IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
Civil Action No.: 1:24-CV-307-MR-WCM

ASHEVILLE BLADE, LLC, MELISSA COIT, and MATILDA BLISS;	)	
Plaintiffs,	)	**REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**
v.	)	
CITY OF ASHEVILLE, et al.,	)	
Defendants.	)	

NOW COME Defendants City of Asheville, Michael Yelton, Michael McClanahan, Melissa Lackey, Jonathan McCain, Amy Stapanowich, Matt Stapanowich, Ian Cooper, John Ziegler, and Samuel DeGrave, by and through counsel, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and hereby submit this Reply to Plaintiffs' Response in Opposition to Defendants Motion to Dismiss.

INTRODUCTION

Read together, the Defendants' briefing on their Motion to Dismiss [Doc. 15-1] and the Plaintiffs' Response Brief [Doc. 17] have clarified that the Parties do not dispute the critical facts relevant to the pending Motion to Dismiss. Namely, Plaintiffs do not dispute that, following the arrests upon which the instant civil claims were predicated, Bliss and Coit were in fact convicted of second-degree trespass. [Doc. 17, p. 4]. Their arguments as to why that fact should not bar their civil claims leave the following four questions[1] for the Court's resolution: (1) did the North

[1] As required by Local Rule 7.1(e), this Reply brief will only address new issues raised by Plaintiffs' Response Brief, and will not rehash the substance of arguments anticipated and already addressed in the Defendants' principle brief including, without limitation, whether Plaintiff the Asheville Blade may maintain a retaliatory arrest claim based on the arrests of its employees and whether mutuality of parties is necessary to give effect to the doctrine of collateral estoppel.

Carolina Court of Appeals really stop short of determining whether the Plaintiffs' First Amendment rights were violated by their arrest, (2) may Plaintiffs' retaliatory arrest claims proceed in the absence of any evidence of disparate treatment, (3) does the fact that the Plaintiffs' wrongful seizure claims are brought exclusively against law enforcement officers in their individual capacities require the dismissal of said claims, and (4) does the suspect exception to the Privacy Protection Act (PPA) apply to the seizure of materials incident to a trespassing arrest, when the arrestee asserts they were members of the press covering a trespassing event? The resolution of those questions requires that this action be dismissed in its entirety.

I. Plaintiffs Seek to Mischaracterize and Narrow the Holding of the North Carolina Court of Appeals in Order to Continue this Action.

As noted above, Plaintiffs do not dispute that the events giving rise to the instant case also resulted in criminal convictions for Bliss and Coit, which were affirmed on appeal, such that the doctrine of collateral estoppel would ordinarily apply. Megaro v. McCollum, 66 F.4th 151, 159 (4th Cir. 2023). Instead, they seek to argue that, after spending three and a half years (the span between their arrest and the resolution of their appeal) asserting that they could not be convicted of trespass, or that their convictions should be overturned because they were exercising their rights as members of the press, that their First Amendment rights were not "actually litigated and necessary to the judgment" in their criminal convictions. [Doc. 17, p. 8] (quoting Williams v. Peabody, 217 N.C. App. 1, 6, 719 S.E.2d 88, 93 (2011)). While even the most cursory review of the arguments raised by Bliss and Coit in their criminal matter demonstrates they clearly sought to, and did, litigate the question of whether their First Amendment rights were implicated by their arrests, the explicit holding of the North Carolina Court of Appeals leaves no doubt.

The North Carolina Court of Appeals explained the issue before it in the criminal appeal as follows:

> Defendants argue their speech—specifically, newsgathering—was protected by the First Amendment. The State, on the other hand, argues the First Amendment was not implicated because the Park Curfew regulates conduct, not speech. As a threshold matter, we consider whether Defendants' newsgathering was protected speech under the First Amendment, because "if it is not, we need go no further."

State v. Bliss, 915 S.E.2d 735, 2025 N.C. App. LEXIS 339 *6-7 (N.C. Ct. App. 2025) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797, 105 S. Ct. 3439, 3446, 87 L. Ed. 2d 567, 576 (1985)). The Court of Appeals resolved this issue unambiguously, ruling that "**[b]ecause the Park Curfew strictly regulates conduct, not speech, Defendants' First Amendment rights were not implicated in this case.**" Id. at *11 (emphasis added). Given the extraordinary clarity of the Court of Appeals' language, it seems beyond dispute that the Court specifically considered whether Bliss and Coit's arrests implicated their First Amendment rights.

That fact is underscored by reference to the case law relied upon by the Court of Appeals in affirming Bliss and Coit's convictions. It expressly premised its analysis on the holding of the Supreme Court in Cornelius, *supra*, which discusses when the enforcement of a content-neutral time place and manner regulation is so inherently unobjectionable that it raises no First Amendment concerns. See Cornelius, 473 U.S. at 797, 105 S. Ct. at 3446 ("To resolve this issue we must first decide whether solicitation in the context of the CFC is speech protected by the First Amendment, **for, if it is not, we need go no further.**") (Emphasis added). Citation to that principle, espoused in the context of an opinion of the Supreme Court *in a civil suit*, would be irrelevant if, as the Plaintiffs contend, the North Carolina Court of Appeals was focused solely on

whether the First Amendment affords a defense to criminal trespassing in their specific circumstances.

At the risk of belaboring the point, envisioning a flowchart for the Court of Appeals' reasoning displays the fault in Plaintiffs' claim that the Court was exclusively interested in whether their First Amendment rights provided a defense to criminal charges for second-degree trespassing. The question- "do Bliss and Coit's First Amendment rights prohibit their conviction for second-degree trespassing" can only be reached *after* one has answered the threshold question posed in Cornelius and cited by the Court of Appeals in Bliss: does the application of a law with little to nothing to do with speech (i.e. trespass laws) at all implicate a person's First Amendment rights? The North Carolina Court of Appeals never moved into a fact-specific consideration of Bliss and Coit's First Amendment arguments *vis a vis* their trespassing charges, precisely because it determined that "[b]ecause the Park Curfew strictly regulates conduct, not speech, Defendants' First Amendment rights were not implicated in this case." Bliss, 915 S.E.2d 735, 2025 N.C. App. LEXIS 339 at *11.

There is one final tell that suggests the Plaintiffs' position must be rejected: they have provided this Court with absolutely no case law holding that losing a motion to dismiss, premised upon their First Amendment rights, in a criminal proceeding, should not have preclusive effect in a companion civil suit. There is, however, clear case law in support of the opposite proposition- that the loss of a motion to dismiss criminal charges based on First Amendment rights, *should* be given preclusive effect in related civil actions. See e.g. Daubenmire v. City of Columbus, 507 F.3d 383, 389 (6th Cir. 2007). That is precisely what happened in Bliss and Coit's criminal case. See Bliss, 915 S.E.2d 735, 2025 N.C. App. LEXIS 339 at *1 ("On appeal, Defendants argue the trial court erred by denying their motion to dismiss

based on their as-applied First Amendment challenge.") In the words of the Sixth Circuit in Daubenmire, "Plaintiffs may not use federal court as a venue for re-litigating issues that were decided in a prior state criminal case." Daubenmire, 507 F.3d at 390.

Simply put, the plain language of the Court of Appeals' opinion and the legal analysis leading up to its ultimate legal conclusion leave no doubt: Plaintiffs Bliss and Coit were afforded an opportunity to litigate the question of whether their First Amendment rights were implicated by their arrests and the North Carolina Court of Appeals rejected their position. That determination was necessary to the Court of Appeals' ultimate holding. Under Megaro, *supra* and Gilliam v. Sealey, 932 F.3d 216, 231 (4th Cir. 2019), the resolution of that issue should be afforded preclusive effect under the doctrine of collateral estoppel.

II. Plaintiffs' Retaliatory Arrest Claims Fail in the Absence of Any Factual Allegation Demonstrating they Received Unequal Treatment in Response to their Trespassing.

At this point in the briefing before the Court, the Defendants have pointed out that the Amended Complaint fails to allege facts that would support a finding that Bliss and Coit's arrests were in any way inconsistent with the treatment that others who have trespassed within a park have received, rendering dismissal of the retaliatory arrest claims proper. See Nieves v. Bartlett, 587 U.S. 391, 393, 139 S. Ct. 1715, 1717, 204 L. Ed. 2d 1 (2019). Plaintiffs' rejoinder is that: (a) they need not present evidence of instances in which others have received more favorable treatment under Gonzalez v. Trevino, 602 U.S. 653, 658, 144 S. Ct. 1663, 1667 (2024), and (b) they did in fact allege facts to support a finding of disparate treatment, by asserting that another individual in the park on the night of their arrest, who left the park upon being directed to do so, was not arrested. [Doc. 17, p. 6]. Because both of these arguments fail, dismissal remains proper.

Plaintiffs' first argument relates to the decision of the Supreme Court in Gonzalez v. Trevino, where the Court held that a survey compiled by the petitioner "showing that, in the last decade, no one charged with the crime for which she was arrested had engaged in conduct similar to hers—is objective evidence admissible to prove that she was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." Gonzalez, 602 U.S. at 675, 144 S. Ct. at 1677 (Jackson, J. concurring) (internal quotations omitted). Here, the Amended Complaint establishes no such thing. Plaintiffs Bliss and Coit were convicted by a jury of second degree trespassing, which in North Carolina:

> occurs when a person 'enters or remains on premises of another' without authorization: '(1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person; or (2) That are posted, in a manner reasonably likely to come to the attention of intruders, with notice not to enter the premises.'

State v. Burwell, 256 N.C. App. 722, 733, 808 S.E.2d 583, 593 (2017) (quoting N.C. Gen Stat. § 14-159.13). To violate that particular crime in a sprawling city park, one would have to be directed by an appropriate authority that they could not remain in the park due to its established hours, and choose to remain in said park in contravention of that directive, within view of a law enforcement officer. If that choice of actions strikes the Court as an inherently odd one, the Amended Complaint sheds further light on why it would have come up in very few circumstances other than those at issue here.

The Amended Complaint affirmatively alleges that Plaintiffs Bliss and Coit were in Aston Park on the day in question to cover a protest regarding a homeless encampment in the park. [Doc. 14, ¶ 122]. While protests in parks are by no means novel, overnight protests relating to encampments of unhoused persons seem to have been uniquely connected to the particular timespan at issue, which the Supreme Court characterized as a "homelessness crisis." City of

Grants Pass v. Johnson, 603 U.S. 520, 556, 144 S. Ct. 2202, 2224 (2024). The nature of the crime for which Bliss and Coit were convicted, alongside the contextual background of homeless encampments on public land in 2021-2022, helps explain why arrests for trespassing in public parks would be a relatively infrequent event.

That factual reality is precisely why the Plaintiffs have not, and cannot, set forth the same types of allegations found by the Supreme Court to be sufficiently objective to sustain a retaliatory arrest claim in Gonzalez, *supra*. For the instant case to be analogous to Gonzalez, Plaintiffs would have to allege facts showing that, among those persons who had: (a) been informed of a park's closing time and directed to leave, and (b) chosen to disregard that directive in the presence of a law enforcement officer, they had been arrested when others were not. The Amended Complaint stops notably short of these allegations. Instead it asserts that thirteen individuals had been arrested within one hour of a park closing in the nine years prior to Bliss and Coit's arrest. [Doc. 14, ⁋ 109]. More importantly, it is devoid of *any* allegation that the Defendants have ever refrained from arresting someone who had chosen to, as Plaintiffs Bliss and Coit did, reject a directive to leave a park after being notified of its closing time. For that reason, Gonzalez is inapplicable.

To go a step further, the Plaintiffs' secondary argument as to why their retaliatory arrest claim should survive- because an individual in the park on the same night in question, who left upon being informed that the park was closed [Doc. 14, ⁋ 110]- was not arrested, actually underscores the frailty of their wrongful arrest claim. In order for that example to be one of disparate treatment that satisfies the requirements of Nieves, the referenced individual *would have to have been committing the offense of second-degree trespassing*, which he was not based on the Plaintiffs' allegations about his actions after being informed of the park closing hours.

[Doc. 14, ¶ 110]. Moreover, the Plaintiffs' Amended Complaint makes clear that they were afforded the very same opportunity to leave the park before being arrested [Doc. 14, ¶ 63], and therefore were not subjected to unequal treatment of any sort, whether it be due to their profession or otherwise. Plaintiffs either fail to comprehend the elements required to charge a person with second-degree trespass under N.C. Gen Stat. § 14-159.13, or have chosen to deliberately ignore them, in order to claim they received inconsistent treatment at the hands of the Defendants. In either event, Plaintiffs' retaliatory arrest claims must be dismissed for want of the type of objective evidence required by Nieves and Gonzalez.

III. Plaintiff Bliss' Section 1983 Wrongful Seizure Claim is Barred by the Doctrine of Qualified Immunity Because She Chose to Exclusively Bring that Claim Against Law Enforcement Officers in their Individual Capacities.

Plaintiff Bliss' wrongful seizure claim pursuant to Section 1983 is unique in that it is the only claim that the Plaintiffs chose not to assert against the City, supervisory members of the police force, or even against individual officers in their official capacities. [Doc. 14, p. 33]. She has brought this claim exclusively against four officers in their individual capacities, which therefore means this cause of action must be dismissed if the Court agrees that such officers are entitled to qualified immunity. Meyers v. Baltimore Cty., Md., 713 F.3d 723, 731 (4th Cir. 2013). Such immunity "protects public officials from bad guesses in gray areas." Durham v. Horner, 690 F.3d 183, 190 (4th Cir. 2012). There could scarcely be a grayer area of law than that which exists in relation to when an otherwise lawful seizure violates the Fourth Amendment by dint of duration.

To evade qualified immunity and impose liability on a law enforcement officer in their official capacity, a plaintiff must show that the officer violated a standard that was "clearly established" under existing case law. Meyers, 713 F.3d at 731. In their Response to the pending

Motion to Dismiss, Plaintiffs point to United States v. Pratt, 915 F.3d 266, 272 (4th Cir. 2019) as the case that supports their argument against the application of qualified immunity. [Doc. 17, p. 18]. That is particularly telling, insofar as the Fourth Circuit in Pratt cited to a trio of cases from the Eleventh Circuit, where delays of 45 and 25 days were found to be reasonable, but a delay of 21 days was found to be unreasonable. Pratt, 915 F.3d at 272 (citing United States v. Vallimont, 378 F. App'x 972, 975-76 (11th Cir. 2010), United States v. Laist, 702 F.3d 608, 616-17 (11th Cir. 2012), and United States v. Mitchell, 565 F.3d 1347 (11th Cir. 2009), respectively). The delay at issue in this case, 25 days, falls smack into the center of the "gray area" described in Pratt.

Notwithstanding the undeniable ambiguity of the holdings on when a seizure becomes wrongful based on duration, Plaintiffs urge the Court to reject the application of qualified immunity. They do so by claiming that applying "qualified immunity would preclude all warrant delay claims except when the exact time delay at issue had previously been held unlawful." [Doc. 17, p. 17]. This is objectively untrue. Plaintiff Bliss created a very context-specific problem for herself by choosing to *exclusively* bring her Section 1983 wrongful seizure claim against officers in their individual capacities. It is that choice that implicated the doctrine of qualified immunity, which necessarily bars her claims given this grey area of law. See Googerdy v. N.C. Agric. & Tech. State Univ., 386 F. Supp. 2d 618, 623 (M.D.N.C. 2005) ("Plaintiff, as master of the lawsuit, must assert appropriate claims against proper parties in a timely manner or suffer dismissal.") Plaintiff Bliss' choice to construct her pleadings in a way that implicates the qualified immunity doctrine cannot serve as a justification for not applying that immunity in this case, without subverting the doctrine altogether.[2]

[2] As noted in the Defendants' principle brief, they believe that the Plaintiffs' corollary claims brought pursuant to the North Carolina Constitution may be properly dismissed by reference to the self-evident justifications for delays of this length, they would further note that the Court may decline to pass on that claim if it finds the corresponding federal claims must be dismissed. See e.g. Ussery v. Freeman, No. 5:23-CV-219-BO-RJ, at *14-15 (E.D.N.C. June 18, 2024) ("Because, as discussed below, dismissal of plaintiff's federal claims is appropriate, the Court will decline

IV. The Suspect Exception to the Privacy Protection Act Bars the Plaintiffs' Claims Under the Act.

The Plaintiffs initially brought their claims under the PPA based on the theory that both the initial seizure of Plaintiff Bliss' phone, *and* the subsequent request for a warrant to search that phone without giving notice to Bliss constituted violations of the PPA. Plaintiffs in their Response Brief have graciously acknowledged that the latter theory of liability is nonviable. [Doc. 17, p. 21, n. 11]. Accordingly, the sole question of law left for resolution is whether the PPA's suspect exception bars the Plaintiffs' claims based on the seizure of Bliss' phone incident to her arrest.[3]

While the Plaintiffs were correct to abandon their assertion that the PPA required the Defendants to comply with the Act's notice and hearing requirements before obtaining a search warrant, the fact that they have persisted in claiming the Act applies to the initial seizure of the subject phone is perplexing. The case law relied upon by the Defendants to explain why the notice and hearing requirement of the PPA was not triggered in the instant case did so by explaining that no such requirement exists when the suspect exception to the PPA applies. See DePugh v. Sutton, 917 F. Supp. 690, 697 (W.D. Mo. 1996) ("under the suspect exception, defendants were clearly within the confines of the law to seek and obtain a search warrant rather than complying with the rigors of the P.P.A.") If the parties are now, as appears to be the case, in agreement that there was no need to comply with the notice and hearing requirement under the

to exercise jurisdiction over Count I insofar as it is premised on violations of the North Carolina Constitution.") (Citing 28 U.S.C. § 1367(c) and Shanaghan v. Cahill, 58 F.3d 106, 109 (4th Cir. 1995).

[3] Plaintiffs continue to assert that the PPA permits a "failure to train" cause of action that they call "similar to a *Monell* claim under § 1983." [Doc. 17, p. 24]. Defendants respectfully disagree that such a claim can be countenanced under the plain language of the PPA, notwithstanding the Northern District of California precedent noted by the Plaintiffs in Morse v. Regents of the Univ. of Cal., 821 F. Supp. 2d 1112, 1121 (N.D. Cal. 2011). Setting that disagreement to one side, and accepting the Plaintiffs' legal theory that the PPA allows a failure to train claim in the same way as Monell, this theory of derivative liability should be able to be rejected where, as here, there is no underlying violation of the PPA given the application of the suspect exception. See Wilson v. Flynn, 429 F.3d 465, 469 n.* (4th Cir. 2005) and Los Angeles v. Heller, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986) (explaining why failure to train claims under Section 1983 fail as a matter of law without an underlying constitutional violation committed by law enforcement officers).

PPA given the suspect exception, it is unclear how there could still be debate over the applicability of the exception to the initial seizure of the phone incident to Plaintiff Bliss' arrest.

Notwithstanding the foregoing, and given the Plaintiffs' apparent intention to continue advancing this aspect of the PPA claim, Defendants respectfully assert that the single case cited in the Plaintiffs' Response brief in support of their contention that the suspect exception should not apply to the initial seizure, Garcia v. Montgomery County, is self-evidently inapplicable to the present set of facts. In Garcia, as the Plaintiffs affirmatively concede in their Response Brief [Doc. 17, p. 20], the reporter plaintiff was arrested while taking photographs of third-parties being arrested for alcohol-related offenses. Garcia v. Montgomery Cty., No. JFM-12-3592, 2013 U.S. Dist. LEXIS 120659, at *2 (D. Md. Aug. 23, 2013). The plaintiff in Garcia was not participating in the alleged criminal offense he was documenting, and was not charged with anything other than disorderly conduct, because of the defendant law enforcement officers' displeasure at being recorded. Id. That is a starkly different scenario than one where the seizure at issue is of footage that necessarily depicts a journalist's own trespassing. See S.H.A.R.K. v. Metro Parks Serving Summit Cty., 499 F.3d 553, 566-67 (6th Cir. 2007). Here, Plaintiffs Bliss and Coit were trespassing alongside the other trespassers who were arrested in Aston Park on the day in question. They were committing the selfsame criminal offense that their contemporaneous recordings documented, unlike the plaintiff in Garcia. For that reason the suspect exception precludes all of the Plaintiffs' claims under the PPA.

CONCLUSION

Based upon the foregoing, the Defendants respectfully renew their request that the Court dismiss the Plaintiffs' Amended Complaint in its entirety.

Respectfully submitted this the 17th day of November, 2025.

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CERTIFICATION RE: ARTIFICIAL INTELLIGENCE

No artificial intelligence was employed in doing the research for the preparation of this document, with the exception of such artificial intelligence embedded in the standard on-line legal research sources Westlaw and Lexis. Every statement and every citation to an authority contained in this document has been checked by an attorney in this case as to the accuracy of the proposition for which it is offered, and the citation to authority provided.

This the 17th day of November, 2025,

s/ Eric P. Edgerton
Eric P. Edgerton

CERTIFICATE OF SERVICE

This is to certify that the foregoing Memorandum of Law has been duly served by electronic filing via the Electronic Filing System to all counsel of record.

This the 17th day of November, 2025,

s/ Eric P. Edgerton
Eric P. Edgerton