 23, 2014)
24 (defendant's motions to dismiss granted); *Davis v. Multnomah Cnty.*, No. 3:14-CV-01815-
25 JO, 2016 WL 2905413 (D. Or. May 16, 2016), *aff'd*, 703 F. App'x 524 (9th Cir. 2017)
26 (defendant's motion for summary judgment granted); *Johnson v. Multnomah Cnty. Sheriff's*
27 *Off.*, No. 3:16-CV-00633-HZ, 2016 WL 3212409 (D. Or. June 7, 2016) (*in forma pauperis*
28 complaint dismissed for failure to state a claim); *Harris v. City of Portland Police Dept.*, No.
3:15-CV-00853-HZ, 2017 WL 2378357 (D. Or. June 1, 2017) (after bench trial, court
determined that officers did not use excessive force and found in favor of all defendants);
MacDonald v. Pedro, No. 6:06-CV-00715-AA, ECF Doc. 43 (D. Or. June 1, 2007) (action
settled); *Yeo v. Washington Cnty.*, No. 3:08-CV-01317, ECF Doc. 154 (D. Or. Nov. 17, 2011)
(action settled); *Elliot v. Station*, No. 3:11-CV-01535-ST, ECF Doc. 55 (D. Or. July 26,
2012) (action settled).

1 brace for his arm, which is a hard plastic brace that serves a similar function as does a sling
2 or swath. (*Id.*) Hard braces are not approved medical adaptive devices in County jail
3 facilities. (*Id.*)

4 Plaintiff asserts that his request for a “high bed” where he could sit up with less pain
5 was denied and he slept on the floor and, as a result, on July 7, 2017, Plaintiff fell while
6 trying to get up and hit his left elbow on the toilet, which increased his pain and swelling.
7 (Doc. 38 at 13.)

8 Plaintiff was not returned to the hospital for follow-up after one week as ordered by
9 the hospital physician, but returned after five weeks. (*Id.* at 12-13.) Although Plaintiff was
10 scheduled for medical follow-ups on July 6, 2017 and July 19, 2017, both had to be
11 rescheduled due to court appearances. (*Id.* at 13-14.)

12 Plaintiff asserts that on July 12, 2017, Defendant Physician’s Assistant Holter visited
13 Plaintiff and recommended that Plaintiff be taken back to the hospital in two weeks. (*Id.* at
14 14.) Plaintiff was taken back to the hospital three weeks after her visit. (*Id.*) Holter told
15 Plaintiff to let his arm hang lower in the sling to allow it to heal better, but she did not have
16 any slings with her. (*Id.*)

17 Plaintiff had a follow-up with OHSU orthopedics on August 3, 2017, with his fracture
18 healing appropriately at that time, allowing Plaintiff to continue his rehabilitation with
19 physical therapy. (Doc. 46 ¶ 8.) Plaintiff asserts that at the August 3, 2017 appointment, the
20 doctor tried to give Plaintiff a sarmiento brace, but two non-defendant deputies said Plaintiff
21 could not have it because it contained metal. (Doc. 38 at 15.) Plaintiff was then given a sling
22 that let his arm hang lower at a better angle. (*Id.*)

23 Plaintiff complained of ongoing pain with the arm, and County medical staff
24 prescribed and provided Norco and ibuprofen for pain management. (Doc. 46 ¶ 8.) Plaintiff
25 asserts that on August 11, 2017, an outside pain specialist visited Plaintiff, diagnosed him
26 with nerve pain, and doubled his Gabapentin prescription. (Doc. 38 at 15.) Plaintiff contends
27 that during the five weeks that he was not brought to the hospital for follow-up, pursuant to
28 a policy set either by the MCSO or the Multnomah County Health Department, Plaintiff was

1 given Norco three times a day, but he contends he should have been given oxycodone every
2 6 hours. (*Id.* at 13.)

3 Plaintiff asserts that in October 2017, Plaintiff had an x-ray, which revealed that his
4 bone had not fully fused together, but that a new bone formed at a bad angle. (*Id.* at 16.)

5 **B. Legal Standard**

6 A pretrial detainee has a right under the Due Process Clause of the Fourteenth
7 Amendment to be free from punishment prior to an adjudication of guilt. *Bell v. Wolfish*, 441
8 U.S. 520, 535 (1979). “Pretrial detainees are entitled to ‘adequate food, clothing, shelter,
9 sanitation, medical care, and personal safety.’” *Alvarez-Machain v. United States*, 107 F.3d
10 696, 701 (9th Cir. 1996) (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982)). A
11 pretrial detainee’s claim that he has been denied adequate medical care is evaluated under an
12 objective deliberate indifference standard. *Gordon*, 888 F.3d at 1124-25. A plaintiff must
13 show that the denial, delay, or otherwise unreasonable course of medical care was taken in
14 “reckless disregard” of an excessive risk to the plaintiff’s health or safety. *Id.* at 1125. The
15 elements of a pretrial detainee’s medical care claim against an individual defendant are:

16 (i) the defendant made an intentional decision with respect to the
17 conditions under which the plaintiff was confined; (ii) those
18 conditions put the plaintiff at substantial risk of suffering serious
19 harm; (iii) the defendant did not take reasonable available
20 measures to abate that risk, even though a reasonable official in
21 the circumstances would have appreciated the high degree of risk
22 involved—making the consequences of the defendant’s conduct
23 obvious; and (iv) by not taking such measures, the defendant
24 caused the plaintiff’s injuries.

25 *Id.*

26 Whether the conditions and conduct rise to the level of a constitutional violation is an
27 objective assessment that turns on the facts and circumstances of each particular case. *Id.*;
28 *Hearns v. Terhune*, 413 F.3d 1036, 1042 (9th Cir. 2005). However, “a de minimis level of
imposition” is insufficient. *Bell*, 441 U.S. at 539 n.21. In addition, the “‘mere lack of due
care by a state official’ does not deprive an individual of life, liberty, or property under the
Fourteenth Amendment.” *Castro*, 833 F.3d at 1071 (quoting *Daniels v. Williams*, 474 U.S.

1 327, 330-31 (1986)). Thus, a plaintiff must “prove more than negligence but less than
2 subjective intent—something akin to reckless disregard.” *Id.*

3 **C. Discussion**

4 **1. Defendant Holter**

5 Plaintiff alleges that Holter visited him on one occasion and told him he should hold
6 his arm differently and that a different sling would help, but that Holter did not have a
7 different sling with her. These allegations do not show that Holter recognized a substantial
8 risk of Plaintiff suffering serious harm or that by not having a sling with her, Holter failed to
9 appreciate a high degree of risk to Plaintiff or failed to act to abate such a risk. Accordingly,
10 summary judgment will be granted in favor of Defendant Holter.

11 **2. Defendants Seale and Platas**

12 Plaintiff sole factual allegation against Seale and Platas is that these Defendants are
13 medical technicians who pass out pills, but that they could not give him oxycodone due to
14 the MCSO’s policy of not allowing any pain medication that is stronger than Norco. Plaintiff
15 does not allege that these Defendants had any authority to prescribe him oxycodone or that
16 they were responsible for the MCSO’s policy regarding oxycodone, and Plaintiff has
17 introduced no evidence supporting a claim against these Defendants at this stage of the
18 proceedings. Accordingly, Plaintiff fails to state a claim upon which relief could be granted
19 against Seale and Platas in his First Amended Complaint, and summary judgment will be
20 granted in favor of these Defendants.

21 **3. Defendants MCSO and Reese in his individual capacity**

22 Defendants assert that MCSO is an improper Defendant because the MCSO is not a
23 person under § 1983. Defendants also assert that because Plaintiff has not alleged any
24 individual involvement by Sheriff Reese, any purported individual-capacity claim against
25 Reese should be dismissed. Because Multnomah County is the real party in interest to
26 Plaintiff’s § 1983 *Monell* claim, the MCSO will be dismissed. *See, e.g., Lukens v. Portland*
27 *Police Bureau*, No. 3:11-CV-00827-MO, 2011 WL 5999376, at *2 (D. Or. Nov. 29, 2011)
28 (“the Portland Police Bureau is not a separate entity from the City of Portland and is not

1 amenable to suit. It is merely the vehicle through which the city fulfills its police functions.”);
2 *see* Fed. R. Civ. P. 17; *see also Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (“As long
3 as the government entity receives notice and an opportunity to respond, an official-capacity
4 suit is, in all respects other than name, to be treated as a suit against the entity. . . . It is *not*
5 a suit against the official personally, for the real party in interest is the entity.”) (internal
6 citation omitted)).

7 Defendant Reese will be dismissed in his individual capacity because Plaintiff has not
8 alleged any *facts* to support an individual capacity claim against Reese. *See Rizzo v. Goode*,
9 423 U.S. 362, 371-72, 377 (1976) (To state a valid claim under § 1983, plaintiffs must allege
10 that they suffered a specific injury as a result of specific conduct of a defendant and show an
11 affirmative link between the injury and the conduct of that defendant.); *Iqbal*, 556 U.S. at
12 676 (“Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must
13 plead that each Government-official defendant, through the official’s own individual actions,
14 has violated the Constitution.”).

15 **4. Defendants Multnomah County, MCHD and Defendant Reese in**
16 **his official capacity**

17 Plaintiff alleges that Multnomah County and MCHD maintain policies of not allowing
18 narcotics, denying a raised bed that resulted in Plaintiff’s fall, failed to institute procedures
19 that would ensure that medical appointments do not interfere with court dates, which caused
20 Plaintiff to miss two follow-up appointments, and maintain a policy of not allowing Plaintiff
21 a sarmiento brace.

22 Defendants assert that they are entitled to summary judgment because Plaintiff
23 received constant care while in Multnomah County custody and no policies violated
24 Plaintiff’s constitutional rights.

25 With regard to Plaintiff’s claims that the policy of not allowing narcotics violated his
26 constitutional rights, the record before the Court shows that Plaintiff’s pain was controlled
27 by Norco until he began to be weaned off Norco. On his discharge from the hospital on June
28 28, 2017, the doctor recommended that Plaintiff be given oxycodone for pain. (Doc. 2-2 at
18.) On June 29, 2017, Plaintiff was seen by RN Woods complaining of pain and she

1 prescribed Norco; later that day Plaintiff reported that Norco was managing his pain and his
2 twitching had stopped. (Doc. 2-2 at 31-32.) On July 7, 2017, Plaintiff again saw RN Woods
3 and she noted that his primary concern was that he be able to continue Norco until he was
4 seen by OHSU, and she ordered that his Norco be extended. (*Id.* at 33.) On July 13, 2017,
5 Plaintiff saw Seale, and Seale noted that Plaintiff had been seen by a pain specialist yesterday
6 and continued Plaintiff's Norco for two weeks. (*Id.* at 34.) On August 3, 2017, after
7 Plaintiff's hospital follow-up, RN Dodd noted that the hospital stated it was "ok for ibuprofen
8 to augment narcotics," and stated that the plan was to taper Plaintiff off Norco starting
9 August 4, 2017 and add Ibuprofen. (*Id.* at 36.) On August 8, 2017, Platas noted that Plaintiff's
10 last day of Norco would be August 12, 2017, but that Plaintiff was given acetaminophen,
11 ibuprofen, and previously prescribed Gabapentin. (*Id.* at 37.) On August 11, 2017, Plaintiff
12 was seen by NP Lucas, who noted that Plaintiff claimed ibuprofen was ineffective, but that
13 Naproxen had been effective in the past. (*Id.* at 38.) NP Lucas decided to discontinue Tylenol
14 and re-prescribe Norco. (*Id.* at 38-41.)

15 There is no evidence in this record that even if Defendants had a policy of not allowing
16 oxycodone into the MCDC, that such policy caused Plaintiff serious harm or that the decision
17 to place him on a different pain reliever was a de facto violation of his constitutional rights.
18 Rather, the record before the Court shows that Plaintiff reported to his medical providers that
19 Norco was controlling his pain and he did not complain about pain on Norco until the
20 decision to wean him off Norco. Accordingly, Plaintiff cannot maintain *Monell* claims
21 against Defendants; the record contradicts Plaintiff's allegation that MCSO employees
22 disregarded a serious risk to his health by choosing to prescribe him Norco instead of
23 oxycodone.

24 With regard to his claim that there was a policy of denying a raised bed that resulted
25 in his fall, Plaintiff has introduced no evidence suggesting that the decision to deny him a
26 raised bed was the result of a policy, practice, or custom of Multnomah County or that raised
27 beds are categorically denied to detainees pursuant to a policy, practice or custom of
28 Multnomah County.

1 With regard to Plaintiff's claim that he was prevented from attending follow-ups due
2 to a custom of not ensuring that medical appointments do not conflict with court dates,
3 Defendants did not directly address this issue in their Motion. The evidence shows that this
4 happened to Plaintiff on two occasions, and it is possible an expert could testify.⁹ Given the
5 lack of briefing, facts, and the possibility that expert testimony could aid this claim, the Court
6 will deny summary judgment on Plaintiff's *Monell* claim regarding of custom of failing to
7 ensure detainees receive adequate medical care due to scheduling conflicts.

8 Likewise, Defendants acknowledge that Plaintiff was denied a sarmiento brace, but
9 only cite to their expert's testimony to support their decision. They do not address Plaintiff's
10 contention that his bone did not heal properly and do not discuss whether this would have
11 still occurred even if Plaintiff was given a sarmiento brace. Given the lack of briefing, facts,
12 and the possibility that expert testimony could aid this claim, the Court will deny summary
13 judgment on Plaintiff's *Monell* claim regarding the policy of not allowing hard braces into
14 the jail.

15 **VI. State Law Assault and Battery**

16 Plaintiff alleges state law assault and battery claims against Multnomah County,
17 MCSO, Mike Reese, Timothy Barker, Matthew Ingram, Phillip Hubert, Paul Simpson, David
18 Kovachevich, Timothy Moore, Gary Glaze, and Kurtiss Morrison.

19 In Oregon, "an assault is an intentional attempt to do violence to the person of another
20 coupled with present ability to carry the intention into effect," and battery is a voluntary act
21 that intentionally caused harmful or offensive contact with another." *Cook v. Kinzua Pine*
22 *Mills Co.*, 207 Or. 34, 48, 293 P.2d 717, 723 (1956). Here, there are no factual allegations
23 supporting Plaintiff's assault and battery claims against Defendants Reese, Hubert, Simpson,
24 Kovachevich, Moore, Glaze or Morrison, and Plaintiff's state law claims against those
25 Defendants will be dismissed.

26
27
28 ⁹ As discussed more fully below, the Parties agreed that summary judgment would
not be granted if expert testimony is required until the Parties have been given an opportunity
to disclose experts.

1 For the same reasons discussed with regard to the Court’s analysis of excessive force,
2 there are disputed issues of material fact that preclude summary judgment in favor of
3 Defendants Timothy Barker and Ingram as to the state law assault and battery claims.

4 Defendants correctly assert that Plaintiff’s sole cause of action for state law tort claims
5 is against Multnomah County pursuant to Oregon Revised Statutes § 30.265(2). That statute
6 provides:

7 The sole cause of action for a tort committed by officers,
8 employees or agents of a public body acting within the scope of
9 their employment or duties and eligible for representation and
10 indemnification under ORS 30.285 or 30.287 is an action under
11 ORS 30.260 to 30.300. The remedy provided by ORS 30.260 to
12 30.300 is exclusive of any other action against any such officer,
13 employee or agent of a public body whose act or omission within
14 the scope of the officer’s, employee’s or agent’s employment or
15 duties gives rise to the action. No other form of civil action is
16 permitted.

17 Or. Rev. Stat. Ann. § 30.265. Accordingly, Plaintiffs tort claims for assault and battery are
18 properly maintained solely against Multnomah County, and all other Defendants to the
19 assault and battery claims will be dismissed.

20 Multnomah County asserts that because the use of force was justified, Plaintiff cannot
21 maintain the assault and battery claim, but the Court has already found there are disputed
22 issues of material fact precluding summary judgment on this basis.

23 **VII. State Law Negligence**

24 Plaintiff alleges negligence claims based on deficiencies in medical care against
25 Defendants Multnomah County, MCSO, Mike Reese, Timothy Barker, Matthew Ingram,
26 Wendy Muth, Phillip Hubert, Paul Simpson, Uwe Pemberton, Timothy Moore, Gary Glaze,
27 Kurtiss Morrison, David Kovachevich, Erica Barker, and Brook Holter.

28 Defendants assert that in order to prevail on a medical negligence claim under Oregon
law, Plaintiff must prove through expert testimony that the County medical staff did not meet
the applicable standard of care exercised by a reasonably careful medical professional with
like training and expertise in the community. (Doc. 40 at 26.) This argument, however, is
precluded by the Parties’ agreement at the Scheduling Conference that if Plaintiff required

1 expert testimony to prove a claim, Plaintiff would be given an opportunity to find an expert.
2 (See Doc. 53 at 3, 19 (noting that the Parties requested bifurcated discovery and after
3 significant discussion finding that “[i]f the parties don’t want to do expert disclosure initially,
4 then the summary judgment motion should only pertain to issues that don’t address—or don’t
5 require expert disclosure”). Accordingly, the Motion for Summary Judgment will be denied as
6 to Plaintiff’s state law negligence claims. However, because Defendant Multnomah County
7 is the proper Defendant to these claims, the Court will dismiss all other Defendants from
8 these claims. See Or. Rev. Stat. Ann. § 30.265.

9 **VIII. State Law Defamation**

10 Plaintiff alleges state law defamation claims against Defendants Multnomah County,
11 MCSO, Mike Reese, Timothy Barker, Matthew Ingram, Wendy Muth, Phillip Hubert, Paul
12 Simpson, Uwe Pemberton, Timothy Moore, Gary Glaze, Kurtiss Morrison, David
13 Kovachevich, Erica Barker, and Brook Holter. Plaintiff alleges that every allegation
14 Defendants made against him, including that he threatened to put out a “hit” on Erica Barker,
15 tried to punch Ingram, elbowed Barker, kicked Muth, ground the chips he threw into powder
16 form, and resisted after leaving the cell on the fifth floor, were false and were told to
17 Detective Bybee resulting in defamation of Plaintiff.

18 Defendants argue that Plaintiff’s defamation claims are barred because Oregon
19 recognizes an absolute privilege for statements made in furtherance of public duties and
20 because Plaintiff did not bring these claims within the one-year statute of limitations.
21 Defendants assert that because the alleged statements were generated in the exercise of the
22 MCSO staff’s work as the corrections department for the County, the statements are
23 privileged and cannot be defamation as a matter of law.

24 In his First Amended Complaint, Plaintiff alleges that Defendants gave false
25 statements to Detective Bybee resulting in defamation, and Plaintiff cites to Detective
26 Bybee’s report dated June 28, 2017. Oregon’s statute of limitations for defamation is one
27 year. Or. Rev. Stat. § 12-120(2). Plaintiff filed this action on June 25, 2019. Accordingly,
28 Plaintiff’s defamation claims are barred by the one-year statute of limitations, and summary

1 judgment as to the defamation claims will be granted in favor of Defendants.¹⁰

2 **IT IS ORDERED** that Defendants' Motion for Summary Judgment (Doc. 40) is
3 **granted in part and denied in part** as follows:

4 (1) The Motion is **denied** as to:

5 (a) Plaintiff's Fourteenth Amendment excessive force claim alleged
6 against Defendants Ingram and Barker based on their conduct on the fourth floor as discussed
7 herein;

8 (b) Plaintiff's Fourteenth Amendment *Monell* claims regarding a custom of
9 failing to ensure detainees receive adequate medical care due to scheduling conflicts and the
10 policy of not allowing hard braces into the jail, asserted against Multnomah County, the
11 MCHD, and Reese in his official capacity;

12 (c) Plaintiff's state law assault and battery claim against Multnomah
13 County based on Barker and Ingram's conduct on fourth floor as discussed herein; and

14 (d) Plaintiff's state law negligence claim against Multnomah County.

15 (2) The Motion is otherwise **granted**.

16 (3) Defendants Multnomah County Sheriff's Office, Mike Reese, solely in his
17 individual capacity,¹¹ Muth, Hubert, Simpson, Pemberton, Moore, Glaze, Morrison,
18 Kovachevich, Erica Barker, Seale, Holter, Platas, and Dodd are **dismissed from this action**.

19 (4) All claims with the exception of the claims listed in (1) above are **dismissed**
20 **from this action**.

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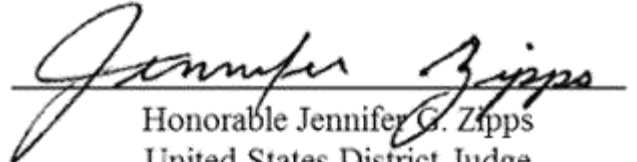
25 //

26 ¹⁰ Because the Court finds that the defamation claims are barred by the statute of
27 limitations, the Court need not determine whether Oregon's absolute privilege would also
28 bar Plaintiff's defamation claims.

¹¹ Reese remains a Defendant solely in his official capacity.

1 (5) The parties shall meet to discuss deadlines for conducting expert discovery,
2 including disclosure of expert reports, and any other deadlines necessary for resolution of
3 this action. The parties shall submit a joint scheduling proposal addressing these issues
4 within twenty-one (21) days of the date of entry of this Order.

5 Dated this 17th day of September, 2021.

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9 Honorable Jennifer G. Zipp
10 United States District Judge
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