UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

ROPHEAL MCGEE JR,

Plaintiff,

v. **Case No. 1:25-cv-36-AW-HTC**

CITY OF GAINESVILLE, FLORIDA, and CASEY WALSH, in her individual capacity,

Defendants.
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DEFENDANTS' MOTION FOR FINAL SUMMARY JUDGMENT

Defendants CITY OF GAINESVILLE, FLORIDA, and CASEY WALSH, pursuant to Rule 56, Fed. R. Civ. P., Local Rule 56.1, file this Motion for Final Summary Judgment.

Shortly after midnight on November 8, 2021, officers with the Gainesville Police Department (GPD) – including Cpl. Casey Walsh and her K9 partner Stern – were executing a warrant for Plaintiff's arrest for armed robbery and burglary. It is undisputed that Plaintiff heard law enforcement announce their presence and understood their order for him to get on the ground. ECF No. 1, ¶ 7. The only real "dispute" in this case is what happened next.

Plaintiff alleges that he "immediately" complied with law enforcement's order, did not attempt to run, and, in fact, "had already complied with commands to

get on the ground *at the time* the canine was released to attack him…" Id., ¶¶ 8, 10 (emphasis added). Officers assert that Plaintiff did not comply and did attempt to run.

Fortunately, this "dispute" can be resolved by body-worn camera footage of the incident which reveals that Plaintiff *did not* comply with commands to get on the ground and *did* attempt to run – *before* Cpl Walsh released K9 Stern.

The above screenshots, taken from video captured by Cpl. Walsh's body-worn camera [ECF No. 19-1], shows Plaintiff in a running stance (red arrow) while K9 Stern (blue arrow) remains under leash control by Cpl. Walsh. ECF No. 19-3, pp. 2-3. The indisputable video evidence in this case disproves Plaintiff's allegation that he was not running, or that K9 Stern was released after Plaintiff "had already complied with commands to get on the ground." Considering this evidence, each of Plaintiff's claims fails as a matter of law.

Plaintiff's Complaint [ECF No. 1] brings the following claims:

COUNT I - COMMON LAW NEGLIGENCE
(Against Defendant City)

COUNT II - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(Against Defendant Walsh)

COUNT III - NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
(Against Defendant City)

COUNT IV - EIGHTH[1] AMENDMENT VIOLATION-EXCESSIVE FORCE (Against Defendant City)

COUNT V – EIGHTH[1] AMENDMENT VIOLATION-EXCESSIVE FORCE (Against Defendant Walsh)

COUNT VI - BATTERY
(Against Defendant Walsh)

COUNT VII - BATTERY
(Against Defendant City)

COUNT VIII - ASSAULT
(Against Defendant Walsh)

COUNT IX - ASSAULT
(Against Defendant City)

For the reasons that follow, there is no genuine issue as to any material fact, and the Defendants are entitled to judgment as a matter of law on all claims.

STATEMENT OF UNDISPUTED FACTS

Armed Robbery Investigation

On October 25, 2021, GPD officers were called to investigate an armed robbery. ECF No. 19-4, p. 4. Officers spoke with Chadwick Paul Earnest, the victim, who reported generally the following:

[1] In the body of this Count, Plaintiff asserts an excessive force claim under the Fourth Amendment.

> Ropheal McGee had entered his home without permission and asked him to come outside "to talk." Once outside with McGee, they got into a verbal argument regarding property belonging to McGee that the victim had thrown away. McGee left, frustrated. Earnest noticed that his car keys were missing. He called McGee, who admitted to taking them. Earnest threatened to call 911 if McGee did not return the keys. When McGee returned, Earnest attempted to take a photo of McGee's vehicle with his cell phone. McGee pulled a black handgun from his waistband, pointed it at Earnest's head, and said "I will kill you." McGee then punched Earnest in his mouth. A scuffle ensued. McGee then fled the scene. Earnest advised that he visited McGee at his home a few months prior at The Polos Apartments on Williston Road, and that may be where he fled.

Id., p. 4.

GPD officers searched for Plaintiff's vehicle at The Polos Apartments and located it around building 15. Id., p. 5. GPD officers created a photo lineup from which Earnest positively identified Plaintiff. Id. GPD officers then brough Earnest to the Polos Apartments to identify Plaintiff's specific apartment. Id. Earnest led officers to apartment 1517. Id.

GPD Officer Christian Hickey conducted a search of utility records and discovered that Lakeyah Denise Johnson had utilities for that apartment registered in her name. Id., p. 13. GPD officers met with Johnson, who reported that Plaintiff stays at the apartment from time to time because they are boyfriend and girlfriend, but she is the only person on the lease and the only other person who stays there. Id. Johnson gave verbal consent for GPD officers to conduct a search for Plaintiff in the apartment. Id. A search was conducted, and while Plaintiff was not located, a black 9mm pistol[2] was observed in plain view. Id. Johnson denied ownership of the pistol. Id.

Johnson then gave officers verbal consent to find any more additional firearms in the apartment. Id. Officers discovered another firearm, illegal narcotics, and large sums of cash. Id. Johnson also denied any ownership of illegal narcotics and cash hidden in the apartment. Id.

A GPD officer attempted to call Plaintiff several times, but was unable to reach him. Id., p. 5; ECF No. 19-5, 21:9-15.

A GPD officer completed a sworn complaint for armed robbery, burglary of a conveyance, and burglary of a dwelling. ECF No. 19-4, p. 5. On October 26, 2021,

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[2] Earnest described the handgun that Plaintiff pointed at him as a black 9mm handgun. ECF No. 19-4, p. 4.

Circuit Court Judge James M. Colaw signed an arrest warrant for Plaintiff, setting a total bond of $350,000. ECF No. 19-6.

Plaintiff knew that GPD officers had searched Johnson's apartment and seized Plaintiff's guns. ECF No. 19-7, 36:10-37:1, 37:11-17. Johnson had called Plaintiff the day after the search and told him that the police were looking for him regarding a robbery. Id., 40:11-41:2.

Plaintiff's Arrest

Shortly before midnight on November 8, 2021, Officer Hickey, while on uniform patrol, responded to the Polos Apartments to follow up on the armed robbery investigation. ECF No. 19-8, pp. 2, 4; ECF No. 19-5, 14:11-14. Officer Hickey confirmed that Plaintiff had an active Alachua County felony warrant for armed robbery, burglary of a dwelling, and burglary of a conveyance. ECF No. 19-8, p. 2. Officer Hickey observed Plaintiff's vehicle in the parking lot. ECF No. 19-8, p. 2; ECF No. 19-5, 14:15-18. Officer Hickey knew that Plaintiff could be armed, so he contacted Cpl. Walsh, Officer Andrew Milman, and Officer Sevor to assist with Plaintiff's apprehension. ECF No. 19-5, 14:21-15:3; ECF No. 19-9, 30:23-31:4; ECF No. 19-10, 8:12-9:5; ECF No. 19-11, 6:20-7:1, 7:16-19.

Officer Hickey and Cpl. Walsh came up with a plan to get Plaintiff to come out of his residence. ECF No. 19-5, 15:24-16:11; ECF No. 19-9, 37:6-13, 37:21-23, 54:14-18. Officer Sevor attempted to set up in a position to see the front door of the

apartment so he could notify the other officers when Plaintiff exited. ECF No. 19-11, 8:5-20. Cpl. Walsh (with K9 Stern), Officer Hickey, and Officer Milman set up under a canopy of trees. ECF No. 19-9, 47:13-48:11; ECF No. 19-10, 10:12-14.

Officer Hickey set off the alarm on Plaintiff's vehicle. ECF No. 19-5, 16:12-17:1; ECF No. 19-9, 54:7-13; ECF No. 19-7, 21:14-17. Shortly thereafter, Plaintiff exited the apartment to check on his vehicle. ECF No. 19-5, 17:2-16; ECF No. 19-9, 56:5-8; ECF No. 19-7, 21:18-22.

Officer Hickey saw Plaintiff turn in the direction of the officers. ECF No. 19-5, 20:4-13. The officers then came out of the darkness, called Plaintiff's name, announced themselves as Gainesville Police Department, and ordered Plaintiff to get on the ground. ECF No. 19-7, 22:9; ECF No. 19-5, 20:4-11; ECF No. 19-9, 57:16-24; ECF No. 19-10, 13:13-17. Plaintiff admits that he heard law enforcement officers announce themselves and order him to get on the ground. ECF No. 1, ¶ 7; ECF No. 19-7, 21:18-22:1, 22:9, 22:13-23:11.

Plaintiff alleges that he complied with officers' commands to get on the ground. ECF No. 1, ¶7. Plaintiff alleges he was "attacked" by K9 Stern "[a]s [he] was laying down on the ground on his stomach…" Id. Plaintiff alleges that he "had already complied with commands to get on the ground at the time the canine was released to attack him…" Id., ¶ 8.

Cpl. Walsh, Officer Milman, and Officer Sevor testified that when they announced their presence, Plaintiff took off running. ECF No. 19-9, 58:4-13; ECF No. 19-10, 13:18-21, 21:9-17; ECF No. 19-5, 20:4-13. Body-worn camera footage of the incident establishes that: Plaintiff did not comply with orders to get on the ground; Plaintiff attempted to run from officers; K9 Stern was only released after Plaintiff attempted to run; Plaintiff never got on the ground; Plaintiff was apprehended by K9 Stern while he was standing.

Very shortly after he started running, Plaintiff appeared to acknowledge that he was not going to be able to get away, at which time he stopped running and threw his hands out to his side. ECF No. 19-5, 27:5-22, 30:3-15; ECF No. 19-9, 111:20-112:3. Cpl. Walsh attempted to recall K9 Stern with a "foos"[3] command, but he had already apprehended Plaintiff. ECF No. 19-9, 112:4-7, 113:4-114:10; ECF No. 19-8, p. 4.

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[3] "Foos" is German. ECF No. 19-9, 113:4-25.

The above screenshot, taken from video captured by Officer Hickey's body-worn camera [ECF No. 19-2], shows Plaintiff standing (red arrow) at the moment that K9 Stern (blue arrow) apprehends him. ECF No. 19-3. This indisputable video evidence disproves Plaintiff's allegation that K9 Stern was released after Plaintiff "had already complied with commands to get on the ground."

K9 Stern apprehended Plaintiff in the area of Plaintiff's left elbow. ECF No. 19-2, 1:00-1:28. Cpl. Walsh used a breaker bar to remove K9 Stern from Plaintiff. ECF No. 19-9, 78:8-17. The duration of K9 Stern's bite was 28 seconds. ECF No. 19-2, 1:00-1:28.

After securing Plaintiff in handcuffs, officers called for EMS and attempted to provide first aid to Plaintiff. ECF No. 19-10, 14:3-6, 18:10-14. Officer Hickey placed a tourniquet on Plaintiff's arm to stop the bleeding. Id.

In the moments that followed, Plaintiff repeatedly told law enforcement and emergency medical personnel that he "wasn't going to run" and "was on the ground." Officers corrected him at first [ECF No. 19-2, 5:25-5:40], but then just let him talk.

On December 14, 2021, the State Attorney's Office filed a No Information. ECF No. 19-12.

MEMORANDUM OF LAW

As more fully briefed below, the deployment of K9 Stern was not excessive, but rather, reasonable under the circumstances, rendering the claims alleging excessive force, assault, battery, and infliction of emotional distress meritless. Plaintiff's negligence claim is based solely on an alleged failure to properly supervise, which is equally meritless. Moreover, Cpl. Walsh enjoys qualified immunity from Plaintiff's federal claim and statutory immunity from Plaintiff's claims arising under state law. Finally, Plaintiff cannot establish municipal liability against the City for his federal claim.

A. The Summary Judgment Standard

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

matter of law." *Benoit v. City of Lake City, Florida*, 343 F. Supp. 3d 1219, 1229 (M.D. Fla. 2018). "Substantive law determines the materiality of facts, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Gill v. Inch*, No. 3:20-cv-535, 2023 WL 2432323, *2 (M.D. Fla. March 9, 2023) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "A mere scintilla of evidence in support of the non-moving party's position is insufficient to defeat a motion for summary judgment." *Benoit*, 343 F. Supp. 3d at 1229, (*quoting Kesinger ex rel. Estate of Kesinger v. Herrington*, 381 F.3d 1243, 1247 (11th Cir. 2004)).

In *Scott v. Harris*, 550 U.S. 372, 380 (2007), the Court held that when uncontroverted video evidence is available, the court should "view the facts in the light depicted by the videotape." *Scott's* holding was based upon the general principle that "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id*. *See also Singletary v. Vargas*, 804 F.3d 1174, 1183 (11th Cir. 2015); *Brooks v. Miller*, No. 4:19-cv-524, 2021 WL 230059, *1 (N.D. Fla. Jan. 22, 2021) (sworn allegations may be so utterly discredited by video evidence that no genuine issue of material fact can exist sufficient to prompt an inference on the plaintiff's behalf.). This case presents evidence through video footage captured by

cameras worn by Cpl. Walsh, Officer Milman, and Officer Hickey. The video footage is shaky and subject to poor lighting conditions. However, screenshots from video footage captured by Cpl. Walsh and Officer Hickey's respective body-worn cameras discredit Plaintiff's allegations such that no genuine issue of material fact exists.

B. <u>Qualified Immunity</u>

Qualified immunity balances two important interests: 1) the need to hold public officials who abuse their power accountable; and 2) the need to shield officials who perform their duties reasonably from harassment, distraction, and liability. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine protects government officials from suit so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

To be clearly established, a right must be sufficiently clear that every reasonable official would have known that what he is doing violates that right. *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (*quoting Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)) (internal quotations omitted). "In other words, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Reichle,* 566 U.S. at 664 (*quoting Aschroft*, 563 U.S. at 741). The defense protects "all but the plainly incompetent or those who knowingly violate the law." *Davis v. Waller*,

44 F.4th 1305, 1312 (11th Cir. 2022) (*quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Qualified immunity is a question of law for the court to decide, preferably on pretrial motions. *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991). Defendants who establish that there is no genuine issue of material fact preventing them from being entitled to qualified immunity should be protected under the doctrine at the summary judgment stage. *Simmons v. Bradshaw*, 879 F.3d 1157, 1163 (11th Cir. 2018).

To be entitled to qualified immunity, a government official must show that he was acting within the scope of his discretionary authority at the time of the alleged wrongful acts. *Davis*, 44 F.4th at 1312. Here, there is no dispute on this issue.

To overcome the defense of qualified immunity, a plaintiff must show that a defendant violated a constitutional right and that the right was "clearly established." *Corbitt v. Vickers*, 929 F.3d 1304, 1311 (11th Cir. 2019). The court has discretion to decide which question to address first, *Pearson*, 555 U.S. at 236, and "qualified immunity will protect the defendant if the answer to either question is 'no.'" *Moss v. Dixon*, No. 3:21-CV-1026, 2023 WL 3687809, at *11–12 (M.D. Fla. May 26, 2023), (*quoting Underwood v. City of Bessemer*, 11 F.4th 1317, 1328 (11th Cir. 2021)). In *Davis*, the Eleventh Circuit identified the three ways a plaintiff can prove a particular constitutional right is clearly established:

> First, a plaintiff can show that a materially similar case has already been decided. ... This category consists of binding precedent tied to particularized facts in a materially similar case. "[A] case that is fairly distinguishable from the circumstances facing a government official cannot clearly establish the law for the circumstances facing that government official [ ]." … Only materially similar cases drawn from the United States Supreme Court, this Circuit, and/or the highest court of the relevant state can clearly establish the law.
>
> Second, a plaintiff can also show that a broader, clearly established principle should control the novel facts of a particular case. "[T]he principle must be established with obvious clarity by the case law so that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted."
>
> Finally, a plaintiff can establish that the case "fits within the exception of conduct which so obviously violates [the] [C]onstitution that prior case law is unnecessary." … This test is a narrow category encompassing those circumstances where "the official's conduct lies so very obviously at the very core of what the [relevant constitutional provision] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding lack of case law."

Davis, 44 F.4th at 1312-13 (citations and quotations omitted); *see also Poulin v. Bush*, No. 8:21-cv-1516, 2023 WL 185122 (M.D. Fla. Jan. 13, 2023).

C. <u>Argument</u>

Cpl. Walsh's use of K9 Stern to apprehend Plaintiff was reasonable because: Plaintiff took headlong flight immediately upon hearing law enforcement announce themselves and order Plaintiff to get on the ground; Plaintiff was the subject of an arrest warrant for a violent felony; Plaintiff was known to be armed; and Plaintiff was in a densely populated apartment complex.

Defendants will address Plaintiff's federal excessive force claims (Counts IV and V) first. Defendants will then address Plaintiff's state law claims, which suffer from the same fatal deficiencies as do his federal claims.

COUNT IV / COUNT V – EXCESSIVE FORCE - FOURTH AMENDMENT

1. The Use of the K9 was not Unconstitutional

The law in this Circuit is clear that in K9 apprehension cases, there is a distinction between the deployment of a canine and the duration of that deployment. *Edwards v. Shanley*, 666 F.3d 1289, 1295 (11th Cir. 2012); *Madson v. City of Gainesville*, No. 1:15-cv-63, 2016 WL 10518447 (N.D. Fla. 2016). These are addressed in order.

a. Cpl. Walsh's Deployment of K9 Stern was Objectively Reasonable

The practice of law enforcement using trained police dogs to find, seize and hold suspects, by biting if necessary, has been upheld by the courts. *See Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989). More to the point, the "bite and hold" training method itself is neither unconstitutional nor objectively unreasonable. *Id*. at 1550 (recognizing the constitutionality of using police dogs trained in the bite and hold method when an officer is placed in a threatening situation); *see also Pace v. City of Palmetto*, 489 F. Supp. 2d 1325, 1333 (M.D. Fla. 2007).

An officer's decision to effectuate a seizure via a police dog is analyzed under the Fourth Amendment. *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 924

(11th Cir. 2000); *Lee v. Ferraro*, 284 F.3d 1188, 1197 (11th Cir. 2002) (citation omitted). The Court must determine "whether the officers' actions [we]re objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989) (citations omitted). In assessing "objective reasonableness," the Court looks to "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396.

Graham requires that a measure of deference be given to an officer's judgment to use force. "In considering these *Graham* factors, the Eleventh Circuit requires the reasonableness of the force employed be judged from the perspective of a reasonable officer on the scene, "rather than with the 20/20 vision of hindsight." *Crenshaw v. Lister*, 556 F.3d 1283, 1291 (11th Cir. 2009) (*quoting Graham*, 490 U.S. at 396) (internal quotation marks omitted). Notably, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Howard v. St. Johns County Sheriff*, No. 3:20-cv-939, 2022 WL 657359, *5 (M.D. Fla. March 4, 2022) (*quoting Graham*, 490 U.S. at 396–97). A court should not "view the matter as judges from the comfort and safety of [ ] chambers, fearful of nothing

more threatening than the occasional paper cut ... [Rather, the Court must] see the situation through the eyes of the officer on the scene who is hampered by incomplete information and forced to make a split-second decision between action and inaction in circumstances where inaction could prove fatal." *Mongeau v. Jacksonville Sheriff's Office*, 197 Fed. Appx. 847, 850 (11th Cir. 2006) (*citing Crosby v. Monroe County*, 394 F.3d 1328, 1333–34 (11th Cir. 2004)).

The first *Graham* factor – the severity of the crime – favors Defendants. The underlying arrest warrant was for armed robbery and burglary. Plaintiff heard and understood that law enforcement was ordering him to get on the ground, but decided to ignore this lawful order and instead attempt to flee and elude – another "serious crime" for purposes of this *Graham* factor. *See Sykes v. United States*, 564 U.S. 1, 9 (2011) ("The attempt to elude capture is a direct challenge to an officer's authority."), *overruled on other grounds by Johnson v. United States*, 576 U.S. 591, 606 (2015); *Williams v. Sirmons*, 307 Fed. Appx 354, 361 (11th Cir. 2009); *Pace*, 489 F. Supp. 2d at 1331; *Edwards*, 666 F.3d at 1295-96 (initial deployment of canine to apprehend and subdue subject who fled after committing a traffic offense was reasonable). This militates against a finding of unconstitutionality.

The second *Graham* factor—the "immedia[cy of the] threat to safety"—likewise weighs in Defendants' favor. At the time of K9 Stern's deployment, officers had not checked Plaintiff for weapons. Plaintiff refused to comply with loud and

clear commands to surrender. Officers didn't know what other residents might be in harm's way if Plaintiff – who was wanted for a violent crime involving a firearm – was permitted to run through the apartment complex. ECF No. 19-8, p. 4 ("McGee had not been searched prior to our contact with him. He was close enough to his apartment to create and armed barricade situation, and most importantly, he was running toward the apartments of innocent bystanders. Because he is known to be armed, and in fear he may attempt to take a position of cover while running away, I released K-9 Stern to apprehend him."). A reasonable officer at the scene could have reasonably concluded that Plaintiff was a threat to the safety of everyone involved in this apprehension or in the surrounding area. *Pace*, 489 F. Supp. 2d at 1331-1332. Immediacy, therefore, was present.

The third *Graham* factor – whether the suspect "is actively resisting arrest or attempting to evade arrest by flight" – also clearly favors Defendants. Plaintiff admits he heard law enforcement order him to get on the ground, and the video evidence shows that he made an effort to run. Accordingly, the third *Graham* factor has been met.

In determining the objective reasonableness of force, a district court should analyze "(1) the need for the application of force, (2) the relationship between the need and the amount of force used, (3) the extent of the injury inflicted and, (4) whether the force was applied in good faith or maliciously and sadistically." *Hadley*

v. Gutierrez, 526 F.3d 1324, 1329 (11th Cir. 2008) (*quoting Slicker v. Jackson*, 215 F.3d 1225, 1233 (11th Cir. 2000)). Each of these factors supports Cpl. Walsh's deployment of K9 Stern. First, Cpl. Walsh only deployed K9 Stern to apprehend Plaintiff *after* Plaintiff made efforts to flee. Cpl. Walsh knew Plaintiff could be armed, and that the surrounding area was an apartment complex. The "need for the application of force" became unmistakable.

Second, the force Cpl. Walsh employed was not inconsistent with that need: she deployed a non-lethal police dog to apprehend a fleeing suspect. The deployment of K9 Stern was the most expedient means of de-escalating the situation and retaking the tactical advantage. *See Mouton v. Prosper*, No. 18-61260-Civ, 2019 WL 4345674, *5 (S.D. Fla. Sept. 12, 2019).

Third, although Plaintiff's injuries were serious, they were not life-threatening. Finally, nothing in the record suggests that Cpl. Walsh acted in any way "maliciously or sadistically" in deploying K9 Stern. To the contrary, Cpl. Walsh only deployed K9 Stern after Plaintiff began to run, and then removed K9 Stern in under 30 seconds.

Put simply, the "Constitution tolerates some uses of a dog under these conditions." *Edwards*, 666 F.3d at 1295. "The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases. The only test is whether what the police officers actually did was

reasonable." *Menuel v. City of Atlanta*, 25 F.3d 990, 996–97 (11th Cir. 1994) (*quoting Plakas v. Drinski*, 19 F.3d 1143, 1148–50 (7th Cir. 1994)). And, on the specific facts of this case, Cpl. Walsh's deployment of K9 Stern "was reasonable." *See Edwards*, 666 F.3d at 1295 ("[B]ecause the evidence shows that [the defendant] had not yet tried to surrender when [the officer] allowed his dog to first bite [the defendant's] leg, this is the sort of 'split-second' determination made by an officer on the scene that *Graham* counsels against second guessing.").

b. The Duration of K9 Stern's Bite was not Excessive

In his Complaint, Plaintiff claims K9 Stern bit him for approximately 28 or more seconds." ECF No. 1, ¶ 9. The 28-second estimate is consistent with all available body-worn camera footage, and was no longer than was reasonable for officers to gain control of a resisting suspect.

An officer engages in excessive force in violation of the Fourth Amendment if she allows a police canine to attack a person who has surrendered and is fully compliant. *Priester*, 208 F.3d at 923–24 (holding that it was unreasonable for officers to allow a police canine to bite a suspect for two minutes when the suspect was compliant, was not resisting arrest, and posed no threat). Similarly, it is "objectively unreasonable for [an officer] to allow the canine to continue attacking [a person] after he [is] secured." *See Crenshaw*, 556 F.3d at 1293. However, neither of those situations apply here.

It is not excessive force for an officer to wait to call off a police canine until after the suspect was fully secured and handcuffed, "regardless of whether [the plaintiff] was actively resisting arrest at that point." *Crenshaw*, 556 F.3d at 1293. Here, Cpl. Walsh removed K9 Stern from his bite of Plaintiff as quickly as possible after Plaintiff had been secured by the other officers. Accordingly, there can be no liability based on the duration of the bite.

2. Cpl. Walsh Enjoys Qualified Immunity

In the Eleventh Circuit, there exists a K9 based excessive force spectrum:

> [A]t one end of the spectrum, we have previously held that the use of a police canine to subdue a suspect is objectively reasonable where the suspect is wanted for the commission of a serious crime, actively flees from police, resists arrest, and is reasonably believed to be armed and dangerous. *See Crenshaw v. Lister*, 556 F.3d 1283, 1292 (11th Cir. 2009) (*per curiam*). By contrast, at the other end, we have held that such force, when employed against an individual who presents no safety risk and is fully compliant with officers' commands, is excessive under the Fourth Amendment. *See* [*Priester*].

Jay v. Hendershott, 579 Fed. Appx. 948, 951-52 (11th Cir. 2014).

In *Priester*, officers used a police canine to track and apprehend a burglary suspect. 208 F.3d at 923. When the officers happened upon the plaintiff, he raised his hands in submission and, without resistance, complied with the officers' commands to lie down on the ground. *Id*. While the plaintiff was lying prostrate, cooperating with the officers, the officers gratuitously ordered the dog to attack him and allowed the dog to bite him for at least two minutes. *Id*. Under these

circumstances—where the plaintiff submitted to police authority, did not attempt to flee or resist arrest, and posed no apparent threat to officer safety or to the safety of anyone else—the Eleventh Circuit held that "no particularized preexisting case law was necessary for it to be clearly established that [the defendant] violated Plaintiff's constitutional right to be free from the excessive use of force." *Id*. at 927.

Although the court decided *Priester* on obvious-clarity grounds, in denying the officers qualified immunity, the court considered the facts pursuant to the excessive-force standard embodied in *Graham*. *Priester*, 208 F.3d at 924. Applying the *Graham* factors, the court noted that the plaintiff, who was suspected of stealing only $20 worth of snacks from a golf shop, "submitted immediately to the police" and complied with officers' instructions to get down on the ground. *Id.* at 927. Moreover, the plaintiff "did not pose a threat of bodily harm to the officers or to anyone else" and "was not attempting to flee or to resist arrest." *Id*. Given these "straightforward circumstances," the court concluded that "no reasonable officer could believe that this force was permissible." *Id*. The facts of this case are easily distinguished.

The obvious-clarity exception is a narrow one upon which "the Court must determine whether application of the excessive-force standard would inevitably lead every reasonable officer in [the Defendant Officers'] position to conclude that the force was unlawful." *Priester*, 208 F.3d at 926 (*quoting Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997). In *Priester*, the Eleventh Circuit ruled that it was

"objectively unreasonable for police officers to allow a dog to bite and hold a suspect for two minutes" where that suspect committed a "non-serious offense ... was compliant with the officers and lay down on the ground when ordered to, ... and was not attempting to flee or to resist arrest." 208 F.3d at 927. "[I]t is also unconstitutional to subject a similarly compliant suspect to a longer attack of five to seven minutes, especially where that suspect is pleading for surrender." *Edwards*, 666 F.3d at 1298.

Similarly, Florida courts have found that officers cannot assert qualified immunity where a suspect no longer presents a threat to officers, but officers nonetheless encourage a K-9 to engage in a five-minute attack. *See Bolanos v. Bain By & Through Bain*, 696 So. 2d 478, 485 (Fla. 3d DCA 1997). In dog bite cases, the "exact amount of time" is not necessarily "relevant" to the court's analysis; rather "[t]he significant factor is whether the animal was allowed to continue to maul [a suspect] after he had been subdued and presented no threat to the officers." *Id*. at 485 n.5.; c*ompare Chatman v. Navarro*, No. 14-cv-62793, 2016 WL 9444164, *7 (S.D. Fla. July 1, 2016) (15-minute attack precluded qualified immunity); with *Pace*, 489 F. Supp. 2d at 1328-30 (court held that the use of an off-leash police canine to apprehend a burglary suspect by biting the suspect's neck and face for more than a minute did not constitute objectively unreasonable force); and *Berry v. Gorsage*, No. 3:10-cv-228, 2012 WL 364093 (M.D. Fla. Feb. 2, 2012) (qualified immunity granted even though court found that, after observing that the suspect was unarmed, the

canine officer did not immediately pull the dog off and another officer subsequently hit the suspect in the face with the butt of his service weapon).

Here, it cannot be disputed that Plaintiff ran in an attempt to evade arrest. Plaintiff's own assertions combined with undisputed record evidence establish that K9 Stern held his bite on Plaintiff for approximately 28 seconds, which comprises a reasonable time for the other officers to subdue and gain control of Plaintiff. Under all applicable law, and considering the totality of the circumstances, such an exposure did not violate a clearly established right. Therefore, Cpl. Walsh enjoys qualified immunity as applied to the use of K9 Stern to apprehend Plaintiff, as well as the duration of the bite.

3. Plaintiff Cannot Establish Municipal Liability

Plaintiff's excessive force claim against the City (Count IV) fails because, as discussed above, there was no constitutional violation. Plaintiff's excessive force claim against the City also fails because the record will not support any recognized theory of municipal liability for such a claim.

It is well-established that a governmental entity, such as a city, "may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Monell v. Department of Soc. Svcs.*, 436 U.S. 658, 694 (1978). Instead, it is only when execution of a government's policy or custom, "whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," inflicts

the injury that a government entity may be held responsible under section 1983. *Id.* Accordingly, "recovery from a municipality is limited to acts that are, properly speaking, acts of the municipality—that is, acts which the municipality has officially sanctioned or ordered." *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986). "To impose liability on a government entity, the plaintiff must show '(1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation.'" *Jennings v. Stewart*, 461 F. Supp. 3d 1198, 1200 (N.D. Fla. 2020) (*quoting McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004)). Thus, liability can only attach if constitutional injuries resulted from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law. *Monell*, 436 U.S. at 694. "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 of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 405 (1997).

Here, Plaintiff makes no real attempt to establish municipal liability against the City of Gainesville in Count IV. First, Plaintiff alleges that "Defendant City acted

under color of state law and intentionally deprived Plaintiff of his rights under the United States Constitution." ECF No. 1, ¶¶ 35, 36. That is, of course, impossible, and the City cannot itself perform any actions outside those of its agents and employees.

Next, Plaintiff alleges the City "through its respective agents and employees, exceeded the level of force necessary to enforce compliance with lawful commands and acted in bad faith and with malicious purpose and in a manner exhibiting wanton and willful disregard of human rights, safety, and property." Id., ¶ 38. This is a mash-up of *respondeat superior* (which cannot support municipal liability for federal claims) and recitation of the language in section 768.28(9)(a), Florida Statutes, which would preclude municipal liability for state law claims (and has no real purpose in federal claims).

The remainder of Count IV fares no better, with mere conclusory allegations regarding various theories of liability – some recognized, some not – but none with any factual support in the record. To be sure, the record evidence in this case does not support any failure to train, failure to supervise, or ratification-based claim.

For the above reasons, Plaintiff's excessive force claims against the City of Gainesville (Count IV) and Cpl. Walsh (Count V) fail, and these Defendants are entitled to summary judgment in their favor.

COUNTS VI, VII, VIII, and IX – ASSAULT AND BATTERY

A claim for assault and battery premised upon the use of excessive force is essentially the state-law counterpart to a section 1983 excessive force claim. *Henry v. City of Mt. Dora*, No. 13-cv-528, 2014 WL 5823229, at *13 n.24 (M.D. Fla. Nov. 10, 2014), aff'd, 688 F. App'x 842 (11th Cir. 2017); *see also Baxter v. Santiago-Miranda*, 121 F.4th 873, 891–92 (11th Cir. 2024) (observing that the Eleventh Circuit "has applied the same Fourth Amendment excessive force analysis to a battery claim against an officer under Florida law" (citation omitted)).

Here, because Plaintiff's excessive force claims fail, his assault and battery claims also fail as a matter of law.

Moreover, Plaintiff's assault and battery claims against Cpl. Walsh are based on the untenable assertion that Cpl. Walsh "was acting outside the course and scope of her employment with [the] City." ECF No. 1, ¶¶ 60, 71. This is, of course, complete nonsense, and insufficient to get past the statutory immunity provided to public employees in section 768.28(9)(a), Florida Statutes.

Plaintiff alleges in his battery claim against Cpl. Walsh (but not his assault claim) that Cpl. Walsh "acted in bad faith, with malicious purpose, and in a manner exhibiting wanton and willful disregard of human rights and safety." This threadbare and conclusory recitation of the other provision in section 768.28(9)(a), Florida

Statutes, that could potentially support individual liability is also entirely without evidentiary support in the record.

In *Pace v. City of Palmetto, supra*, the court granted summary judgment on a state court battery claim in favor of an officer who used his canine to apprehend the suspect. The court there held that because the officer's actions were objectively reasonable under the totality of circumstances, the officer was statutorily immune from the battery claim under section 768.28(9)(a), Florida Statutes. 489 F. Supp. 2d at 1336. The same is true here.

COUNTS I and III – NEGLIGENCE-BASED CLAIMS

In Counts I and III, Plaintiff presents a recitation of the elements of negligence and negligent infliction of emotional distress causes of action. However, Plaintiff makes no effort to present factual allegations to satisfy any of the elements.[4]

Moreover, each of the factual allegations in Plaintiff's Complaint suggest intentional actions, not negligent ones. Simply put, Florida law does not recognize a cause of action for the negligent use of force by a police officer in making an arrest. *See City of West Palm Beach*, 561 F.3d at 1294; *City of Miami v. Sanders*, 672 So. 2d 46, 48 (Fla. 3d DCA 1996). In fact, "Florida courts have conclusively established that a cause of action for the negligent use of excessive force is an

[4] To be sure, Plaintiff attempts to establish liability against the City based on "the actions of Defendant L/N/U…" ECF No. 1, ¶¶ 22, 32.

oxymoron." *Secondo v. Campbell*, 327 Fed. Appx. 126, 131 (11th Cir. 2009) (*citing Sanders*, 672 So. 2d at 48). Moreover, where a plaintiff alleges negligent infliction of emotional distress in the context of a police officer's infliction of an intentional tort, such a claim is non-cognizable. *Feliciano v. City of Miami Beach*, 847 F. Supp. 2d 1359, 1367-68 (S.D. Fla. 2012).

COUNT II – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In Count II, Plaintiff presents a recitation of the elements of an intentional infliction of emotional distress cause of action. However, Plaintiff makes no effort to present facts that would establish even plausible liability against Cpl. Walsh.[5] When Plaintiff does refer to Cpl. Walsh specifically, it is just to allege without support that Cpl. Walsh acted "outside the course and scope of her employment with [the City]" and "in bad faith and with a malicious purpose and with a willful disregard for' Plaintiffs rights." Id., ¶¶ 24, 26.

In any event, because Cpl. Walsh's use of K9 Stern was reasonable under the circumstances, it follows that her actions do not amount to "outrageous conduct" to support a claim for intentional infliction of emotional distress. *See, e.g., Davis v. City of Leesburg*, No. 5:12-CV-609, 2014 WL 4926143, at *27–28 (M.D. Fla. Sept. 30, 2014) (finding that Defendants are entitled to summary judgment on an intentional

[5] In fact, most of Plaintiff's allegations are against Defendant Doe or Defendant L/N/U. ECF No. 1, ¶¶ 25, 26, 27.

infliction of emotional distress claim where the officers acted with reasonable force).

For these reasons, Defendants CITY OF GAINESVILLE, FLORIDA, and CASEY WALSH respectfully request that this Court enter an order granting the instant motion and entering final summary judgment in their favor.

Respectfully submitted,

/s/ Matthew J. Carson

MATTHEW J. CARSON
Florida Bar No. 0827711
Email: mcarson@sniffenlaw.com

SNIFFEN & SPELLMAN, P.A.
123 North Monroe Street
Tallahassee, Florida 32301
Telephone: (850) 205-1996
Facsimile: (850) 205-3004
Attorneys for Defendants

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

In accordance with N.D. Fla. Loc. R. 56.1(E) and 7.1(F), undersigned counsel hereby certifies that according to the word count function of the word-processing system used to prepare this document, the instant motion and memorandum of law contain 6,638 words, excluding the case style, signature block, and the certificate of service.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of September, 2025, a true and correct copy of the foregoing was electronically filed in the United States District Court for the Northern District of Florida using the CM/ECF system, which will serve counsel of record.

/s/ Matthew J. Carson
MATTHEW J. CARSON