IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

JANET M. HICKS,

Plaintiff,

vs.

RICHARD MOORE, individually and in his official capacity as Sheriff of Habersham County, MICHAEL LONG, Individually, JOSHUA HIGHFILL, Individually, JENNIE CLOUATRE, Individually, JOHN TAYLOR, Individually, RUSSELL GOSNELL, Individually, and BRIAN AUSBURN, Individually,

Defendants.

CIVIL ACTION
NO. 2:02-cv-36-WCO

ORDER

This case is before the court for consideration of defendants' motion for summary judgment [33-1]. Plaintiff Janet Hicks filed suit against defendants, claiming that they subjected her to an illegal strip search in violation of her rights under the Fourth Amendment. Her complaint includes seven counts. Count I is a claim against Sheriff Richard Moore individually for violation of plaintiff's civil rights. Count II is against defendant Habersham County for violation of plaintiff's civil rights.

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Count III is against defendants Long, Clouatre, Highfill, Taylor, Gosnell, and Ausburn in their individual capacities for violation of plaintiff's civil rights. Count IV is a state law claim for assault against defendant Clouatre. Count V is a state law claim of invasion of privacy against defendants Long, Clouatre, Highfill, and Taylor in their individual capacities. Count VI is a state law claim of assault and battery against defendant Highfill in his individual capacity. Count VII is a state law claim of intentional infliction of emotional distress against defendants Long, Clouatre, Highfill, and Taylor. Count VIII is a claim for injunctive relief against all defendants in all capacities.

In her response to defendants' motion for summary judgment, plaintiff withdraws the following claims: the assault claims against defendants Long and Taylor, the invasion of privacy claims against defendant Long, and the claim for intentional infliction of emotional distress against all defendants. Plaintiff filed a response to defendants' motion on April 24, 2003, and defendants filed a reply on May 12, 2003. Defendants have also filed a notice of their objection to several of plaintiff's statements of material fact.

I. Factual Background

The following facts are taken from the parties' statements of material facts, except where otherwise noted. On April 21, 2001, plaintiff Janet Hicks ("Janet Bryant" in April 2001) was involved in a domestic dispute with her husband at the time, Craig Bryant. Habersham County Sheriff's Deputy Michael Long was dispatched to plaintiff's home on a domestic violence call and was backed up by Sergeant John Ferguson. During his investigation of the incident, Corporal Long questioned plaintiff, Craig Bryant, and the couple's two children at the scene. Corporal Long also photographed a scratch sustained by Craig Bryant and a cellular phone damaged by plaintiff. Corporal Long determined that plaintiff was the primary aggressor, but plaintiff denies this allegation, stating that the argument started when Bryant pushed plaintiff, almost knocking her down. Plaintiff claims she responded in self defense by hitting Bryant in the shoulder with the inside of her right forearm.

Corporal Long arrested plaintiff for family violence, battery, and interference with a 911 call.[1] Corporal Long did not pat down plaintiff during the arrest, and he testified that he did not consider her to be a threat to himself or to other officers or jail personnel. (Long Dep. p. 73.) He then transported plaintiff to the Habersham County Detention Center, where he turned plaintiff over to the custody of the jailers on duty between 5:30 and 6:15 p.m. This was about the time that the jailers at the detention center had a shift change. Corporal Long prepared an incident report and had no further contact with plaintiff.

Plaintiff was placed in a holding cell for more than thirty minutes. She was later removed and permitted to see her attorney and was then returned to the holding cell. John Taylor and Joshua Highfill came on duty at 5:45 p.m. on April 21, 2001. Taylor was the shift corporal. Taylor and Highfill are the only two jailers with whom plaintiff recalls interacting. After an unspecified length of time, plaintiff was removed from the holding cell. At that point, plaintiff was directed to a private, windowless shower room where she was strip searched. Plaintiff alleges

[1] These charges were later dropped.

that defendant Jennie Clouatre was the sheriff's department employee who performed the strip search, but this has not been conclusively established by the evidence.[2] (Clouatre Dep. p. 18; Hicks Dep. pp. 94-95.) During the strip search, plaintiff was ordered to remove her clothing, lift her breasts, and cough three times while squatting on the floor. The procedure lasted approximately six minutes. Plaintiff was then told that she could get dressed and was returned to the holding cell. The demeanor of the woman who strip searched plaintiff was businesslike, and it appeared to plaintiff that she was "just doing her job." (Hicks Dep. p. 102.)

In addition to the dispute between the par ties regarding the identity of the woman who strip searched plaintiff, there is also a dispute over who gave the order to perform the strip search. In her deposition testimony, defendant Clouatre testified that she performs strip searches only when instructed to do so by the "shift corporal over dispatch." (Clouatre Dep. p. 15.) Jennie Clouatre worked as a dispatcher at the

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[2] Plaintiff's Exhibit 2, attached to the deposition of Janet Hicks, is the time sheet of Lisa Rogers, another employee of the detention center. The time sheet shows that Rogers was also on duty at the time that plaintiff was strip searched and could have been the employee who strip searched plaintiff.

detention center and went off duty at 6:30 p.m. on April 21, 2001. John Taylor was the shift corporal on April 21, 2001, but he does not recall if he ordered plaintiff to be strip searched. (Taylor Dep. pp. 42–43.)

After being strip searched and returned to the holding cell, plaintiff was removed from the holding cell by defendant John Taylor, and she was photographed, fingerprinted, and questioned. Defendant Highfill obtained the photographs of plaintiff and stated that he was taking pictures of her "in case [she] escaped." Plaintiff alleges that defendant Highfill laughed when he made this statement. In her complaint, plaintiff claims that defendant Highfill "focused the camera on Plaintiff's obvious birth defect, making fun of her cleft lip and palate, and took several humiliating close-up pictures of the defect, supposedly in the event that she "escaped" from jail. (Compl. ¶ 20.) Highfill testified that when he took the pictures of plaintiff's scar, he was not making fun of her cleft palate.

Plaintiff also alleges that defendant Highfill made her stand directly behind him and reach her arms around his midsection in order to provide her fingerprints. Plaintiff claims that while she was giving her fingerprints, defendant Highfill pressed her breasts and pelvis against

him in a way that made her feel uncomfortable. (Compl. ¶ 21; Hicks Dep. pp. 113-114; 116-118.) The record of plaintiff's fingerprints is signed by defendant Taylor. Defendant Highfill testified that the document containing an arrestee's fingerprints is always signed by the person who took the fingerprints.[3] (Highfill Dep. pp. 46, 48-49.) In addition, defendant Taylor testified that he believed that he was the person who took plaintiff's fingerprints. (Taylor Dep. p. 44.) Both defendants Taylor and Highfill testified that they never had inmates stand behind them while being fingerprinted. (Taylor Dep. p. 45; Highfill Dep. p. 48.)

Plaintiff does not contend that defendants Moore, Ausburn, or Gosnell were personally involved in her strip search. Defendant Ausburn was the captain in charge of the jail on April 21, 2001. Defendant Gosnell was the jail sergeant on April 21, 2001. Plaintiff notes that Gosnell testified that it was his understanding that "anybody who came through that door, out of that sally port, they were strip searched." (Gosnell Dep. p. 13.)

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[3] At one point in his deposition testimony, defendant Highfill testified that he was not sure if he had taken plaintiff's fingerprints. (Highfill Dep. pp. 46, 49.) Based on the signature of John Taylor on the fingerprint card, however, he asserted that he did not take plaintiff's fingerprints. (Highfill Dep. pp. 46, 49.)

Defendant Moore was the sheriff of Habersham County at the time of plaintiff's arrest and search, having taken office on January 1, 2001. Prior to becoming sheriff, defendant Moore was employed as a deputy with the Habersham County Sheriff's Office for approximately fifteen years. He was first hired in 1985 as a jailer and was a jailer for two years. In 1987 he became a certified peace officer and began patrol duties. The Habersham County Sheriff's Office did not have a written strip search policy or procedure when Moore served as a jailer, and Moore was not aware of any strip searches being performed when he was a jailer. After Moore became a deputy in 1987 and was later promoted to chief investigator, he had no further involvement with the operation of the jail prior to becoming sheriff on January 1, 2001. When he took office on January 1, 2001, defendant Moore did not change the written policies applicable to the jail that had been adopted by the prior sheriff and had been in effect since 1998. Prior to the date of plaintiff's arrest and search, defendant Moore had not reviewed the written policy concerning searches at the jail. The written policy placed additional restrictions on when strip searches could be performed.

Defendants claim that Sheriff Moore had not discussed the strip search practice with any jailer or employee prior to plaintiff's arrest and alleged strip search on April 21, 2001 and was not aware that jailers were following the unwritten practice of strip searching every detainee placed in a holding cell. Defendants further contend that after the lawsuit was filed in Snyder v. Moore, et al., Case No. 2:01-cv-181-WCO, Sheriff Moore learned that the practice had begun prior to his taking office and had continued thereafter. Plaintiff objects to these claims and points out that Sheriff Moore had promised in January 2001 to investigate a claim by Barry Lipsitz that he had been unlawfully strip searched. In addition, plaintiff urges that Sheriff Moore was in the immediate vicinity when officers were carrying out the illegal strip search policy. As such, there is a significant dispute between the parties over whether Sheriff Moore had notice of the way strip searches were being performed at the detention center.

Defendants indicate that Sheriff Moore relied on Captain Brian Ausburn, a jail administrator under a prior sheriff, to oversee operations in the jail and make sure proper procedures were followed. When Sheriff Moore learned in September of 2001 of the strip search procedure being

followed in the jail, he instructed his deputies to stop the practice and make sure that all jailers followed the written policy. According to plaintiff, Sheriff Moore's testimony was that he did this in November of 2001.

II. Defendants' Motion for Summary Judgment

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Only those claims for which there is no need for a factual determination and for which there is a clear legal basis are properly disposed of through summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

It is well-settled that a court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. See, e.g., Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988); Tippens v. Celotex Corp., 805 F.2d 949, 953 (11th Cir. 1986), reh'g denied, 815 F.2d 66 (11th Cir. 1987). To survive a motion for summary judgment, the non-moving party need only present evidence

from which the trier of fact might return a verdict in his favor. Samples, 846 F.2d at 1330. However, Rule 56, "[b]y its very terms, . . . provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The materiality of facts is governed by the relevant substantive law in the case. Id. at 248. A dispute is genuine if the evidence is such that the factual issues "may reasonably be resolved in favor of either party." Id. at 250.

Consideration of a summary judgment motion does not lessen the burden on the non-moving party: the non-moving party still bears the burden of coming forth with sufficient evidence. See Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990). "If the non-movant in a summary judgment action fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted." Herzog v. Castle Rock Entertainment, 193 F.3d 1241, (11th Cir. 1999) (citation omitted).

In the instant case, defendants' motion can be divided into three categories with several subparts. The court will consider each one in turn.

A. Federal Claims Under Section 1983

1. Reasonable suspicion

Under current law, a strip search of a pre-trial detainee must be based upon reasonable suspicion that the detainee possesses a weapon or contraband. Wilson v. Jones, 251 F.3d 1340, 1343 (11th Cir. 2001). Defendants argue that plaintiff's arrest for domestic violence provided reasonable suspicion sufficient to allow a strip search. Therefore, defendants contend that the search was not violative of the Fourth Amendment. As support for this claim, defendants point to the Eleventh Circuit case of Cuesta v. School Bd. of Miami-Dade County, 285 F.3d 962 (11th Cir. 2002), where the court held that there was reasonable suspicion to justify a strip search of a student who had participated in writing a pamphlet containing "violent and threatening language and imagery," including a reference to shooting the school principal in the head. Cuesta, 285 F.3d at 970. Because the plaintiff in Cuesta failed to produce any evidence indicating that the personnel involved in the strip

search lacked reasonable suspicion, the court found that her Fourth Amendment claim was without merit. Id. at 970-71.

Defendants cite to other cases where the Eleventh Circuit has found reasonable suspicion in cases somewhat analogous to the one at issue, but the court is not persuaded by defendants' reasoning because plaintiff correctly points out that all of the defendants involved in the strip search conceded that they did not suspect plaintiff to be in possession of a weapon or other contraband. (Long Dep. pp. 62-64; Taylor Dep. pp. 51; Hicks Dep. pp. 35, 85-86.) From the deposition testimony, it appears that the sole reason for the strip search was to follow the unwritten practice of strip searching every detainee that came into the detention center. (Gosnell Dep. p. 13.) Defendants urge in their reply brief that plaintiff wrongly focuses on the subjective beliefs of the defendants in this case and cites the cases of Cuesta and Skurstenis v. Jones, 236 F.3d 678 (11th Cir. 2000). The court has reviewed these cases and does not agree with defendants' argument. The subjective belief of the person performing a strip search is relevant to the reasonable suspicion analysis. In Cuesta, the court noted that "[i]f jail officials have reasonable suspicion that an arrestee is concealing weapons or contraband, then they do not infringe

on her constitutional rights by conducting a strip search." Cuesta, 285 F.3d at 968. Furthermore, the court in Cuesta noted that plaintiff's § 1983 action failed for the reason that the plaintiff "failed to produce any evidence that [the defendants] lacked reasonable suspicion that she was concealing weapons or contraband." Id. at 970. The opposite is true in the instant case.

Additionally, the Eleventh Circuit Court of Appeals in Wilson based its analysis in part on its determination that "there [was] no evidence that the officers at Shelby County Jail had reasonable suspicion that Wilson was concealing weapons or any other type of contraband." Wilson, 251 F.3d at 1343. The Wilson court therefore concluded that "because Wilson was strip searched absent reasonable suspicion, we hold that the search . . . violated the Fourth Amendment prohibition against unreasonable searches and seizures." Id. Contrary to defendants' assertion, the court thinks it entirely appropriate to take into consideration the fact that none of the defendants who could recall the strip search in this case testified that they had any reasonable suspicion that plaintiff was in possession of any weapons or contraband. Furthermore, the court is satisfied that this case is not analogous to

Cuesta, where reasonable suspicion was based on "violent and threatening language and imagery" contained in a pamphlet. Cuesta, 285 F.3d at 969. Based on the deposition testimony and factual assertions viewed in the light most favorable to the plaintiff, there was nothing surrounding the circumstances of plaintiff's arrest to suggest that she might become violent or could be in possession of a weapon or contraband. To the contrary, the evidence demonstrates that plaintiff was cooperative with the detention center personnel and was never violent in any way. As such, the court is satisfied that plaintiff has satisfied her burden of setting forth evidence to demonstrate the lack of reasonable suspicion. The court declines to grant defendants' motion for summary judgment on this basis.

2. Section 1983 supervisory liability claim against defendants Habersham County, Moore, Ausburn, and Gosnell

Defendants point out that plaintiff asserts various theories of § 1983 liability against defendants who never personally interacted with her. This includes defendants Moore, Ausburn, and Gosnell. As defendants correctly point out, plaintiff must prove § 1983 liability based on failure

to train or supervisory liability because there is no *respondeat superior* liability under § 1983.

Courts must apply a three-prong test to determine a supervisor's liability under § 1983: "(1) whether, in failing adequately to train and supervise subordinates, he was deliberately indifferent to an inmate's [constitutional rights]; (2) whether a reasonable person in the supervisor's position would know that his failure to train and supervise reflected deliberate indifference; and (3) whether his conduct was causally related to the constitutional infringement by his subordinate." Greason v. Kemp, 891 F.2d 829, 836 (11th Cir. 1990). Defendants first argue that they cannot be liable for failure to train because there is no showing of past constitutional violations or notice of any such violations and that plaintiff therefore cannot show that defendants were deliberately indifferent to her constitutional rights.

In response, plaintiff contends that, as to defendant Moore, he was the final policymaker for the detention center and knew that his officers would have to conduct strip searches and in fact did so. Rather than testing jailers on their understanding of the written strip search policy, defendant Moore never even posted the policy. Additionally, plaintiff

elsewhere contends that defendant Moore did in fact have notice of prior strip searches as a result of a complaint made to Sheriff Moore by Barry Lipsitz. Sheriff Moore never investigated this claim. The facts are sufficiently in dispute on this matter to preclude summary judgment in favor of defendant Moore on a theory of supervisory liability.

As to defendant Ausburn, plaintiff points out that, under his supervision, new jailers were not supervised or properly trained. New employee orientations "fell by the wayside" and stopped altogether in 1999. Similarly, plaintiff notes that defendant Gosnell, the jail sergeant in charge of all jail staff shifts at the jail, also failed to properly train his subordinates. Additionally, plaintiff alleges that Barry Lipsitz lodged his complaint regarding an improper strip search with defendants Ausburn and Gosnell as well as with defendant Moore. Defendant Taylor testified that he asked defendant Gosnell about the strip search practice two or three times and that his response indicated that "we were to fall back on our departmental policy and that he thought that we could get away with it." (Taylor Dep. p. 20; Gosnell Dep. pp. 21-22.) Plaintiff argues that all three defendants ignored warning signs and allowed the strip searches to flourish. The court is of the opinion that it is for a jury to decide

whether these facts amount to deliberate indifference, but that it is clear that a failure to train in this instance, if proven, is clearly connected to the constitutional violation allegedly suffered by plaintiff. Again, the court is satisfied that the facts in this case are such that it would not be appropriate to grant summary judgment in favor of defendants Ausburn and Gosnell under a theory of supervisory liability.

3. Section 1983 liability of defendants Taylor, Highfill, and Long

Defendants take issue with plaintiff's contention that defendants Taylor, Highfill, and Long "ordered or acquiesced in" the strip search. Amend. Verif. Compl. ¶¶ 19, 41-43. Defendants assert that defendant Taylor did not order the strip search, nor did defendant Highfill. Nor, according to defendants, is there any evidence that defendant Long had any interaction with or any supervisory authority over any deputy.

As to the claim for failure to intervene, defendants argue that plaintiff has not set forth any evidence that defendants Taylor, Highfill, or Long were present or had the opportunity to intervene in the strip search. Plaintiff does not respond to this assertion in her response and therefore has not met her burden of showing evidence to the contrary. Defendants Taylor, Highfill, and Long are entitled to summary judgment

on plaintiff's claim that they are liable for violations of plaintiff's Fourth Amendment rights in their positions as supervisors or for failure to intervene. The only federal claim advanced against defendants Long and Taylor is the instant claim for failure to intervene. Because plaintiff has withdrawn the state law claims against defendant Long, there are no outstanding claims remaining against him. The only remaining claim against defendant Taylor is a state law claim of invasion of privacy.

4. Qualified immunity

The court must determine whether defendants Moore, Ausburn, Gosnell, Highfill, and Clouatre[4] are entitled to qualified immunity. Qualified immunity protects government officials performing discretionary functions from civil liability if their conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). First, the official must prove that the allegedly unconstitutional actions occurred while he was acting within the scope of his discretionary authority. Evans v. Hightower, 117 F.3d 1318, 1320

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[4] As the court noted above, there are no remaining federal claims against defendants Taylor and Long.

(11th Cir. 1997). If the official meets this burden, the plaintiff must prove that the official's conduct violated clearly established law. Id.

To establish that the challenged actions were within the scope of their discretionary authority, defendants must show that their actions were (1) undertaken pursuant to the performance of their duties and (2) within the scope of their authority. Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1282 (11th Cir. 1998). To make this showing, defendants must demonstrate "objective circumstances that would compel [the] conclusion" that the complained-of actions were undertaken pursuant to the performance of their duties and within the scope of their authority. Id. (quoting Barker v. Norman, 651 F.2d 1107, 1124-25 (5th Cir. Unit A July 1981)). If a defendant demonstrates that the actions taken were within his or her discretionary authority, then "the plaintiff must prove that the official's conduct violated clearly established law." Harbert Intern., Inc. v. James, 157 F.3d 1271, 1281 (11th Cir. 1998).

Defendants urge that Moore, Ausburn, Gosnell, Clouatre, and Highfill all acted within their discretionary authority. Plaintiff claims that none of these defendants acted within their discretionary authority. As to defendants Moore, Ausburn, and Gosnell, who are subject to

plaintiff's failure to train claim, the court takes note of plaintiff's argument that although qualified immunity protects all "but the plainly incompetent or those who knowingly violate the law," it does not protect those who do not do their job at all. Malley v. Briggs, 475 U.S. 335, 341 (1986). The court employed this same reasoning in the Snyder case and found that an utter failure to ensure proper training and supervision of subordinates is not within a supervisor's discretionary authority. See Snyder v. Moore, et al., Case No. 2:01-cv-181-WCO (Order granting in part and denying in part Summary Judgment at 17.) The same reasoning is applicable in this case. The evidence about Sheriff Moore's actions have not changed since the Snyder case. Additionally, the deposition testimony viewed in the light most favorable to the plaintiff supports plaintiff's claim that defendant Gosnell did not act at all in overseeing the operations in the jail. In fact, it appears from the facts as alleged by plaintiff that he was asked at least twice about the strip search policy and never did anything but defer to the sheriff.

The evidence as it pertains to discretionary authority is less clear with regard to defendant Ausburn. Plaintiff alleges that defendant Ausburn "did not act at all, even when presented with the clear

constitutional duties that arise with daily strip searches," but does not explain how this is shown by the facts as they relate to defendant Ausburn. Pl.'s Resp. to Defs.' Mot. for Summ. J. at 15. Defendant Ausburn's deposition testimony includes a discussion about Ausburn's realization of the unlawful practice and his efforts to change it, but it appears from the testimony that this took place after the strip search involved in this case. (Ausburn Dep. pp. 44-55.) Defendants, who are charged with the burden of demonstrating evidence that defendant Ausburn was acting within his discretionary authority, do not point to any evidence of his actions with regard to the strip search practice. They simply argue that it is improper to look to a failure to act as a basis for denying qualified immunity. Though the court agrees that it is not legally correct to base a determination regarding discretionary authority on facts solely relevant to liability, defendants have ignored this court's decision on this very issue in the Snyder case. While the term "discretionary authority" encompasses essentially every law enforcement action that could be "done for a proper purpose," the term is meaningless if the defendant at issue has done *nothing*. Harbert, 157 F.3d at 1282. It is not within a law enforcement official's discretionary authority to

simply fail to do his job, and it is on that basis that the court finds that defendants Moore, Gosnell, and Ausburn lack discretionary authority for purposes of qualified immunity.

The court next turns to the question of whether defendants Clouatre and Highfill were acting within their discretionary authority for the purposes of qualified immunity. As to defendant Clouatre, if the court assumes that she was in fact the person who carried out the strip search of plaintiff, it is clear that, had the strip search been "done for a proper purpose" (i.e. had there been reasonable suspicion), it would have been reasonably related to the outer perimeter of her discretionary duties. Id.

As to defendant Highfill, the remaining allegations against him pertain to actions taken while allegedly fingerprinting plaintiff.[5] If the court assumes that defendant Highfill did in fact take plaintiff's fingerprints, then the question is whether his actions were reasonably related to or within the outer perimeter of his discretionary duties. The court is satisfied that the "method" of fingerprinting alleged by plaintiff

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[5] As discussed above, the court will grant summary judgment on the claim against defendant Highfill stemming from his alleged involvement in the strip search.

is not within defendant Highfill's discretionary authority.[6] The manner of fingerprinting alleged by plaintiff could not be reasonably related to defendant Highfill's discretionary duties; forcing a female detainee to wrap her arms around a jailer's midsection and therefore press her entire body against him is egregious behavior and not at all necessary or related to the carrying out of an official duty. Id. Defendant Highfill is therefore not entitled to qualified immunity on this basis.

The next issue is whether plaintiff has proven that the conduct of defendant Clouatre violated clearly established law. It is this issue over which the parties have a dispute. Defendants claim that, as of April 21, 2001, it was not clearly established for purposes of qualified immunity that there must be reasonable suspicion that an arrestee is concealing weapons or contraband in order to justify a strip search. The Wilson decision which made this rule the law was decided *after* the strip search in this case took place. It therefore does not operate to strip the officials in this case of qualified immunity. The dispute is over whether "dicta" in

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[6] The court again notes that plaintiff is the only person who claims her fingerprints were taken this way. Both defendants Taylor and Highfill claim that fingerprints are never obtained in this manner nor have they ever obtained an arrestee's fingerprints in this manner.

the Skurstenis case asserting that strip searches absent reasonable suspicion are unconstitutional can operate to make this rule "clearly established" for purposes of qualified immunity. Defendants claim it cannot. Plaintiff claims it can.

The Eleventh Circuit Court of Appeals "has held that dicta cannot clearly establish the law for qualified immunity purposes." Jones v. Cannon, 174 F.3d 1271, 1288 n. 11 (11th Cir. 1999) (internal citations omitted). In Skurstenis v. Jones, the Eleventh Circuit Court of Appeals was faced with a blanket strip search policy like the one at issue in the instant case and joined "every other circuit which has had the occasion to review a similar policy and holds such policy to be unconstitutional." Skurstenis, 236 F.3d at 682. The court went on, however, to find that there was reasonable suspicion under the facts of the case and therefore determined that the strip search at issue was justified. Id.

In Hope v. Pelzer, 536 U.S. 730, 739 (2002), the Supreme Court noted that, "[f]or a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very

action in question has been held unlawful . . . but it is to say that in light of the pre-existing law the unlawfulness must be apparent.'" Hope, 536 U.S. at 739 (citing Mitchell v. Forsyth, 472 U.S. 511, 535 n. 12 (1985), and quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). The Court in Hope quoted Anderson v. Creighton for the proposition that "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] been previously held unlawful.'" Hope, 536 U.S. at 741 (quoting Anderson, 483 U.S. at 640 (internal citation omitted)). The Hope court then turned to the question of whether the respondents in that case had "fair warning that their alleged treatment of Hope was unconstitutional." Hope, 536 U.S. at 741.

In reaching the conclusion that there was "fair warning" that the "hitching post" treatment at issue in Hope was unconstitutional, the Court relied on several authorities. First, the court observed that the violation in this case was so obviously unconstitutional that the Supreme Court's Eighth Amendment cases should have been sufficient warning.

Id. Next, the Court found that "binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post" were sufficient to allow the Court to conclude that the "conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" Id. at 742 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

After discussing the binding precedent of Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974),[7] the Court also noted that "[t]he reasoning, though not the holding, in a case decided by the Eleventh Circuit in 1987 sent the same message to reasonable officers in that Circuit." Id. (citing Ort v. White, 813 F.2d 318 (11th Cir. 1987)). The Court in Hope noted the premise in Ort that "'physical abuse directed at [a] prisoner after he terminates his resistance to authority would constitute an actionable eighth amendment violation." Id. (quoting Ort, 813 F.2d at 324). The Court went on to find that, even though the facts of the two cases were not identical, the premise stated in Ort nonetheless had clear

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[7] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

applicability in Hope. Id. at 743. The Court then concluded that "Ort therefore gave fair warning to the respondents that their conduct crossed the line of what is constitutionally permissible." Id.

The Court in Hope therefore relied in part on the reasoning, rather than the holding, of a case to find "fair warning" for purposes of qualified immunity. In Vinyard v. Wilson, the Eleventh Circuit Court of Appeals pointed out that the reasoning in Ort along with the DOJ report condemning the hitching post practice "only strengthened the fair notice or warning which the Hope Court had already decided was given by Gates v. Collier; neither the DOJ report nor Ort's reasoning were held in Hope to be sufficient, apart from Gates, to afford officials the required fair and clear notice or warning." Vinyard v. Wilson, 311 F.3d 1340, 1354 n. 27 (11th Cir. 2002).

Despite the Eleventh Circuit's assertion in Vinyard that the reasoning in Ort standing alone was insufficient to afford fair and clear notice or warning, this court thinks that the instant situation is distinguishable. The statement in Skurstenis that reasonable suspicion is required for a strip search is a clear statement of the law that reflects the law as it stands in every other circuit to address this issue. If the

court were to view this statement as unbinding dicta for qualified immunity purposes, then the result would be that the law would never become "clearly established" until a court in this circuit was presented with a case in which there was no reasonable suspicion. If this were the case, then a finding of qualified immunity would be predicated on whether the facts of a case match a legal standard as stated in "dicta" or whether the facts represent an exception to that standard. In other words, the effect would be that the "dicta" in Skurstenis could not become "clearly established" law until the Eleventh Circuit was presented in Wilson with a case in which there was no reasonable suspicion even though the legal principle guiding both cases was exactly the same. The court is of the opinion that the interpretation of "clearly established" advanced by defendants would improperly link qualified immunity to the way in which court opinions are worded, regardless of their obvious legal implications. The court therefore finds that defendants' contention on this issue is without merit.

In addition, this court is not entirely convinced that the statement of the law in Skurstenis is dicta in the first place. In order to reach its decision that the search was justified based on reasonable suspicion, the

court had to first determine that reasonable suspicion was a prerequisite to a lawful strip search. In that sense, the court views this statement as necessary to the holding in Skurstenis and therefore not dicta. In any event, under the law as stated by the Supreme Court in Hope, the court is satisfied that the rule announced in Skurstenis was sufficient to render the law on strip searches clearly established at the time of plaintiff's strip search.

Because defendants have not demonstrated that defendants Moore, Ausburn, and Gosnell were acting within their discretionary authority when they failed to train their subordinates, these three defendants are not entitled to qualified immunity, and the failure to train claim against them remains. Defendant Clouatre was acting within her discretionary authority but, at the time of the strip search of plaintiff, it was clearly established that strip searches were unconstitutional if performed absent reasonable suspicion that the person to be searched was in possession of weapons or contraband. Therefore, she is not entitled to qualified immunity on plaintiff's civil rights claim. As to defendant Highfill, he was not acting within his discretionary authority. In addition, his alleged behavior while taking plaintiff's fingerprints is so egregious as to be

violative of plaintiff's clearly established rights. See Hope, 536 U.S. at 739-41. Therefore, defendants Moore, Ausburn, Gosnell, Clouatre, and Highfill are not entitled to qualified immunity with regard to the federal claims lodged against them.

B. State Law Claims

There are three state law claims that remain pending in this case.

1. Assault – Jennie Clouatre

Plaintiff alleges that defendant Clouatre assaulted her when she required plaintiff to submit to an unconstitutional strip search. The Official Code of Georgia provides that "[a]ny violent injury or illegal attempt to commit a physical injury upon a person is a tort for which damages may be recovered." O.C.G.A. § 50-1-14. In addition, "an actual touching is not a necessary element of the tort of assault." Wallace v. Stringer, 250 Ga. App. 850, 853 (2001). In Georgia, an assault occurs when "all the apparent circumstances, reasonably viewed, are such as to lead a person reasonably to apprehend a violent injury from the unlawful act of another . . . . " Capitol T.V. Serv., Inc. v. Derrick, 163 Ga. App. 65, 65 (1982). Although the question of what a reasonable person might apprehend from this situation is a question of fact for the jury, the court

still finds it appropriate to grant summary judgment on this claim on the basis of official immunity.

The Georgia Constitution provides that state officials being sued in their official capacities are immune from suit regarding discretionary acts done without malice and ministerial acts that are not negligent. GA CONST. art. I, § 2, cl. 9(e) (amended 1991); Woodard v. Laurens County, 265 Ga. 404, 406 (1995). For purposes of official immunity, "'[a] discretionary act calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.'" Dep't of Corrections v. Lamaine, 233 Ga. App. 271, 273 (1998) (quoting Vertner v. Gerber, 198 Ga. App. 645, 646 (1991)). In contrast, a ministerial act is one that is "simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty." Phillips v. Walls, 242 Ga. App. 309, 311 (2000). In the instant case, the facts demonstrate that when Clouatre allegedly strip searched plaintiff, she was doing so under orders from a supervisor and did not exercise any personal deliberation or judgment in doing so. The court is satisfied, therefore, that her actions were ministerial.

Additionally, although her actions may have been unlawful, there is no evidence to show that the s trip search was performed negligently. Accordingly, defendant Clouatre is entitled to official immunity from plaintiff's claim of assault.

2. Assault and battery – Joshua Highfill

Plaintiff contends that Joshua Highfill assaulted and battered her ten times while taking her fingerprints. Amend. Verif. Compl. ¶¶ 21, 56. Plaintiff alleges that she felt like she was being "toyed with" when defendant Highfill gratuitously pulled her breasts and pelvis into his back while fingerprinting her. (Hicks Dep. pp. 113-119.) Defendant dismisses plaintiff's allegations as "frivolous." Again, this factual dispute is more appropriately left for a jury and is not subject to resolution on summary judgment because defendant Highfill is not entitled to official immunity from this claim. Assuming that defendant Highfill took plaintiff's fingerprints in the manner stated by plaintiff, his decision to accomplish this task in a way different from the general practice renders this action discretionary. Assuming plaintiff's allegations are true, the court is unwilling to find at this time that a decision to take fingerprints

in such an invasive manner is without malice. Defendant Highfill is not entitled to summary judgment on this claim.

3. Invasion of privacy

Plaintiff alleges that defendants Clouatre, Highfill, and Taylor have invaded her privacy by intruding into her seclusion in a manner that would be offensive to a reasonable person. The tort of intrusion most commonly involves an intrusion that is "physical, analogous to a trespass." See, e.g., Kobeck v. Nabisco, Inc., 166 Ga. App. 652, 654 (1983). Any "intrusion" by defendants Highfill or Taylor clearly was not physical since they were not present when the search occurred. There is, however, an "extension of the tort beyond physical invasion to include prying and intrusion that wo uld be offensive or objectionable to a reasonable person." Pospicil v. Buying Office, Inc., 71 F. Supp.2d 1346, 1361 (N.D. Ga. 1999) (citing Yarbray v. Southern Bell Tel. & Tel. Co., 261 Ga. 703, 705 (1991)). "Thus, the tort includes unauthorized surveillance, such as eavesdropping or wiretapping." Id. (citation omitted). There appear to be, however, "no Georgia cases recognizing a cause of action for intrusion into 'psychological sanctity' or an inner 'sphere of privacy.'" Id. There is no evidence in this case, however, that defendants Taylor or

Highfill played any role in causing plaintiff to be strip searched. Though it appears that someone gave an order for plaintiff to be strip searched, there is no evidence to show who did this. Absent any such evidence, the court will not allow the claim for invasion of privacy against defendants Highfill and Taylor to survive a motion for summary judgment.

Defendant Clouatre claims that the is immune from suit on the claim for invasion of privacy under the doctrine of official immunity. For the same reason that she is entitled to official immunity on the assault claim, defendant Clouatre is entitled to official immunity on the invasion of privacy claim.

C. Injunctive relief

Defendants claim in their motion for summary judgment that plaintiff's request for injunctive relief, if granted, would be tantamount to an order that defendants "obey the law" as established by Wilson v. Jones, 251 F.3d 1340, 1343 (11th Cir. 2001). Because they claim that such an injunction is unnecessary, defendants request that summary judgment be granted on this claim. Plaintiff has not responded to this argument, and the court is satisfied that defendants' argument on this issue is correct. There is nothing presented in this case to show that

defendants will commit the same constitutional violation against plaintiff in the future, and plaintiff may not seek injunctive relief in general. At any rate, plaintiff has an adequate remedy at law in the form of this lawsuit for money damages. Summary judgment will be granted on plaintiff's claim for injunctive relief.

III. Conclusion

Defendants' motion for summary judgment is DENIED in part and GRANTED in part [33-1]. Summary judgment is DENIED as to the § 1983 claims against defendants Moore, Gosnell, Ausburn, Highfill, and Clouatre. Summary judgment is also DENIED as to the claim of assault and battery against defendant Highfill. As to all other claims on which defendants have moved for summary judgment, summary judgment is hereby GRANTED. The clerk is directed to set this case for trial at the earliest possible date.

IT IS SO ORDERED, this 20th day of June, 2003.

William C. O'Kelley
Senior United States District Judge