IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

CHERYL A. MUNDAY, and MARGARET DEVINE, *on behalf of themselves and others similarly situated*,	)	
Plaintiffs,	)	No. 9:20-cv-02144-DCN
vs.	)	**ORDER**
BEAUFORT COUNTY,	)	
Defendant.	)	

The following matter is before the court on the named plaintiffs Margaret Devine ("Devine") and Cheryl Munday's ("Munday") (together, "plaintiffs") motion for partial summary judgment, ECF No. 93, and motion to strike, ECF No. 125. For the reasons set forth below, the court denies the motions.

I. BACKGROUND

Because the parties are well acquainted with this litigation, the court will only briefly summarize material facts for the purpose of aiding an understanding of the court's legal analysis.

This matter arises from certain practices at the Beaufort County Detention Center ("BCDC"), which is operated by defendant Beaufort County ("Beaufort County"). See generally ECF No. 12, Amend. Compl. The practices at issue are used for pre-classification detainees.[1] Once a pre-trial detainee goes to a bond hearing and cannot

[1] A pre-classification detainee is an inmate who has been arrested and placed or housed in an area at the detention center prior to going to a bond hearing. ECF No. 34-1 at 20:7–14.

post a bond, upon returning to BCDC, he or she is then classified to a different area at BCDC, such as in general population or, depending on the inmate's behavior, maximum or super maximum security. ECF No. 34-3 at 21:3–18. On February 27, 2015, BCDC adopted a policy (the "policy") that all inmates moved from pre-classification to other areas of BCDC, including general population, would be strip searched. See ECF No. 31-4 at 2.[2] However, BCDC's practice (the "practice") has been to house female pre-classification inmates in general population while placing male pre-classification inmates in a separate pre-classification cell outside of general population. ECF No. 31-3 at 14, Black Dep. 24:2–20. Because female pre-classification inmates are housed in general population from the outset, the practice, when combined with the policy, resulted in BCDC conducting a strip search on every female pre-classification detainee awaiting a bond hearing. ECF No. 40-1 ¶ 6. BCDC, however, did not do so for similarly situated male pre-classification detainees prior to May 5, 2020, because they were housed in a separate pre-classification cell outside of general population.

Plaintiffs allege they were impacted by this practice. Specifically, each of them describes being arrested for driving under the influence (each later had that charge dismissed), brought into BCDC for holding, and subjected to a public strip search and visual body cavity search—while similarly situated men were not subjected to such a search. See generally Amend. Compl.

Plaintiffs filed the instant case on March 6, 2020, in the Beaufort County Court of Common Pleas on behalf of themselves and a class of all similarly situated women who

[2] BCDC adopted the policy through a memorandum sent by Major C.E. Allen ("Deputy Director Allen"), the Deputy Director of BCDC. ECF No. 31-4 at 2.

were subjected to the practice and the policy.[3] ECF No. 1-1, Compl. On June 5, 2020, Beaufort County removed the case to federal court. ECF No. 1. This case was referred to Magistrate Judge Molly Cherry for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Civil Rule 73.02(B)(2)(g) (D.S.C.). On August 5, 2020, plaintiffs filed an amended complaint, now the operative complaint. ECF No. 12, Amend. Compl. The plaintiffs bring various state and federal claims against Beaufort County, Assistant County Administrator for the Public Safety Division Philip Foot ("Foot"), Director of the BCDC Colonel Quandara Grant ("Director Grant"), John Does 1–5 (described as "BCDC Supervisory Defendants"), and Jane Does 1-5 (described as "BCDC Officer Defendants") (collectively, "defendants"). Amend. Compl. ¶¶ 7–11. On March 27, 2023, this court issued an order resolving a motion for summary judgment which dismissed all claims against individual defendants and dismissed many of the claims brought against Beaufort County but denied the motion as to plaintiffs' claim of violation of the equal protection clause against Beaufort County under 42 U.S.C. § 1983, as well as plaintiffs' request for attorneys' fees under 42 U.S.C. § 1988(b). ECF No. 82. On August 1, 2023, the court denied defendants' motion for reconsideration of that order. ECF No. 104.

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[3] Specifically, the class is defined as

> all women who have been admitted to the Beaufort County Detention Center while waiting for bail to be set or for an initial court appearance, women who have been arrested on default warrants and held in the Beaufort County Detention Center, and women who have been held in protective custody in the Beaufort County Detention Center. . . . These women have all been unlawfully subjected to routine strip searches, including degrading visual body cavity searches of their anuses and vaginas.

Amend. Compl. ¶ 4. The court granted plaintiffs' motion for certification on July 14, 2022. ECF No. 68.

On June 13, 2023, plaintiffs filed a motion for partial summary judgment. ECF No. 93. On July 31, 2023, Beaufort County filed a response in opposition, ECF No. 103, to which plaintiffs replied on August 18, 2023, ECF No. 109. On October 5, 2023, the court directed the parties to file supplemental briefs on the issue of Monell liability.[4] The court thereafter held a conference call with the parties. The parties filed an amended scheduling order on December 19, 2023, which reopened limited discovery and set a March 2024 deadline for the supplemental briefs addressing Monell liability. ECF No. 115. On March 15, 2024, Beaufort County filed a supplemental memorandum addressing Monell liability, ECF No. 116, and plaintiffs filed a supplemental reply in support, ECF No. 117, and a supplemental memorandum addressing Monell liability, ECF No. 118. On July 23, 2024, Beaufort County filed a supplemental affidavit from Director Grant, ECF No. 123, Grant Aff., and on July 24, 2024, it filed an affidavit from Sean Stewart ("Stewart"), ECF No. 124, Stewart Aff., in response to the pending partial motion for summary judgment. On August 2, 2024, plaintiffs filed a motion to strike the affidavits, ECF No. 125, to which Beaufort County responded in opposition on August 12, 2024, ECF No. 127. The court held a hearing on these motions on August 14, 2024. ECF No. 128. As such, the motions have been fully briefed and are now ripe for review.

II. STANDARD

Summary judgment shall be granted if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "By its very terms, this standard provides that the mere existence of some

[4] Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

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). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. However, "when the movant bears the burden of proof at trial, [s]he 'must do more than put the issue into genuine doubt; indeed [she] must remove genuine doubt from the issue altogether.'" McIntyre v. Robinson, 126 F. Supp. 2d 394, 400 (D. Md. 2000) (quoting Hoover Color Corp. v. Bayer Corp., 199 F.3d 160, 164 (4th Cir. 1999) (internal quotation marks and citations omitted)). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. The court should view the evidence in the light most favorable to the non-moving party and draw all inferences in its favor. Id. at 255.

III. DISCUSSION

A. Motion for Partial Summary Judgment

The court begins with the motion for partial summary judgment. Rather than summarizing all filed briefs—which included arguments irrelevant to the question of municipal liability—the court instead only summarizes each party's position as to whether there is a genuine issue of material fact that Beaufort County, a municipality, may be liable to plaintiffs should they win this case at trial.

Plaintiffs filed a motion for partial summary judgment which seeks "judgment in their favor with respect to the issue of liability on all remaining causes of action." ECF No. 93 at 1. In their memo in support, plaintiffs contend that "[t]here are no genuine issues of fact as to the relevant BCDC policy and practice," and "[t]he sole remaining issue is whether the practice is constitutional." ECF No. 93-1 at 3. Plaintiffs emphasize that at least two other courts have granted summary judgment on liability under nearly identical circumstances. Id. at 10–12 (citing Ford v. City of Bos., 154 F. Supp. 2d 131, 151 (D. Mass. 2001); Gary v. Sheahan, 1998 WL 547116, at *7–10 (N.D. Ill. Aug. 20, 1998)).[5] Plaintiffs contend that no reasonable jury could return a verdict in favor of Beaufort County on the question of liability because its challenged practice—strip searching female pre-trial detainees but not similarly situated male pre-trial detainees—fails both the intermediate and more deferential standards of scrutiny. Id. at 12–13. In other words, plaintiffs request the court follow the other courts which have granted summary judgment on liability, without providing the court any arguments as to municipal liability and solely framing their arguments in relation to equal protection.

In response, Beaufort County first notes that plaintiffs' motion is unusual because they seek summary judgment on an issue for which they bear the burden of proof. ECF No. 103 at 6. Stated differently, plaintiffs carry the burden of proving unconstitutionality and therefore for the court to grant their motion, the plaintiffs "must affirmatively make an extremely strong showing," namely, "they must remove genuine doubt from the issue

[5] Each of these cases addressed Monell liability in reaching the conclusion to hold the municipality liable under § 1983 for civil rights violations. See Ford, 154 F. Supp. 2d at 144–46; Gary, 1998 WL 547116, at *4–6. Only after reaching the municipal liability conclusions did each court consider the equal protection arguments to which plaintiffs cite. See 93-1 at 10–12.

altogether." Id. at 6–7 (quoting Hoover Color Corp., 199 F.3d at 164) (internal quotation marks omitted). Beaufort County thereafter provides arguments related to equal protection without addressing municipal liability. See generally ECF No. 103.

In reply, plaintiffs reiterate their position as to equal protection, with no references to municipal liability. See generally ECF No. 109.

Despite solely seeking summary judgment against Beaufort County with respect to liability, the parties each failed to brief the issue of municipal liability in the motion for partial summary judgment or the subsequent response briefs. See generally ECF Nos. 93-1; 103; 109. The court directed the parties to submit supplemental briefs addressing municipal liability pursuant to Monell and its progeny and each party filed those briefs in March 2024. ECF Nos. 116; 117; 118. The parties did not confine those briefs to the question of municipal liability; instead, each party reiterates its position as to the remaining equal protection claim and Beaufort County asserts new arguments regarding damages and the statute of limitations. The court will summarize only the arguments related to municipal liability.

Beaufort County concludes its introduction by saying that "if anything, the Court should grant the County summary judgment because Plaintiffs cannot create a genuine issue of material fact as to municipal liability under Monell."[6] ECF No. 116 at 2 (emphasis in original). It identifies the four theories of Monell liability and explains that

[6] Beaufort County has it bass ackwards. It previously filed a motion for summary judgment that failed to brief the issue of municipal liability. ECF No. 48. The court granted in part and denied in part that motion. ECF No. 82. Presently before the court is plaintiffs' motion for partial summary judgment. ECF No. 93. It is plaintiffs' burden to establish that there is no genuine dispute of material fact as to municipal liability. See Fed. R. Civ. P. 56(c). Conversely, if Beaufort County disagrees, it is the county's burden to show that there is a genuine issue of material fact as to municipal liability.

plaintiffs have not carried their burden of establishing municipal liability. Id. at 6–17. First, it argues that the plaintiffs do not allege that the purported equal protection violations were pursuant to express county policy. Id. at 7–8. It contends that, rather than alleging discriminatory language in any formal written county policy, plaintiffs instead focus on Beaufort County's alleged practice, which is not an express county policy. Id. Second, it claims that plaintiffs have not presented any evidence of who decided to strip search all female pre-classification detainees and whether that person was a final policymaker. Id. at 10–11. To the extent that plaintiffs now argue that Director Grant is a final policymaker who enacted that policy, Beaufort County argues that she serves under the County Administrator and the County Council, which are the appropriate "final policymakers" for this theory of liability. Id. at 12–14. Third, Beaufort County argues that plaintiffs have not presented any evidence of omissions by the county—such as training in constitutional violations or the lack thereof—which caused the alleged gender discrimination that could give rise to municipal liability under the third theory of liability. Id. at 14–15. Fourth, it asserts that plaintiffs have not presented any evidence that the county policymakers—which Beaufort County identifies as the County Council or the County Administrator—ever had actual or constructive knowledge of the challenged practice of disparate treatment of female versus male pre-classification detainees, such that the practice is not fairly attributable to Beaufort County. Id. at 16–17. In sum, Beaufort County claims that there is a genuine issue of material fact as to municipal liability such that the court should deny the partial motion for summary judgment. Id. at 7–17. Beaufort County thereafter provides additional

arguments against plaintiffs' case unrelated to the liability question at issue in this motion.[7] Id. at 17–30.

Plaintiffs filed two supplemental briefs. ECF Nos. 117; 118. The first solely focuses on their equal protection claims against Beaufort County and reiterates many of the equal protection arguments made in their original motion for partial summary judgment. ECF No. 117 at 2–9. This brief is wholly irrelevant to the question of municipal liability. See id. The second focuses on municipal liability. ECF No. 118. Plaintiffs argue that they have identified a specific municipal policy or custom: the detention center's practice of conducting strip searches of all pre-classification female detainees, but not similarly situated male detainees. Id. at 5. An unconstitutional municipal policy can be found not only in municipal ordinances or regulations, but also can be found "in formal or informal ad hoc 'policy' choices or decisions of municipal officials authorized to make and implement municipal policy." Id. at 6 (citing Spell v. McDaniel, 824 F.2d 1380, 1385–86 (4th Cir. 1987)). Moreover, plaintiffs claim that Beaufort County "failed to stop or to correct the widespread pattern of unconstitutional conduct which lasted over five years and included thousands of constitutional violations." Id. This pattern was so persistent "that it constituted a custom as contemplated by Monell." Id. at 7. Plaintiffs assert that "[t]his is not a case in which the actions of individual county employees cannot be attributed to the county itself" and "[t]here is no attempt to impose liability on [Beaufort County] on the basis of respondeat superior." Id.

[7] Namely, that some of the plaintiffs' claims are time-barred, that plaintiffs have not demonstrated that there was an "easy" solution available to the county, and that plaintiffs may only recover nominal damages. ECF No. 116 at 17–30.

Municipalities and other local government units may be held liable under § 1983. Monell, 436 U.S. at 690. But "a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." Id. at 691; see Connick v. Thompson, 563 U.S. 51, 60 (2011) (holding that local governments "are not vicariously liable under § 1983 for their employees' actions"). Beyond identifying a policy or practice that may be attributable to the governmental unit, the plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. See Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 404 (1997) (emphasis in original). In other words, a plaintiff must show that the action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the action and the deprivation of federal rights. Id. Indeed, "[t]he first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." City of Canton v. Harris, 489 U.S. 378, 385 (1989).

Thus, a plaintiff who seeks to assert a § 1983 claim against a municipality is obliged to "to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." Bd. of Cnty. Comm'rs, 520 U.S. at 403 (citing Monell, 436 U.S. at 694). As interpreted by the Fourth Circuit, a "policy or custom" can exist in four ways:

> (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that "manifest[s] deliberate indifference to the rights of citizens"; or (4) through a practice that is so "persistent and widespread" as to constitute a "custom or usage with the force of law."

Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003) (quoting Carter v. Morris, 164 F.3d 215, 218 (4th Cir. 1999)). The Fourth Circuit has long recognized that Monell and its progeny require the plaintiff to adequately plead and prove the existence of an official policy or custom that proximately caused a deprivation of rights. Walker v. Prince George's Cnty., 575 F.3d 426, 431 (4th Cir. 2009). The identification of a specific municipal policy or custom is a threshold requirement. See Semple v. City of Moundsville, 195 F.3d 708, 712 (4th Cir. 1999).

Stated differently, municipal liability results only when the policy or custom—as defined by one of the four Monell theories—is also (1) fairly attributable to the municipality as its "own" and (2) the "moving force behind the particular constitutional violation. Spell, 824 F.2d at 1386–87 (first citing Monell, 436 U.S. at 683; and then citing Polk Cnty. v. Dodson, 454 U.S. 312, 326 (1981)). In practical terms, that means that beyond identifying one of the four Monell theories, the plaintiff must also demonstrate that, through the county's deliberate conduct, it was the "moving force" behind the injury alleged. See Bd. of Cnty. Comm'rs, 520 U.S. at 404. A plaintiff must show that the action was taken with the requisite degree of culpability and must demonstrate a direct causal like between the action and the deprivation of federal rights. Id.

The court starts by addressing the four Monell theories—which include an analysis of whether the policy or custom is fairly attributable to Beaufort County—before reaching the issue of causation. The court ultimately concludes that there are genuine issues of material fact that preclude a finding of partial summary judgment on the question of municipal liability.

Plaintiffs do not specify which of the four ways a "policy or custom" exists in this case to establish Monell liability. See generally ECF No. 118 at 5–8. Instead, they identify that "the strip and/or visual body cavity searches to which [plaintiffs] were subjected were performed pursuant to [Beaufort County's] policy and practice to indiscriminately search all or a large number of women but not men being processed into the jail." Id. at 5 (citing ECF No. 12 at 29). Plaintiffs do not specify that the practice (1) was an express policy; (2) was established through the decisions of someone with final decision-making authority for Beaufort County; (3) through an omission that manifests deliberate indifference to the rights of citizens; or (4) through a practice that is so persistent and widespread as to constitute a custom or usage with the force of law. See generally id. at 5–8. Instead, plaintiffs provide arguments that fall into multiple categories. Compare id. at 6 (implicating the first and second theories by arguing that a policy may also be found in formal or informal ad hoc policy choices or decisions of municipal officials authorized to make and implicate municipal policy); with id. (implicating the third and fourth theories by contending that Beaufort County failed to stop or to correct the widespread pattern of unconstitutional conduct which lasted over five years). Given the uncertainty, the court will review each of the four ways that a policy or custom could exist to determine whether there is a genuine issue of material fact. The court ultimately concludes that there remain genuine issues of material fact for each Monell theory such that summary judgment is denied.

1. Express Policy

A municipality may deprive a plaintiff of her constitutional rights, triggering Monell liability under Section 1983, through an express policy typically embodied in its

written ordinances or regulations. See Lytle, 326 F.3d at 471. Indeed, the Fourth Circuit has characterized "the enactment of legislation as the prototypical conduct that can give rise to liability under Monell." Berkley v. Common Council of Charleston, 63 F.3d 295, 299 (4th Cir. 1995) (en banc).

Plaintiffs do not identify an express policy. See ECF No. 118 at 6. At most, plaintiffs identify Beaufort County's "policy and practice to indiscriminately search all or a large number of women but not men being processed into [BCDC]." Id. at 5 (quoting ECF No. 12 at 29). The practice of strip-searching all female pre-classification detainees but not all male pre-classification detainees is not an express policy because it was not a written ordinance, regulation, or enacted legislation. See Lytle, 326 F.3d at 471; Berkley, 63 F.3d at 299. Alternatively, plaintiffs point to the policy which arose from a written memorandum sent by Deputy Director Allen on February 27, 2015. See ECF No. 31-4 at 2. To reiterate, the policy directed that all inmates moved from pre-classification to other areas of BCDC, including general population, would be strip searched. See id. This memorandum is not a written ordinance, regulation, or enacted legislation and therefore does not qualify as an express policy. See Lytle, 326 F.3d at 471; Berkley, 63 F.3d at 299. Unsurprisingly, Beaufort County highlights that plaintiffs fail to challenge county "legislation, ordinances, regulations, or official county policy that elected officials have enacted." ECF No. 116 at 7. Moreover, it notes that "[p]laintiffs do not claim that the language of any formal written [c]ounty policy is discriminatory." Id. The court agrees with Beaufort County and finds that plaintiffs have not met their burden to show no genuine issue of material fact as to this first method of establishing municipal liability.

2. Decision of Final Policymaker

Not every decision by every municipal official will subject a municipality to section 1983 liability. Riddick v. Sch. Bd. of Portsmouth, 238 F.3d 518, 523 (4th Cir. 2000). Rather, municipal liability attaches "only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." Id. (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986)). "To qualify as a 'final policymaking official,' a municipal official must have the responsibility and authority to implement final municipal policy with respect to a particular court of action." Id. (quoting Pembaur, 475 U.S. at 482–83). Policymaking authority implies authority to set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely operation aspects of government. Spell v. McDaniel, 824 F.2d 1380, 1386 (4th Cir. 1987). "The focus on final policymaking authority has long been recognized as a vital inquiry in determining a municipality's liability under § 1983, for it distinguishes 'acts of the municipality from acts of employees of the municipality.'" Washington v. Balt. Police Dep't, 457 F. Supp. 3d 520, 537 (D. Md. 2020) (first citing Pembaur, 475 U.S. at 479; and then citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988)).

The question of who possesses final policymaking authority is one of state law to be resolved by the trial judge before the case is submitted to jury. Riddick, 238 F.3d at 523 (citing Pembaur, 475 U.S. at 483); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989). In this analysis, courts generally look to "the relevant legal materials, including

state and local positive law, 'as well as 'custom or usage' having the force of law.'"[8] Jett, 491 U.S. at 737 (quoting Praprotnik, 485 U.S. at 124 n.1).

Though plaintiffs cite to a decision which found an ad hoc policy constituted a municipal policy when implemented by an authorized municipal official, plaintiffs fail to identify a single person who implemented the "policy" or "practice" at issue in this case. See ECF No. 118 at 6. Additionally, plaintiffs fail to explain how that unidentified person possesses final policymaking authority under South Carolina law. See id. In contrast, Beaufort County first argues that plaintiffs have not identified any final policymaker's decision that prompted the strip-search practice. ECF No. 116 at 10. However, even if plaintiffs were to argue that Director Grant had such authority, Beaufort County claims that Director Grant was not a final policymaker under South Carolina state law because she was an employee and not an elected officeholder.[9] Id. at 11–12.

At the hearing, Beaufort County explained that county council was the final policymaker but that it had delegated its policymaking authority to the county administrator, whereas it had delegated the operational authority of the BCDC to Director Grant. ECF No. 128. Additionally, the parties agreed that Director Grant, through her

[8] "Positive law typically consists of enacted law—the codes, statutes, and regulations that are applied and enforced in the courts. The term derives from the medieval use of positum (Latin 'established'), so that the phrase positive law literally means law established by human authority." Black's Law Dictionary (12th ed. 2024). The Fourth Circuit has implied that positive law encompasses not only legislative or executive enactment but also common law. See Worm v. Am. Cyanamid Co., 5 F.3d 744, 748 (4th Cir. 1993). The nuances of that distinction are irrelevant for the instant inquiry before the court.

[9] Plaintiffs fail to make any argument under the appropriate standard as to a final policymaker decision. See ECF No. 118 at 6. Therefore, the court need not delve into the intricacies of the Beaufort County administration, though Beaufort County provides such a summary in its brief. See ECF No. 116 at 12.

Deputy Director, implemented the policy after consultation with the then-county attorney. Id.; see also ECF No. 103-1, Grant Aff. ¶ 50. Plaintiffs do not contend that Director Grant is a final policymaker for Beaufort County in their briefs, though they implied as much at the hearing. See ECF Nos. 118 at 6; 128.

As such, the court denies the motion for partial summary judgment to the extent it claims that an unconstitutional policy or custom was established by the decision of a final policymaker because there is a genuine issue of material fact as to who made the decision regarding the practice and a question of law of whether that person had final policymaking authority. Should plaintiffs pursue the second Monell theory to establish liability at trial, the court will resolve the latter question of law before the case goes to the jury. See Riddick, 238 F.3d at 523.

3. Omission that Manifests Deliberate Indifference to the Rights of Citizens

A plaintiff can establish liability by demonstrating a deficient program of police training and supervision that results in a constitutional violation committed by untrained or improperly trained officers. Spell, 824 F.2d at 1387–89. "Section 1983 liability may attach if officers are not adequately trained 'in relation to the tasks the particular officers must perform,' and this deficiency is 'closely related to the ultimate injury.'" Lytle, 326 F.3d at 473 (quoting Canton, 489 U.S. at 390–91). To establish such an omission, plaintiffs must provide "evidence that additional training" would have resulted in the officers responding differently. Id. at 473–74. Moreover, "a failure to train can only form a basis for liability if 'it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations.'" Id. at 474 (quoting Canton, 489 U.S. at 397 (O'Connor, J., concurring in part and dissenting in part)).

While establishing a custom or policy of failure to train normally requires a pattern of constitutional violations that demonstrated to the municipality the need for better or different training, the Supreme Court has suggested that liability of a municipality for failure to train could be based on a single incident where the need for training was obvious. Canton, 489 U.S. at 390 n.10 (explaining that the need to train officers on the constitutional limitations of the use of deadly force is obvious when those officers are directed to arrest fleeing felons and provided firearms for that task). However, "a single incident is almost never enough to warrant municipal liability." Est. of Jones v. City of Martinsburg, 961 F.3d 661, 672 (4th Cir. 2020).

Plaintiffs do not claim that an omission or Beaufort County's failure to train its correctional officers and employees caused the alleged constitutional violation in this case. See ECF No. 118 at 6–8. Beaufort County identifies that "[p]laintiffs have not presented, and cannot present, any evidence of an omission in training that specifically caused the alleged constitutional violations." ECF No. 116 at 15. The court agrees and finds that plaintiffs have not adequately shown there is no genuine dispute of material fact as to this theory of municipal liability.

4. Persistent and Widespread Policy that Constitutes a Custom or Usage with the Force of Law

"Custom, or usage" may serve as a basis for imposing municipal liability, where the existence of that custom or usage is illustrated by "persistent and widespread . . . practices of municipal officers which although not authorized by written law, are so permanent and well-settled as to have the force of law." Spell, 824 F.2d at 1386 (quoting Monell, 436 U.S. at 690–91) (cleaned up). A plaintiff can demonstrate this fourth Monell theory by identifying an "irresponsible failure by municipal policymakers

to put a stop to or correct a widespread pattern of unconstitutional conduct by police officers of which the specific violation is simply an example." Id. at 1387–89. "A municipality is not liable for mere 'isolated incidents of unconstitutional conduct by subordinate employees . . . . Rather, there must be numerous particular instances of unconstitutional conduct in order to establish a custom or practice.'" Smith v. Ray, 409 F. App'x 641, 650 (4th Cir. 2011) (quoting Lytle, 326 F.3d at 473). This fourth theory of liability is commonly referred to as a "condonation theory" of liability. See Lilly v. Balt. Police Dep't, 694 F. Supp. 3d 569, 589 (D. Md. 2023).

Plaintiffs allege that Beaufort County maintained a custom, policy, and/or practice of strip searching every female pre-trial detainee at BCDC. ECF No. 93-1 at 2–3. Plaintiffs therefore allege a theory of custom "by condonation." See Owens v. Balt. City State's Att'ys Off., 767 F.3d 379, 402 (4th Cir. 2014) (quoting Spell, 824 F.2d at 1390); see also Lytle, 326 F.3d at 471. "Under this theory of liability, a city violates § 1983 if municipal policymakers fail 'to put a stop to or to correct a widespread pattern of unconstitutional conduct.'" Owens, 767 F.3d at 402 (quoting Spell, 824 F.2d at 1389). To prevail under such a theory, a plaintiff must point to a "persistent and widespread practice[] of municipal officials," the "duration and frequency" of which indicate that policymakers (1) had actual or constructive knowledge of the conduct and (2) failed to correct it due to their "deliberate indifference." Spell, 824 F.2d at 1386–91 (alterations omitted). Actual knowledge may be evidenced by recorded reports to or discussions by a municipal governing body. Id. at 1387. Constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of its official responsibilities the governing body should have known of them. Id. Both

knowledge and indifference can be inferred from the "extent" of employees' misconduct. Id. at 1391. Sporadic or isolated violations of rights will not give rise to Monell liability; only "widespread or flagrant" violations will. Id. at 1387. Additionally, "if the custom grew from within the ranks of employees, [plaintiffs] may need to make an additional showing that the municipality knew about the custom and 'condoned' it." Greensboro Pro. Fire Fighters Ass'n, Loc. 3157 v. City of Greensboro, 64 F.3d 962, 966 (4th Cir. 1995).

Plaintiffs agree that no municipality can be held liable under § 1983 on a respondeat superior theory. See ECF No. 118 at 7. "A plaintiff's theory is most likely to slip into that forbidden realm when she alleges municipal omission—either a policy of deliberate indifference or the condonation of an unconstitutional custom." Carter, 164 F.3d at 218 (citing Bd. of Cnty. Comm'rs., 520 U.S. at 405). "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." Bd. of Cnty. Comm'rs, 520 U.S. at 405. Thus, "municipal liability will attach only for those policies or customs having a 'specific deficiency or deficiencies . . . such as to make the specific violation almost bound to happen, sooner or later, rather than merely likely to happy in the long run.'" Carter, 164 F.3d at 218 (quoting Spell, 824 F.2d at 1390).

Plaintiffs allege that the unlawful practice of strip-searching female detainees—but not similarly situated male detainees—"lasted over five years and included thousands of constitutional violations." ECF No. 118 at 6. In other words, plaintiffs "do not rely on episodic exercises of discretion," but rather "a widespread and pervasive practice." Id. at

7. This practice was BCDC's "unequal practice of conducting a strip search on every female pre-classification detainee awaiting bond between February 27, 2015, and May 5, 2020, but not on every mail pre-classification detainee." Id. Plaintiffs imply that this duration and frequency warrants "a finding of either actual or constructive knowledge by the municipal governing body that the [strip-searching] practice[] ha[s] become customary among its employee." Id. at 7 n.8. Specifically, plaintiffs contend that the court should find constructive knowledge—where the practice was so widespread or flagrant that in the proper exercise of its official responsibilities the governing body should have known of them—such that the custom or usage may be fairly attributed to Beaufort County on its own. Id. Finally, plaintiffs allege that this practice "was the moving force and proximate cause" of the violations of plaintiffs' equal protection rights. Id. at 8.

Beaufort County emphasizes that plaintiffs have not presented any evidence that the responsible policymakers for Beaufort County ever had actual or constructive knowledge of the strip-searching practice. ECF No. 116 at 16. It further identifies those policymakers to be the County Council and the County Administrator. Id. It specifies that the plaintiffs fail to identify legal actions challenging the practice, complaints about the practice, or any other information that could have put the appropriate county policymaker on notice. Id. at 16–17. However, at the hearing, counsel for Beaufort County conceded that because Director Grant consulted with the county attorney, Beaufort County likely had actual notice if not constructive notice of the strip-searching practice. ECF No. 128.

In essence, both parties agree that there is no genuine issue of material fact that the alleged searches were a widespread and pervasive practice that occurred over a five-year span of time. See ECF Nos. 118 at 6–8; 116 at 16–17; cf. Carter, 164 F.3d at 220 (concluding that the "meager history of isolated incidents" did not approach the "'widespread and permanent' practice necessary to establish municipal custom").

The parties dispute whether the final element—that the policymakers failed to correct the unconstitutional custom due to their "deliberate indifference"—is met. Spell, 824 F.2d at 1386–91. On the one hand, at the hearing, Beaufort County emphasized that there is a genuine dispute of material fact as to deliberate indifference because of the many other considerations that may have led to their failure to address the practice. ECF No. 128. For example, at that time the constitutional right was not clearly established, the policymakers had to abide by state laws separating male and female detainees, and BCDC was dealing with an issue of overcrowding that only affected male inmates. Id. Each of these purportedly led the relevant decisionmakers to house male and female pre-classification detainees differently. Id. In contrast, plaintiffs appear to argue in a footnote that the practice was so severe and pervasive that some unidentified county policymaker should have been on notice as to the practice and he or she were thereafter deliberately indifferent to the inequal treatment of male and female pre-classification detainees at BCDC. ECF No. 118 at 7 n.8.

The court finds that there is a genuine dispute of material fact as to whether Beaufort County's failure to correct the strip-search practice reflects deliberate indifference. As such, the court finds that genuine disputes over material facts remain as

to whether a policy or custom—as defined by Monell— exists in this case such that the court denies the partial motion for summary judgment as to municipal liability.[10]

B. Motion to Strike

Plaintiffs filed a motion to strike the late-filed affidavits from Director Grant, ECF No. 123, and expert witness Sean Stewart, ECF No. 124. ECF No. 125. Plaintiffs specify they bring a motion to strike pursuant to Fed. R. Civ. P. 56(c)(4). Id. at 3. The affidavits are both irrelevant to the issue of municipal liability, which is the sole issue before the court in the partial motion for summary judgment. See ECF Nos. 93; 123; 124. Consequently, the court denies plaintiffs' motion to strike. Should the parties object to the entry of evidence at the forthcoming jury trial, they may raise those objections pursuant to the Federal Rules of Evidence and the Federal Rules of Civil

[10] To reiterate, beyond identifying one of the four Monell theories, the plaintiff must also demonstrate that, through the county's deliberate conduct, it was the "moving force" behind the injury alleged. See Bd. of Cnty. Comm'rs., 520 U.S. at 404 (1997); Franklin v. City of Charlotte, 64 F.4th 519, 536 (4th Cir. 2023) (explaining that plaintiffs must establish that the municipal policy or custom "caused the alleged constitutional injury"). When a municipal policy or custom is itself unconstitutional (i.e., when it directly commands or authorizes constitutional violations) the causal connection between policy and violation is manifest and does not require independent proof. Spell, 824 F.2d at 1387. "But a policy or custom that is not itself unconstitutional in this strict sense must be independently proven to have caused the violation." Id. at 1387–88. "Proof merely that such a policy or custom was 'likely' to cause a particular violation is not sufficient; there must be proven at least an 'affirmative link' between policy or custom and violation." Id. at 1388. Stated in tort principle terms, "the causal connection must be 'proximate' not merely 'but-for' causation-in-fact." Id. (quoting City of Okla. City v. Tuttle, 471 U.S. 808, 823 (1985)).

Neither party extensively briefed this final step. However, the unconstitutional "custom" entailed strip searching female pre-classification detainees, but not strip searching similarly situated male pre-classification detainees. This is unconstitutional on its face because it treats males and females differently on the face of the implemented practice. See, e.g., Monell, 436 U.S. at 661 (mandatory pregnancy leave policy); Tuttle, 471 U.S. at 822–23 (noting that no additional causal evidence was required when the policy in and of itself violated constitutional rights and when the municipality exercised that policy). Therefore, it is likely that the causal connection is manifest.

Procedure either at trial or in a motion in limine timely filed in accordance with the scheduling order.

IV. CONCLUSION

For the foregoing reasons, the court **DENIES** the motion for partial summary judgment and **DENIES** the motion to strike.

AND IT IS SO ORDERED.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

August 21, 2024

Charleston, South Carolina