

CASE NO. 09-3258

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

LOUIS ALDINI, Jr.

Plaintiff-Appellant

vs.

DUSTIN L. JOHNSON; TROY E. BODINE,

Defendants

and

**JOSHUA PAUL KACZMAREK; STEVEN R. LEOPOLD,
Defendants- Appellees**

On Appeal From the United States District Court
For the Southern District of Ohio
Western Division

BRIEF OF PLAINTIFF-APPELLANT

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, Plaintiff-Appellant offers the following disclosures:

Plaintiff-Appellant Louis Aldini is not a subsidiary or affiliate of a publicly owned corporation.

No publicly traded corporation has a financial interest in the outcome of this appeal.

/s/ Jennifer L. Branch
Attorney for Plaintiff

Date: June 3, 2009

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff requests oral argument on this appeal since it includes important constitutional issues regarding use of excessive force on a pretrial detainee.

I. JURISDICTIONAL STATEMENT

Plaintiff-Appellant appeals from the district court's decision granting summary judgment to Defendants Steven Leopold and Joshua Kaczmarek. R.42: Decision and Order. Plaintiff moved for a Fed. R. Civ. Proc. 54 certification of judgment. R.45: Motion for Rule 54 Certification. The Court granted the motion and certified the judgment for Leopold and Kaczmarek. R.48: Decision and Order Granting Finality Certification. The district court then entered judgment for Leopold and Kaczmarek. R.52: Amended Judgment for Kaczmarek and Leopold.

The district court's judgment for Leopold and Kaczmarek does not dispose of all the claims. The companion appeal by Defendants Johnson and Bodine Case No. 09-3183, taken with this appeal, will dispose of all the claims and issues.

For these reasons this Court has jurisdiction to reverse the grant of summary judgment on an interlocutory appeal since the District Court

entered judgment for Defendants. *See* Federal Rule of Civil Procedure 54 (b); *Good v. Ohio Edison Co.*, 104 F.3d 93, 95 (6th Cir. Cir. 1997); *Gregory v. City of Louisville*, 444 F.3d 725, 737 (6th Cir. 2006).

The Order Granting Finality Certification was filed on March 10, 2009. The Amended Judgment was filed on March 11, 2009. Plaintiff-Appellant filed his notice of appeal on March 10, 2009 before the Judgment or Amended Judgment was entered. R. 49: Plaintiff's Notice of Appeal. While Plaintiff filed his notice of appeal before the Amended Judgment was entered, the notice of appeal is considered filed on the date entry of judgment. Fed. R. App. Proc. 4 (a)(2). Therefore this appeal was properly and timely filed.

II. SUMMARY OF THE ISSUES FOR REVIEW

1. Whether the district court erred in applying the Fourteenth Amendment standard to determine whether defendants' use of force was excessive in violation of the Constitution?
2. Whether the court erred in granting qualified immunity to defendants on the 42 U.S.C. § 1983 claims?
3. Whether the court erred in granting judgment to defendants?

III. STATEMENT OF THE CASE

This is a 42 U.S.C. § 1983 civil rights excessive force case brought against four corrections officers at the Montgomery County, Ohio jail. All four defendants moved for summary judgment. The district court granted

summary judgment for Defendants Leopold and Kaczmarek. Plaintiff appealed. The district court denied summary judgment to Defendants Johnson and Bodine. Those defendants filed an interlocutory appeal, which is pending, Case No. 09-3183.

IV. STATEMENT OF FACTS

A. Louis Aldini Was Injured by Defendants

Louis Aldini was a 24 year old Air Force First Lieutenant who was based at Wright Patterson Air Force Base in Montgomery County, Ohio in 2006. He started his military career in ROTC in college and by the time of his deposition was a Program Manager for the Guardian Angels weapons system. He is active duty and is highly deployable to Iraq or Afghanistan but had no orders to leave the country at the time of his deposition. R. 18: Aldini Dep. pp. 10-13, 16. On Friday evening May 12, 2006 Mr. Aldini was celebrating his birthday with his friends at a bar in Dayton. He was asked to leave the bar after midnight and on the way out he kicked the door, breaking the glass. He immediately apologized and offered to pay for the damage. *Id.* at 28. Nonetheless, he was arrested for criminal damaging and disorderly conduct by the Dayton Police on May 13, 2006.

Mr. Aldini arrived at the Montgomery County Jail at 2:11 in the morning. The booking process could not be completed until his photograph

was taken. Defendant Dustin Johnson was tasked with taking Mr. Aldini's photograph. Defendant Johnson is a civilian detention officer. He is not a sworn deputy. R. 20: Johnson Dep. p.11. He did not take the photograph immediately. Instead, Mr. Aldini was told to wait in the booking area. R. 18: Aldini Dep. p. 73-74. The booking area of the jail is essentially one large room, where the detainees waiting to be booked are on one side and the detainees who have been booked are on the other side. Telephones are available for booked detainees to use.

While Mr. Aldini was in booking waiting to be photographed so that the booking process could be completed, he kept asking for a phone call. *Id.* at 81-82. Mr. Aldini wanted to make a telephone call to let his friends know where he was so they could post his bond. He repeatedly asked to make a phone call. *Id.* at 80-82. Mr. Aldini testified he must have "pushed their buttons" and "got on their nerves" because he had asked too many times for his phone call. He was told to go to a cell. *Id.* 81-82. Mr. Aldini complied. Defendant Johnson placed Mr. Aldini in cell 134. The cells line the back wall of the booking room. The cell door was not closed. No other detainee was in the cell. *Id.* at 83-84. When Mr. Aldini was asking for the phone call he did not yell or swear or become abusive, but he was demanding. *Id.* at 82, 86.

As Officer Johnson walked away from cell 134, Aldini raised his voice, said, “hey,” and demanded to make a call. Officer Johnson became irritated with Mr. Aldini’s persistent demands to use the phone. Officer Johnson turned around, said “that’s it” and came after Mr. Aldini. Johnson entered the cell and started coming at Aldini. Aldini, thinking he was about to be cuffed, backed up, placed his hands behind his head and said “I’m not resisting.” Johnson pushed Aldini up against the back wall of the cell, and then other officers arrived in the cell. Aldini was then spun around and taken to the ground and viciously beaten and kicked. Aldini never resisted, constantly said he was not resisting, was in a submissive position, and repeatedly said “cuff me.” *Id.* at 66-70, 90, 92-93. The officers held his body up – elevated above the floor – with a person holding each leg and arm in a crucifix position. The officers punched and kicked him and said “how do you like taking these orders officer.” Aldini screamed for help but no one came to stop the beating. *Id.* at 94-98. Aldini was begging them to stop but the beating continued for several minutes before they brought in the taser. *Id.* 96. Sgt. Bodine said nothing before he tased Aldini multiple times for about 10 minutes. *Id.* 100-102. Aldini screamed for them to stop. Someone said Aldini was going to die in the jail that night. Aldini said “just kill me”

because it felt like he was being tortured. *Id.* at 102. The defendants just laughed. *Id.*

When the officers were done, Aldini was bleeding profusely all over his face. He asked for help. *Id.* at 103. They took him to another cell and put a hood on him and restrained him in a chair. He was scared and was afraid they would beat him again once he was tied down. *Id.* at 103-04, 107. This was about 3:00 a.m. (The first tasing took place at 2:51 a.m. according to the taser report R 32-6: Exhibit E p.7 and lasted about 10 minutes. Sgt. Bodine testified that the time on the taser report was wrong and should have said it was 4:05 a.m. when he first tased Aldini. R. 19: Bodine Dep. p. 33-34. But this corrected time is not credible given that the video of Aldini in the restraint chair starts at 4:05 and lasts to 6:00 showing no tasings in those 2 hours; the log states Aldini entered the restraint room at 4:05 (R.32-6: Incident Reports Exhibit E p. 6) and despite allegedly knowing the report times were wrong, Bodine did not amend the printout or note the correct time in his report. R. 19: Bodine Dep. p. 35-36.)

Sometime later the officers brought Aldini to the desk to sign papers and then returned him to the restraint chair which was moved to a different room. *Id.* at 111-116. This second restraint was preserved on videotape which started recording Aldini in the restraint chair at 4:05 a.m. R. 32- 2:

Exhibit A disk of restraint chair video (filed manually below). The jail took photographs of Mr. Aldini's injuries while the hood was on his face. R. 32-3: Exhibit B photographs identified in Johnson's deposition as Ex. 3. The photographs clearly show Mr. Aldini's injuries from the beating. Mr. Aldini was terrified by the beating, the tasing, and the restraining.

Mr. Aldini's friend and girlfriend paid his bond. As is obvious from the video, Mr. Aldini was calm and submissive while he was restrained. However he was not released from the restraints until 6:00 a.m. After he was released he was ordered to clean his face to remove the blood so his booking photo could be taken. R. 18: Aldini Dep. p. 121-122. R. 32-4: Exhibit C booking photograph identified in Johnson's deposition as Ex. 2. Soon after he cleaned his face he was photographed and released.

Mr. Aldini's friends then took him to Miami Valley Hospital where he was treated. The medical records indicated he had a 3 cm. laceration over his left eye and a 1 cm. laceration on his face. The lacerations required six sutures. He had multiple taser marks on his back, and complained of pain to his back. His head showed signs of trauma including multiple areas of swelling and bruising. He also had bruising on his back and skin irritation on his wrists. Mr. Aldini was in pain all over including the side of his head, his nose, neck, and back. R. 32-5: Exhibit D selected photographs; R. 32-8:

Exhibit G all photographs of injuries (filed manually below). The Dayton Police arrived and took a statement and photographs of Mr. Aldini. However, the statement and photographs have not been recovered.¹

B. Defendants Leopold and Kaczmarek admit using force on Aldini

The District Court held that “[t]he force which Plaintiff testifies was applied to him before he was ordered into the restraint chair - kicking, beating, and the taunting which he testifies went with it and evinces a punishing frame of mind by those administering the beating – is plainly conduct which shocks the conscience.” R. 42: Decision and Order p. 16. The Court concluded however that Leopold and Kaczmarek were immune from liability because their actions were “limited” to placing Plaintiff in the restraint chair, which actions were not conscious shocking since Plaintiff admittedly struggled. R. 42 p. 15. The Court found this decision “more difficult” than its decision to deny summary judgment to Defendants Johnson and Bodine. R. 42: Decision and Order p. 15. However, the Court’s decision turned on whether Leopold and Kaczmarek used force in the cell or in the restraint chair, which is a disputed issue of fact.

¹ Dayton Police and counsel for former defendant Dayton Police Officer Jones searched for the photographs without finding them.

Aldini testified that the force used on him occurred in the cell not in the restraint chair. Aldini did not testify that any force was used on him in the chair. R. 18 Aldini Dep. p.103-117. Aldini did not testify that any punching, kicking or tasing occurred while in the chair. R. 18 p. 103-117. Leopold even admitted that Aldini's injuries occurred in the cell before he was in the restraint chair. R. 23: Leopold Dep. p.19, 23.

It is undisputed that Leopold and Kaczmarek used force on Aldini. Kaczmarek admits punching Aldini twice and kneeing him once. R. 22: Kaczmarek Dep. p.34-35; R. 32-6: Exhibit E Kaczmarek Incident Report p. 11. Leopold admits punching Aldini in the back. R. 23: Leopold Dep. p.19.

It is also undisputed that Leopold and Kaczmarek were in the cell at the time Johnson and Bodine were using force on Aldini. All four defendants, Johnson, Bodine, Leopold and Kaczmarek, admit they were in the cell together. R. 20: Johnson Dep. p.61; R. 19: Bodine Dep. p. 53, 55; R. 22: Kaczmarek Dep. p.28, 31; R. 23: Leopold Dep. p.16. Leopold denies using force in the cell, claiming that in the cell he stood back and did not try to cuff Aldini. R. 23: Leopold Dep. p. 17-19. However, Kaczmarek testified that Leopold did assist Johnson in handcuffing Aldini in the cell. R. 22: Kaczmarek Dep. p.32.

Kaczmarek's justification for using force while placing Aldini in the restraint chair was that Aldini allegedly grabbed Officer Johnson's shirt. R. 22: Kaczmarek Dep. p.34 and R.32-6 Exhibit E p.11. However, this justification is fabricated since Officer Johnson never testified that Aldini tried to grab his shirt. *See* R. 20: Johnson Depo. pp. 87-88, 112-113 and R. 32-6: Incident Reports collected in Exhibit E.

Fed. R. Evid. 608 allows the credibility of a witness to be attacked for untruthfulness. When deciding the credibility of a witness it is appropriate to consider the defendant officer's use of force history. Defendant Leopold had a history of being disciplined for use of force. In January 2007 he was given a 30 day suspension and two years probation for lying on a use of force report. He stated he only hit an inmate. What he really did was hit the inmate and then kick him in the back after he was cuffed and down on the ground. R. 23: Leopold Dep. p.7-9. Defendant Kaczmarek was suspended for failing to complete a use of force report in 2005 and was ordered terminated in 2006 for using excessive force on a cuffed inmate. He pushed the inmate and caused injuries to this head and wrists and left me on the floor. His incident report was false and he lied about what happened. Apparently before he was terminated, Kaczmarek quit. R. 22: Kaczmarek Dep. pp.12, 66-71. (Defendant Kaczmarek failed to reveal his termination at

first when asked about discipline in his deposition (pp. 10-14), but later volunteered it (pp. 65 – 71)).

Leopold's justification for punching Aldini was his resistance, after being cuffed, to being belted to the restraint chair. R. 32-6: Exhibit E Leopold Incident Report p. 9; R. 23: Leopold Dep. pp. 19-20, 25. However this justification is fabricated given that Leopold admitted Aldini did not spit, kick, punch, kneel, hit or strike anyone. R. 23: Leopold Dep. pp. 24-25. Kaczmarek agreed that Aldini did not spit, kick, punch, hit or strike anyone. R. 22: Kaczmarek Dep. p. 33, 51.

V. SUMMARY OF ARGUMENTS

The district court improperly found the defendants Leopold and Kaczmarek were immune from suit for excessive force. The district court erred in applying the Fourteenth Amendment standard instead of the Fourth Amendment standard. Additionally the district court erred in granting summary judgment to defendants because there are genuine issues of material fact in dispute.

VI. LEGAL ARGUMENT

A. STANDARD OF REVIEW

This Court's review of a grant of summary judgment is *de novo*. *Curry v. Scott*, 249 F.3d 493 (6th Cir. Cir. 2001); *Johnson v. United States Postal Serv.*, 64 F.3d 233, 236 (6th Cir. 1995).

B. LEOPOLD AND KACZMAREK ARE NOT IMMUNE FROM LIABILITY ON MR. ALDINI'S CLAIM FOR EXCESSIVE FORCE

The district court found that Defendants Leopold and Kaczmarek were entitled to immunity for their actions and entered judgment in their favor. R. 42: Decision and Order p. 15; R. 52: Amended Judgment. Plaintiff appeals this decision.

The Supreme Court has created a two-tiered test to determine whether or not defendants are entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001). The first question a court must answer is whether the facts alleged show the officer's conduct violated a constitutional right. If that question is answered affirmatively, the court must then ask whether the right alleged was clearly established when the violation was alleged to have occurred. *Id.* at 201. The order for answering those questions was recently relaxed by the Court but the essential questions related to qualified immunity remain unchanged. *Pearson v. Callahan*, 129

S.Ct. 808 (2009). While the existence of qualified immunity is typically a question of law, the task simply cannot be done so long as the facts are in dispute. In such instances immunity decisions must necessarily wait on the fact finder determinations. *Brandenburg v. Cureton*, 882 F.2d 211, 216 (6th Cir. 1989).

In this appeal the decision to grant Defendants immunity was in error for two reasons: First, the district court erred when it applied the Fourteenth Amendment shocks the conscience standard. Second, under the Fourth Amendment reasonableness standard or even the Fourteenth Amendment standard, material facts are in dispute to preclude summary judgment.

1. The Facts Construed In the Light Most Favorable To Mr. Aldini Demonstrate Conduct That Violated His Constitutional Rights

A pretrial detainee is protected from excessive force that amounts to punishment. *Bell v. Wolfish*, 441 U.S. 520 (1979); *Lanman v. Hinson*, 529 F.3d 673, 680-681 (6th Cir. 2008). *Bell v. Wolfish* held that during pretrial detention the state may not “punish” the suspect by using excessive force. *Bell v. Wolfish*, 441 U.S. at 535-39. In *Bell v. Wolfish* the Supreme Court defined pretrial detainees as those persons “who have been charged with a crime but who have not yet been tried on the charge.” *Bell*, 441 U.S. at 523, 99 S.Ct. 1861. The law is clear that force used during an arrest is judged

under the Fourth Amendment standard set forth in *Graham v. Connor*, 490 U.S. 386 (1989) and force used after conviction is judge by the Eight Amendment standard as set forth in *Whitley v. Albers*, 475 U.S. 312 (1986). However, force used on a person after his arrest and before his conviction lies in the “murky area” between the Fourth and Eight Amendments. *Gantt v. Akron Corr. Facility*, 1996 WL 6530, at *2 (6th Cir. 1996). Where the Fourth Amendment ends and the Fourteenth Amendment protections begin is “murky” because this Court has not clearly delineated a bright line between arrestee and detainee. This Court need not answer this question in this case for two reasons: First, this Court has extended Fourth Amendment protections after arrest far enough to cover the force used on Mr. Aldini in this case. Second, under either the more relaxed Fourth Amendment standard or the tougher Fourteenth Amendment standard, there are sufficient facts in the record for the jury to find that the force used on Mr. Aldini violated his right to be free from excessive force.

a. The Fourth Amendment Reasonableness Standard Has Been Extended Through The Booking Process And Therefore Protected Mr. Aldini From Excessive Force In This Case.

This Court first clearly stated that the Fourth Amendment protects a person at least through the time he remains in the custody of the arresting officers. *Phelps v. Coy*, 286 F.3d 295, 300 (6th Cir. 2002), (citing *McDowell*

v. Rogers, 863 F.2d 1302, 1306 (6th Cir. 1988)). In *Phelps* this Court acknowledged that the Fourth Amendment protections do not magically evaporate at the moment of arrest. “Our cases refute the idea that the protection of the Fourth Amendment disappears so suddenly.” *Phelps*, 286 F.3d at 300.

This Court then expanded Fourth Amendment protections through the booking process. “The Fourth Amendment says that a governmental ‘seizure’ of an individual must be ‘reasonable,’ a rule that applies to an officer’s use of force *during a booking procedure.*” *Lawler v. City of Taylor*, 268 Fed.Appx. 384, 386, 2008 WL 624770, at *3 (6th Cir. 2008) (emphasis added) (citing *Phelps v. Coy*, 286 F.3d 295, 300-01 (6th Cir. 2002)). In *Lawler* the Court interpreted *Phelps* as extending Fourth Amendment protections based on the status of the arrestee (through the booking process), not on the presence of the arresting officer at the time of the use of force. Using the Fourth Amendment analysis this Court in *Lawler* determined that there was a triable issue of fact whether the officer’s throwing Lawler to the ground and striking him with his knee and elbow, thus breaking Lawler’s arm, was objectively unreasonable in light of the facts and circumstances confronting the officer. *Id.*

Fourth Amendment excessive-force inquiries require a “careful balancing” of the force used “against the countervailing governmental

interests at stake,” and we have held that there is “simply no governmental interest in continuing to beat [an arrestee] after he ha[s] been neutralized, nor could a reasonable officer [think] there [is.]” Accepting Lawler's testimony as true and giving his evidence the benefit of all reasonable inferences, we conclude that he has raised a cognizable excessive-force claim because a jury fairly could find that Lawler never posed a threat to Toro's safety (making Toro's take-down excessive) and could find that he was not a threat once he hit the floor (making Toro's knee strikes and elbow jab gratuitous).

Lawler v. City of Taylor, 268 Fed.Appx. 384, 387, 2008 WL 624770, at *3 (6th Cir. 2008) (internal citations omitted). *See also, Marvin v. City of Taylor*, 509 F.3d 234, 245 (6th Cir. 2007) (applying Fourth Amendment to excessive force claims that occurred (1) at the scene of the arrest; (2) on arrival at the police station sally port; (3) in the booking room; (4) outside the cell; and (5) outside the police station at the blood draw at the outside clinic; *Holmes v. City of Massillon, Ohio*, 78 F.3d 1041, 1049 (6th Cir. 1996) (holding it was not plain error for judge to instruct jury under Fourth Amendment on pretrial detainee's excessive force claim where non-arresting sergeant forcibly removed her wedding ring during booking).

District Courts in this Circuit have also extended the Fourth Amendment through the booking process. *See Harris v. City of Circleville*, 2008 WL 211363 (S.D. Ohio 2008) (currently on appeal in this Court Case No. 08-3252); *Bucherl v. Miller*, 2006 WL 2850460 (N.D. Ohio, October 2, 2006) (applying Fourth Amendment reasonableness analysis to claim of

excessive force during booking); *Guzinski v. Hasselbach*, 920 F. Supp. 762 (E.D. Mich. 1996) (extending the Fourth Amendment through the end of the booking process based on strong policy arguments that would extend Fourth Amendment protections after arrest until a judicial officer has made a determination on probable cause). *See also Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996) (extending Fourth Amendment until arrestee is released or a probable cause determination is made); *Valencia v. Wiggins*, 981 F.2d 1440, 1443-1444 (5th Cir. 1993) (finding that the Fourth Amendment did not apply after the plaintiff had been in detention awaiting trial for a significant period of time (three weeks)); *Austin v. Hamilton*, 945 F.2d 1155, 1162 (10th Cir. 1991) (overturned on other grounds) (holding that the Fourth Amendment applied to force used on a arrestee until a judicial hearing is conducted); *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990) (holding that the completion of booking marked the line between arrest and detention and since the force was used after she had been booked the Fourth Amendment did not apply); *Hill v. Algor*, 85 F. Supp.2d 291, 404 (D.N.J. 2000) (applying Fourth Amendment to force used on plaintiff before he was charged or taken before a judicial officer).

b. Kaczmarek's And Leopold's Conduct Was Unreasonable And Violated Mr. Aldini's Constitutional Rights

The Fourth Amendment protects the rights of citizens to be free from unreasonable searches and seizures during arrests and investigative stops. *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Under the Fourth Amendment reasonableness standard, an officer's use of force must be objectively reasonable. Factors considered in determining whether the use of force was reasonable include: 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. citing Tennessee v. Garner*, 471 U.S., 1, 8-9, 105 S.Ct., at 1699-1700. The officer's subjective intentions are irrelevant to the Fourth Amendment analysis. *Id.* at 397.

Under the Fourth Amendment's reasonableness standard it is clear Plaintiff has submitted sufficient facts for summary judgment to have been denied. Defendants must be willing to concede the most favorable view of the facts to the plaintiff in a qualified immunity summary judgment motion. *Sheets v. Mullins*, 287 F.3d 581, 585 (6th Cir. 2002); *Phelps v. Coy*, 286 F.3d 295, 298 (6th Cir. 2002). “[W]hen the non-moving party presents direct evidence refuting the moving party’s motion for summary judgment,

the court must accept the evidence as true.” *Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994). Additionally, when a plaintiff testifies to a material fact, that is sufficient to defeat summary judgment. *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 904 (6th Cir. 2006) (plaintiff’s testimony created a genuine issue of material fact as to whether or not a vessel was seaworthy); *D’Agastino v. City of Warren*, 2003 WL 22220530, at *5 (6th Cir. 2003) (holding that for purposes of summary judgment the court must “take the plaintiff’s version of the facts as true” and that if that testimony creates a question of fact, summary judgment should not be granted). “The central issue is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Spadafore v. Gardner*, 330 F.3d 849, 852 (6th Cir. 2003).

As the facts clearly show, Plaintiff has submitted sufficient direct evidence for reasonable minds, drawing all inferences in Plaintiff’s favor, to conclude that the Defendants were not objectively reasonable when Defendants Leopold and Kaczmarek joined Defendants Johnson and Bodine in the vicious punching, kicking, tasing and taunting of Mr. Aldini. The District Court held that “[t]he force which Plaintiff testifies was applied to him before he was ordered into the restraint chair - kicking, beating, and the

taunting which he testifies went with it and evinces a punishing frame of mind by those administering the beating – is plainly conduct which shocks the conscience.” R. 42: Decision and Order p. 16. The Court concluded however that Leopold and Kaczmarek were immune because their actions were “limited” to placing Plaintiff in the restraint chair, which the court found was not conscious shocking since Plaintiff admittedly struggled. R. 42 p. 15. This conclusion was in error.

The Court acknowledged its decision on Leopold and Kaczmarek was “more difficult” than its decision to deny summary judgment to Defendants Johnson and Bodine. R. 42 p. 15. This decision should not have been more difficult since the same facts are in dispute. The Court decided Leopold and Kaczmarek used force not in the cell but in the restraint chair which is a disputed issue of fact. Taking the facts in the light most favorable to Mr. Aldini, there is sufficient evidence for a jury to conclude that Kaczmarek and Leopold were in the cell at the time of the beating. Aldini testified four to five officers beat him, not just Johnson and Bodine. Leopold and Kaczmarek each admitting being in the cell at the time of the beating. Leopold and Kaczmarek each admitting hitting and punching Aldini, just not in the cell. Furthermore Leopold denied doing anything in the cell; yet Kaczmarek testified Leopold assisted Johnson in the handcuffing.

Kaczmarek justified his use of force in the restraint chair as a response to Aldini grabbing Johnson's shirt but no such act ever occurred. *See* R. 22: Kaczmarek Dep. p.34 and R.32-6 Exhibit E p.11; R. 20: Johnson Dep. pp. 87-88, 112-113; R. 32-6 Incident Reports collected in Exhibit E). There is sufficient evidence, therefore, for a jury to conclude that Leopold and Kaczmarek's actions occurred in the cell.

Clearly defendant's conduct beating Aldini in the cell is not objectively reasonable given the circumstances that Aldini was down in the cell, was surrounded by four officers, and was offering no resistance. Aldini testified he did not resist. He constantly said he was not resisting, was in a submissive position, and kept saying "cuff me." R. 18: Aldini Dep. p. 66-70, 90, 92-93. Furthermore, Defendants testified Aldini never struck, hit, punched, spit, or kicked any officer. R. 23: Leopold Dep. p. 24-25; R. 22: Kaczmarek Dep. p. 33, 51. Even Johnson and Bodine admit Aldini never struck or spit on anyone. R. 19: Bodine Dep. pp. 87-89, 112; R. 20: Johnson Dep. p. 67.

Under similar facts courts have denied summary judgment using the Fourth Amendment analysis. In *Phelps*, the plaintiff was in the process of being booked for a misdemeanor. An officer asked the plaintiff to lift his foot so that the officer could take the plaintiff's shoe off. Another officer

saw this and believed that the plaintiff was attempting to kick the other officer. The second officer tackled the plaintiff, and both fell to the floor. The officer was on top of the handcuffed plaintiff. The officer told the plaintiff not to try to kick one of his officers, and he hit the plaintiff in the face twice. He then grabbed the plaintiff's shirt and banged his head into the floor at least three times. There was no evidence that the plaintiff posed a threat to the officer or anyone else after the officer had tackled him. The Sixth Circuit affirmed the district court's finding that the plaintiff's version stated a clearly established constitutional violation, and decision to deny the defendant's motion for summary judgment. *Phelps*, 286 F.3d at 301. In *Holmes v. Massillon*, 78 F.3d 1041(6th Cir. 1996) the plaintiff went to the police station to ask a question and was arrested on an outstanding warrant for failure to appear. During booking the officer was abusive to her when she could not remove her wedding ring. The officer grabbed her wrist and forcibly removed her ring. The jury found excessive force, which was upheld on appeal.

In *Harris v. City of Circleville*, 2008 WL 211363, at *6 (S.D. Ohio 2008), state highway patrol troopers arrested the plaintiff for speeding and OVI. At the jail, they initiated booking by removing the plaintiff's jewelry and belt. The plaintiff became uncooperative, and did not want the police to

take his belongings. The jail officers then kicked the plaintiff's leg out from under him, causing him to fall and hit his head on the floor. The jail officers then administered a takedown maneuver, and two strikes to the plaintiff's thigh. The plaintiff fell to the ground, and the officers placed their knees in the plaintiff's back. The court held that the officers were not entitled to qualified immunity because, if the plaintiff's version of events were to be believed, there was no question that the officer's conduct violated his established right to be free from excessive force. *Id.*, at *12.

Given this case law and the facts in evidence a jury could find that the force used on Aldini was unreasonable. For these reasons, Leopold and Kaczmarek are not entitled to immunity and summary judgment should have been denied.

2. Mr. Aldini's Right To Fourth Amendment Protection At The Time Of Booking Was Clearly Established At The Time Of The Incident

Since 2002 the law has been clearly established that the Fourth Amendment protects arrestees from excessive force during the booking process. *See, Phelps v. Coy*, 286 F.3d 295 (6th Cir. 2002).

“The district court also correctly held that Lawler's right to be free from such force was clearly established. In *Phelps*, decided two years before this incident, we held that an officer's use of gratuitous force in a booking room-beyond the point at which any threat could have been reasonably perceived-violated the individual's clearly established rights. *Id.* at 302. Precedent thus would have made it “clear to a

reasonable officer [in Toro's position] that his conduct was unlawful in the situation he confronted.”

Lawler v. City of Taylor, 268 Fed.Appx. 384, 388, 2008 WL 624770, at *3 (6th Cir. 2008).

3. Even Under the Fourteenth Amendment’s Shocks the Conscious Standard Kaczmarek’s And Leopold’s Conduct Was Deliberately Indifferent And Violated Mr. Aldini’s Constitutional Rights

The Fourteenth Amendment provides protection from abuse by officials: “[i]t is clear ... that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.”

Phelps v. Coy, 286 F.3d 295, 300 (6th Cir. 2002) (citing *Graham v. Connor*, 490 U.S. 386, 395 n. 10, 109 S.Ct. 1865 (1989)).

The Fourteenth Amendment substantive due process test is a balancing test. “Basing this right in substantive due process . . . allows for balancing the individual’s liberty interest against the State’s asserted reasons for restraining the individual’s liberty while in its care.” *Lanman v. Hinson*, 529 F.3d 673, 681-682 (6th Cir. 2008) (balancing mental health patient’s freedom with government’s desire to evaluate patient, the Court held material issues of fact precluded summary judgment on whether some defendants were deliberately indifferent to plaintiff’s medical needs).

In the excessive force context, this Circuit has applied the Fourteenth Amendment's "shocks the conscience test." *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000). The "shocks the conscience" test has two prongs; which prong is applied depends on whether the officer had time to deliberate before acting. If he did have time to deliberate, the deliberate indifference test is used; if he had no time to deliberate, the malicious and sadistic test is used. *Id.*

Fundamentally, the substantive component of the due process clause insulates citizens against the arbitrary exercise of governmental power. Accordingly, conduct of a law enforcement officer towards a citizen which "shocks the conscience" denies the victim fundamental substantive due process. In situations wherein the implicated state, county, or municipal agent(s) are afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action (such as, for example, most occasions whereby corrections officials ignore an inmate's serious medical needs), their actions will be deemed conscience-shocking if they were taken with "deliberate indifference" towards the plaintiff's federally protected rights. In contradistinction, in a rapidly evolving, fluid, and dangerous predicament which precludes the luxury of calm and reflective pre-response deliberation (such as, for example, a prison riot), public servants' reflexive actions "shock the conscience" only if they involved force employed "maliciously and sadistically for the very purpose of causing harm" rather than "in a good faith effort to maintain or restore discipline[.]"

Claybrook v. Birchwell, 199 F.3d 350, 359 (6th Cir. 2000) (citations omitted) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 852-53, 118 S.Ct. 1708 (1998)). The Sixth Circuit, in contrasting the deliberate indifference evidentiary proof to the malicious or sadistic proof, has called

the former proof “comparatively relaxed” as contrasted to the more exacting latter proof. *Claybrook*, 199 F.3d at 360.² Whether governmental conduct shocks the conscience depends on the factual circumstances of the case.

Darrah v. City of Oak Park, 255 F.3d 301, 306 (6th Cir. 2001).

Sixth Circuit and Supreme Court opinions illustrate what constitutes a fluid situation, where the court will apply the more demanding prong of the “shocks the conscience” standard. In *County of Sacramento v. Lewis*, the U.S. Supreme Court noted that a prison riot was such a situation. 523 U.S. at 852-53. The Court also found that a high-speed police chase was a fluid situation. *Id.* at 854. Similarly, the *Claybrook* court found a fluid situation where undercover police officers confronted a man who was holding a shotgun while standing next to a car in which the plaintiff was seated. 199 F.3d at 360. The gunman was guarding the plaintiff, but the police thought a robbery was in progress. The policemen ordered the gunman to drop the gun. In response, the gunman ordered the police, who had not identified

² The malicious and sadistic Fourteenth Amendment standard is similar to the Eighth Amendment excessive force standard. *See Farmer v. Brennan*, 511 U.S. 825, 835-36, 114 S.Ct. 1970, (1994) (explaining that the Eighth Amendment malicious or sadistic behavior entails unjustifiable intentional conduct undertaken with the direct purpose of causing harm to the victim). *Claybrook*, 199 F.3d at 360-361.

themselves as officers, to drop their guns. A policeman then fired, hitting the plaintiff in her car. *Id.* at 354-355. Finally, the *Darrah* court found that a fluid situation existed where a police officer was attempting to make an arrest in the midst of an unruly crowd, and the officer was suddenly grabbed from behind. 255 F.3d at 307.

In the case at bar, Defendants had time to deliberate before beating Mr. Aldini. Leopold and Kaczmarek entered the cell where Johnson had already taken Mr. Aldini down. Mr. Aldini was not resisting, yet all the officers, including Leopold and Kaczmarek, attacked him. Viewing the evidence in the light most favorable to Mr. Aldini, defendants had time to decide to join in the beating. This was not a situation where the events were rapidly evolving fluid and dangerous situation, like a prison riot. In fact, as the Magistrate Judge found, a jury could determine that Johnson could have simply closed the door and locked Mr. Aldini in the cell. R. 42: Decision and Order p.15. Therefore, the less demanding deliberate indifference standard applies to the force used by Leopold and Kaczmarek. In the alternative, whether Leopold and Kaczmarek had time to deliberate before using force is a material fact in dispute and thus a question for the jury.

This Court has equated deliberate indifference with subjective recklessness, where a plaintiff must show that the official knew of and

disregarded a substantial risk of harm to the plaintiff. *Ewolski v. City of Brunswick*, 287 F.3d 492, 513 (6th Cir. 2002). Deliberate indifference means that “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference,” *Sperle v. Mich. Dep’t of Corr.*, 297 F.3d 483, 493 (6th Cir. 2002) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). Subjective recklessness can “be proven circumstantially by evidence showing that the risk was so obvious that the official had to have known about it.” *Bukowski v. City of Akron*, 326 F.3d 702 (6th Cir. 2003) 326 F.3d at 710. *McQueen v. Beecher Community Schools*, 433 F.3d 460, 469 (6th Cir. 2006).

Viewing the evidence in the light most favorable to the Plaintiff, there are sufficient facts from which a jury could decide that Leopold and Kaczmarek saw gratuitous force being used on Aldini and they joined in. Under these facts, it is clear the officers were aware of the risk to Aldini and disregarded the risk by joining in the beating. For these reasons, Leopold and Kaczmarek are not entitled to qualified immunity, and summary judgment should have been denied.

Finally, even if the court were to evaluate Leopold and Kaczmarek’s conduct under the punishment prong of the Fourteenth Amendment’s shocks

the conscience standard, their actions were unconstitutional. The “amounts to punishment” standard guarantees that a pretrial detainee may not, consonant with the Fourteenth Amendment’s Due Process Clause, be subjected to conditions or treatment that amount to punishment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The Due Process Clause is violated when a detainee is punished before being found guilty in a court of law. *Id.* To determine what constitutes punishment, courts must decide “whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.” *Id.* at 538. Even if there is a legitimate government purpose, the condition or treatment must not be excessive in relation to that purpose. *Id.*

Even under this most stringent of constitutional standards, there is sufficient evidence for the jury to conclude that Leopold and Kaczmarek’s actions were not intended to restore order but were intended to punish Aldini for demanding to make a phone call. Leopold and Kaczmarek offer no justification for their actions striking Aldini in the cell since they deny doing so. However, there is sufficient evidence for a jury to conclude that Leopold and Kaczmarek’s joined in on the beating of Aldini to punish him and for no legitimate reason. Therefore these Defendants are not entitled to immunity and summary judgment should be denied.

VII. CONCLUSION

For these reasons, Defendants are not entitled to qualified immunity on the excessive force claim and summary judgment should have been denied. The judgment in favor of Defendants should be reversed and the case remanded for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Sixth Circuit Local Rule 32(a)(7)(B). According to the word-processing system used for the brief, it contains fewer than 6,738 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32

(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word XP in the Times New Roman 14 point font size.

/s/ Jennifer L. Branch

Date: June 3, 2009

CERTIFICATE OF SERVICE

I certify that this brief was filed with the clerk of court on June 3, 2009. I certify that a copy of the foregoing brief was served June 3, 2009 on Attorneys for Defendants-Appellants:

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ADDENDUM A
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Description of Item	Docket Record Number
Louis Aldini Deposition	R. 18
Troy Bodine Deposition	R. 19
Dustin Johnson Deposition	R. 20
Joseph Kaczmarek Deposition	R. 22
Leopold Deposition Volume 1	R. 23
Leopold Deposition Volume 2	R. 24
Memorandum in Opposition to Summary Judgment Exhibit A disk of restraint chair video (filed manually below).	R. 32-2
Memorandum in Opposition to Summary Judgment Exhibit B photographs identified in Johnson's deposition as Ex. 3	R. 32-3
Memorandum in Opposition to Summary Judgment Exhibit C booking photograph identified in Johnson's deposition as Ex. 2	R. 32-4
Memorandum in Opposition to Summary Judgment Exhibit D selected photographs	R. 32-5
Memorandum in Opposition to Summary Judgment Memorandum in Opposition to Summary Judgment Exhibit E Incident Reports	R. 32-6
Memorandum in Opposition to Summary Judgment Exhibit G all photographs of injuries (filed manually below)	R. 32-8
Decision and Order on Summary Judgment	R. 42
Motion for Rule 54 Certification	R. 45
Decision and Order Granting Finality Certification	R. 48
Plaintiff's Notice of Appeal	R. 49
Amended Judgment for Kaczmarek and Leopold	R.52

ADDENDUM B
(unreported cases)

1. *Gantt v. Akron Corr. Facility*, 1996 WL 6530 (6th Cir. 1996)
2. *Lawler v. City of Taylor*, 268 Fed.Appx. 384, 2008 WL 624770 (6th Cir. 2008)
3. *Harris v. City of Circleville*, 2008 WL 211363 (S.D. Ohio 2008)
4. *Bucherl v. Miller*, 2006 WL 2850460 (N.D. Ohio, October 2, 2006)
5. *D'Agastino v. City of Warren*, 2003 WL 22220530 (6th Cir. 2003)

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2006 WL 2850460 (N.D. Ohio)
(Cite as: **2006 WL 2850460 (N.D. Ohio)**)

Page 1

C
Only the Westlaw citation is currently available.

United States District Court,
N.D. Ohio, Eastern Division.
Shane BUCHERL, Plaintiff,
v.
Deputy MILLER, et al., Defendants.
No. 1:04CV7353.

Oct. 2, 2006.

Elliot Richardson, James Tragos, Richardson,
Stasko, Boyd & Mack, Blake Horwitz, David
Lipschultz, Emily Sherrer, Chicago, IL, Kenneth D.
Myers, Cleveland, OH, for Plaintiff.

Carl E. Cormany, Mazanec, Raskin & Ryder, So-
lon, OH, Todd M. Raskin, Mazanec, Raskin & Ry-
der, Cleveland, OH, for Defendants.

OPINION AND ORDER

BOYKO, J.

*1 This matter comes before the Court upon the Motion (ECF DKT # 53) of Defendants, Deputy Miller, et al., for Summary Judgment and the Motion (ECF DKT # 64) of Plaintiff, Shane Bucherl, to Strike Portions of Defendants' Motion for Summary Judgment. For the reasons that follow, the Motion for Summary Judgment is granted and the Motion to Strike is denied.

I. FACTUAL BACKGROUND

Plaintiff Shane Bucherl and his friend, Mark Pryor, arrived in Allen County, Ohio on May 14, 2004. Plaintiff and Pryor went to the Allen County Fairgrounds, set up camp and sold goods Pryor sells at a monster truck show. Plaintiff and Pryor went to a bar around midnight and Plaintiff drank one beer, four or five margaritas and a shot of "liquid co-

caine." Around closing time, Plaintiff and Pryor went outside to Pryor's truck and Plaintiff began to drive back to where they had set up camp earlier.

Plaintiff has very little memory of the events that followed. Plaintiff remembers seeing the lights of a law enforcement vehicle before he was pulled over near his campsite. Deputy Miller approached the vehicle Plaintiff was driving and asked Plaintiff to submit to field sobriety tests and a breathalyzer but Plaintiff refused. Next, Plaintiff was handcuffed and concedes he may have been uncooperative when getting into the police cruiser. Although Plaintiff remembers being taken directly to jail, Deputy Miller asserts he was actually first transported to the Ohio Highway Patrol Post in Lima, Ohio where he again refused to take a breathalyzer.

Upon arrival at the jail, Deputy Miller escorted Plaintiff to the sally port and turned him over to Corrections Officer ("CO") Chiles. CO Chiles told Plaintiff to face the window so he could be searched. Next, CO Chiles escorted Plaintiff to a cell where he told Plaintiff to kneel on a cement bench so he could remove Plaintiff's handcuffs. After being instructed to kneel on the bench several times, Plaintiff placed one knee on the bench and used his head and knee to push off away from the wall. CO Chiles had intended to take Plaintiff to the ground to gain control, however, before he could, Plaintiff again pushed back and CO Chiles ended up on the ground side-by-side with Plaintiff. Plaintiff was helped back up and the handcuffs were then removed. At that point in time, CO Chiles did not observe any swelling, blood or black and blue marks on Plaintiff's face.

As CO Chiles left Plaintiff's cell, Plaintiff began yelling and kicking the cell door. CO Chiles, CO Lee and Corporal Wireman told Plaintiff if he did not stop yelling and kicking, he would be sprayed. Plaintiff concedes he was told not to be so loud. However, Defendants assert Plaintiff continued for two to five more minutes-at which time, Corporal

Wireman opened the cell door and CO Chiles ordered Plaintiff to sit down. When Plaintiff refused to back off and sit down, CO Chiles administered a one-half second spray of pepper spray or OC gas to Plaintiff's face to stop Plaintiff's disruptive noisemaking and to keep him from injuring himself. However, Plaintiff alleges, to the contrary, when his cell door was opened, he stood still but was sprayed nonetheless. CO Chiles directed Plaintiff to the sink and told him to splash water on his face immediately after administering the OC spray. Approximately fifteen minutes later, Corporal Wireman provided Plaintiff with Bio-Shield decontaminant to counteract the spray's effects.

*2 According to CO Chiles, when his shift ended at 7:00 a.m. the next morning, he observed Plaintiff's face and saw some swelling due to the pepper spray; but "no marks, blackness around his eyes, bruising on his face or swelling or bleeding of his nose." CO Chiles further claims Plaintiff never asked him for medical attention. Nurse Glenna Upshaw saw Plaintiff at 9:30 a.m. to conduct a routine TB test pursuant to state law. According to Nurse Upshaw, she had to call Plaintiff's name several times to have him come out of the cell to the medication cart. Nurse Upshaw observed a strong odor of alcohol, but stated Plaintiff appeared able to understand her and respond to her questions. Nurse Upshaw asked Plaintiff about his black eye which she categorized as mild-on a scale ranging from mild to severe. Nurse Upshaw examined Plaintiff and found no open areas, cuts, swelling, bruising or markings. Plaintiff refused Nurse Upshaw's offer of Tylenol and did not ask for additional medical attention.

Following his arrest, Plaintiff pled guilty both to operating a vehicle under the influence of alcohol or drugs and driving in violation of the law by failing to maintain the proper lane. After serving his three-day mandatory jail sentence, Plaintiff was released. Plaintiff filed a Complaint in this Court against numerous individual Defendants, alleging excessive force and failure to provide medical at-

tention under 42 U.S.C. § 1983, and lodging *Monell* claims regarding excessive force and inadequate training against Allen County. Now before this Court is Defendants' Motion for Summary Judgment.

II. LAW AND ANALYSIS

Standard of Review

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting *Fed.R.Civ.P. 56(c)*). A fact is not material unless it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 248 (1986). An opponent of a motion for summary judgment may not rely on the mere allegations of the complaint, but must set forth specific facts showing a genuine issue for trial. *Id.* When no reasonable jury could return a verdict for the non-moving party, no genuine issue exists for trial. *Id.* However, in evaluating a motion for summary judgment, the court must draw all inferences from the facts in the light most favorable to the non-moving party. *Gen. Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1097-98 (6th Cir.1994).

§ 1983 Claims Against Individually-Named Defendants

To state a viable claim under 42 U.S.C. § 1983, "plaintiffs must produce evidence that: (1) they were deprived of a right, privilege, or immunity secured by the federal Constitution or law of the United States, and (2) the deprivation was caused by a person while acting under the color of state law." *Upsher v. Grosse Pointe Public School Sys.*, 285 F.3d 448, 452 (6th Cir.2002). The parties con-

cede Defendants were acting under the color of state law. However, Defendants argue Plaintiff was not deprived of any right, privilege or immunity secured by the federal Constitution or law of the United States.

Excessive Force Claims

*3 When addressing an excessive force claim brought under § 1983, the specific constitutional right allegedly infringed must be identified. *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Plaintiff asserts his Fourth Amendment right “to be secure in one's person against ... unreasonable seizures” was violated by CO Chiles' use of alleged excessive force when removing Plaintiff's handcuffs. Under the Fourth Amendment, the Court must analyze the reasonableness of the officer's actions. *Id.* at 396-97. “The reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Id.* at 397. Plaintiff alleges the use of excessive force by CO Chiles, Deputy Miller and CO Lee; however, Plaintiff has produced no evidence of any force used by anyone other than CO Chiles. Therefore, summary judgment is granted in favor of Deputy Miller and CO Lee on the excessive force claim.

Takedown Maneuver

Plaintiff contends CO Chiles' intentional takedown of an intoxicated, restrained prisoner for the purpose of removing handcuffs was not objectively reasonable. Plaintiff claims he posed no substantial risk to the officer and there was no reason to take him down face-first onto a concrete floor. However, Plaintiff puts forth no evidence to support his assertions that it was unreasonable for CO Chiles to attempt to take down Plaintiff. In fact, Plaintiff answered “No” when asked if he had any memory

of the events relating to the removal of the handcuffs.

Accordingly, because Plaintiff has presented no evidence to demonstrate CO Chiles' actions were objectively unreasonable, this Court finds CO Chiles did not use excessive force when removing Plaintiff's handcuffs, and therefore, did not violate Plaintiff's Fourth Amendment right to be secure in one's person from unreasonable seizures.

Pepper Spray

Plaintiff further contends CO Chiles utilized excessive force when he administered a short burst of pepper spray or OC spray to Plaintiff. According to Plaintiff, he was sprayed while standing quietly in his cell. However, Plaintiff's recollection of the events leading up to the OC spray being administered is foggy. Plaintiff remembers pounding on the cell, kicking the cell and yelling for the officers in an attempt to obtain permission to use the telephone. Moreover, Plaintiff remembers the officers warning him to be quiet, but he does not remember how many times he received this warning. Lastly, Plaintiff asserts Corporal Wireman's conduct was unreasonable because he waited ten to fifteen minutes before offering him decontaminant. In support of his allegations, Plaintiff produced expert testimony regarding the use of OC spray. Plaintiff's expert, Joseph Stine, opines the use of the OC spray on Plaintiff was tantamount to torture because Plaintiff was standing quiet and still in his cell when CO Chiles administered the spray.

*4 On the other hand, Defendants testify Plaintiff was uncooperative and disruptive. As a result, Corporal Wireman made the decision to spray Plaintiff. According to Allen County policy, once the decision is made to spray an inmate, the acting officer, CO Chiles in this case, must follow through with the order. CO Chiles testified he was not aware Corporal Wireman waited fifteen minutes before administering the Bio-Shield decontaminant to Plaintiff; although he testified it is standard to wait

a little bit after spraying an inmate in order to let the spray take effect before re-entering the cell. Ultimately, Defendants maintain CO Chiles used the minimum amount of force necessary to deal with Plaintiff. Specifically, according to Sheriff Beck, the use of OC spray on an inmate who is yelling, kicking the cell door and disrupting jail procedures is appropriate under the use of force continuum utilized by Allen County. Critically, the testimony of Plaintiff's expert, Joseph Stine, relies upon Plaintiff's shaky recollections, and is countered by Plaintiff's own admissions to pounding on the cell, kicking the cell and yelling for the officers on the night in question. Even if Plaintiff may have stopped such behavior upon the opening of his cell door by Corporal Wireman and CO Chiles, the order to spray him had already been issued and therefore, according to Allen County's policy, CO Chiles was to follow through and spray the inmate.

Accordingly, because CO Chiles and Corporal Wireman followed Allen County policy regarding the administration of OC spray to an inmate; because the officers' conduct was at the minimum end of the use of force continuum; and because Plaintiff cannot provide evidence to show CO Chiles acted unreasonably, this Court finds CO Chiles did not violate Plaintiff's Fourth Amendment rights by using excessive force in the administration of the OC spray.

Claim of Failure to Provide Medical Attention

The Eighth Amendment prohibits "unnecessary and wanton infliction of pain" caused by a "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* at 105. A constitutional claim under § 1983 based on the denial of medical treatment has an objective and a subjective component. *Blackmore v. Kalamazoo County*, 390 F.3d 890, 895 (6th Cir.2004). The objective com-

ponent requires the existence of a "sufficiently serious" medical need. *Id.* at 896. "A medical need is objectively serious if it is 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Id.* at 897. Further, the subjective component "requires an inmate to show that prison officials have 'a sufficiently culpable state of mind in denying medical care.'" *Id.* at 896. Furthermore, "[k]nowledge of the asserted serious needs or of circumstances clearly indicating the existence of such needs, is essential to a finding of deliberate indifference." *Id.* (citing *Horn v. Madison County Fiscal Ct.*, 22 F.3d 653, 660 (6th Cir.1994)).

*5 Plaintiff alleges his Eighth Amendment constitutional rights were violated when he was injured in the Allen County Jail and subsequently denied medical treatment. Specifically, Plaintiff alleges Deputy Sheriff Miller, Deputy Sheriff Joseph, CO Chiles, CO Lee and Corporal Wireman all acted with deliberate indifference towards his "obvious medical needs." However, Defendants assert Plaintiff made no requests for medical attention and none of the Defendants noticed anything other than the fact that Plaintiff appeared to have a black eye. Moreover, an Allen County Nurse, Nurse Glenna Upshaw, examined Plaintiff, and she recorded he had a "mild" black eye and refused her offer of Tylenol.

Parenthetically, the Court notes that Plaintiff has moved to strike parts of Defendants' brief supported by the "expert" testimony of Nurse Upshaw because her "expert" report was not provided. Defendants maintain, and the Court agrees, that Nurse Upshaw is a fact witness. The Court considered only her recitation of events she witnessed, and her interaction with Plaintiff, and based no determination upon any purported medical opinion. Plaintiff's motion to strike is denied.

Plaintiff Bucherl can satisfy neither the objective nor the subjective requirements of an Eighth Amendment failure to provide medical attention

claim. First, no evidence has been produced to show Plaintiff suffered anything other than a “mild” black eye. Therefore, Defendants did not act unreasonably when they failed to identify a sufficiently serious medical need. Second, Plaintiff has produced no evidence to show that he requested medical attention. In fact, he declined Nurse Upshaw's offer of medical attention beyond the standard evaluation she administered. Therefore, Defendants did not act with deliberate indifference toward Plaintiff in not providing medical care beyond the evaluation done by Nurse Upshaw. Accordingly, this Court grants summary judgment in Defendants' favor on Plaintiff's Eighth Amendment failure to provide medical attention claim.

Monell Claims Against County

Under [42 U.S.C. § 1983](#), “[l]ocal governing bodies ... can be sued directly .. where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.” *Monell v. Dep't Of Social Servs.*, [436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 \(1978\)](#). Moreover, “local governments ... may be sued for constitutional deprivations visited pursuant to governmental ‘custom.’ ” *Id.* at 691. While a city can be liable under [§ 1983](#) for inadequate training of its employees, “only where a municipality's failure to train its employees in a relevant respect evidences a ‘deliberate indifference’ to the rights of its inhabitants can such a shortcoming be properly thought of as a city ‘policy or custom’ that is actionable under [§ 1983](#).” *City of Canton v. Harris*, [489 U.S. 378, 388-89, 109 S.Ct. 1197, 103 L.Ed.2d 412 \(1989\)](#).

*6 Plaintiff alleges his injuries were the result of Allen County's improper policies, practices and procedures regarding the use of excessive force. First, Plaintiff alleges the execution of a face-first takedown procedure performed on a handcuffed inmate in a jail cell is not reasonable. However, because Plaintiff testified at his deposition he does

not remember the alleged takedown, the removal of handcuffs, nor the surrounding circumstances, this argument lacks merit.

Second, Plaintiff contends Allen County's policy, practice and procedure allegedly encouraging the use of pepper or OC spray on prisoners confined in cells for the purpose of forcing their silence is unreasonable. However, Sheriff Daniel Beck and CO Chiles' acting supervisor on the night in question, Corporal Wireman, both stated in their depositions that CO Chiles used the appropriate level of force when dealing with Plaintiff's behavior-yelling and kicking at the cell door. Allen County Sheriff Department employees receive yearly training on the use of OC spray and are instructed to follow a standard use of force continuum when dealing with uncooperative and/or dangerous inmates. According to Sheriff Beck, the use of OC spray on an inmate who is yelling, kicking the cell door and disrupting jail procedures is appropriate under the use of force continuum in place in Allen County. Although Plaintiff's expert, Joseph Stine, asserts the use of OC spray is two levels above the force necessary in this situation according to Allen County's force continuum, Sheriff Beck testified the use of force continuum is in place merely to guide the officers and it is up to the particular officer to decide what is necessary in particular circumstances.

Despite Plaintiff's numerous claims, Defendants argue that without proof of a constitutional violation by any individual Defendant, there can be no liability by the County. *City of Los Angeles v. Heller*, [475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 \(1986\)](#). Plaintiff has offered no evidence to show either Defendants' actions or the County's practices, policies, procedures or customs are unconstitutional. Plaintiff has produced no evidence to show Allen County's policy of administering OC spray to confined inmates is deliberately indifferent to an inmate's rights. Instead, Defendants, for their part, have produced evidence to show Allen County's policy regarding the use of OC spray is strictly followed, and that officers receive yearly training re-

garding such policy. Accordingly, Plaintiff has failed to demonstrate Allen County is liable to Plaintiff under *Monell* for any claims asserted against it.

III. CONCLUSION

Plaintiff, Shane Bucherl, having little or no recollection of the occurrences at the Allen County Jail in May of 2004, has not met his burden under Fed.R.Civ.P. 56 of providing specific facts and competent evidence showing a genuine issue for trial. Even drawing all possible inferences from the facts in the light most favorable to Plaintiff, he has not demonstrated the elements necessary to sustain his claims under 42 U.S.C. § 1983 of constitutional and federal law violations. Therefore, summary judgment is granted in favor of all Defendants.

*7 IT IS SO ORDERED.

N.D.Ohio,2006.

Bucherl v. Miller

Not Reported in F.Supp.2d, 2006 WL 2850460
(N.D.Ohio)

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(Cite as: 2008 WL 211363 (S.D. Ohio))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Eastern Division.
William R. HARRIS, Jr., Plaintiff,
v.
CITY OF CIRCLEVILLE, et al., Defendants.
No. 2:04-cv-1051.
Jan. 23, 2008.

Charles Horne Cooper, Jr., John C. Camillus,
Cooper & Elliott LLC, Columbus, OH, for Plaintiff.

John T. McLandrich, Robert Henry Stoffers,
Mazanec, Raskin & Ryder Co., LPA, Cleveland,
OH, Michael S. Loughry, Mazanec Raskin Ryder &
Keller Co LPA, Columbus, OH, for Defendants.

MEMORANDUM OPINION & ORDER

JOHN D. HOLSCHUH, District Judge.

*1 Plaintiff, William R. Harris, Jr., sustained a spinal cord injury while being booked at the Circleville jail. He filed suit against the City of Circleville and Circleville police officers Glenn R. Williams, II, Robert Gaines, and Phillip Roar, seeking relief under 42 U.S.C. § 1983 for alleged violations of his constitutional rights. He also brought claims of assault and battery and intentional infliction of emotional distress. This matter is currently before the Court on Plaintiff's motion for partial summary judgment on his claim that Defendants were deliberately indifferent to his serious medical needs (Record at 96), and on Defendants' motion for summary judgment on all claims (Record at 97).

I. Background and Procedural History

On the evening of April 3, 2004, Harris, a

32-year-old African-American male, was pulled over in his car by Ohio State Highway Patrol Trooper Heather McManes. Trooper R.A. Cooper arrived at the scene minutes later. Harris was charged with speeding and OVI. At the time, the troopers also mistakenly believed that Harris had an outstanding arrest warrant for failure to appear in the Reynoldsburg Mayor's Court. Because Harris was largely uncooperative, the troopers notified the Circleville Jail dispatch that they were bringing in a resistor.

At the jail, Circleville police officers Williams, Roar and Gaines took Harris, who was already handcuffed, directly to Cell 3, otherwise known as the "drunk tank." In the cell, they initiated the booking process by attempting to remove Harris's jewelry and belt. It is undisputed that Harris was uncooperative and pulled away from them. According to Harris, when he refused to allow the officers to take his personal belongings, they kicked his leg out from under him and pushed him in the back, causing him to fall and hit his head inside the cell. (Harris Dep. at 75; Harris Aff. ¶ 5, Ex. 2 to Pl.'s Mem. in Opp'n).

The officers then stood him up, and took him back out into the booking area so that their attempts to remove his personal property would be recorded on the surveillance videotape. Officer Williams instructed Harris to kneel down. Harris claims that he could not do so because he was handcuffed and one of the officers was pulling his arms up behind him. When Harris did not comply with the request to kneel, the officers engaged in a takedown maneuver to get Harris to the floor. Officer Gaines pushed his knee into the back of Harris's knee and Officer Roar administered two peroneal strikes to the side of Harris's thigh. Officer Roar fell to the floor with Harris, cushioning Harris's fall.

Harris testified that after he fell to the ground, he felt the officers' knees in his back. The officers allegedly pulled his hands up, and placed a hand on

his forehead. Harris heard a popping noise and began to scream in pain. He yelled that the officers had broken his neck and demanded that they stop shocking him. He believed that they were using Tasers on him because "it felt like electricity was running through my body." He told them that he could not move. (Harris Dep. at 95). The officers ignored his protests and, after removing his watch, necklace, and belt, they told him to stand up. When he again told them that he could not move, they dragged him back to Cell 3, stripped him down to his underwear and t-shirt and left him lying face-down on the cement floor. That was at 10:18 p.m.

*2 Harris continued to scream in pain and complain that his back was broken. He testified at his deposition that because he could not move and was having trouble breathing, he thought he was going to die. (*Id.* at 98). He heard people walking past the cell, but no one responded to his cries for help. Harris testified that one of the officers later came into the cell, kicked him in the ribs, and said, "Looks like we got us a broke nigger here." The officer then turned around and left. (*Id.*)

Finally, Patricia Rice, a jail employee, asked Corporal Stephanie Kinser to check on Harris, noting that he had not moved since being placed in the cell. Harris told Kinser that his back was broken and that he needed to see a doctor. Kinser called Sergeant Donald Barton and asked him to come to the jail regarding a "medical request." When Barton arrived at the jail and examined Harris, he directed the dispatcher to call for an ambulance. By then, it was 11:39 p.m., an hour and 20 minutes after the injury to his back occurred.

Harris was transported to Berger Hospital and then to Grant Medical Center where it was discovered, for the first time, that he suffered from a congenital condition called [spinal stenosis](#), a narrowing of the spinal canal. Because of this condition, he suffered a [spinal cord injury](#) during the takedown maneuver. He underwent surgery three days later to relieve the pressure on his spinal cord. The doctors fused several cervical disks with screws and plates. While

Harris has regained much of the feeling in his arms and legs and can walk with a cane, he still suffers numerous permanent effects of the [spinal cord injury](#), including constant pain, weakness, migraine headaches, [sexual dysfunction](#), and loss of bowel and bladder control. (*Id.* at 142-61).

Harris filed suit against the City of Circleville, and Circleville police officers Williams, Roar, and Gaines. Count I of the Third Amended Complaint asserts [§ 1983](#) claims against Williams, Roar and Gaines. Plaintiff alleges that they violated his constitutional rights by using excessive force against him and by exhibiting deliberate indifference to his serious medical needs. Count II alleges that the City of Circleville's failure to train and supervise the officers caused these constitutional injuries. Count III alleges a violation of the Equal Protection Clause of the Fourteenth Amendment. Count IV asserts a claim of assault and battery, and Count V alleges [intentional infliction of emotional distress](#).^{FN1}

^{FN1}. Plaintiff's original complaint also asserted claims against Circleville Emergency Medical Services and its employees Lisa Swift and D. Sharp, and against Kenneth Morckel, Director of the Ohio Department of Highway Safety, and State Troopers McManes and Cooper. All claims against these parties have been dismissed.

Harris has moved for partial summary judgment on his [§ 1983](#) claim of deliberate indifference to serious medical needs. Defendants have moved for summary judgment on all claims asserted against them.

II. Standard of Review

Although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules, which are designed "to secure the just, speedy and inexpensive determination of every action." [Celotex Corp. v. Catrett](#), 477 U.S. 317, 327, 106 S.Ct. 2548,

91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 1). The standard for summary judgment is found in Federal Rule of Civil Procedure 56(c):

*3 [Summary judgment] ... should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Summary judgment will be granted “only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is ... [and where] no genuine issue remains for trial, ... [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.” *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 467, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962) (quoting *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 88 L.Ed. 967 (1944)). See also *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir.1994).

Moreover, the purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. *Lashlee v. Sumner*, 570 F.2d 107, 111 (6th Cir.1978). The court's duty is to determine only whether sufficient evidence has been presented to make the issue of fact a proper question for the jury; it does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Weaver v. Shadoan*, 340 F.3d 398, 405 (6th Cir.2003).

In a motion for summary judgment, the moving party bears the initial burden of showing that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law. *Leary v. Daeschner*, 349 F.3d 888, 897 (6th Cir.2003). All the evidence and facts, as well as inferences to be drawn from the underlying facts, must be considered in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v.*

Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Wade v. Knoxville Util. Bd.*, 259 F.3d 452, 460 (6th Cir.2001). Additionally, any “unexplained gaps” in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-60, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

“[T]he mere existence of *some* 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*, 477 U.S. at 247-48 (emphasis in original). A “material” fact is one that “would have [the] effect of establishing or refuting one of [the] essential elements of a cause of action or defense asserted by the parties, and would necessarily affect [the] application of [an] appropriate principle of law to the rights and obligations of the parties.” *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir.1984). See also *Anderson*, 477 U.S. at 248. An issue of material fact is “genuine” when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. See also *Leary*, 349 F.3d at 897.

*4 If the moving party meets its burden, and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. The non-moving party must demonstrate that “there is a genuine issue for trial,” and “cannot rest on her pleadings.” *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir.1997).

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out spe-

cific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Fed.R.Civ.P. 56(e).

The existence of a mere scintilla of evidence in support of the opposing party's position is insufficient; there must be evidence on which the jury could reasonably find for the opposing party. *Anderson*, 477 U.S. at 252. The nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Companies, Inc.*, 8 F.3d 335, 340 (6th Cir.1993). The court may, however, enter summary judgment if it concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based on the presented evidence. *Anderson*, 477 U.S. at 251-52; *Lansing Dairy, Inc.*, 39 F.3d at 1347.

III. Discussion

A. Count I (§ 1983 Claims Against Williams, Roar, and Gaines)

In Count I of the Third Amended Complaint, Plaintiff seeks relief under 42 U.S.C. § 1983 against Officers Williams, Roar, and Gaines. That statute states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

42 U.S.C. § 1983. This statute " 'is not itself a source of substantive rights,' but merely provides 'a

method for vindicating federal rights elsewhere conferred.'" *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)).

In order to recover under § 1983, a plaintiff must prove that the defendant, while acting under color of state law, violated rights secured by the Constitution or laws of the United States. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). In this case, it is undisputed that the Circleville police officers were acting under color of state law. Plaintiff claims that they violated his constitutional rights by using excessive force against him, and by acting with deliberate indifference to his serious medical needs. The Court turns first to Defendants' motion for summary judgment on the excessive force claim.

1. Excessive Use of Force

a. Fourth Amendment Applies

*5 The parties disagree over whether the excessive force claim is governed by the Fourth Amendment's "objective reasonableness" standard or by the Fourteenth Amendment's more stringent "shocks the conscience" standard. In *Phelps v. Coy*, 286 F.3d 295 (6th Cir.2002), the Sixth Circuit explained that "[w]hich amendment applies depends on the status of the plaintiff at the time of the incident, whether free citizen, convicted prisoner, or something in between." *Id.* at 299. If the use of force occurs during the course of an arrest, the Fourth Amendment applies. If the use of force occurs post-conviction, the Eighth Amendment applies. However, "if the plaintiff is not in a situation where his rights are governed by the particular provisions of the Fourth or Eighth Amendments, the more generally applicable due process clause of the Fourteenth Amendment still provides the individual some protection against physical abuse by officials." *Id.* at 299-300. Pretrial detainees generally fall into this last category. *Id.* at 300.

Unfortunately, the dividing line between where the protections of the Fourth Amendment end and the protections of the Fourteenth Amendment begin is not well-defined. In *Graham v. Connor*, 490 U.S. 386, 395 n. 10, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court noted that it has not yet “resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pre-trial detention begins.” See also *Berishaj v. City of Warren*, Nos. 04-70998, 05-71476, 2006 WL 2069440, at * 14 (E.D.Mich. July 26, 2006) (“It is not clear whether the Fourth Amendment continues to apply after arresting officers turn an arrestee over to colleagues for processing at the jail and excessive force is allegedly used during the latter period of custody.”).

The Sixth Circuit has held that the Fourth Amendment's protections extend “throughout the time the person remains in the custody of the arresting officers.” *McDowell v. Rogers*, 863 F.2d 1302, 1306 (6th Cir.1988). The parties agree that this is the governing law, but disagree as to its application in this particular case. The question is whether, at the time the Circleville police officers used force against Plaintiff, he was in the joint custody of the arresting officers, Ohio State Highway Patrol Troopers McManes and Cooper, and the Circleville police officers who were booking Plaintiff at the troopers' request.

McManes testified that Circleville police officers were waiting for her arrival in the sally port at the Circleville Police Department, and that it was her intent to transfer custody of Harris to the Circleville Police Department and the jail. (McManes Dep. at 30). Both McManes and Cooper testified that, once inside the jail, the Circleville police officers took physical custody of Plaintiff. (McManes Dep. at 36; Cooper Dep. at 36). The jail surveillance video confirms this. (Ex. 1 to Pl.'s Mot. Partial Summ. J.). The Circleville officers immediately took Plaintiff to the “drunk tank” and initiated the booking pro-

cess by attempting to remove Plaintiff's jewelry and belt. When he failed to cooperate, they took him back out to the booking area so that their attempts to remove his personal property would be videotaped. When he failed to comply with their instructions to get on his knees, they engaged in a take-down maneuver, removed his personal property and then returned him to his cell. Although McManes and Cooper were present and observed the entire incident, they had no physical contact with Plaintiff and were not involved in the use of force.

*6 However, this does not necessarily mean that Plaintiff was not in the joint custody of the arresting officers and the booking officers. Throughout the entire incident, he was physically restrained by handcuffs placed on him by the State Highway Troopers. After the Circleville officers dragged Plaintiff back to his cell, McManes and Cooper remained at the Circleville Jail for over an hour to complete paperwork incident to the arrest (McManes Dep. at 96-98; Cooper Dep. at 72) and, presumably, to obtain the handcuffs they used to restrain their prisoner. In the jail surveillance video, Trooper McManes is observed, at some point after Plaintiff is injured, kneeling outside his cell door, reading the BMV's administrative license suspension form to him. The jail surveillance video shows that McManes remained at the jail until the paramedics arrived at 11:39 p.m. to take Plaintiff to the hospital.

In this Court's view, Plaintiff's claim is governed by the Fourth Amendment. It is undisputed that Plaintiff was injured at the very beginning of the booking process, in the presence of the arresting officers. A similar case from the Eastern District of Michigan is instructive. In *Guzinski v. Hasselbach*, 920 F.Supp.2d 762 (E.D.Mich.1996), the district court extended the Fourth Amendment's protections through the end of the booking process. The plaintiff in that case was arrested for DUI, taken to the county jail and placed in a holding cell. After being escorted to the booking window to begin the booking process, he indicated that he needed to use

the bathroom. When the booking officer ignored his request, plaintiff turned away and began walking toward the bathroom. Twice, he was ordered to return to the booking window. When he failed to comply with those orders, he was restrained by several officers including the officer who had arrested him. The arresting officer allegedly injured the plaintiff's arm in the process.

The court noted that the alleged excessive use of force took place "after arrest but before booking." *Id.* at 765. In determining whether to apply the Fourth or Fourteenth Amendment to plaintiff's claim, the court noted, "[w]hile I find no case in which the Sixth Circuit has addressed this issue, other courts and strong policy arguments would extend Fourth Amendment protections after arrest until a judicial officer has made a determination on probable cause and the issue of pre-trial release or detention." *Id.*^{FN2} At the very least, "courts have treated the completion of the booking process as the point where 'arrest' ends and 'detention' begins." *Id.* at 766. The court decided that the Fourth Amendment applied to the plaintiff's claim because even though he had been turned over to the jailers, he had not yet been booked. The court believed that, during this time, plaintiff was in the "joint custody" of the booking officers and the arresting officer. *Id.*

FN2. For example, in *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996), the Ninth Circuit concluded that when an arrestee is detained without a warrant, the Fourth Amendment applies "up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest." *See also Hill v. Algor*, 85 F.Supp.2d 391, 404 (D.N.J. 2000) (holding that because officers' use of force occurred in a holding cell before the plaintiff was "formally charged or taken before a judicial officer," the Fourth Amendment's "objective reasonableness" standard applied). These holdings comport

with the Supreme Court's decision in *Bell v. Wolfish*, 441 U.S. 520, 523, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), defining "pretrial detainees" as those persons "who have been charged with a crime but who have not yet been tried on the charge."

This Court agrees with the reasoning set forth in *Guzinski*. The protections of the Fourth Amendment should be extended to cover all claims of excessive force that arise through the time the booking process is completed. The arresting officer has an obvious interest in remaining with the prisoner until the booking process has been correctly completed, at which time the jail assumes sole custody of the prisoner. Until then, the arrestee remains in the joint custody of the arresting officer and the booking officers. Therefore, even though the jail officers may find it necessary to take physical control of the arresting officer's prisoner in order to complete the booking process, the Fourth Amendment protection follows the prisoner throughout the arrest and the contiguous booking process.

*7 Although it could be argued that *Guzinski* is distinguishable because the alleged injury in that case was caused by the arresting officer, other courts within the Sixth Circuit have applied the Fourth Amendment to claims that, during the booking process, a booking officer used excessive force. *See e.g., Bucherl v. Miller*, No. 1:04cv7353, 2006 WL 2850460 (N.D. Ohio Oct. 2, 2006); *Boyer v. City of Mansfield*, 3 F.Supp.2d 843 (N.D. Ohio 1998).

Having determined that the Fourth Amendment governs Plaintiff's claim of excessive force, the Court must next determine the proper scope of Plaintiff's claim.

b. Scope of Claim

In his Third Amended Complaint, Plaintiff alleges that the officers engaged in an excessive use of force when they struck at the back of his knee and administered peroneal strikes to force him to the

floor, causing a [compression injury](#) to his spinal cord. (Third Amd. Compl. at ¶¶ 10-11). However, in his memorandum in opposition to Defendants' motion for summary judgment, Plaintiff also claims that the officers engaged in excessive force: (1) when one of the officers kicked his leg out from under him and pushed him in the back, causing him to land on the left side of his head inside the cell immediately upon his arrival at the jail (Harris Dep. at 75; Harris Aff. ¶ 5); and (2) when one of the officers kicked him in the ribs as he was lying paralyzed on the cell floor (Harris Dep. at 98).

Defendants argue that because Plaintiff failed to advance these additional claims of excessive force in his Third Amended Complaint, he is barred from pursuing them now. Defendants cite no authority for this proposition. [Federal Rule of Civil Procedure 8\(a\)\(2\)](#) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." A plaintiff is not required to detail the facts upon which he bases his claim. Rather, the scope of the claim is uncovered during the discovery process. [Conley v. Gibson](#), 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Plaintiff's complaint clearly sets forth a claim for excessive use of force, and paragraph 14 states, "[a]s a direct proximate result of being taken to the floor by the defendant officers *and other force applied by the defendant officers*, plaintiff suffered bodily injury." (Third Amd. Compl. ¶ 14). This put Defendants on notice that the force at issue was not necessarily limited to what occurred during the takedown maneuver in the booking area. Moreover, Plaintiff testified at length at his May 2006 deposition about the additional alleged uses of force. Under these circumstances, Defendants cannot show any prejudice. The Court therefore finds that Plaintiff may pursue his expanded excessive force claims. *See* [Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1219 \(3d ed. 2004\)](#) (noting that plaintiff may augment original legal theory absent a showing of prejudice to the other party).

c. Analysis

*8 In *Graham v. Connor*, the United States Supreme Court set forth the analysis to be used in determining whether a particular seizure is "reasonable" under the Fourth Amendment. The Court stated, "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." 490 U.S. at 397. Factors to be considered include "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. These factors, however, are not exhaustive. The ultimate question is "whether the totality of the circumstances justify[s] a particular sort of ... seizure." *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)).

With respect to each of the alleged incidents of excessive use of force, Defendants argue that they are entitled to summary judgment because, even viewing the facts in a light most favorable to Plaintiff, their conduct was objectively reasonable in light of the facts and circumstances confronting them. Defendants have also asserted the defense of qualified immunity. "Qualified immunity is an affirmative defense that shields government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Estate of Carter v. City of Detroit*, 408 F.3d 305, 310 (6th Cir. 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396, (1982)). Once a defendant raises the defense of qualified immunity, the plaintiff bears the burden of proving that the defendant is not entitled to qualified immunity. *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006).

As the Supreme Court explained in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272

(2001), a claim of qualified immunity involves a two-step inquiry. First, the court must determine whether the facts, viewed in the light most favorable to the plaintiff, show that a constitutional violation has occurred. *Id.* at 201. Second, the court must determine whether the constitutional right was clearly established. The relevant inquiry is “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* at 201-02. If there is no constitutional violation, or if the “law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.” *Id.*

With these general principles in mind, the Court then turns to an analysis of each segment of Plaintiff's excessive force claim. See *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir.1996) (holding that excessive force claims are to be analyzed in segments).

i) Initial Incident in Cell

*9 Plaintiff alleges that the first incident of excessive force occurred inside the cell when the officers initially attempted to take his jewelry. According to Plaintiff, Officer Roar slid a ballpoint pen under the chain of Plaintiff's necklace and yanked on it. When Plaintiff verbally protested and pulled away, either Officer Roar or Officer Gaines kicked Plaintiff's leg out from under him and pushed him in the back, causing him to fall and hit the left side of his head. (Harris Dep. at 75; Harris Aff. ¶ 5). Because Plaintiff was handcuffed, he was unable to break his fall. Officers Roar and Gaines deny that they knocked Plaintiff to the ground inside the cell. (Roar Dep. at 36; Gaines Dep. at 66). Officer Williams, however, testified that he believed that Plaintiff went to the floor, but could not recall with certainty. (Williams Dep. at 39). These conflicting accounts of what happened inside the cell preclude summary judgment on this portion of Plaintiff's excessive force claim.

If Plaintiff's account is to be believed, a jury could find that the officers' conduct was not objectively reasonable. The *Graham* factors all cut in Plaintiff's favor. He was accused of speeding, DUI and failing to appear in mayor's court, not particularly serious crimes. It cannot be said that he posed an immediate threat to the safety of the officers or others. He was already handcuffed and was inside a jail cell surrounded by several law enforcement officers. Although Plaintiff verbally protested and pulled away when the officers attempted to take his jewelry, there is no evidence that he was violent or combative. Under these circumstances, a reasonable jury could find that the force used by the officers was excessive. Moreover, it would have been clear to a reasonable officer that such conduct was unlawful. In *McDowell*, the Sixth Circuit held that the need for application of force is nonexistent where a handcuffed arrestee is not trying to escape or hurt anyone. 863 F.2d at 1307. For these reasons, Defendants are not entitled to qualified immunity on Plaintiff's first claim of excessive force.

ii) Takedown Maneuver in Booking Area

The facts giving rise to Plaintiff's second claim of excessive force are largely undisputed. After Plaintiff refused to let the officers take his jewelry, the officers escorted him from inside the cell back to the booking area so that their attempts to remove his personal property would be recorded on videotape. As seen on the jail surveillance videotape, Williams asked Plaintiff two or three times in quick succession to kneel on the floor. Plaintiff, however, remained standing. He claims that he attempted to comply with Williams' request, but was unable to get on his knees because Gaines was lifting Plaintiff's arms behind his back.

When Plaintiff failed to immediately comply with Williams' request, Gaines used his knee to attempt to buckle the back of Plaintiff's knee. When this attempt failed, Roar administered two peroneal strikes to Plaintiff's thigh, causing Plaintiff to drop to the ground. Plaintiff felt the officers kneeling on

his back and pulling up on his arms. One of the officers placed a hand on Plaintiff's forehead.^{FN3} Plaintiff then heard a popping sound in his neck and began screaming that the officers had broken his back. (Harris Dep. at 87-89).

FN3. Plaintiff claims that this officer also pulled up on his head. (Harris Aff. ¶ 7). However, when asked at his earlier deposition whether he specifically recalled someone pulling up on his head, he said that he did not. (Harris Dep. at 89).

***10** Despite the unfortunate injury suffered by Plaintiff as a result of the takedown maneuver, Defendants nevertheless maintain that their conduct was objectively reasonable. They note that Plaintiff was intoxicated, verbally abusive, and uncooperative. Plaintiff's own use-of-force expert, Dr. Geoffrey Alpert, agreed that the officers' decision to take Plaintiff to the ground was appropriate because it facilitated control. (Alpert Dep. at 42; Ex. L to Defs.' Mot. Summ. J.). Plaintiff had not complied with Williams' request to kneel down and, according to Defendants, they needed to gain control of the situation so that they could complete the booking process.

Troopers McManes and Cooper, who witnessed the takedown maneuver, testified that the officers standing on either side of Plaintiff did not let him fall, but assisted him in going to the ground. The troopers also testified that there was no reason to believe that the officers intended to injure Plaintiff. (Cooper Dep. at 47; McManes Dep. at 50). After viewing the videotape of the incident, Plaintiff's expert, Dr. Alpert, agreed. (Alpert Dep. at 32).

Moreover, Dr. Alpert and Timothy Dimoff, Plaintiff's other use-of-force expert, both testified that there was no reason to anticipate that the specific techniques the officers used in the takedown maneuver would cause a [spinal cord injury](#). (*Id.* at 35; Dimoff Dep. at 69; Ex. M to Defs.' Mot. Summ. J.). No one, including Plaintiff, knew that he suffered from [spinal stenosis](#). Patrick McCormick,

M.D., testified that individuals with this condition can suffer serious injury simply by sneezing, bumping into a door, or tripping over a piece of furniture. (McCormick Dep. at 37, 46; Ex. J to Defs.' Mot. Summ. J.).

Plaintiff nevertheless argues that, based on the evidence presented, a reasonable jury could find that the officers' conduct was not objectively reasonable. Applying the *Graham* factors, Plaintiff once again notes that he was not arrested for a serious crime, did not pose a threat to the safety of the officers or others, and did not actively resist arrest or attempt to flee. Because there was no need for urgent action, he argues that the officers' conduct was objectively unreasonable.

According to Plaintiff's expert witnesses, the officers failed to give Plaintiff ample time to comply with Williams' request to kneel before forcing him to the floor. Alpert testified that "[i]f they gave him time to negotiate his way down to his knees, none of this probably would have happened." (Alpert Dep. at 38). Likewise, Dimoff concluded that "the action of giving him two quick commands and not giving him proper amount of time to react to those commands and then incorporating force downs [sic] strikes to-the combination of all those things that they did adds up to excessive force." (Dimoff Dep. at 40). Defendants have offered no expert testimony to the contrary. Alpert concluded that the peroneal strikes were "unnecessary" and "unreasonable." He believes that the officers should have used other techniques to get Plaintiff to the ground. (Alpert Dep. at 62). Officer Gaines testified that he could remember no other incident in which a handcuffed prisoner was taken to the ground inside the jail, and this was the only time he remembers a peroneal strike being administered to a handcuffed prisoner. (Gaines Dep. at 134-35).

***11** Plaintiff further notes that the officers' conduct violated the Circleville Jail Operations Manual. According to the Manual, use-of-force guidelines are intended to be followed in sequence so that a minimum amount of force will be used. (Ex. 3 to Pl.'s

Mem. in Opp'n). When a prisoner refuses to comply with an order, the officer should first attempt verbal persuasion, then give a verbal warning. If the prisoner still fails to comply, additional personnel should be summoned. A control hold may be used, but the officers "will strike no blows unless the resisting prisoner becomes the attacker." If the prisoner becomes an attacker, the officer should summon aid, block the blows and, finally, engage in take-down techniques. (*Id.*). Plaintiff argues that since he was never an attacker, it was inappropriate and excessive for the officers to administer peroneal strikes. (Alpert Dep. at 41, 58, 62; Dimoff Dep. at 41-42). Peroneal strikes are aggressive pain-compliance techniques and not control holds. (Alpert Dep. at 33; Gaines Dep. at 92).

Defendants correctly point out that the alleged violation of the jail's use-of-force guidelines does not necessarily establish a constitutional violation. Nevertheless, the violation is certainly a factor to be considered in determining whether the officers' conduct was objectively reasonable. *See, e.g., Gantt v. Akron Corrections Facility*, No. 95-3147, 1996 WL 6530, at *2 (6th Cir. Jan.8, 1996) (denial of summary judgment was proper where officers violated jail's policy regarding the use-of-force continuum); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 449 (5th Cir.1998) ("it may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department.").

In the Court's view, based on the evidence presented, a reasonable jury could find that the force used during the takedown maneuver was excessive. After viewing the jail surveillance video and listening to the testimony of witnesses, a jury could reasonably find that the officers did not give Plaintiff ample time or opportunity to comply with their verbal commands prior to engaging in the takedown maneuver, in which case their actions could be viewed as objectively unreasonable. *See Watkins v. Kanitz*, No. 1:03-cv-428, 2004 WL 3457634, at *6 (W.D.Mich. Sept.24, 2004) (denying summary

judgment on claim of excessive force where plaintiff testified that the officer began hitting her without giving her any time to comply with another officer's command to exit her vehicle).

Even if Plaintiff was engaged in passive resistance, consciously refusing to obey Williams' order, the fact remains that he was already handcuffed and was under the firm control of three law enforcement officers. Under these circumstances, a reasonable jury could find that it was not objectively reasonable for the officers to administer peroneal strikes. *See Bultema v. Benzie County*, No. 04-1772, 2005 WL 1993429, at ---8 (6th Cir. Aug.17, 2005) (noting that "when a suspect has already been restrained, the officer's constitutional authority to use force is significantly more circumscribed.").

*12 Having found that, viewing the evidence in a light most favorable to Plaintiff, a constitutional violation exists, the Court turns to the question of whether the law was clearly established. In *Lustig v. Mondeau*, No. 05-1905, 2006 WL 3253496 (6th Cir. Nov.8, 2006), the Sixth Circuit, reversing a grant of qualified immunity in an excessive force case, held that "it is sufficiently obvious under *Graham* that it would be objectively unreasonable for an officer to gratuitously cause additional pain to a nonviolent and, at most, passively resistant detainee while she is being restrained in a full control hold by two officers." *Id.* at ---7. Because a reasonable officer would have known that the conduct alleged here was unlawful, qualified immunity is not available.

iii) Kicking in Ribs After Spinal Cord Injury

The final incident giving rise to Plaintiff's excessive use of force claim occurred after Plaintiff suffered the spinal cord injury and was lying paralyzed on the floor of his cell. According to Plaintiff, Officer Williams entered the cell and told him to get up. When Plaintiff responded that he could not move, Williams allegedly said, "Yes, you can," and

kicked him in the ribs. Williams then said, "Looks like we got us a broke nigger here." (Harris Dep. at 98).

Williams admits that he entered the cell, but claims that he was looking for a missing pair of handcuffs. Because he thought that Plaintiff might be lying on top of them, he asked Plaintiff to roll over. When Plaintiff told him that he could not move, Williams rolled him over, but found no handcuffs. Williams denies kicking Plaintiff. (Williams Dep. at 132-33).

These conflicting accounts of what happened clearly preclude summary judgment. If Plaintiff's testimony is to be believed, there is no question that Williams engaged in an excessive use of force. Under no circumstances is it objectively reasonable to kick an arrestee who is lying handcuffed and paralyzed on the floor of the cell. Furthermore, no reasonable officer would have believed that such gratuitous violence would be constitutionally permissible. See *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 772 (6th Cir.2004) ("even minor uses of force are unconstitutionally excessive if they are 'totally gratuitous.' "); *McDowell*, 863 F.2d at 1307 (gratuitous blow to handcuffed suspect violates the Fourth Amendment). Officer Williams, therefore, is not entitled to qualified immunity on this portion of Plaintiff's excessive force claim.

2. Deliberate Indifference to Serious Medical Needs

Count I of Plaintiffs' Third Amended Complaint also alleges that "Defendants, acting with deliberate indifference, failed to seek appropriate medical care for plaintiff in a timely manner and in accordance with established policy. Defendants were aware that plaintiff had been harmed and/or that a substantial risk of serious harm to plaintiff existed, but failed to promptly summon or provide medical assistance. As a result, plaintiff suffered extreme pain and emotional injury." (Third Amd. Compl. ¶ 26). Plaintiff and Defendants have filed cross-motions for summary judgment on this claim. The Court

finds that genuine issues of material fact preclude summary judgment in favor of either party.

*13 The Fourteenth Amendment forbids prison officials from acting with "deliberate indifference" toward the serious medical needs of pretrial detainees. See *Blackmore v. Kalamazoo County*, 390 F.3d 890, 895 (6th Cir.2004) (citing *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). In order to establish a constitutional violation, the plaintiff must prove an objective component and a subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

a. Objective Component

"The objective component requires the existence of a 'sufficiently serious' medical need." *Blackmore*, 390 F.3d at 895 (quoting *Farmer*, 511 U.S. at 834). The inmate must show that "he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834. A medical need is objectively serious if it is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Blackmore*, 390 F.3d at 897 (quoting *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 208 (1st Cir.1990)).

Plaintiff argues that, with respect to the objective component, his *spinal cord injury* was so obvious that even a lay person would recognize the need for medical help. The Court agrees. Immediately following the takedown maneuver, Plaintiff began screaming in pain, complaining that he could not move his arms or legs, yelling that the officers broke his neck, and begging the officers to stop shocking him. The officers had to help him sit up to take off his jewelry and belt, and then had to drag him back to his cell since he could not stand on his own.

Incredibly, Defendants argue that Plaintiff exhib-

ited no obvious physical signs of injury because there was no bleeding, swelling or bruising, and Williams testified that he heard no “sounds of any kind of breakage,” such as “crackling of the vertebrae.” Williams admitted that Plaintiff’s complaints of a shocking sensation and the inability to move his arms and legs were indicative of a [spinal cord injury](#), but noted that Plaintiff did not experience other symptoms of a [spinal cord injury](#) such as a spontaneous erection, loss of bowel control, or uncontrollable twitching. (Williams Dep. at 108-09).^{FN4}

^{FN4}. Williams’ testimony appears to contradict a statement he made to a lieutenant within days of the incident. Williams told the investigating officer that when he went back into Plaintiff’s cell to look for the handcuffs, Plaintiff’s “shoulders were flopping around” and “his hips was [sic] twitching.” (Williams Dep. at 153). Corporal Kinser’s incident report also indicates that, when she went in to check on Plaintiff she noticed that Plaintiff’s legs were twitching. (Ex. 3 to Pl.’s Mot. Summ. J.).

In the Court’s view, it would have been obvious to any layperson that Plaintiff needed prompt medical attention. Even though there was no visible external injury, Plaintiff’s inability to move his arms and legs, combined with his pleas to the officers to stop shocking him, clearly signaled a serious problem. No reasonable jury could find otherwise.

Dr. McCormick stated in his report that dragging Plaintiff to his cell did not did not exacerbate the [spinal cord injury](#), and the delay in obtaining medical treatment caused no additional harm. (Ex. to McCormick Dep.). Citing [Napier v. Madison County](#), 238 F.3d 739 (6th Cir.2001), Defendants argue that because Plaintiff has presented no evidence that the delay in obtaining medical treatment had a detrimental effect, he cannot establish a constitutional violation. As the Sixth Circuit noted in [Blackmore](#), however, “*Napier* does not apply to medical care claims where facts show an obvious

need for medical care that laymen would readily discern as requiring prompt medical attention by competent health care providers.” [Blackmore](#), 390 F.3d at 898. In cases involving obvious injury or illness, “it is sufficient to show that he actually experienced the need for medical treatment, and that the need was not addressed within a reasonable time frame.” *Id.* at 900. Therefore, because Plaintiff’s injury was obvious, there is no need for him to prove that the delay in obtaining medical treatment was detrimental.

*14 Even though the Court finds no genuine issue of material fact concerning whether Plaintiff’s injury satisfies the objective component of his claim, genuine issues of material fact preclude summary judgment with respect to the subjective component.

b. Subjective Component

The subjective component of this claim requires an inmate to show that prison officials have “a sufficiently culpable state of mind” in denying medical care. [Farmer](#), 511 U.S. at 834. The plaintiff must show that the officials were deliberately indifferent to his serious medical needs. *Id.* Deliberate indifference is shown when prison officials intentionally deny or delay access to medical care. See [Estelle v. Gamble](#), 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). It “entails something more than mere negligence,” but can be “satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” [Farmer](#), 511 U.S. at 835. “[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Id.* at 837.

Genuine issues of material fact preclude summary judgment on this issue. Based on the evidence presented, a reasonable jury could find that the officers were deliberately indifferent to Plaintiffs’ serious medical needs. Officer Williams testified that he knew that Plaintiff’s complaints of being unable

to move his arms and legs, and complaints of a shocking sensation were possible signs of a [spinal cord injury](#). (Williams Dep. at 108-09). Moreover, the jail policy provides that all persons involved in use of force incidents who complain of injuries will receive medical attention as soon as possible. (Ex. O to Defs.' Mot. Summ. J.). Although Plaintiff was involved in a use of force incident and was complaining of injuries, Williams did nothing to help him. (Williams Dep. at 137-38).

Officer Roar testified that he believed that Plaintiff needed medical assistance but Roar relied on Williams, as the officer in charge, to summon help. Roar does not recall having any discussion with Williams about the need to call an ambulance or the shift sergeant. (Roar Dep. at 66-69). Likewise, Officer Gaines testified that he relied on Williams as the officer in charge. (Gaines Dep. at 132). He testified that, in retrospect, based on Plaintiff's complaints, he should have encouraged Williams to call for medical assistance. (*Id.* at 133-34). When asked why he failed to do so, Gaines replied, "I don't know. I can't answer that. I don't know." (*Id.* at 130). Based on this evidence, a reasonable jury could find that the officers were deliberately indifferent to Plaintiff's serious medical needs.

There is also evidence, however, from which a reasonable jury could find to the contrary. Williams and Roar both testified that they suspected that Plaintiff might be faking his injuries as prisoners often do. (Williams Dep. at 109; Roar Dep. at 67). Plaintiff was intoxicated and generally uncooperative. More importantly, because the takedown maneuver was relatively smooth, it was difficult to believe that it could have resulted in a [spinal cord injury](#) as Plaintiff was claiming. No one knew that Plaintiff suffered from [spinal stenosis](#). Trooper McManes, who witnessed the maneuver, testified that she had no reason to believe that Plaintiff was truly injured. "They just took him to the ground. I didn't see how he could be injured." (McManes Dep. at 57). Likewise, Officer Gaines testified that he was "shocked" and "amazed" when Plaintiff all of a

sudden dropped to the ground "like a rock" and then complained of a broken neck. (Gaines Dep. at 131). According to Gaines, Plaintiff still had strength in his arms and his body after the take-down maneuver, and was able assist Officer Williams in sitting himself up. (*Id.* at 103). In addition, according to Williams and Roar, Plaintiff did not ask any of the Defendants to summon help. (Williams Dep. at 130; Roar Dep. at 69). Williams further testified that if the need for medical care had been obvious, he would have called the squad even if Plaintiff did not request medical assistance. (Williams Dep. at 110-14).

*15 Because a reasonable jury could find in favor of either Plaintiff or Defendants with respect to the subjective component, summary judgment is not warranted on this claim. Nor are Defendants entitled to qualified immunity. Viewing the evidence in a light most favorable to Plaintiff, his constitutional rights were violated when Defendants failed to seek timely medical assistance. ^{FN5} Moreover, a pretrial detainee's right to medical treatment for a serious medical need was clearly established at the time this incident occurred. See *Fitzke v. Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972). A reasonable officer would have understood that he had an affirmative duty to summon prompt medical help for Plaintiff.

FN5. Defendants contend that the hour and twenty minutes that elapsed before medical help was summoned does not demonstrate deliberate indifference. In support, they cite to *Hubbard v. Gross*, No. 05-5088, 2006 WL 2787044 (6th Cir. Sept. 27, 2006), in which the Sixth Circuit held that even if the plaintiff's broken hand constituted an obvious injury, no reasonable jury could find that the two-hour delay in obtaining a splint was unreasonable. In this Court's view, *Hubbard* is easily distinguishable on its facts. A spinal cord injury is clearly more serious than a broken hand. While a two-hour delay in obtaining treat-

ment for a broken hand might be reasonable, it does not necessarily follow that a similar delay in the case of a spinal cord injury is also reasonable.

B. Count II (§ 1983 Claims Against City of Circleville)

Plaintiff alleges in Count II of his Third Amended Complaint that the above violations of his constitutional rights were caused by the City of Circleville's custom, practice and/or policy of inadequate and improper training, supervision and discipline of its police officers.^{FN6} Plaintiff argues that, in failing to adequately train its officers, the City acted with deliberate indifference to the constitutional rights of its citizens. (Third Amd. Compl. ¶¶ 33-34).

FN6. Because Plaintiff's memorandum in opposition to Defendants' motion for summary judgment does not discuss failure to supervise or discipline, the Court presumes that Plaintiff is proceeding only on his "failure to train" claim.

The City of Circleville has moved for summary judgment on this claim, which is governed by *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). While a governmental entity may be considered a "person" for purposes of § 1983, it cannot be held liable for the acts of its employees on a *respondeat superior* theory. *Id.* at 691. A governmental entity may be held liable for constitutional violations only if those violations are the result of an official policy or custom. *Id.* at 694. See also *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (official policy or custom must be the "moving force" behind the alleged constitutional deprivation); *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) ("the entity's 'policy or custom' must have played a part in the violation of federal law").

An official policy or custom may be found, and municipal liability may attach, if "in light of the duties

assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers ... can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390. As the Sixth Circuit explained in *Cherrington v. Skeeter*, 344 F.3d 631, 646 (6th Cir.2003):

We have read *City of Canton* as recognizing at least two situations in which inadequate training could be found to be the result of deliberate indifference. "One is failure to provide adequate training in light of foreseeable consequences that could result from the lack of instruction," as would be the case, for example, if a municipality failed to instruct its officers in the use of deadly force. *Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir.1999). "A second type of situation justifying a conclusion of deliberate indifference is where the city fails to act in response to repeated complaints of constitutional violations by its officers." *Brown*, 172 F.3d at 931.

*16 Plaintiff presents no evidence that the City failed to act in response to any previous complaints of constitutional violations by Circleville police officers. Instead, Plaintiff argues that it was reasonably foreseeable that a failure to adequately train the officers concerning the proper use of force and provision of medical care for pretrial detainees would result in constitutional violations. In order to succeed under this theory, Plaintiff must prove the following: "(1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury." *Ellis v. Cleveland Muni. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir.2006) (citing *Russo v. City of Cincinnati*, 953 F.2d 1036, 1046 (6th Cir.1992)). Defendant argues that Plaintiff has failed to present sufficient evidence from which a reasonable jury could find that, because of inadequate training, the City of Circleville should be held liable for Plaintiff's injuries. The

Court agrees.

Plaintiff must first prove that the training provided was inadequate for the tasks the officers were required to perform. The Sixth Circuit has cautioned that “[m]ere allegations that an officer was improperly trained or that an injury could have been avoided with better training are insufficient to prove liability.” *Miller v. Calhoun County*, 408 F.3d 803, 816 (6th Cir.2005) (citing *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 904 (6th Cir.1998)). In this case, based on the evidence presented, no reasonable jury could find that the training provided by the City of Circleville was so deficient that it rose to the level of a constitutional violation.

Defendants note that, prior to being hired by the City of Circleville, they were fully trained on the use of force at the basic peace officer training academy. (Gaines Dep. at 25-26; Roar Dep. at 12-13; Williams Dep. at 10). In addition, the Circleville Police Department promulgated General Order 1 which sets forth standard operating procedures governing limits of authority and use of force. (Ex. O to Defs.’ Mot. Summ. J.). Each officer was given a copy of this order to review and was required to sign a statement that he read it. (Roar Dep. at 14, 70-71; Williams Dep. at 11; Gaines Dep. at 28-29). The officers were also required to review the Circleville jail manual which contains a section on “Use of Force.” (Gaines Dep. at 35). The Circleville Police Department also had a written policy governing the provision of medical care for prisoners and trained its officers concerning such procedures. (Gaines Dep. at 127, 129; Roar Dep. at 65; Williams Dep. at 137; Kinser Dep. at 97-99).

Plaintiff notes that the City of Circleville provided no formal training concerning the use of force and, although the officers had to sign a statement saying that they had read the policies, they were not tested over the material. (Gaines Dep. at 29, 33-34). Nevertheless, Officer Gaines testified that after reviewing the standard operating procedures, “you then go out into the patrol atmosphere and get trained.” (Gaines Dep. at 29). Moreover, when he

had questions concerning proper policies and procedures, other officers were always available to provide guidance. (*Id.* at 34). Officer Roar testified likewise. (Roar Dep. at 71).

*17 Plaintiff has presented no evidence that the training received was inadequate for the tasks the officers were required to perform. He simply speculates that additional training might have prevented his injury. However, as the Supreme Court noted in *City of Canton*:

Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

489 U.S. at 391.

Even if Plaintiff could establish that the training provided was inadequate for the tasks the officers were required to perform, there is no evidence that the City was deliberately indifferent, or that the alleged inadequate training was closely related to or actually caused Plaintiff’s injury.

The City did make an effort to establish appropriate policies and to train its officers concerning the use of force and the provision of medical care to pre-trial detainees. In fact, Plaintiff’s expert, Dr. Alpert, testified that “the written policies are fine.” (Alpert Dep. at 15). Defendant notes that the Sixth Circuit has held that where a municipality acts to prevent constitutional violations, but does so negligently, there is no deliberate indifference. *Molton v. City of Cleveland*, 839 F.2d 240, 247 (6th Cir.1988). In this case, the officers’ deposition testimony makes it

clear that they were aware of the jail policies concerning use of force and the provision of medical care to prisoners. It may well be that they did not follow those policies in their interactions with Plaintiff, but there is no evidence that additional training would have changed the outcome.

Based on the evidence presented, no reasonable jury could find that the training provided to jail officers by the City of Circleville concerning the use of force and the provision of medical care was so deficient as to constitute deliberate indifference to the constitutional rights of prisoners. Finding no genuine issue of material fact, the Court concludes that the City of Circleville is entitled to summary judgment on Count II.

C. Count III (Equal Protection)

In Count III of the Third Amended Complaint, Plaintiff alleges that “due in whole or in part to his membership in a protected class, defendants, who are Caucasian, deliberately discriminated against Plaintiff by using excessive force against him, and/or by denying him prompt medical treatment.” Plaintiff contends that this conduct violated his rights under the Equal Protection Clause of the Fourteenth Amendment. (Third Amd. Compl. ¶ 38).^{FN7} Defendants claim to be entitled to summary judgment on this claim because Plaintiff has produced no evidence that the use of force or the delay in medical treatment was motivated by a racial animus. The Court disagrees.

^{FN7}. The Court presumes that Plaintiff's Equal Protection claim is also brought pursuant to § 1983.

*18 Plaintiff notes that Patricia Rice, an employee of the Circleville Jail, estimated that only 2-5 % of detainees at the jail are African-American. (Rice Dep. at 50-51). The officers testified that on no previous occasion had they ever administered peroneal strikes to a handcuffed detainee, and Williams could not recall any previous instance where a

handcuffed detainee was struck to obtain compliance with a verbal instruction. (Roar Dep. at 76-77; Williams Dep. at 98-99; Gaines Dep. at 134). Based on this evidence, a reasonable jury could infer that Plaintiff was treated more harshly than other detainees solely because he was African-American.

Moreover, Plaintiff testified that after he was dragged back into the cell and was lying motionless on the floor, one of the officers came into the cell and told him to get up. When Plaintiff told him he couldn't move, the officer said “Yes, you can.” He then kicked Plaintiff in the ribs and said “Looks like we got us a broke nigger here.” (Harris Dep. at 98). Plaintiff yelled in pain and begged the officer not to hurt him any more. The officer then turned around and left. (*Id.* at 99). Defendants contend that there is some question as to who that officer was. Plaintiff could not identify the officer by name, but described him as a slim white male, about 6'2", wearing black boots and a greenish jail uniform. (*Id.*). Defendants maintain that it could have been one of the state troopers. However, as Plaintiff notes, the jail surveillance video shows that Officer Williams is the only officer who entered Plaintiff's cell after the injury occurred. (Ex. 1 to Pl.'s Mot. Partial Summ. J.). In addition, Williams admitted that he entered the cell and attempted to roll Plaintiff over to look for a pair of missing handcuffs, and that Plaintiff cried out, “Don't hurt me.” (Williams Dep. at 133-134).

In the Court's view, Plaintiff has presented sufficient evidence from which a reasonable jury could find that, because of a racial animus, Defendants engaged in an excessive use of force and were deliberately indifferent to Plaintiff's serious medical needs. Moreover, the law was clearly established that such discriminatory conduct would be unlawful. *See Bell, 441 U.S. at 545* (holding that pretrial detainees and convicted prisoners are protected against invidious discrimination on the basis of race). Therefore, Defendants are not entitled to qualified immunity, and summary judgment is not warranted on Count III.

D. Count IV (Assault and Battery) and Count V (Intentional Infliction of Emotional Distress)

In Count IV of the Third Amended Complaint, Plaintiff asserts a state law claim of assault and battery against Defendants Williams, Roar, and Gaines based on their alleged excessive use of force. (Third Amd. Compl. ¶¶ 41-45). In Count V, Plaintiff asserts a claim of intentional infliction of emotional distress based on Defendants' failure to provide medical assistance following his [spinal cord injury](#). (*Id.* at ¶¶ 47-48).

*19 Defendants maintain that, pursuant to [Ohio Revised Code § 2744.03\(A\)\(6\)](#), they are statutorily immune from liability on these claims. That statute states, in pertinent part:

(A) In a civil action brought against ... an employee of a political subdivision to recover damages for injury ... to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

- (6) ... the employee is immune from liability unless one of the following applies:
- (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;
 - (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
 - (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code ...

[Ohio Revised Code § 2744.03\(A\)\(6\)](#).

In other words, Defendants are immune from liability unless Plaintiff can demonstrate that their actions fall within one of the three exceptions set forth in [§ 2744.03\(A\)\(6\)](#). In connection with Count IV, the assault and battery claim, Plaintiff alleges

that Defendants acted in a malicious, wanton, and/or reckless manner. (Third Amd. Compl. ¶ 44). This allegation implicates the exception set forth in [Ohio Revised Code § 2744.03\(A\)\(6\)\(b\)](#).

“ ‘Malice’ is the willful and intentional design to do injury or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified.” *Cook v. Cincinnati*, 103 Ohio App.3d 80, 90, 658 N.E.2d 814, 821 (Ohio Ct.App.1995). “Wanton misconduct” is “[t]he failure to exercise any care toward one to whom a duty of care is owed when the failure occurs under circumstances for which the probability of harm is great and when the probability of harm is known to the tortfeasor.” *Brockman v. Bell*, 78 Ohio App.3d 508, 515, 605 N.E.2d 445, 449 (Ohio Ct.App.1992). “Recklessness” is defined as “a perverse disregard of a known risk.” *Poe v. Hamilton*, 56 Ohio App.3d 137, 138, 565 N.E.2d 887, 889 (Ohio Ct.App.1990).

The question of whether an officer acted with malice, or in a wanton or reckless manner is normally a question of fact that must be determined by a jury. See *Wingrove v. Forshey*, 230 F.Supp.2d 808, 827 (S.D.Ohio 2002) (*citing Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 639 N.E.2d 31, 35 (1994), and *Potter v. Troy*, 78 Ohio App.3d 372, 604 N.E.2d 828, 837-38 (1992)). In this case, Plaintiff has raised a genuine issue of material fact about whether the exception to statutory immunity set forth in [Ohio Revised Code § 2744.03\(A\)\(6\)\(b\)](#) applies to the three incidents alleging excessive force. Viewing the evidence in a light most favorable to Plaintiff, a reasonable jury could find that Defendants acted with a malicious purpose, or in a wanton or reckless manner. This is particularly true with respect to Plaintiff's claim that when he was first taken in handcuffs to the cell, the officers kicked his leg out from under him and pushed him in the back, causing him to fall and land on his head, and with respect to Plaintiff's claim that Officer Williams came back into the cell and kicked him in the ribs. Such conduct, if proven,

clearly rises above the level of negligence and could be viewed as malicious, wanton or reckless.

*20 Whether Plaintiff has presented sufficient evidence from which a reasonable jury could find that Defendants acted with malice, or in a wanton or reckless manner during the takedown maneuver in the booking area is a much closer call. Defendants note that Plaintiff's own experts testified that there was no indication that the officers acted with the intent to injure Plaintiff. While a lack of intent to cause injury may foreclose a finding of malice, it does not foreclose a finding that the officers acted in a wanton or reckless manner. *See Tighe v. Diamond*, 149 Ohio St. 520, 526, 80 N.E.2d 122 (Ohio 1948).

Defendants contend that they exercised due care during the takedown maneuver, making sure to cushion Plaintiff's fall. Plaintiff argues, however, that the act of administering painful peroneal strikes, which Dr. Alpert has concluded were unnecessary, demonstrates wanton or reckless misconduct. Based on the evidence presented, and particularly on the testimony of Plaintiff's expert witnesses, the Court believes that a reasonable jury could find that Defendants acted in a wanton or reckless manner by administering peroneal strikes to a handcuffed detainee during the takedown maneuver. For these reasons, the Court denies Defendants' motion for summary judgment on Count IV.

With respect to Count V, the intentional infliction of emotional distress claim, Plaintiff does not allege that Defendants acted with a malicious purpose, in bad faith, or in a wanton or reckless manner. Nor does Plaintiff allege that Defendants' acts or omissions were manifestly outside the scope of their employment, or that civil liability is otherwise expressly imposed upon them by statute. Because none of the exceptions set forth in [Ohio Revised Code § 2744.03\(A\)\(6\)](#) applies, the Court finds that Defendants are statutorily immune from liability on Plaintiff's claim of intentional infliction of emotional distress. They are, therefore, entitled to summary judgment on Count V.

IV. Conclusion

For the reasons stated above, Plaintiff's motion for partial summary judgment on his [§ 1983](#) claim of deliberate indifference to serious medical needs (Record at 96) is **DENIED**. Defendants' motion for summary judgment (Record at 97) is **GRANTED IN PART and DENIED IN PART**. Genuine issues of material fact preclude summary judgment on Counts I, III, and IV of Plaintiff's Third Amended Complaint. However, the Court grants summary judgment in favor of the City of Circleville on Count II, and in favor of Defendants Roar, Phillips, and Gaines on Count V.

IT IS SO ORDERED.

S.D.Ohio, 2008.
Harris v. City of Circleville
Slip Copy, 2008 WL 211363 (S.D.Ohio)

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C

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United States Court of Appeals, Sixth Circuit.
Anthony W. GANTT and Cecily Gantt, Plaintiffs-
Appellees,

v.

AKRON CORRECTIONS FACILITY, Defendant,
William Meier and Paul Crow, Defendants-Appel-
lants.

No. 95-3147.

Jan. 8, 1996.

On Appeal from the United States District Court for
the Northern District of Ohio, No. 93-01799;
[George W. White](#), Chief Judge.
N.D. Ohio.

AFFIRMED.

Before: [JONES](#), [DAUGHTREY](#) and
[PHILLIPS](#),^{FN*} Circuit Judges.

PER CURIAM.

*1 This civil rights action was brought under [42 U.S.C. § 1983](#) by plaintiff Anthony W. Gantt for injuries he suffered while in pretrial detention in the Akron Correctional Facility. The defendants, Sergeant William Meier and Officer Paul Crow, moved for summary judgment based on qualified immunity. The district court denied their motion, finding that the record reflected the existence of genuine questions of material fact requiring review and resolution by a jury. We agree and affirm.

Because we conclude that the district court's memorandum opinion fully and correctly addresses the factual and legal issues presented at this stage of the litigation, we find it unnecessary to expound at great length on the questions raised on interlocutory appeal. Summarized, the record shows that Gantt was involved in a traffic accident on the night of July 27, 1992. Akron officers who came to the scene discovered that Gantt had an outstanding warrant for failure to pay a fine in Akron Municipal Court, arrested him, and took him to the Akron Correctional Facility, where he was held when he could not post a bond.

Later that night, Gantt reported experiencing shortness of breath and "a tightening in his left arm." Emergency medical technicians were called to the jail, examined Gantt, and directed that he be taken to a local hospital as a "code 1" (by private vehicle rather than ambulance). When the paddy wagon arrived, Gantt was put in leg irons and ordered out of the holding cell where he was being detained. When he complained that he could not walk unassisted and thereafter asked to stop periodically to "catch his breath," his escorts, Meier and Crow, decided he was "malingering" and proceeded to apply what are known as "compliance holds" to move Gantt along.

Crow, holding Gantt's left arm, applied a "thumb lock," which he described as a "pain compliance hold," to Gantt's left hand. Meier, on Gantt's right side, applied a "gooseneck hold," in which the wrist is bent severely enough to cause pain and thereby force compliance. Between the two of them, Meier and Crow managed to walk Gantt to the paddy wagon despite his repeated requests to stop momentarily. They situated him on a bench in the rear of the vehicle for his trip to the hospital, leaving him in shackles.

Once there, Gantt, a diabetic, was found to have a seriously elevated blood-sugar condition and an injured right wrist. The wrist was thought, at first, to

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be fractured, but after several x-rays was diagnosed as severely sprained—so severely that Gantt was later evaluated as suffering a 16% impairment of his right arm, or a 10% impairment of his body as a whole. He was still undergoing physical therapy and wearing a wrist brace almost two years after the precipitating incident in the Akron jail.

Despite the defendant's insistence that Gantt's claims “do not rise to the level of constitutional violations,” we conclude that the plaintiff has made out a case of excessive force sufficient to defeat a motion for summary judgment. Because application of the doctrine of qualified immunity to a particular defendant is a question of law, *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir.1988), this court reviews *de novo* the district court's determination. *Long v. Norris*, 929 F.2d 1111, 1113 (6th Cir.1991).

*2 The Supreme Court has “reject[ed] [the] notion that all excessive force claims brought under § 1983 are governed by a single generic standard.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). “In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.” *Id.*, 490 U.S. at 394. The standard under which a pretrial detainee's claim of excessive force is evaluated lies in the murky area between the Fourth and Eighth Amendments. “Where ... the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right ‘to be secure in their persons ... against unreasonable ... seizures’ of the person.” *Id.*

Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today. It is clear, however, that the Due Process

Clause protects a pretrial detainee from the use of excessive force that amounts to punishment. See *Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979). After conviction, the Eighth Amendment “serves as the primary source of substantive protection ... in cases ... where the deliberate use of force is challenged as excessive and unjustified.” *Whitley v. Albers*, 475 U.S. [312, 327 (1986).]

Id., 490 U.S. at 395 n. 10.

The appellants urge that their actions should be evaluated under the comparatively lenient Eighth Amendment standard, citing the Fifth Circuit's opinion in *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir.), *cert. denied*, 113 S.Ct. 2998 (1993). In *Valencia*, a pretrial detainee brought a § 1983 claim that a jail official used excessive force in controlling him during a jail disturbance. After reviewing *Graham*, the court rejected the *Bell v. Wolfish* analysis of conditions of pretrial detention, stating that “it does not lend itself to analysis of claims of excessive force in controlling prison disturbances.... [I]t is impractical to draw a line between convicted prisoners and pretrial detainees *for the purpose of maintaining jail security.*” *Valencia*, 981 F.2d at 1446 (emphasis added). Clearly, *Valencia* is inapplicable to this case, since Gantt was by no stretch of the imagination guilty of causing a prison disturbance. Moreover, there seems to have been no motive for him to resist: the officers were taking him where he apparently wanted and needed to go. There is, finally, no allegation that he was being unruly or abusive.

Moreover, as the district court noted, the officers were in violation of established police policy, as set out in the Akron Corrections Facility's procedural manual. It specifically provided that certain alternative measures (verbal persuasion, verbal warnings of the consequences of non-compliance, and intimidation through a “show of force,” *i.e.*, the use of additional personnel) must be tried prior to the imposition of “compliance holds.” Aside from asking Gantt to move along, the defendants used none of these alternative methods of compliance.

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*3 We conclude that the district court's denial of summary judgment was proper for the reasons set out in the court's memorandum opinion. Given the disputed issues of fact in this case, the question of whether the defendants used excessive force is one properly presented to a trier of fact, as is the issue of relative liability as between the two defendants.

The judgment of the district court is AFFIRMED, and the case is REMANDED for further proceedings.

FN* The Hon. J. Dickson Phillips, Jr.,
United States Circuit Judge for the United
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cuit, sitting by designation.

C.A.6 (Ohio),1996.

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The judgment of the district court is AFFIRMED, and the case is REMANDED for further proceedings.

FN* The Hon. J. Dickson Phillips, Jr.,
United States Circuit Judge for the United
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C.A.6 (Ohio), 1996.

Gantt v. Akron Corrections Facility

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(Not Selected for publication in the Federal Reporter)

(Cite as: 75 Fed.Appx. 990, 2003 WL 22220530 (C.A.6 (Ohio)))

H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28)

United States Court of Appeals,
Sixth Circuit.

Hans D'AGASTINO, Plaintiff-Appellant,

v.

CITY OF WARREN; Richard Kovach, Defendants-
Appellees.

No. 01-4357.

Sept. 24, 2003.

Arrestee brought § 1983 action against city and police officer alleging use of excessive force during arrest, in violation of the Fourth and Fourteenth Amendments, and assault and battery under state law. Defendants moved for summary judgment and to strike affidavit filed by arrestee. The United States District Court for the Northern District of Ohio, [Gwin, J., 175 F.Supp.2d 967](#), granted motion for summary judgment and denied motion to strike. Arrestee appealed. The Court of Appeals, [Batchelder](#), Circuit Judge, held that genuine issue of material fact existed as to amount of force used by arresting police officer and whether force was excessive.

Reversed and remanded.

West Headnotes

Federal Civil Procedure 170A 2491.5

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2491.5 k. Civil Rights Cases in

General. Most Cited Cases

Genuine issue of material fact existed as to amount of force used by arresting police officer and whether force was excessive, precluding summary judgment in arrestee's § 1983 and state law assault and battery claims against city and arresting police officer. [42 U.S.C.A. § 1983](#).

*990 On Appeal from the United States District Court for the Northern District of Ohio. [Gregg A. Rossi](#), Youngstown, OH, for Plaintiff-Appellant.

[Amie L. Bruggeman](#), [Stephen W. Funk](#), Roetzel & Andress, Akron, OH, for Defendant-Appellee.

Before [BATCHELDER](#) and [CLAY](#), Circuit Judges; and [SCHWARZER](#),^{FN*} District Judge.

FN* The Honorable William W Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

[BATCHELDER](#), Circuit Judge.

**1 Plaintiff-appellant Hans D'Agastino appeals from the district court's order granting summary judgment in favor of defendant-appellee Officer Richard Kovach, of the City of Warren Police Department, in this action brought pursuant to [42 U.S.C. § 1983](#) and state law, seeking damages for Kovach's alleged use of excessive force. On appeal, D'Agastino argues that the district court erred in its application of the doctrine of qualified immunity by deciding that the force used by Officer Kovach was reasonable and therefore no constitutional violation had occurred. Because we conclude that a reasonable fact-finder viewing the facts in a light most favorable to D'Agastino could conclude that the force used by Kovach was not objectively reasonable, we will reverse the judgment of *991 the district court and remand for proceedings consistent with this

opinion.

BACKGROUND

Procedural History

This case arises from the defendant's forceful arrest of D'Agastino on June 14, 2000, and the injuries D'Agastino suffered incident to that arrest. D'Agastino brought a two-count complaint against Kovach and the City of Warren; the first count, brought under [section 1983](#), claimed that Officer Kovach used excessive and unreasonable force to arrest him, which caused him severe mental, emotional, and physical injuries; the second count raised the state law claim that Officer Kovach maliciously assaulted and battered him through the use of excessive force without legal justification. Officer Kovach and the City of Warren both moved for summary judgment on both counts. The district court granted the City's motion as to the [section 1983](#) claim, noting that D'Agastino had conceded that he had no evidence to support a finding of liability on the part of the City. The district court granted the City's motion as to the state law claim on grounds of state law immunity. Finding no issues of material fact, the district court granted summary judgment to Officer Kovach on the [section 1983](#) claim because his use of force during the arrest was objectively reasonable and therefore did not violate the Constitution; the court granted Kovach's motion on the state law claim because Kovach's actions during the arrest were not reckless, wanton or malicious, or taken in bad faith, and Kovach was therefore entitled to immunity under state law. D'Agastino timely appealed to this court, challenging the grant of summary judgment to Officer Kovach on both the [section 1983](#) and the state law claims.

Factual History

Officer Kovach's arrest of D'Agastino at approximately 9:00 p.m. on June 14, 2000, for disorderly

conduct while intoxicated was the culmination of several events that occurred throughout the day. That morning, D'Agastino had been involved in a three-car accident in the City of Niles. He was taken to Trumbull Memorial Hospital where, complaining of pain in his neck and back, he was given a [CAT scan](#), MRI, and blood tests, and released around 4:00 p.m. Immediately upon his release, the county sheriff arrested and booked him for failing to appear in court for a required hearing stemming from a previous incident in Niles. He posted bail and proceeded directly to Joe and Kay's bar in Warren to begin --- in his own words --- drinking "enough to kill somebody" in less than an hour. [FNI](#)

[FNI](#). Later that evening, D'Agastino had a .26 recorded blood alcohol level.

****2** While still at Joe and Kay's bar, D'Agastino began making "suggestions" to "everybody in the bar" about his desire to commit suicide; he then pulled out a Bowie knife and began shaving his forearm. Leaving the bar, he started back to Trumbull Memorial Hospital in order to admit himself, but turned around and entered another bar, where he told the bartender that he wanted an ambulance. Emergency Medical Services and the police arrived and took D'Agastino back to Trumbull Memorial Hospital, where, as he was being processed in the emergency room, he was apparently told to strip down to his underwear and turn over his valuables. According to D'Agastino, he stood around in the emergency room lobby in his underwear for twenty minutes before deciding "to hell with it," and running out of the hospital.

D'Agastino admits to running into the street, disrupting traffic, and forcing one driver to swerve his vehicle to avoid hitting ***992** him. The police received reports of this activity from both the hospital and the driver of the vehicle, whereupon the police dispatcher sent two messages about D'Agastino to the officers on patrol. The first dispatch advised the officers that a white male in his fifties and wearing only green underwear had escaped from Trumbull Memorial Hospital. The second advised that a cit-

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izen had called and complained that this same man had attempted to get inside of the caller's truck by pounding on the window. The dispatcher also told the officers that the subject was HIV positive.

Officer Kovach was the first one to arrive at the scene. At this point in the story, D'Agastino's version of events differs somewhat from Officer Kovach's. After spotting D'Agastino, Officer Kovach claims that he got out of his marked cruiser and told D'Agastino to stop, and that D'Agastino began running towards him and yelling that he wanted to die. D'Agastino, however, claims he began running away from Officer Kovach. Regardless, both agree that the two met in the middle of the road where Officer Kovach hit D'Agastino once in the leg with a police baton, and D'Agastino fell face-forward toward the ground. According to D'Agastino, he broke his fall with one outstretched arm and Officer Kovach repeatedly slammed his face into the pavement, knocking out his teeth and fracturing his jaw. D'Agastino admits to accidentally spitting blood at Kovach, but only after the ambulance arrived and the medical personnel had helped him to his feet.

Officer Kovach, on the other hand, claims that before D'Agastino fell, Kovach hit him for a second time with the baton, this time in the shoulder area, causing D'Agastino to become limp and fall face-first onto the pavement, injuring his face and jaw. Officer Kovach claims he handcuffed D'Agastino without any difficulty, but then the plaintiff began spitting blood at Officer Kovach and saying he wanted to die. Moments later, a patrol car from the Braceville police department arrived on the scene and used its overhead lights to alert the other cars driving in the vicinity of the plaintiff and defendant.

**3 D'Agastino was eventually taken to Trumbull Memorial Hospital, where he was diagnosed with a compound comminuted alveolar fracture of the maxilla, a compound comminuted fracture of the left side of the mandible, a compound fracture of the symphysis of the mandible, a displaced fracture of the left mandibular condyle, a probable fracture

of the right mandible condyle, a four to five centimeter laceration of the chin through and through, four one to two centimeter lacerations of the lateral borders of the tongue, and multiple teeth fractures and upper teeth crushed into his sinuses. D'Agastino's lawsuit seeks compensation for these injuries, which he claims Officer Kovach caused by his repeated use of excessive force once D'Agastino had been knocked to the ground. The plaintiff concedes that the use of the police baton was reasonable under the circumstances that evening.

ANALYSIS

Standard of Review

We review a district court's grant of summary judgment de novo, using the same standard under Rule 56(c) used by the district court, *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir.1999) (en banc), and we consider the record as it stood before the district court at the time of its ruling. *Niecko v. Emro Marketing Co.*, 973 F.2d 1296, 1303 (6th Cir.1992). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *993 no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). We view the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). To withstand summary judgment, the non-movant must present sufficient evidence to create a genuine issue of material fact. *Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir.1990). A mere scintilla of evidence is insufficient; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Entry of summary judgment is appropriate "against a party who fails to make a showing

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sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Qualified Immunity

Qualified immunity, which the Supreme Court has deemed "the best attainable accommodation of [the] competing values" of deterring abuse of power by government officials and vindicating constitutional guarantees on the one hand, and protecting government officials from frivolous suits that may dampen the ardor with which they carry out their jobs on the other, *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), is an affirmative defense that shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. 2727.

**4 A court in this circuit undertaking a qualified immunity analysis must first determine whether the plaintiff has alleged a violation of a constitutionally protected right; if so, the court must examine whether the right was clearly established at the time of the alleged violation. *Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). The right allegedly violated cannot be asserted at a high level of generality, but, instead, "must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). As the Court in *Harlow* explained, the "reasonable person," in this instance, is a "reasonably competent public official [who] should know the law governing his conduct." *Harlow*, 457 U.S. at 819, 102 S.Ct. 2727. To overcome qualified immunity, the right allegedly violated must be so

clear that any reasonable public official in the defendant's position would understand that his conduct violated the right: "if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

We have established that there are two ways in which a plaintiff seeking to overcome the bar of qualified immunity can show that a right was clearly established in the law at the time the alleged violation occurred. First, "a district court within this circuit must 'find binding precedent from the Supreme Court, the Sixth Circuit, or ... itself' that directly establishes the conduct in question as a violation of the plaintiff's rights." *994 *Summar v. Bennett*, 157 F.3d 1054, 1058 (6th Cir.1998). If no binding precedent is "directly on point," the court may still find a clearly established right if it can discern a generally applicable principle from either binding or persuasive authorities whose "specific application to the relevant controversy" is "so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional." *Id.*; accord *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir.1992).

Excessive Force

The essential question before this court is whether from the facts provided in plaintiff's deposition and shaped by the other evidence—a reasonable finder of fact could conclude that Officer Kovach used excessive force when arresting D'Agastino. The Supreme Court has stressed the importance of beginning the qualified immunity analysis in a Fourth Amendment excessive force case thus: "A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). To determine if a constitution-

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al violation has occurred, we must analyze the claim of excessive force under the Fourth Amendment's "objective reasonableness" standard based on "the facts and circumstances of each particular case, including 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 205, 121 S.Ct. 2151 (internal quotations and citations omitted).

****5** The district court found insufficient evidence to support D'Agastino's claim of excessive force. In particular, the district court relied upon the police dispatcher call records, which show that Officer Kovach and the plaintiff were alone for approximately one and a half minutes, and the fact that D'Agastino admits he tried to get up after being knocked to the pavement. The court concluded that D'Agastino's version of events did not show that Kovach used excessive force, and that, accepting that version of the events, a reasonable officer on the scene would have used a similar degree of force. We disagree.

For purposes of summary judgment, we must take the plaintiff's version of events as true, and we must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby, Inc.*, 477 U.S. at 251-52, 106 S.Ct. 2505. This case, although strong from the defendant's perspective, is not so one-sided. Here, D'Agastino testified in his deposition that Kovach repeatedly slammed his face into the pavement. The extent of his injuries, which is not disputed, is not inconsistent with D'Agastino's testimony. We recognize that the credibility of this testimony may be questionable, particularly in light of D'Agastino's undisputed blood alcohol level of .26 that night. Credibility, however, is an issue for the jury, and a jury certainly would be entitled to credit that testimony. But nothing in the district court's opinion indicates that the court credited D'Agastino's testimony that Officer Kovach force-

fully and repeatedly slammed his face into the pavement.

The issue before the court, then, is whether, under *Saucier*'s standard of objective reasonableness, if D'Agastino's allegations were established, Officer Kovach's use of force against him was excessive and violated the constitution. More specifically, the question is whether an officer who, after taking a subject to the ground-even ***995** if that suspect is attempting to get to his feet and to evade the officer's attempts to handcuff him-repeatedly slams the subject's face into the pavement, uses force that exceeds that which is reasonably necessary to accomplish the arrest. We do not think that under the circumstances described by D'Agastino, a reasonable officer would believe that slamming the subject's face into the pavement was an objectively reasonable use of force, and we do not read the district court's opinion as holding that such a use of force would be reasonable. Rather, we hold that the district court erred by failing to view the facts in the light most favorable to D'Agastino in reaching its conclusion that no constitutional violation occurred. Further, we hold that the material facts remain in dispute.

The district court ended its qualified immunity inquiry before reaching the next sequential step in the analysis mandated by the Court in *Saucier*. Because we have held that the material facts surrounding this incident are genuinely in dispute, we further hold that a determination with regard to the claim of qualified immunity is not appropriate at this stage in the proceedings but the qualified immunity defense may again be raised by the defendant at trial. We therefore reverse the judgment as to the [section 1983](#) claim and remand the matter for trial.

Assault and Battery

****6** "If an officer uses more force than is necessary to make an arrest and protect himself from injury, he is liable for assault and battery...." *City of Cincinnati v. Nelson*, No. C-74321, 1975 Ohio App.

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LEXIS 7443, *5 (May 5, 1975) (citing 5 O Jur (2d) ARREST §§ 50) (unpublished); *see also Schweder v. Baratko*, 103 Ohio App. 399, 403, 143 N.E.2d 486 (1957) (“Force when used lawfully in making an arrest is in the exercise of a government function, and only in cases where excessive force is used, that is, force going clearly beyond that which is reasonably necessary to make the arrest, can such force be claimed an assault and battery by the person arrested.”). An officer, acting in his official capacity, is immune from liability for injury unless his actions were “manifestly outside the scope” of his responsibilities, or the officer acted “with malicious purpose, in bad faith, or in a wanton or reckless manner.” O.R.C. § 2744.03(A)(6).

The district court, relying upon its determination that Officer Kovach's actions were objectively reasonable for the purposes of section 1983, found that the defendant's use of force was not malicious or undertaken in bad faith or in a wanton or reckless manner, and held that Officer Kovach was entitled to immunity under Ohio Revised Code § 2744.03. Having reversed the district court's finding of reasonableness for the excessive force claim, we also reverse the district court's grant of summary judgment on the state law assault and battery claim. We again stress that our holding proceeds from the requirement that the district court view all the evidence in a light most favorable to the plaintiff in this case. Because the facts in this record are sufficiently in dispute to require that they be submitted to a jury, it will be up to the jury to determine what exactly happened on the evening in question and then decide whether to hold Officer Kovach responsible for D'Agastino's injuries.

CONCLUSION

For the reasons set forth above, we REVERSE the decision of the district court and REMAND for trial.

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