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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

MIGUEL ANGEL)	
REYNAGA HERNANDEZ,)	Cause No. CV 18-40-BLG-SPW
)	
Plaintiff,)	DERREK SKINNER’S BRIEF
)	IN SUPPORT OF MOTION FOR
vs.)	SUMMARY JUDGMENT
)	
DERREK SKINNER <i>et al</i> ,)	FILED UNDER SEAL
)	STIPULATION AND ORDER,
Defendants.)	ECF NO. 36, ¶ 6, pp. 6-7
_____)	

Introduction

Miguel Hernandez filed a complaint that alleged Derrek Skinner, a former Deputy Yellowstone County Sheriff, and Pedro Hernandez, a former Yellowstone County Justice of the Peace, violated his right against unreasonable searches and seizures under the 4th Amendment of the United States Constitution. ECF No. 1. Skinner and Pedro Hernandez filed an answer that denied the allegations. ECF No.

18. Skinner filed a motion for summary judgment. ECF No. 39. Skinner argues in the motion: (1) he did not violate Miguel Hernandez's right against unreasonable searches and seizures, (2) if he did violate the right, he is entitled to qualified immunity, (3) he did not act with the required mental state to have punitive damages assessed against him and (4) injunctive and declaratory relief are not available against him. *Id.* Skinner files this brief in support of the motion.

Facts

On October 2, 2017, Pedro Hernandez, a Yellowstone County Justice of the Peace, presided over a protective order hearing. Miguel Hernandez appeared at the hearing as a potential witness. Pedro Hernandez excluded all witnesses including Miguel Hernandez from the courtroom. During the hearing, a witness testified Miguel Hernandez was illegally in the United States of America. Pedro Hernandez telephoned the Yellowstone County Sheriff's Office to have a deputy sheriff respond to the courtroom to investigate the immigration status of Miguel Hernandez. Pedro Hernandez did not order Miguel Hernandez to be arrested. Derrek Skinner, a Deputy Yellowstone County Sheriff, responded to the courtroom. Pedro Hernandez told Skinner that he had heard testimony that Miguel Hernandez was illegally in the United States of America and requested Skinner investigate the allegation. Pedro Hernandez did not order Skinner to arrest Miguel Hernandez. Skinner left the courtroom. Skinner located Miguel Hernandez outside the courtroom. Skinner requested Miguel

Hernandez identify himself. Miguel Hernandez identified himself with an expired United Mexican States identification card. Skinner requested Miguel Hernandez explain his immigration status. Miguel Hernandez could not explain his immigration status. Skinner brought Miguel Hernandez to his vehicle parked outside of the courthouse. Skinner had an arrest warrants check run on Miguel Hernandez. There were no arrest warrants for Miguel Hernandez. Skinner contacted United States Immigration and Customs Enforcement, ICE, to determine whether it wanted to detain Miguel Hernandez. ICE advised Skinner it needed to check and would contact Skinner. While Skinner waited for a decision from ICE, Pedro Hernandez left the courthouse for lunch and saw Skinner outside the courthouse with Miguel Hernandez. Pedro Hernandez asked Skinner what was happening with Miguel Hernandez. Skinner told Pedro Hernandez he was waiting for a decision from ICE as to what to do with Miguel Hernandez. Pedro Hernandez left for lunch. Pedro Hernandez did not order Skinner to arrest Miguel Hernandez. This is the last interaction Pedro Hernandez had with Miguel Hernandez. ICE contacted Skinner that it wanted Miguel Hernandez detained. Skinner transported Miguel Hernandez to the Yellowstone County Detention Facility on the request of ICE. This is the last interaction Skinner had with Miguel Hernandez. ICE placed a detainer on Miguel Hernandez. On October 3, 2017, ICE removed Miguel Hernandez from the Facility. Miguel Hernandez had entered

the United States of America without permission. Miguel Hernandez committed a crime with his entry into the United States of America.

This is only a brief summary of what occurred. A more detailed account of what occurred can be found in Pedro Hernandez's Statement of Undisputed Facts that Skinner has adopted as his Statement of Undisputed Facts.

Summary Judgment

A court should grant a motion for summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(a), Fed.R.Civ.P. Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The moving party for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *See Id.* On an issue where the nonmoving party will have the burden of proof at trial, the moving party need only point out there is an absence of evidence to support the nonmoving party's case. *See*

Celotex at 325 and 2554. If the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, set forth specific facts showing a genuine issue for trial. *See Id.* at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The standard to grant a motion for summary judgment is similar to the standard for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–52, 106 S. Ct. 2505, 2511–12, 91 L. Ed. 2d 202 (1986). Summary judgment is an integral part of the Federal Rules of Civil Procedure and not a disfavored procedural shortcut. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986).

Unreasonable Searches and Seizures

Law

A person has a right against unreasonable searches and seizures by the government. *U. S. Const. amend. IV*. The government violates a person’s right against unreasonable searches and seizures when it detains the person for an investigatory stop without reasonable suspicion that the person is or has engaged in criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The government may detain a person for a reasonable period to determine whether the person is or has engaged in criminal activity. *See United States v. Sharpe*, 470 U.S. 675, 686–87, 105 S. Ct. 1568, 1575–76, 84 L. Ed. 2d 605 (1985). If the government

determines the person has engaged in criminal activity, it develops probable cause to believe the person committed a crime, it may arrest the person. *See United States v. McCarty*, 648 F.3d 820, 838–39 (9th Cir. 2011), as amended (Sept. 9, 2011). If the government determines the person has not engaged in criminal activity, it does not develop probable cause to believe the person committed a crime, it should release the person. *Id.* When the government detains a person it may perform a cursory search of the person for weapons if the government believes that person may be armed and dangerous. *Terry, supra.*

It is a crime to enter the United States of America without permission. 8 U.S.C. § 1325(a). A person who enters the United States of America without permission commits a crime. *Id.* The person is subject to criminal prosecution. *Id.* The government can perform an investigatory stop of a person to determine whether the person has entered the United States of America without permission. *See Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 464 (4th Cir. 2013); *Gonzales v. Peoria*, 722 F.2d 468, 475-76 (9th Cir. 1983) *overruled on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999). It is not a crime to stay in the United States of America longer than allowed after the person has entered with permission. 8 U.S.C.A. § 1227. A person who stays in the United States of America longer than allowed after the person has entered with permission does not commit a crime. *Id.* The person is subject to civil prosecution. *Id.*

Analysis

Dispatch ordered Derrek Skinner to Pedro Hernandez's courtroom to investigate whether a person was illegally in the United States of America. Pedro Hernandez was a Yellowstone County Justice of the Peace. Skinner reported to the courtroom. Pedro Hernandez told Skinner that he had received testimony that Miguel Hernandez was illegally in the United States of America and would like Skinner to investigate the claim. Pedro Hernandez did not order Skinner to arrest Miguel Hernandez.

Based on the information provided by Pedro Hernandez, Skinner did not know whether Miguel Hernandez had committed a crime. Skinner did not know whether Miguel Hernandez had entered the United States of America without permission that would subject him to criminal prosecution or had entered the United States of America with permission and overstayed a visa that would have subject him to civil prosecution. Skinner endeavored to find out.

Skinner asked Miguel Hernandez to identify himself. Miguel Hernandez produced an expired United Mexican States identification card. Skinner asked Miguel Hernandez his immigration status. Miguel Hernandez could not explain his immigration status. Skinner had an arrest warrants check run on Miguel Hernandez. There were no arrest warrants for Miguel Hernandez. The failure to have any arrest warrants did not surprise Skinner. If Miguel Hernandez had illegally entered the

United States of America, the United States of America would not know of his presence. Skinner had ICE contact him as to whether it wanted to detain Miguel Hernandez. ICE indicated it wanted to detain Miguel Hernandez. Based on ICE's representation it wanted to detain Miguel Hernandez, Skinner transported him to the Yellowstone County Detention Facility. Skinner assumed ICE had access to the visas issued by the United States of America, could not locate a visa for Miguel Hernandez and determined there was probable cause to arrest him for illegal entry into the United States of America.

Skinner had a reasonable suspicion that Miguel Hernandez had committed a crime based on the testimony Miguel Hernandez was illegally in the United States of America, his inability to speak English, his production of an expired United Mexican States identification card to identify himself and his inability to articulate his immigration status. Based on the request by ICE to detain Miguel Hernandez, Skinner assumed there was probable cause to arrest Miguel Hernandez for illegal entry into the United States of America.

Miguel Hernandez did illegally enter the United States of America. He did commit a crime when he entered the United States of America.

Qualified Immunity

Law

Qualified immunity protects government officials from liability for civil damages if their conduct does not violate clearly established statutory or constitutional

rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Qualified immunity shields an official from liability even if the official's actions resulted from a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (Kennedy, J., dissenting). The purpose of qualified immunity is to strike a balance between the competing need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. *Id.* Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). When a court determines whether an official is entitled to qualified immunity it should consider (1) whether the official has violated a constitutional right and (2) whether the right was clearly established at the time of the official's alleged violation. *Pearson*, 555 U.S. at 232, 129 S.Ct. 808. A court should deny qualified immunity to an official when (1) the official has violated a constitutional right and (2) the right at issue was clearly established at the time of the violation that a reasonable official would have understood his conduct in that particular situation would violate the right. *Id.*

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Analysis

There is no clear legal authority that would have placed Skinner on notice that what he did based on the circumstances presented to him that he would violate Miguel Hernandez's right against unreasonable searches and seizures with what he did. Based on the circumstances, it was reasonable for Skinner to believe he could detain Miguel Hernandez and transport him to the Yellowstone County Detention Facility. It was reasonable for Skinner to believe he had an articulable reasonable suspicion of a crime that allowed him to detain Miguel Hernandez and ICE had probable cause to arrest Miguel Hernandez that allowed him to transport him to the Facility.

Skinner had a reasonable suspicion that Miguel Hernandez might have committed a crime with his presence in the United States of America that allowed him to detain him to determine whether he had committed a crime. Skinner knew (1) there had been sworn testimony that he was illegally in the United States of America, (2) he was not fluent in English, (3) he identified himself with an expired United Mexican States identification card and (4) he could not articulate his immigration status. Skinner had a reasonable belief that probable cause existed to arrest him. Skinner assumed that ICE had information that Miguel Hernandez had illegally entered the United States of America that established probable cause to arrest him. Skinner assumed ICE had the ability to search the visas issued by the United States of America

and determined that Miguel Hernandez did not have a visa and had committed a crime with his entry into the United States of America.

Punitive Damages

Law

A jury may award punitive damages to punish a defendant and to deter similar acts in the future. A jury may award punitive damages when a defendant acts with malice, oppression or in reckless disregard of a plaintiff's rights. *Dang v. Cross*, 422 F.3d 800, 806–09 (9th Cir. 2005). A defendant acts with malice if the act is motivated by ill will or spite, or if the purpose of the act is to injure the plaintiff. *Id.* A defendant acts with oppression if the defendant injures, damages or violates a plaintiff's rights with unnecessary harshness or severity, such as by misusing or abusing authority or power or by taking advantage of some weakness or disability or misfortune of the plaintiff. *Id.* A defendant acts in reckless disregard of a plaintiff's rights if, under the circumstances, it reflects complete indifference to a plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate a plaintiff's rights under federal law. *Id.* It is unclear whether punitive damages have to be proved by a preponderance of the evidence or by clear and convincing evidence. *See Green v. Montana Dep't of Pub. Health & Human Servs.*, No. CV 12-62-H-DLC, 2014 WL 12591835, at *5 (D. Mont. June 13, 2014). Many courts have used the preponderance of evidence standard because the lack of authority to require the clear and convincing evidence standard. *Id.*

Analysis

There is no evidence that Skinner acted with malice, oppression or in reckless disregard that would make him responsible for punitive damages. He detained Miguel Hernandez to determine whether he had committed a crime, illegally entered the United States of America, and transported him to the Yellowstone County Detention Facility at the request of ICE. He did not detain or transport Miguel Hernandez because of ill will or spite, or with the purpose to injure him. He did not misuse or abuse his authority when he detained and transported him. He did not act with a complete indifference to Miguel Hernandez's rights or a risk that he would violate Miguel Hernandez's rights when he detained and transported him.

Skinner had a reasonable suspicion that Miguel Hernandez might have committed a crime with his presence in the United States of America that allowed him to detain him to determine whether he had committed a crime. Skinner knew (1) there had been sworn testimony that he was illegally in the United States of America, (2) he was not fluent in English, (3) he identified himself with an expired United Mexican States identification card and (4) he could not articulate his immigration status. Skinner did not detain him because of malice or without any basis. Skinner had a reasonable belief that probable cause existed to arrest him. Skinner assumed that ICE had information that Miguel Hernandez had illegally entered the United States of America that established probable cause to arrest him. Skinner assumed ICE had the

ability to search the visas issued by the United States of America and determined that Miguel Hernandez did not have a visa and had committed a crime with his entry into the United States of America. Skinner did not transport him because of malice or without any basis.

Injunctive and Declaratory Relief

Law

Injunctive relief either requires a party to abstain from or perform particular conduct. Declaratory relief either declares particular conduct proper or improper. In general, to obtain injunctive relief a party must show (1) irreparable harm, (2) inadequate remedies at law, (3) a remedy in equity is required and (4) public interest would not be disserved. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57, 130 S. Ct. 2743, 2756, 177 L. Ed. 2d 461 (2010). With an injunction to abstain from particular conduct, a party must show there is a likelihood that the violation is capable of repetition. *Nordstrom v. Ryan*, 762 F.3d 903, 911 (9th Cir. 2014); *Fikre v. Fed. Bureau of Investigation*, 142 F. Supp. 3d 1152, 1164 (D. Or. 2015). There is a likelihood that the violation is capable of repetition when a policy or a practice of the entity caused the violation. *Id.* When a damages claim based on an alleged past constitutional violation is intertwined with a declaratory judgment claim based on the same alleged past constitutional violation, the declaratory judgment claim serves no purpose. *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 847, n.5 (9th Cir.), opinion amended on denial of reh'g, 312 F.3d 416 (9th Cir. 2002).

Analysis

Miguel Hernandez did not file a complaint against Yellowstone County and declined to pursue the official capacity claims against Skinner that would actually have been a claim against the County. Because the County is not a party to the case, the injunction or declaration would not run to it.

Skinner is retired. Skinner is no longer a Yellowstone County Deputy Sheriff. An injunction or declaration against him would have little effect. There would be little possibility that a similar situation would occur with him.

Miguel Hernandez will not be able to prove he suffered an irreparable harm or that the remedies at law are inadequate.

Miguel Hernandez filed both a damages claim and a declaratory judgment claim based on the same alleged past constitutional violation. A determination of the damages claim by necessity will also determine the declaratory judgment claim. The declaratory judgment claim is unnecessary.

Conclusion

The Court should grant Skinner's motion for summary judgment. There is no genuine issue of material fact and he is entitled to judgment as a matter of law. He did not violate Miguel Hernandez's right to unreasonable searches and seizures. He detained Miguel Hernandez to determine whether he had committed a crime, illegally entered the United States of America, and transported him to the Yellowstone County

Detention Facility at the request of ICE. Even if Skinner violated Miguel Hernandez's right to unreasonable searches and seizures with the detention and transportation, he is entitled to qualified immunity. There is no legal authority that clearly establishes he would violate Miguel Hernandez's right against unreasonable searches and seizures when he detained him to determine whether he had committed a crime and transported him to the Facility at the request of ICE. He did not act with malice, oppression or in reckless disregard that would make him responsible for punitive damages. Injunctive and declaratory relief are not available against him.

Dated this 27th day of February, 2019.

/s/ Kevin Gillen
Kevin Gillen
Deputy Yellowstone County Attorney

Certificate of Compliance

Pursuant to Civil Local Rule 7.1(d)(2)(E), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word 2016 is 3,347 words, excluding Certificate of Service and Certificate of Compliance.

Dated this 27th day of February, 2019.

/s/ Kevin Gillen

Kevin Gillen

Deputy Yellowstone County Attorney

Certificate of Service

I certify that on the date below I served a copy of Derrek Skinner's Brief in Support of Motion for Summary Judgment to:

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Dated this 27th day of February, 2019.

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