IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CASSANDRA R. DINGUS,	)	
	)	
Plaintiff,	)	**Civ. Action No. 7:02CV00934**
	)	
v.	)	**MEMORANDUM OPINION**
	)	
DAVID M. MOYE, et al.,	)	**By: Samuel G. Wilson,**
	)	**Chief United States District Judge**
Defendant.	)	

This is a suit pursuant to 42 U.S.C. §1983 by Cassandra Dingus (hereinafter "plaintiff") against her former husband, David Moye, two police officers, Robert Von Uchtrupt and Franklin Niece, and the Chief of Police of the Town of Pulaski,[1] Eric Montgomery, arising out of a domestic dispute between plaintiff and Moye at their jointly owned home during their marriage. Essentially, plaintiff alleges that defendants subjected her to an unlawful search and seizure and used excessive force against her in violation of the United States Constitution and unlawfully restrained and battered her in violation of state law. She also alleges that Montgomery chilled her First Amendment rights by threatening her. This case is now before the court on the Motions for Summary Judgment of Von Uchtrupt, Niece, and Montgomery. For the reasons that follow, the court (1) denies Von Uchtrupt's and Niece's Motion for Summary Judgment as to plaintiff 's excessive force claim, (2) dismisses without prejudice plaintiff's state trespass claim, (3) denies Von Uchtrupt's and Niece's Motion for Summary Judgment on plaintiff's remaining state tort claims, and (4) grants all of the defendants'

[1] Plaintiff also sued the Town of Pulaski but has indicated to the court that she wishes to dismiss the Town.

remaining Motions for Summary Judgment.

I.

The facts, as recounted by plaintiff at her deposition, are essentially as follows. She and Moye, a police officer for the Town of Pulaski, were married but separated. Plaintiff continued to reside at their jointly owned marital dwelling in Pulaski. The relationship had become quite contentious, to the point that the Pulaski Police Department placed Moye on administrative leave for allegedly brandishing a firearm at his wife's paramour, a neighbor, Dr. Donald Dingus. Thus, when Moye went to his jointly owned house on September 8, 2000, and found his wife in bed with Dr. Dingus, a somewhat predictable argument ensued. Moye's wife, who later married Dr. Dingus, ordered her present and future husbands to leave. Once outside, events took an awkward if not unfortunate turn. Moye called police headquarters and requested that officers respond with an evidence collection kit.

In response to Moye's call, Officers – soon to be defendants – Von Uchtrupt and Niece arrived. When the officers arrived, Moye insisted on entering the house. Although he did not live at the couple's house, he assured the officers that he jointly owned it and that no formal separation agreement or legal proceeding terminated his interest in it, and when he knocked on the door demanding that his wife open it she responded apparently for all to hear: " [w]ell, you have a key. Why don't you open it yourself?" (Pl's depo. at 29). She, nevertheless, opened the door. When he attempted to enter, however, something again quite predictable with hindsight judgment occurred: his wife tried to stop him. During the ensuing turmoil, Von Uchtrupt physically restrained plaintiff, causing minor injuries, on at least three occasions: Von Uchtrupt pulled plaintiff from the house and twisted her arm and wrist; he pushed her against a kitchen table, causing her to fall onto the floor; and he pinned plaintiff against the

bedroom floor.

Once Moye entered the house, he confiscated the bed sheets, presumably to use as evidence of adultery in separation and divorce proceedings. Neither of the hapless, responding officers actually obtained any evidence or other property from the house. Moye left the house with the bed sheets; the two officers left with him; and the argument spilled out into the yard. Niece and plaintiff's husband left the premises. In frustration, plaintiff banged her fist on the hood of her car. Officer Von Uchtrupt responded by restraining plaintiff for a fourth time and allegedly slammed plaintiff's face on the hood of her car. Von Uchtrupt then left the premises, and plaintiff went to the police station to complain about the officers' conduct.

While meeting with the chief of police, Eric Montgomery, plaintiff insisted that Montgomery take action. According to plaintiff, however, Montgomery refused, and plaintiff stated that she would find someone "bigger" than he to deal with the situation. In response, Montgomery allegedly threatened plaintiff with arrest for assaulting the two police officers and for adultery. He told plaintiff not "to go shooting her mouth off," and to think about her daughter.

Plaintiff filed this action in August 2002, alleging various causes of action under 42 U.S.C. § 1983 against Von Uchtrupt, Moye, and Montgomery.[2] Plaintiff also claims defendants committed state torts. This case is now before the court on defendants' Motion for Summary Judgment.

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[2] Plaintiff also alleges that defendants conspired to deprive her of various rights protected by 42 U.S.C. § 1986. However, § 1986 requires the plaintiff to prove that defendants' actions are part of a class-based invidious discriminatory conspiracy. See Buntin v. Bd. of Trustees of the Virginia Supplemental Retirement System, 548 F.Supp. 657, 659 (W.D.Va. 1982). Because plaintiff cannot do so, the court will dismiss the claim.

II.

Plaintiff claims that Von Uchtrupt and Niece violated the Fourth Amendment prohibition against unreasonable searches and seizures when they entered her bedroom and removed her bed sheets. The court, however, finds no Fourth Amendment violation by either officer and that qualified immunity protects them from liability. Accordingly, the court grants their Motion for Summary Judgment as to the claim.[3]

There is no evidence that either officer actually searched for or seized any property. Apparently, plaintiff claims that the officers unlawfully intruded in violation of the Fourth Amendment, allowing Moye to confiscate the bed sheets. The question of whether the police officers, who restrained plaintiff while her spouse entered his jointly owned home and seized bed sheets, participated in a Fourth Amendment intrusion or simply kept the peace during a domestic dispute is a close question that this court finds unnecessary to resolve. Instead, the court assumes that the officers' entry into the couple's jointly owned property was an intrusion under the Fourth Amendment. Nevertheless, the court finds that the officers' reasonably believed that Moye retained authority to consent to their entry and that their entry was therefore not unlawful. The court also finds that even if the officers' entry was unlawful, that entry transgressed no bright Fourth Amendment lines. For that reason, and because the

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[3] Plaintiff also claims that Von Uchtrupt and Niece violated the Fourteenth Amendment Due Process Clause by confiscating her bed sheets. However, "an intentional . . . deprivation of property by a state employee does not violate the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available." Hudson v. Palmer, 468 U.S. 517, 533 (1984). Therefore, because plaintiff does not challenge the sufficiency of her post-deprivation remedies and, in fact, testified in her deposition that she does not even want her sheets back, the claim is frivolous.

officers reasonably believed that their presence was necessary to preserve the peace during a rapidly unfolding domestic dispute, the officers have qualified immunity.

The Fourth Amendment protects against unreasonable government intrusions into homes. Kyllo v. United States, 533 U.S. 27, 31 (2001). The Fourth Amendment draws a firm line at the entrance of one's home and a warrantless physical invasion of even a fraction of an inch, with few exceptions, is unlawful. Id. at 37-40. One exception, however, is consent. An individual may consent to a search if he possesses common authority, mutual use, or general access to the place. United States v. Block, 590 F.2d 535, 539-40 (4th Cir. 1978). See United States v. Crouthers, 669 F.2d 635, 643-43 (10th Cir. 1982) (holding that defendant's wife, who had moved out of the couple's apartment, had control over the apartment and validly consented to its search when she had a key to the apartment and invited FBI agents into the apartment); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992) (holding that defendant's wife validly consented, over defendant's objections, to officers responding to a domestic dispute when she produced a key to the apartment and insisted on gathering personal belongings from inside); New Mexico v. Madrid, 574 P.2d 594, 597 (N.M. 1978) (holding that defendant's wife, who had moved out of the couple's home, provided valid consent for a police search where she had a right to occupy the premises, retained a key to the home, and left personal property in the house). Moreover, an officer may rely on the apparent authority of the person giving consent, and determining apparent authority requires an objective inquiry into whether the facts available at the moment would warrant a person of reasonable caution in the belief that the consenting party had authority over the premises. Illinois v. Rodriguez, 497 U.S. 177, 188 (1990). See United States v. Kerchum, 71 F.Supp.2d 779, 782 (N.D. Oh. 1999) (holding that an officer, who knew of a prior restraining order

prohibiting defendant's wife from being at the house, but did not know if the order was still in effect, reasonably believed defendant's estranged wife had authority to consent when, after arresting a burglary suspect, the wife requested the officer to go with her into the home and determine what property had been taken).

With those precepts in mind, the court concludes that the facts available at the moment the officers entered were sufficient to warrant a person of reasonable caution to believe that Moye had authority to consent. The officers knew that Moye jointly owned the house. Indeed the officers had even heard plaintiff invite Moye to use his key to enter. It follows that with this knowledge, the officers reasonably believed Moye possessed common authority, mutual use, or general access to the house, and reasonably relied on Moye's consent to enter.

Even if defendants had acted unlawfully by entering the house, qualified immunity precludes plaintiff's claim. Qualified immunity "protects law enforcement officers from 'bad guesses in gray areas' and ensures that they are liable only 'for transgressing bright lines.'" Wilson v. Collins, 141 F.3d 111, 114 (4th Cir. 1998) (quoting Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992)). Once a plaintiff asserts a viable claim, the defense of qualified immunity shields defendants from liability unless the federal law is both clearly established and an objectively reasonable officer would have known that his conduct violated the clearly established federal law. See Henderson v. Simms, 223 F.3d 267, 271 (4th Cir. 2000). In order to be "clearly established," the contours of the constitutional right, in light of the pre-existing law and the information possessed by the officers at the scene, must be sufficiently clear to a reasonable officer so that any violation is apparent. See Wilson v. Layne, 526 U.S. 603, 614-15 (1999).

Here, there is no clearly establish federal law that, even when there is no judicially enforced separation agreement, a husband with the key to his jointly owned home is without authority to consent to others entering the property. In short, in light of the pre-existing law and the information possessed by Officers Von Uchtrupt and Niece at the scene, Moye's lack of authority to consent to their entry would not have been sufficiently clear to a reasonable officer such that any violation would have been apparent.

When the officers arrived, they confronted a volatile domestic situation and decided to treat the matter as civil, rather than criminal. There is no evidence that either officer actually searched or ever intended to search for any object or property in the house. Rather, Moye insisted on reentering his house. Perhaps their time would have been well spent dissuading Moye. But that is not the question. Better judgments and choices frequently appear with hindsight. However, "[p]olice must often make balanced choices. Domestic violence situations require police to make particularly delicate and difficult judgments quickly." Fletcher v. Town of Clinton, 196 F.3d 41, 50 (1st Cir. 1999) (citing Tierney v. Davidson, 133 F.3d 189, 197 (2nd Cir. 1998) ("Courts have recognized the combustible nature of domestic disputes, and have accorded great latitude to an officer's belief that warrantless entry was justified by exigent circumstances when the officer had substantial reason to believe that one of the parties to the dispute was in danger.").

Under the circumstances, Von Uchtrupt and Niece are entitled to some latitude, and since neither officer, while responding to a volatile, non-criminal, domestic disturbance, transgressed a bright-line in entering the jointly owned home, each is shielded by qualified immunity. Therefore, this court grants Von Uchtrupt's and Niece's Motion for Summary Judgment on plaintiff's Fourth Amendment

unreasonable search and seizure claim.

III.

Plaintiff alleges that Von Uchtrupt and Niece violated the Equal Protection Clause by assisting Moye in gathering the bed sheets. Since the Town of Pulaski, according to plaintiff, has not prosecuted and adultery violation in over two decades, the officers treated plaintiff differently than others similarly situated. The court finds that the attenuated claim lacks merit.

The claim lacks merit for a host of the reasons the court finds unnecessary to explore here. It is sufficient to state that "[w]ithin the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is [not] in itself a federal constitutional violation' so long as the 'selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" Bordenkircher v. Hayes, 434 U.S. 357, 668-69 (1978) (alteration in original) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962). In any event, it is a stretch to claim that Officers Von Uchtrupt and Niece were investigating anything and even a greater stretch to claim that they lack qualified immunity as to this attenuated equal protection claim.

IV.

Plaintiff also claims that Von Uchtrupt and Niece used excessive force to physically restrain her in violation of the Fourth Amendment.[4] Von Uchtrupt and Niece claim they used no more force than

[4] Plaintiff also appears to raise an excessive force claim under the Fourteenth Amendment's Due Process Clause. However, a claim that a law enforcement officer used excessive force in seizing a free citizen is properly analyzed under the Fourth Amendment's "reasonableness" standard, not substantive due process under the Fourteenth Amendment. Chavez v. Martinez, 123 S.Ct. 1994, n.5 (2003) (citing Graham v. Connor, 490 U.S. 386, 395 (1989)).

reasonably necessary to keep the peace during a volatile domestic confrontation and that they have qualified immunity. The court finds that if plaintiff's allegations are true, then Von Uchtrupt, with Niece's complicity, exceeded his self-professed peace keeping role and used objectively unreasonable force to restrain plaintiff and that neither is entitled to qualified immunity.

Under the Fourth Amendment, a court applies an "objective reasonableness" test to evaluate whether an officer used excessive force to effect a seizure. Jones v. Buchanan, 325 F.3d 520, 527 (4th Cir. 2003). In evaluating a Fourth Amendment claim, a court considers "the facts 'from the perspective of a reasonable officer on the scene,' and avoids judging the officer's conduct with the '20/20 vision of hindsight,' recognizing that 'police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving.'" Id. (quoting Graham v. Connor, 490 U.S. 386, 396-97 (1989). Rather, courts must evaluate three factors: (1) "the severity of the crime at issue"; (2) "whether the suspect poses an immediate threat to the safety of the officers or others"; and, (3) "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." Bailey v. Kennedy, 349 F.3d 731, 744-45 (4th Cir. 2003) (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).

In this case, plaintiff alleges that, while Niece escorted Moye, Von Uchtrupt used excessive force against her both inside and outside of her house. Von Uchtrupt's conduct caused injury, such as bruising and minor cuts. In reviewing the officers alleged conduct, this court cannot say that reasonable officers in the same situation would have used the same level of force in responding to the plaintiff in the course of a civil disturbance in which the plaintiff was neither resisting nor evading arrest. Further, although plaintiff admits that she fought back and resisted Von Uchtrupt, plaintiff claims she only did so

after several unprovoked attacks. An officer may certainly use physical force to respond to threatening actions and gestures, but plaintiff asserts that she posed no such threat. Rather, as indicated by plaintiff's deposition, she objected to Moye and the officers entering the house, at which point Von Uchtrupt pulled her out of the house and pinned her arm behind her back. Once back inside the house, she followed Niece and Moye to the bedroom while screaming obscenities and objections. Von Uchtrupt then shoved her against a kitchen table and later pinned her to the bedroom floor. In addition, once outside and after both Moye and Niece had left the premises, she punched her own car in frustration. In response, however, Von Uchtrupt, who remained on the premises, physically subdued her, causing "tremendous pain." Although plaintiff may have been quite upset and even hysterical, her assertions, which are taken as true, indicate that she did not pose any significant threat to Von Uchtrupt, Niece, or Moye. Therefore, this court finds a genuine issue of material fact as to whether Von Uchtrupt, with Niece's complicity, used excessive force.

The court also concludes that Von Uchtrupt and Niece are not protected by qualified immunity. Qualified immunity shields a defendant from liability unless his conduct violates clearly established federal law and an objectively reasonable officer would know that his conduct violated that federal law. See Milstead v. Kibler, 243 F.3d 157, 161 (4th Cir. 2001). Although the test for qualified immunity is separate from the excessive force "objective reasonableness" test, it is well established that objectively unreasonable force used to effect a seizure violates clearly established federal law. See Bailey v. Kennedy, 349 F.3d 731, 744-45 (4th Cir. 2003). Further, officers may use physical restraint when a citizen poses a threat to officers or the public, but in this case, viewing the facts as alleged by plaintiff, she posed no threat. An objectively reasonable officer would know that Von Uchtrupt's conduct, in

the absence of a particular threat by plaintiff, constituted excessive force. Although the evidence at trial may establish that Von Uchtrupt acted reasonably in this particular circumstance, a genuine issue of material fact exits. Therefore, the court denies Von Uchtrupt's summary judgment motion on the claim.

V.

According to plaintiff, Montgomery was deliberately indifferent because he failed to take appropriate measures to prevent Von Uchtrupt's and Niece's alleged misconduct. Plaintiff's evidence, however, falls far short of proving that Montgomery had knowledge of any risk or acted with deliberate indifference. The court, consequently, grants Montgomery's Motion for Summary Judgment.

In certain circumstances, a supervisor may be held liable for the conduct of his subordinates. A supervisor, however, is liable under § 1983 only if (1) he had actual or constructive knowledge that his subordinates' conduct posed a "pervasive and unreasonable risk" of constitutional injury, (2) the supervisor's response to that knowledge showed "deliberate indifference to or tacit authorization of the alleged offensive practices," and (3) there is an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury. Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994).

In this case, plaintiff's evidence does not raise a cognizable claim. Plaintiff claims that Montgomery knew of Moye's volatility and, in fact, had placed him on administrative leave because of it. Therefore, according to plaintiff, when Moye called the police station and asked for two officers to respond with an evidence collection kit, Montgomery should have known that the officers would likely violate plaintiff's constitutional rights. This argument is another stretch, and the court rejects it.

There is no evidence that Montgomery had actual or constructive knowledge that Von Uchtrupt and Niece, Montgomery's subordinates, posed "a pervasive and unreasonable risk" to plaintiff.

Plaintiff does not claim that either Von Uchtrupt or Niece previously violated her constitutional rights or the rights of any other citizen for that matter. Rather, plaintiff essentially claims that Montgomery knew that Moye, who was on administrative leave, posed a risk to his wife. The shallowness of this argument, however, is clearly demonstrated by asking the question: what were the potential consequences of not sending the officers, and what kind of claims might those consequences have generated?

Although Montgomery had no actual or constructive knowledge of a risk before the incident, as an alternative theory of liability, plaintiff alleges that Montgomery learned of the risk while the officers were at plaintiff's house because Dr. Dingus called and told Montgomery that Von Uchtrupt was "killing" plaintiff. However, a phone call in the course of rapidly evolving domestic dispute hardly establishes the requisite knowledge. At most, Montgomery learned that Dr. Dingus was claiming that his subordinates were actively involved in a domestic dispute. Nothing suggests Montgomery should have given the report credence or that he could have intervened effectively during the course of these relatively brief events. Accordingly, the court grants Montgomery's Motion for Summary Judgement as to plaintiff's deliberate indifference claim.

VI.

Plaintiff also asserts a First Amendment retaliation claim against Montgomery. However, since plaintiff cannot show that Montgomery in fact retaliated against her or that she refrained from protected speech because of the alleged threat, the court grants Montgomery's Motion for Summary Judgment.

In asserting her retaliation claim, plaintiff claims that the First Amendment protects her statements to Montgomery, in which she complained about the misconduct of the officers. See

Connick v. Myers, 461 U.S. 138, 147 (1983) (indicating that the First Amendment protects citizens speaking on matters of public concern); Gonzalez v. City of Chicago, 239 F.3d 939, 941 (7th Cir. 2001) (noting that police misconduct is certainly a matter of public concern). Retaliation is actionable because it may chill the exercise of First Amendment rights. ACLU v. Wicomico County, 999 F.2d 780, 785 (4th Cir. 1993). In order to establish a viable retaliation claim, plaintiff must establish three elements: (1) that she was engaged in speech protected by the First Amendment; (2) that Montgomery's allegedly retaliatory conduct adversely affected plaintiff's constitutionally protected speech; and (3) that a causal connection exists between plaintiff's speech and Montgomery's retaliatory conduct. Suarez Corp. Idus. v. McGraw, 202 F.3d 676, 686 (4th Cir. 2000). "To satisfy this standard, it is essential that plaintiffs demonstrate that they 'suffered some adversity in response to [the] exercise of protected rights.'" ACLU v. Wicomico County, 999 F.2d 780, 785 (4th Cir. 1993) (alterations in original). "Where there is no impairment of the plaintiff's rights, there is no need for the protection provided by a cause of action for retaliation." Id. at 785.

In this case, plaintiff claims that she met with Montgomery to complain about the conduct of the officers. When Montgomery failed to act, plaintiff pledged to complain to someone "bigger" than Montgomery. In retaliation, Montgomery allegedly threatened plaintiff with arrest if she pursued her complaints. Assuming that the First Amendment actually protects plaintiff's meeting with Montgomery, however, plaintiff fails to raise a genuine issue of material fact that Montgomery either actually prevented her from exercising a constitutional right or that Montgomery's alleged threat chilled the exercise of a right. She does not claim that Montgomery's alleged threats prevented her from asserting future complaints about police conduct. Further, plaintiff's statement threatening to complain to

someone "bigger" than Montgomery is vague and offers no indication of what speech or conduct plaintiff wished to pursue. This court will not speculate on any potential future complaints or actions and any possible adverse affect on those complaints or actions. Therefore, plaintiff fails to establish a viable First Amendment retaliation claim and, consequently, this court grants Montgomery's Motion for Summary Judgment.

VII.

In addition to plaintiff's claims under 42 U.S.C. § 1983, plaintiff asserts claims under state tort law. She alleges trespass, battery, false imprisonment, and false arrest against defendants. In part II of this opinion, the court dismissed plaintiff's Fourth Amendment search and seizure claim. Plaintiff, however, would have to rely on the same underlying facts to establish a state trespass claim. Therefore, the court declines supplemental jurisdiction over this claim and dismisses the trespass action without prejudice pursuant to 28 U.S.C. § 1367.

As for the remaining state torts, as with the Fourth Amendment excessive force claim, the court finds that there is a genuine issue of material fact that Von Uchtrupt, with Niece's complicity, unlawfully restrained plaintiff.[5] Further, to the extent that plaintiff implicates Montgomery in her remaining state tort claims, she fails to present a factual predicate that Montgomery in any way participated in any battery, false arrest, or false imprisonment. Therefore, Von Uchtrupt's and Niece's Motion for

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[5] Von Uchtrupt and Niece assert the Virginia's good faith immunity defense as a defense to plaintiff's state law claims. Good faith immunity, however, requires the defendants to allege and prove both good faith and reasonableness. DeChene v. Smallwood, 311 S.E.2d 749, 751 (Va. 1984). In this case, the defendants have failed to do either. Further, Virginia's good faith immunity defense does not spare defendants the burden of a jury trial. Figg v. Schroeder, 312 F.3d 625, n.15 (4th Cir. 2002). Therefore, this court rejects the good faith immunity defense.

Summary Judgment as to plaintiff's battery, false imprisonment, and false arrest claims is denied, but Montgomery's summary judgment motion is granted.

VIII.

For the reasons stated, the court (1) denies Von Uchtrupt's and Niece's Motion for Summary Judgment on plaintiff's excessive force claim, (2) dismisses without prejudice plaintiff's state trespass claim under 28 U.S.C. § 1367, (3) denies Von Uchtrupt's and Niece's Motion for Summary Judgment on plaintiff's remaining state tort claims, and (4) grants all of the defendants remaining Motions for Summary Judgment. Defendants Montgomery and the Town of Pulaski, Virginia are dismissed from this action.

ENTER: This ____ day of January, 2004.

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Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CASSANDRA R. DINGUS,	)	
	)	
Plaintiff,	)	**Civ. Action No. 7:02CV00934**
	)	
v.	)	**ORDER**
	)	
DAVID M. MOYE, et al.,	)	**By: Samuel G. Wilson,**
	)	**Chief United States District Judge**
Defendant.	)	

In accordance with the written Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that: (1) Von Uchtrupt's and Niece's Motion for Summary Judgment on plaintiff's Fourth Amendment excessive force claim is **DENIED**; (2) Von Uchtrupt's and Niece's Motion for Summary Judgment on plaintiff's Fourth Amendment search and seizure claim and 42 U.S.C. § 1986 conspiracy claim is **GRANTED**; (3) Montgomery's Motion for Summary Judgment on all claims is **GRANTED**; (4) plaintiff's state tort trespass claim is **DISMISSED** without prejudice; and (5) Von Uchtrupt's and Niece's Motion for Summary Judgment on plaintiff's remaining state tort claims is **DENIED**. Defendants Montgomery and the Town of Pulaski, Virginia are **DISMISSED** as defendants to this action.

ENTER: This _____ day of January, 2004.

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Chief United States District Judge