UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LAURA MIRELES,	§	
Plaintiff,	§	Civil Action No. 13-CV-00197 (ASH)
v.	§	
UNITED STATES CUSTOMS AND BORDER PROTECTION AGENT DANIEL RIANO in his Individual Capacity, and THE UNITED STATES OF AMERICA,	§	
Defendants.	§	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

This case challenges the wanton actions of Defendant Daniel Riano, a United States Customs and Border Protection officer, who violently grabbed Plaintiff, threw and pinned her to the ground, and forcibly handcuffed and arrested her without any justification, during a vehicle search. Plaintiff Laura Mireles, a petite woman with congenital malformations of her hands and feet, suffered numerous physical injuries and significant psychological harm as a result. Because Agent Riano unreasonably arrested and seized Ms. Mireles and employed excessive force in contravention of clearly established law, he is not entitled to qualified immunity. Moreover, the customs-duty exception does not bar Ms. Mireles's claims because the claims do not involve property damage. Accordingly, Defendants' Motion to Dismiss should be denied.

STATEMENT OF FACTS

Plaintiff Laura Mireles ("Ms. Mireles") is a United States Citizen. Complaint, Dkt. No. 1, ¶ 10. Ms. Mireles has a visually apparent congenital malformation of her hands and legs, for which she has undergone various surgeries. *Id*. She keeps a disabled parking placard in her car that is visible from inside or outside of the car. *Id*. She is approximately 5'1'' tall. *Id*.

Since 2005, Ms. Mireles has been employed by Brady's Free Duty ("Brady's"), a store located on the United States side of the Veterans International Bridge at Los Tomates ("the Bridge") in Brownsville, Texas. Compl., ¶ 11. U.S. Customs and Border Protection ("CBP") operates a port of entry on the Bridge, where it inspects vehicles entering the United States from Mexico. *Id*. ¶ 12. Because of Brady's location on the foot of the Bridge, each time Ms. Mireles leaves Brady's by vehicle to any location in the U.S., she must briefly drive toward Mexico, make a U-turn, and pass through the CBP inspection point at the Bridge. *Id*. ¶ 13. Ms. Mireles is a participant in CBP's Secure Electronic Network for Travelers Rapid Inspection ("SENTRI")

program. Compl. ¶¶ 16–17; Answer, Dkt. No. 12, ¶¶ 16–17. She has a valid SENTRI sticker clearly visible on her vehicle. Compl. ¶ 17; Answer ¶ 17.

On November 5, 2012, at about 8:00 p.m., Ms. Mireles left Brady's by car to pick up keys from a coworker on the Mexican side of the Bridge. Compl. ¶ 15. She entered Mexico via the Bridge, picked up the keys from a co-worker, and immediately headed back to work. *Id*. Ms. Mireles returned to the United States using a lane dedicated for SENTRI participants. Compl. ¶ 16; Answer ¶ 16. She presented herself for inspection before the CBP agent staffing the SENTRI lane, and he admitted her into the U.S. after inspection. Compl. ¶ 18; Answer ¶ 18. Ms. Mireles asked the agent for permission to use a special lane, known as the return lane, to head back to Brady's, and the agent gave her permission to do so, authorizing her to exit the port of entry without further inspection. Compl. ¶ 19; Answer ¶ 19. Ms. Mireles left the inspection point using the return lane and returned to Brady's. Compl. ¶ 20; Answer ¶ 20.

Ms. Mireles spent approximately ten to fifteen minutes closing and locking the store. Compl. ¶ 21. As she and her coworker got in their cars and began to leave, Defendant Riano and another CBP officer named Canaba approached in a patrol car. Compl. ¶¶ 21–22; Answer ¶ 21–22. Riano exited the patrol car and asked Ms. Mireles why she had not passed through the X-ray machines on the Bridge. Compl. ¶ 23; Answer ¶ 23. She responded that she was given permission to use the return lane by the agent in the SENTRI lane. Compl. ¶ 23; Answer ¶ 23. Riano radioed the SENTRI agent and confirmed that Ms. Mireles had been permitted to use the return lane. Compl. ¶ 24. Nevertheless, Riano informed Ms. Mireles that he and Canaba would search her and her coworker's vehicles. Compl. ¶ 25; Answer ¶ 25. Ms. Mireles agreed, exited her vehicle, and stood several feet away from the vehicle on the driver's side. Compl. ¶¶ 25–26. She was not carrying anything as she exited her car. *Id*. ¶ 26

Riano searched the interior and trunk of Ms. Mireles's vehicle and found no contraband or weapons. Compl. ¶¶ 27–28; Answer ¶¶ 27–28. Riano then searched Ms. Mireles's purse, which was in the front passenger seat, while standing on the front passenger side of her car. Compl. ¶ 30. Ms. Mireles took a few steps forward to have a better view of her purse, but remained on the driver's side of the car, several feet away from Riano. *Id*. Riano told her to move away, and she asked him if he was searching her purse. *Id*. ¶ 32. Without answering, Riano told her to move away, and Ms. Mireles responded that she only wanted to watch. *Id*.

Riano suddenly walked from the passenger side of the car to the driver's side, toward Ms. Mireles, and forcibly grabbed her and threw her to the ground with such force that her jeans ripped at the knee and her flesh tore. *Id*. ¶¶ 34–36. Riano forcibly pinned her face-down on the ground and handcuffed her, even though she did not physically resist him at any point. *Id*. ¶¶ 38–39. Canaba picked Ms. Mireles up and put her into the back of the patrol car where she was forced to remain, handcuffed. Compl. ¶ 44. Riano and Canaba transported Ms. Mireles, still handcuffed, to the CBP office on the Bridge. Compl. ¶ 47; Answer ¶ 47. She remained in the patrol car, with Agent Riano in the vicinity, until approximately 10:00 p.m. Compl. ¶ 48. After CBP officers and paramedics tried and failed to remove her handcuffs, which had rubbed her wrists raw and caused wounds, firefighters were called to remove them. Compl. ¶¶ 51–52. After approximately two hours in custody, Ms. Mireles was permitted to leave, with no charges filed. Compl. ¶ 53; Answer ¶ 53. As a result of the incident, Ms. Mireles suffered physical injuries as well as significant mental anguish. Compl. ¶¶ 59–61.

ARGUMENT

Defendants move to dismiss this case based on qualified immunity and lack of subject matter jurisdiction. As explained below, this motion fails on both grounds. The doctrine of

qualified immunity "protects public officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hernandez v. United States*, 11-50792, __ F.3d __, 2014 WL 2932598 (5th Cir. 2014) (quoting *Brown v. Strain*, 663 F.3d 245, 249 (5th Cir. 2011). In assessing qualified immunity, the court must determine "(1) whether the facts that the plaintiff has alleged make out a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the defendant's alleged misconduct." *Id.* (quoting *Ramirez v. Martinez*, 716 F.3d 369, 375 (5th Cir. 2013).

Defendants argue that "Plaintiff has failed to adduce any evidence that would create a triable issue of fact with regard to whether Defendant Riano violated Plaintiff's clearly established Fourth Amendment rights," Defendants' Motion to Dismiss Complaint, Dkt. No. 22 ("Def. Mot.") at 17, but that is not the applicable standard here. On a motion to dismiss, the court takes material allegations of the complaint as true, and liberally construes the complaint in favor of plaintiff. *Voter Info. Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 210 (5th Cir. 1980).

I. THE COURT SHOULD DENY QUALIFIED IMMUNITY ON MS. MIRELES' EXCESSIVE FORCE CLAIM.

A. The Facts Alleged In the Complaint Demonstrate That Defendant Used Excessive Force When He Lunged at Ms. Mireles, Threw Her to the Ground, and Handcuffed her With Force.

This Court should deny qualified immunity to Defendant Riano because Ms. Mireles pled facts demonstrating all the elements of a successful excessive force claim. In order to succeed on an excessive force claim under the Fourth Amendment, a plaintiff must show that she suffered "(1) an injury which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." *Ikerd*

v. Blair, 101 F.3d 430, 433–34 (5th Cir. 1996). Determining whether the force used is "reasonable" under the Fourth Amendment requires a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal citation omitted). The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene and on the totality of the circumstances. *Id.* at 396–97. *Graham v. Connor* instructs courts to analyze key factors, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

Ms. Mireles has established all three elements of the claim. She pled that she suffered physical injuries to her arms, legs, and other parts of her body and that the injuries directly resulted from Defendant Riano's forcible take-down and handcuffing. Compl. ¶¶ 37, 52, 59–61. She also pled that Riano's use of force under the circumstances was unreasonable and unwarranted, in violation of the Fourth Amendment to the U.S. Constitution. *Id.* ¶ 63, 67.

While Defendants justify the force Defendant Riano used on Ms. Mireles on the grounds that Ms. Mireles was uncooperative and obstructionist, Def. Mot. 24, the Complaint shows the opposite: she complied with the order to search her car, stood at a distance, and did not interfere. Compl. ¶ 26, 29, 31. As alleged in the Complaint, every factor the Supreme Court identifies as relevant to the excessive force analysis in *Graham* weighs in Ms. Mireles's favor.

The first *Graham* factor, the severity of the crime at issue, weighs in favor of Ms. Mireles. First, when Defendant Riano initiated the search, he had already confirmed with CBP that Ms. Mireles had not absconded from the port of entry, and that the SENTRI agent had given

her permission to use a different return lane. Compl. ¶ 24. Second, Ms. Mireles was a trusted traveler in CBP's SENTRI program for frequent border crossers, with no criminal history. *Id*. ¶ 17. Third, when Defendant Riano forcibly grabbed Ms. Mireles and threw her to the ground, he had already searched the interior and trunk of her vehicle and had found no contraband or weapons. *Id*. ¶ 27. Fourth, at no time did Ms. Mireles physically resist or threaten Riano or pose any danger to him and Canaba. *Id*. ¶ 31, 33. Therefore, Riano's use of force was completely unconnected to any suspected criminal activity, much less suspicion of a serious crime. *Graham*, 490 U.S. at 396; *see Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (finding that a minor traffic violation weighed against the level of force used by Defendant).

The second *Graham* factor, "whether the suspect poses an immediate threat to the safety of the officers or others," also weighs in Ms. Mireles's favor. *Graham*, 490 U.S. at 396. At no time did she pose a threat to the safety of the officers. As explained above, Ms. Mireles is a petite disabled woman who is a trusted SENTRI traveler, and who did not evade the port of entry inspection—facts that Riano verified before the search. At the time that Riano forcibly threw Ms. Mireles to the ground, he had already confirmed there were no weapons in the car's interior and trunk. Compl. ¶¶ 27–28. Riano had possession and control of her purse, and she was standing approximately fifteen feet away. Compl. ¶¶ 30–31. Moreover, at the moment that Riano lunged at Ms. Mireles, her car was interposed between her and Riano, preventing her from making any hypothetical advance upon him. Compl. ¶¶ 30–31. Another officer, Christopher Canaba, was also on the scene to provide back-up. Compl. ¶¶ 21–22. At no time did Ms. Mireles advance on, or threaten, Riano or Canaba, and she cooperated with the baseless search of her vehicle. Compl. ¶ 33, 39. Finally, Ms. Mireles's obvious disability and the discrepancy in size between her and Defendant further show that she posed no threat: she is barely five feet tall and has an apparent

malformation of her hands and legs, while Riano is tall and weighs an estimated 200 pounds. Compl ¶ 10, 40. Thus, on the face of the Complaint, Ms. Mireles posed no threat of harm whatsoever to Riano or Canaba at the moment that Riano used force on her. *See Newman v. Guedry*, 703 F.3d 757, 762–64 (5th Cir. 2012) (holding police officers' use of force excessive because, *inter alia*, plaintiff posed no threat to officers or others).

Defendants argue that traffic stops as a general matter can be dangerous for police, citing numerous cases. Def. Mot. 23. This alone is insufficient to warrant the use of force. The Fifth Circuit instructs that a court must determine, based on the circumstances of each particular case, whether plaintiff's behavior posed a threat to law enforcement officers. *See Newman*, 703 F.3d at 762–63 (acknowledging that traffic stops may be dangerous encounters but concluding that the particular facts of the encounter did not justify the use of force)*; Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (same).

The third *Graham* factor, concerning whether the suspect actively resisted arrest or attempted to evade arrest, also weighs in favor of Plaintiff. *Graham*, 490 U.S. at 396. At no time did Ms. Mireles resist arrest or attempt to flee. Compl. ¶ 39. Defendants argue that the use of force was justified because Ms. Mireles did not immediately move back when told to do so by Riano, and failure to comply amounted to resistance. Def. Mot. 23. The Fifth Circuit makes clear, however, that mere failure to comply with an officer's instructions, especially when the plaintiff carries no weapon and poses no danger to the officer, does not amount to resistance warranting the use of force. *Deville*, 567 F.3d at 168 (plaintiff's repeated refusal to exit car did not warrant physical force where officer "engaged in very little, if any, negotiation" before using force, and where force used was disproportionate to need); *Newman*, 703 F.3d at 763 (finding officers' use of force against plaintiff excessive where plaintiff failed to comply with officers'

instructions and where officers failed to negotiate or use less aggressive techniques). Thus, all the *Graham* factors favor Ms. Mireles.

Based on the totality of circumstances, Riano's use of force was also objectively unreasonable under the circumstances because the force used was disproportionate to the supposed need for force. *Ikerd*, 101 F.3d at 434 (the amount of force permissible depends on the context in which it is deployed); *Newman*, 703 F.3d at 763 ("officers still must assess the relationship between the need and the amount of force used")(internal citation omitted). Without warning, negotiation, use of other de-escalation techniques, or use of less forceful techniques such as an escort hold, Riano threw Ms. Mireles to the ground with such force that her jeans ripped open at the knee and her flesh tore, Compl. ¶ 36, pinned her down, and forcibly handcuffed her, causing her physical injuries. *Id.* ¶¶ 37, 38, 40, 52. On the facts pled, any force, much less this level of force, was unreasonable.

The Fifth Circuit has found use of force to be excessive under similar facts. *See Martinez-Aguero v. Gonzalez*, 459 F.3d 618, at 626 (5th Cir. 2006) (holding use of force excessive where plaintiff was "entirely docile and compliant" with the exception of a stray remark not intended for the border patrol officer to hear); *Ikerd*, 101 F.3d at 435 (holding an officer's forcible grabbing of a ten-year-old's arm, after she refused to answer the officer's question, to be excessive); *Bush v. Strain*, 513 F.3d 492, 501 (5th Cir. 2008) (holding use of force excessive where officer used force after plaintiff was handcuffed and restrained); *Deville*, 567 F.3d at 167–168 (holding officer's use of force excessive despite plaintiff's repeated refusal to exit car); *Newman*, 703 F.3d at 762 (holding officers' actions in pushing plaintiff onto a car and striking him to be excessive after plaintiff complied with officers' orders and was not resisting or

attempting to flee). The court should hold that Ms. Mireles has adequately pled an excessive force claim.

B. Ms. Mireles's Right to Be Free from Excessive Force in These Circumstances Was Clearly Established.

Ms. Mireles'right to be free from Riano's use of excessive force was clearly established at the time of the incident. A right is clearly established when "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Ramirez v. Martinez*, 716 F.3d 369, 375 (5th Cir. 2013) (internal citation omitted). The law can be clearly established despite factual distinctions with precedent, so long as prior decisions gave "reasonable warning" that the conduct at issue violated constitutional rights. *Hope v. Pelzer*, 536 U.S. 730, 740 (2002) (internal citations omitted); *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc).

At the time of the incident at issue, the Fifth Circuit already recognized a "clearly established right to be free from excessive force." *Deville*, 567 F.3d at 169; *Bush*, 513 F.3d at 502. Fifth Circuit cases also gave Defendant Riano "reasonable warning" that an officer may not use disproportionate physical force toward a compliant, non-resistant suspect, including in the course of a search or seizure. In *Ikerd v. Blair*, the Fifth Circuit held that an approximately three-hundred pound officer used unreasonable force when he "jerked [a ten year-old girl] out of her chair by the arm" and dragged her to a room. 101 F.3d at 435. The girl had previously endured an operation in the arm the officer grabbed and subsequent to the incident suffered additional pain. *Id*. at 433. In *Deville*, officers' forcible extraction of a suspect from a vehicle and subsequent handcuffing were held to be excessive even though the plaintiff had refused to exit the vehicle several times because she presented no danger and was not attempting to flee. 567 F.3d 156 at 169. In *Bush*, an officer's actions in slamming a suspect's face against a vehicle during arrest was held to be excessive since the plaintiff was not physically resisting or

attempting to flee. 513 F.3d at 502. Accordingly, Riano plainly had "fair warning" and qualified immunity should be denied.

II. THE COURT SHOULD DENY QUALIFIED IMMUNITY ON MS. MIRELES'S CLAIM OF UNREASONABLE SEIZURE.

A. The Facts Alleged in the Complaint Demonstrate That Defendant's Forcible Seizure of Ms. Mireles Was Unreasonable Under the Circumstances.

The court should also deny qualified immunity to Defendant on Ms. Mireles's claim of unreasonable seizure because Ms. Mireles pled facts establishing a violation of her Fourth Amendment right to be free of unreasonable seizure of her person. *Hernandez*, 2014 WL 2932598. To be clear, Ms. Mireles does not challenge the initial brief detention required for Riano to search her vehicle. Although Riano's search of her vehicle was baseless, as explained above, Ms. Mireles does not challenge the search as unconstitutional. Rather, she challenges the legality of her forcible physical seizure, starting with when Riano forcibly grabbed Ms. Mireles, pinned her to the ground, and handcuffed her. Compl. ¶¶ 35–38. She also challenges her continued seizure: being placed in the patrol car, transported in handcuffs to the CBP station, and made to wait in the patrol car at the CBP station for approximately two hours. *Id.* ¶ 44, 53.

To state a claim for unreasonable seizure and arrest in violation of the Fourth Amendment, a plaintiff must demonstrate that 1) she was seized within the meaning of the Fourth Amendment and that 2) such seizure was unreasonable. *Brower v. County of Inyo*, 489 U.S. 593, 599, (1989). A person is "seized" by a law enforcement officer "when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement, through means intentionally applied." *Brendlin v. California*, 551 U.S. 249, 254, (2007) (internal citations omitted).

A warrantless arrest is a seizure that is reasonable under the Fourth Amendment only if it is supported by probable cause that the individual arrested was engaged in criminal activity. *U.S. v Ho*, 94 F.3d 932, 935 (5th Cir. 1996). The Fifth Circuit has held that "[p]robable cause . . . exists when the totality of facts and circumstances within a police officer's knowledge *at the moment of arrest* are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Id*. at 395–96 (emphasis added).

Even without a formal arrest, the Supreme Court and Fifth Circuit hold that a seizure can rise to the level of an arrest and require probable cause when "a reasonable person in the suspect's position would understand the situation to be a restraint on freedom of the kind that the law typically associates with a formal arrest." *Freeman v. Gore*, 483 F.3d 404, 413 (5th Cir. 2007); *Michigan v. Summers*, 452 U.S. 692, 700 (1981) (recognizing "the general rule that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause."). The Fifth Circuit also recognizes that a seizure amounts to an arrest when a person is handcuffed in the absence of a threat to officer safety and where a person is transported from the scene of the stop to headquarters. *United States v. Thomas*, 787 F. Supp. 663, 681–82 (E.D. Tex. 1992) *aff'd*, 983 F.2d 1062 (5th Cir. 1993) (acknowledging that handcuffing a person where there is no threat to officer safety is a seizure amounting to arrest); *United States v. Martinez*, 808 F.2d 1050, 1055 (5th Cir. 1987) (affirming that transporting a person from the scene of the stop is a seizure amounting to arrest); *United States v. Tookes*, 633 F.2d 712, 715 (5th Cir. 1980) (finding that arrest occurred where police detained a person on the ground, frisked and search him and removed him by car from the scene of the stop); *see also Kaupp v. Texas*, 538 U.S. 626, 630 (2003) (concluding that transportation of an individual from his home to the station was "sufficiently like arrest").

Here, Ms. Mireles was arrested. Although CBP did not charge Ms. Mireles with any crime, Riano and Canaba's seizure of her had the essential attributes of an arrest. Riano used physical force to pin Ms. Mireles to the ground and handcuffed her. She was placed her in the CBP patrol car and transported—in handcuffs—to the CBP office, where she was made to wait in the patrol car for two hours. Compl. ¶¶ 44, 48. A reasonable person would not believe she was free to leave under these circumstances. On the facts pled in the Complaint, Ms. Mireles's seizure amounted to an arrest, for which probable cause was required. *Freeman*, 483 F.3d at 413.

Even if the court finds that Ms. Mireles's seizure fell short of an arrest, it must still be supported by reasonable suspicion. In certain circumstances, a brief seizure of a person, such as for a traffic stop, may be reasonable even in the absence of probable cause, if it is supported by reasonable suspicion that the person was engaging in criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968). The Fifth Circuit defines reasonable suspicion as "specific and articulable facts which, taken together with rational inferences from those facts, that reasonably warrant suspicion that the vehicle's occupant is engaged in criminal activity." *United States v. Hernandez-Mandujano*, 721 F.3d 345, 348 (5th Cir. 2013).

In this case, Defendants lacked any suspicion for Ms. Mireles's seizure. As previously argued, Riano knew before he initiated the search that Ms. Mireles was a trusted traveler who had not absconded from the port of entry. Compl. ¶¶ 17, 24–25. Before he began to handcuff her, Riano knew that her car contained no contraband or weapons. Compl. ¶¶ 27–28. Ms. Mireles did not resist or interfere. Compl. ¶¶ 29, 39. The facts in the Complaint suggest no criminal activity whatsoever. Thus, Riano's actions amounted to an unreasonable seizure.

Defendants erroneously argue that Ms. Mireles's seizure did not require any suspicion because the search pursuant to which she was detained was a border search. Def. Mot. 22. In

fact, the search of Ms. Mireles's vehicle was not a border search. When a person is seeking admission into the United States, courts, pursuant to a doctrine known as the Border Search Doctrine, allow routine searches of persons and their property, and brief seizures pursuant to those searches, to be conducted with no suspicion. *United States v. Ramsey*, 431 U.S. 606, 618 (1977) ("Travellers may be so stopped in crossing an international boundary because of national self protection [*sic*] reasonably requiring one *entering* the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.") (emphasis added); *U.S. v. Jackson*, 825 F.2d 853, 858 (5th Cir. 1987) ("The government's power to stop and examine vehicles crossing into this country derives solely from the sovereign's right of self protection.").

In this case, the search occurred well after Ms. Mireles was admitted into the United States and outside a port of entry. Compl. ¶¶ 18–19. As Defendants concede, a SENTRI officer permitted her to leave the port of entry after initial inspection, through a special return lane. Compl. ¶ 19; Answer ¶ 19. Another fifteen minutes passed before Riano stopped her car. Compl. ¶ 21. As Defendants also concede, the stop and search occurred in the parking lot of Brady's, which is not the port of entry. Compl.¶ 21; Answer ¶ 21. Thus, the search of Ms. Mireles's vehicle did not occur at a port of entry or at the time of admission, and therefore was not a border search within the meaning of the Border Search Doctrine. Despite this, Defendants argue that Riano's search of Ms. Mireles's vehicle should be treated as a border search occurring at a port of entry. Def. Mot. 22. Their only basis for this argument is that the location of the search—the parking lot of the store where Ms. Mireles works—is in the vicinity of a port of entry. *Id*. Defendants point to no authority for this novel proposition. No court has held that areas outside the ports of entry could be "deemed" ports of entry for search and seizure purposes

simply on account of their proximity to a port of entry. Indeed, the Constitution does not permit such a fiction. *Ramsey*, 431 U.S. at 618 ("[T]hose lawfully within the country . . . have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."). Since the search was not a border search, at a minimum, reasonable suspicion was required—if not probable cause—for Ms. Mireles's seizure.

Moreover, even if the search of Ms. Mireles' vehicle was a border search requiring no suspicion, the forcible physical seizure and arrest challenged by Ms. Mireles would still be unlawful. This is because the Border Search Doctrine does not contemplate detentions beyond those that are reasonably necessary to effectuate the search. Put another way, even an officer conducting a border search may not arrest someone without probable cause, or detain someone beyond the time of the search without reasonable suspicion. *Cf. Martinez-Aguero*, 459 F.3d at 627 (finding suspect's arrest in zone adjacent to a port of entry unsupported by probable cause and holding that "no officer would reasonably conclude that Martinez–Aguero lacked protection against suspicionless arrest"); *United States v. Vazquez-Pulido*, 155 F.3d 1213 (10th Cir. 1998) (considering an arrest at a port of entry and explaining that a warrantless arrest must be supported by probable cause).

Defendants further justify Ms. Mireles's seizure based on three arguments, none of which are persuasive. First, Defendants contend that Riano viewed her as a possible absconder from the port of entry. Def. Mot. 22.[1] As discussed above, Riano confirmed his suspicion was not true before he initiated the search.[2] Compl. ¶¶ 24, 38, 44. But even if the facts pled supported

[1] Defendants' claim that Riano's belief was based on "apparent communication issues" is not only irrelevant, but also unsupported by the facts in the Complaint and should not be credited. Def. Mot. 22.
[2] Defendants' claim that the search of Ms. Mireles's vehicle was an outbound border search is likewise unsupported by facts in the Complaint and should not be credited. Def. Mot. 22.

Defendants' argument, that purported suspicion would only justify the initial stop of Ms. Mireles's car, but not her subsequent seizure. *United States v. Santiago*, 310 F.3d 336, 341 (5th Cir. 2002) (holding that even where a stop is initially valid, reasonable suspicion must support the extension of the stop). Since on the facts pled, Riano had no basis to suspect Ms. Mireles of wrongdoing, her seizure was unreasonable and unconstitutional.

Second, Defendants justify the seizure on the grounds that Ms. Mireles "disobeyed Defendant Riano's request to remain where she was standing, became combative, and resisted the request to search her purse." Def. Mot. 22-23. These contentions are contradicted by the facts in the Complaint. Ms. Mireles did not "disobey" Riano's request. Rather, she asked him if she could watch his search of her purse from a distance of approximately fifteen feet away. Compl. ¶ 31–32. Without responding, and before giving her an adequate opportunity to take any action, Riano immediately advanced toward her and forcibly threw her to the ground. Compl. ¶ 35. She was not combative, and she never physically resisted. *See Newman*, 703 F.3d at 763 (finding officers' actions unreasonable where plaintiff supposedly failed to comply with a command and officers failed to negotiate with plaintiff before seizing her forcibly); *Deville*, 567 F.3d at 168 (determining plaintiff's refusal to exit car did not warrant a seizure with physical force where officer "engaged in very little, if any, negotiation" before deploying force).

Third, Defendants contend that Riano was justified in seizing Ms. Mireles because traffic stops can be dangerous to police officers. Def.'s Mot. 23. While that may be true generally, a court must analyze the circumstances of a particular traffic stop. *See Newman*, 703 F.3d at 762–63 (recognizing traffic stops can be dangerous but concluding the particular stop posed no danger). And this particular stop, as discussed above, did not support Riano's fear for his safety

given Ms. Mireles's small size, her position several feet away from him, her lack of criminal history or contraband, and her cooperation. Compl. ¶¶ 10, 17, 26–29.

The Fifth Circuit's holding in *Martinez-Aguero* should guide this Court here. In *Martinez-Aguero*, a border patrol agent requested to see plaintiff's documents upon entry to the U.S. and she complied. 459 F.3d at 620. However, when she made a sarcastic remark to her companion and began walking back to Mexico, the agent ordered her to stop, seized her violently and arrested her. *Id*. The Court held the arrest unconstitutional as lacking probable cause because the plaintiff had not interfered with the officer's duties or posed any threat such that "the arrest was entirely without provocation." *Id*. at 626–27. Similarly, Ms. Mireles was arrested and seized without any provocation for asking a couple of questions about her purse. Under the logic of *Martinez-Aguero*, Ms. Mireles's seizure was unreasonable.

B. Ms. Mireles's Right to Be Free from Unreasonable Seizure in These Circumstances Was Clearly Established.

The Fifth Circuit recognizes that "[i]t has long been clearly established that there is a constitutional right to be free from unreasonable seizures." *Wooley v. City of Baton Rouge*, 211 F.3d 913, 925 (5th Cir. 2000). At the time of Defendant's conduct, several cases gave fair warning to Riano that an arrest required probable cause to be constitutional. *Martinez-Aguero*, discussed above, held conduct similar to Riano's unconstitutional. 459 F.3d at 626. In *Harvey v. Montgomery County*, the court held that a plaintiff was unconstitutionally *de facto* arrested where he "was forced to the ground, handcuffed for more than an hour, and placed in a patrol car" for merely for telling officers to get off his property. 881 F.Supp.2d 785, 803 (S.D.Tex. 2012).

The law was likewise clearly established at the time of the incident at issue that any prolonged seizure, including traffic stops, must be supported by reasonable suspicion of criminal activity. In *Coons v. Lain*, the court held plaintiff's detention unlawful for lack of reasonable

suspicion where plaintiff alleged he did not interfere with the officer's duties, did not disregard commands or resist but was still handcuffed and placed in a patrol car for fifteen to thirty minutes. 277 Fed. Appx. 467, 471 (5th Cir. 2008) (unreported). *See also U.S. v. Valadez*, 267 F.3d 395, 398 (5th Cir. 2001) (holding a stop unconstitutional where an officer asked questions of, and detained, plaintiff after the officer's initial concerns of illegal window tint and registration were dispelled and no reasonable suspicion was present to continue the detention); *Santiago*, 310 F. 3d at 341(5th Circuit, 2002). Defendant Riano had fair warning that his conduct would constitute an unreasonable seizure, and qualified immunity should be denied.

III. THE CUSTOMS DUTY EXCEPTION OF THE FTCA DOES NOT BAR THE COURT'S JURISDICTION OVER MS. MIRELES'S FTCA CLAIMS.

Defendants' argument for dismissing this case for want of subject matter jurisdiction also fails. The Federal Tort Claims Act ("FTCA") waives the United States' sovereign immunity for certain torts, including assault, battery, false arrest, or false imprisonment, if they were committed by an "investigative or law enforcement officer [] of the United States Government." The FTCA defines "law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h) ("Law Enforcement Proviso"). Further, the Supreme Court held that the Law Enforcement Proviso applies to the acts or omissions of law enforcement officers "that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest." *Millbrook v. United States*, 133 S. Ct. 1441, 1446 (2013). Thus, the plain language of the FTCA waives sovereign immunity for the torts in this case.

Defendants contend that, notwithstanding the Law Enforcement Proviso, the customs-duty exception to the FTCA's waiver of governmental immunity bars Ms. Mireles's claims. Def.

Mot. 16. But this argument not only renders the Law Enforcement proviso meaningless, it also misapplies Supreme Court precedent that applies this exception only to property damage.

A. The Customs Duty Exception Applies Only to Property Damage Claims

The plain language of the FTCA's customs-duty exception applies to property damage, not personal torts:

> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer . . .

28 U.S.C.A. § 2680 (c). In *Kosak v. United States*, the Supreme Court determined that this provision applies to property damage claims, and subsequent cases have followed suit, as Defendants concede. Def. Mot. 14. As Defendants recognize, the Supreme Court explained that the phrase "'any claim arising in respect of'" the detention of goods means any claim 'arising out of' the detention of goods, and includes a claim resulting from negligent handling or storage of detained property." 465 U.S. 848, 854 (1984) (addressing seizure of petitioner's art collection by customs officials and focusing solely on property damage). Other Supreme Court precedent emphasizes this nexus to property damage. *Ali v. Federal Bureau of Prisons*, another case Defendants cite, applied the exception to tort claims arising from Bureau of Prisons officers who lost an inmate's personal property. 552 U.S. 214, 216, 227–28 (2008). Here, this exception does not apply because the claims concern personal injury, not property damage. Moreover, as explained above, since Riano and Canaba were not performing a border inspection at the time they stopped Ms. Mireles, the exception should not apply.

B. Applying the Customs Duty Exception to This Case Would Nullify the Law Enforcement Proviso.

In addition, applying the Customs Duty Exception as Defendants urge would render the Law Enforcement Proviso meaningless. Governing precedent regarding interpretation of the FTCA makes clear that the law enforcement proviso must not be rendered meaningless. The Supreme Court has instructed that FTCA exceptions should be narrowly construed because:

> [U]nduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute [], which waives the Government's immunity from suit in sweeping language . . . . Hence, the proper objective of a court attempting to construe one of the subsections of [the FTCA] is to identify those circumstances which are within the words and reason of the exception—no less and no more.

Dolan v. U.S. Postal Service, 546 U.S. 481, 491-92 (2006) (citations and quotation marks omitted); *see also United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) (noting narrow construction of FTCA exceptions). Similarly, the Fifth Circuit has stated that proper interpretation of the FTCA must reconcile its various provisions. *See, e.g., Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987) (holding that the law enforcement proviso and the discretionary function exception must be reconciled to ensure that the law enforcement proviso is more than an "illusory" remedy.). To avoid rendering the Law Enforcement Proviso meaningless, the court must find that it applies here, despite the Customs Duty exception.

C. The Customs Duty Exception Does Not Apply to Interior Searches or Post-Search Seizure.

Defendants rely on two Fifth Circuit cases to argue that the customs duty exception precludes Ms. Mireles's claims. Def. Mot. 15–16 (citing *Davila v. United States*, 713 F.3d 448 (5th Cir. 2013), *Jeanmarie v. United States*, 242 F.3d 600 (5th Cir. 2001)). Neither *Jeanmarie* nor *Davila* requires a different result. *Jeanmarie* deals with claims that arise during or after official inspection of goods and property at a border port of entry. Ms. Mireles had already been admitted to the U.S., and her vehicle search was not a border inspection. *Davila* addresses claims

arising at a designated border-area checkpoint. [3] Ms. Mireles was not passing through any such checkpoint.

Moreover, as the *Davila* case cited by Defendants holds, even where the challenged conduct does occur at ports of entry and checkpoints, officers can be liable for conduct that occurs *after* the customs-related search. In *Davila*, the Fifth Circuit refused to apply the customs duty exception to preclude a personal injury tort claim because the conduct in question occurred *after* the search and detention of the plaintiff's vehicle had ended. *Davila*, 713 F.3d at 256. Thus, even torts that occur as a result of customs inspection are not precluded by the customs duty exception unless they directly "arise from the inspection, seizure, or detention of goods by the Border Patrol agents." *Id*. Here, Ms. Mireles's claims of unreasonable seizure and excessive force arise from events that occurred after the search of the vehicle occurred. Compl. ¶ 30. Riano had already searched the vehicle's interior and trunk when he lunged for Ms. Mireles and threw her to the ground. *Id.* Riano kept her handcuffed during her transport to the CBP station and detained her in the CBP patrol car for approximately two hours, long after the search ended. Compl. ¶ 44. Even if Riano's search *had* been at a port of entry or checkpoint, the customs duty exception would not preclude Ms. Mireles's claims.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss in its entirety and allow Plaintiff's *Bivens* claims and FTCA claims to proceed.

[3] To the extent that Defendants contend *Jeanmarie* and *Davila* could be read to preclude all personal injury tort claims incident to any search on the border, Defendants are asking the Court to ignore directly conflicting Supreme Court precedent. *See Kosak v. United States*, 465 U.S. 848, 854 (1984).

Dated: August 1, 2014

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CERTIFICATE OF SERVICE

I, Adriana Pinon, hereby certify that I caused Plaintiff's Opposition to Defendants' Motion to Dismiss to be served on August 1, 2014, via this Court's Electronic Case Filing System on the following counsel for Defendants:

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