No. __-___

IN THE
SUPREME COURT OF THE UNITED STATES

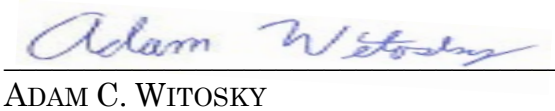
CHARLES MCMANEMY,
Petitioner,

vs.

BRUCE TIERNEY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX



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United States Court of Appeals
For the Eighth Circuit

No. 18-3519

Charles McManemy

Plaintiff - Appellant

v.

Bruce Tierney; Kiley Winterberg; Curt Lubben; Jennifer Degroote; Karson Roose; Dewayne Viet; John/Jane Doe(s), in each individual's capacity as a law enforcement officer/jailer/dispatcher for the Butler County Sheriff's Office; Jennifer Becker, in her individual capacity as a nurse for Butler County, Iowa; Kirk Dolleslager, in his individual capacity as a law enforcement officer for the Grundy County Sheriff's Office; Sheriff Jason Johnson, in his individual capacity; Sheriff Rick Penning; Butler County; Grundy County

Defendants - Appellees

No. 18-3520

Charles McManemy

Plaintiff - Appellee

v.

Bruce Tierney; Kiley Winterberg; Curt Lubben

Defendants - Appellants

Jennifer Degroote; Karson Roose; Dewayne Viet

*Defendant*s

John/Jane Doe(s), in each individual's capacity as a law enforcement officer/jailer/dispatcher for the Butler County Sheriff's Office

Defendant - Appellant

Jennifer Becker, in her individual capacity as a nurse for Butler County, Iowa; Kirk Dolleslager, in his individual capacity as a law enforcement officer for the Grundy County Sheriff's Office

*Defendant*s

Sheriff Jason Johnson, in his individual capacity

Defendant - Appellant

Sheriff Rick Penning

Defendant

Butler County

Defendant - Appellant

Grundy County

Defendant

No. 18-3554

Charles McManemy

Plaintiff - Appellee

v.

Bruce Tierney; Kiley Winterberg; Curt Lubben; Jennifer Degroote; Karson Roose; Dewayne Viet; John/Jane Doe(s), in each individual's capacity as a law

enforcement officer/jailer/dispatcher for the Butler County Sheriff's Office; Jennifer Becker, in her individual capacity as a nurse for Butler County, Iowa

*Defendant*s

Kirk Dolleslager, in his individual capacity as a law enforcement officer for the Grundy County Sheriff's Office

Defendant - Appellant

Sheriff Jason Johnson, in his individual capacity

Defendant

Sheriff Rick Penning

Defendant - Appellant

Butler County

Defendant

Grundy County

Defendant - Appellant

Appeals from United States District Court
for the Northern District of Iowa - Ft. Dodge

Submitted: January 15, 2020
Filed: August 17, 2020

Before BENTON, GRASZ, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

Charles McManemy believes that deputies used excessive force against him after he led them on a high-speed chase. Although he suffered physical injuries during the ensuing arrest, the district court[1] granted summary judgment to the deputies based on qualified immunity. We affirm.

I.

The deputies believed that McManemy was on his way to making a drug delivery. Hoping that they would have the chance to stop him, they seized the opportunity when he ran a stop sign. Even flashing lights and a siren, however, did not stop McManemy. For the next 10 minutes, he led them on a high-speed chase through rural highways, gravel roads, and a private farm.

With their other options exhausted, the deputies finally rammed McManemy's vehicle. McManemy eventually emerged from the disabled vehicle after trying to make a call and lighting a cigarette. When he did, he laid face down on the road with his arms and legs spread.

Still, the deputies had difficulty arresting him. Although the parties dispute how much he resisted and why, the dash-cam video shows his legs flailing, and he admits to having failed to comply with orders to "[q]uit resisting" and to "knock it off." *See* Oral Arg. at 1:44–1:50 (conceding that the dash-cam video "clearly" shows that he was resisting "up until a point"). In the end, subduing McManemy took two interlocked sets of handcuffs and six deputies.

This case is all about what happened during the scuffle. McManemy claims that one deputy tased him up to five times and that another used a knee to

[1]The Honorable Leonard T. Strand, Chief Judge, United States District Court for the Northern District of Iowa.

repeatedly bash him in the head. The blows to the head allegedly caused damage to his eye, first bruising and later problems with light sensitivity and "floaters."

McManemy brought excessive-force claims under 42 U.S.C. § 1983 against the deputies and other government defendants. Also included are claims against the other deputies on the scene, who allegedly failed to intervene and protect him. These basic theories are mirrored in several Iowa state-law claims, too.

Neither side is satisfied with how the district court decided the case. On one hand, McManemy believes that the court should not have granted summary judgment to the defendants on his federal claims. At the same time, the defendants are disappointed that the court did not exercise supplemental jurisdiction over McManemy's state-law claims. Both appeal the parts of the ruling that they lost.

II.

We review the district court's decision to grant summary judgment de novo. *Morgan v. Robinson*, 920 F.3d 521, 523 (8th Cir. 2019) (en banc). "Summary judgment [was] appropriate [if] the evidence, viewed in [the] light most favorable to [McManemy], shows no genuine issue of material fact exists and the [defendants were] entitled to judgment as a matter of law." *Phillips v. Mathews*, 547 F.3d 905, 909 (8th Cir. 2008) (citation omitted).

For McManemy's federal claims, it all comes down to whether the deputies are entitled to qualified immunity, which depends on the answer to two questions. First, did they violate a constitutional right? Second, was the right clearly established? *See Morgan*, 920 F.3d at 523. If the answer to either question is "no," we will affirm. *See id.* (making clear that we may answer the questions in either order).

A.

The first allegedly unconstitutional act was the use of a taser against McManemy. *See Jackson v. Stair*, 944 F.3d 704, 710 (8th Cir. 2019). In addition to suing Deputy Kirk Dolleslager, who used the taser, McManemy alleges that a nearby officer, Deputy Curt Lubben, violated clearly established law by failing to intervene on his behalf. *Hicks v. Norwood*, 640 F.3d 839, 843 (8th Cir. 2011) (discussing the duty to intervene). Both claims depend on whether using the taser was objectively reasonable under the circumstances. *See Graham v. Connor*, 490 U.S. 386, 396–97 (1989); *Hicks*, 640 F.3d at 843.

1.

As in many qualified-immunity cases, the parties have "two different stories" about what happened. *Scott v. Harris*, 550 U.S. 372, 378, 380 (2007). McManemy claims that Deputy Dolleslager "sadistically" tased him in drive-stun mode,[2] once before handcuffing him and two-to-four times afterward. Deputy Dolleslager says that he only tased him twice, once before placing the handcuffs on his right wrist and once more to get them on his other wrist.

In an appeal from a summary-judgment ruling on qualified immunity, we typically credit the plaintiff's version of the facts. *See id.* at 378. In some cases, however, the record so "blatantly contradict[s]" the plaintiff's account that "no reasonable jury could believe it." *Id.* at 380. In those instances, we do *not* "adopt th[e plaintiff's] version of the facts" in evaluating whether the officers were entitled to summary judgment. *Id.*

[2]Drive-stun mode is the "lowest" setting. In this mode, the taser makes direct contact with the suspect's skin, but the charge is not incapacitating. *See Cravener v. Shuster*, 885 F.3d 1135, 1137 n.1 (8th Cir. 2018).

This is one of those cases. Many tasers have logs that record when and how they are used. The log on Deputy Dolleslager's device revealed that it had only been discharged twice—each for three seconds, fifteen seconds apart. McManemy has never challenged the log's accuracy, so the record "blatantly contradicts" his account that he was tased between three and five times. *See* Oral Arg. at 2:10–2:25 (conceding that the log accurately reflects the number and timing of the taser bursts).

With the taser having been discharged only twice, McManemy's admissions take on central importance. *See Tokar v. Armontrout*, 97 F.3d 1078, 1081–83 (8th Cir. 1996) (relying heavily on a plaintiff's admissions when affirming a qualified-immunity ruling). The first key admission is that he was not yet handcuffed when Deputy Dolleslager tased him the first time. Under our precedent, it is reasonable for an officer to tase an uncuffed suspect who appears to be resisting arrest. *See Ehlers v. City of Rapid City*, 846 F.3d 1002, 1011 (8th Cir. 2017); *Carpenter v. Gage*, 686 F.3d 644, 650 (8th Cir. 2012).

The second tasing was reasonable too because of McManemy's other admission: in the intervening 15 seconds between taser discharges, the deputies had to get the handcuffs on his other wrist. Construing the remaining disputed facts in McManemy's favor, it is possible that Deputy Dolleslager tased him for the second time just *after* he was fully handcuffed. Even so, we have already held that discharging a taser in drive-stun mode under similar circumstances is objectively reasonable. *See Brossart v. Janke*, 859 F.3d 616, 626 (8th Cir. 2017); s*ee also Franklin v. Franklin Cty.*, 956 F.3d 1060, 1062–63 (8th Cir. 2020) (discussing cases allowing the use of drive-stun taser bursts on suspects who are already handcuffed). After all, here it came at the tail end of a "tumultuous" struggle between McManemy and the deputies. *Rudley v. Little Rock Police Dep't*, 935 F.3d 651, 654 (8th Cir. 2019).

It makes no difference if, as McManemy argues, one of the deputies knew that he had a preexisting shoulder condition that made it difficult for him to comply with their commands. *See Schoettle v. Jefferson Cty.*, 788 F.3d 855, 858, 860–61 (8th Cir. 2015). Regardless of whether one or more of them knew about his injury, the deputies still had to subdue him, even if he had an "innocent" reason for flailing his legs and refusing to give up one of his arms. *Carpenter*, 686 F.3d at 650 (explaining that the use of a taser does not become excessive just because an arrestee has an "innocent" motive for refusing to give up his hands); *see also Schoettle*, 788 F.3d at 858, 860–61 (holding that the force used to restrain a noncompliant arrestee was reasonable even if the officers knew that his belligerence was caused by a hypoglycemic episode).

2.

This conclusion also resolves the failure-to-intervene claim against Deputy Lubben. To be sure, "an officer who fails to intervene to prevent the *unconstitutional* use of *excessive* force by another officer may be held liable for violating the Fourth Amendment." *Hollingsworth v. City of St. Ann*, 800 F.3d 985, 991 (8th Cir. 2015) (emphases added and citation omitted). But there is no duty to prevent the *constitutional* use of *reasonable* force. *See id.* If Deputy Dolleslager did not violate McManemy's constitutional rights, then neither did Deputy Lubben. *See Hicks*, 640 F.3d at 843.

B.

According to McManemy, the deputies did more than just tase him. One of them, Deputy Bruce Tierney, used his knee as a weapon and repeatedly hit him in the head with it. Once again, the claim is excessive force, but this time it fails for a different reason: the absence of a clearly established right.

1.

As with McManemy's other claim, we must first identify the relevant facts. Again, the stories differ. McManemy says that he suffered severe bruising and lasting eye damage from being hit in the face with Deputy Tierney's knee. The deputies argue, by contrast, that no one's knee touched McManemy's head and that his injuries must have happened some other way. They claim to have proof: a dash-cam video.

The dash-cam video, however, is equivocal at best. It shows Deputy Tierney kneeling next to McManemy's head for about 40 seconds. But for much of that time, it is impossible to see what he is doing because another officer and a dog block the view. And even when they do not, the footage is just too grainy to make out what is happening. In short, the video does not "blatantly contradict[]" McManemy's account. *Coker v. Ark. State Police*, 734 F.3d 838, 841, 843 (8th Cir. 2013) (citation omitted) (reaching a similar conclusion when faced with an inconclusive dash-cam video).

Construing the facts in McManemy's favor, Deputy Tierney still did not violate a clearly established right. McManemy does not suggest that this is the "rare[,] obvious case," in which the violation is so clear that it is unnecessary to identify an "existing precedent." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (internal quotation marks and citation omitted). So to prevail on this claim, McManemy must point to a case that "squarely governs the specific facts at issue." *Kelsay v. Ernst*, 933 F.3d 975, 980 (8th Cir. 2019) (en banc) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam)). He believes there are two: *Gill v. Maciejewski*, 546 F.3d 557 (8th Cir. 2008), and *Krout v. Goemmer*, 583 F.3d 557 (8th Cir. 2009). Neither, however, "squarely governs" this case.

The first, *Gill*, is the closer of the pair. There too, an officer slammed his knee into an arrestee's head. 546 F.3d at 561. The arrestee, who was lying on the

ground at the time, suffered five facial-bone fractures, a concussion, and a brain bleed after the officer performed a standing knee-drop maneuver on him. *Id.* We upheld the jury's finding that this level of force was unreasonable under the circumstances. *Id.* at 562.

For two reasons, however, *Gill* is still not close enough. First, Gill offered "no resistance," whereas McManemy led deputies on a 10-minute, high-speed chase and, by his own admission, put up some resistance once he was captured. *Id.* at 561–62; *see Kelsay*, 933 F.3d at 980 (distinguishing between fully compliant and non-compliant arrestees); *see also Kisela*, 138 S. Ct. at 1152 (discussing flight). Second, the level of force was different. By jumping on Gill from a standing position, the officer used near-deadly force and caused life-threatening injuries. *Gill*, 546 F.3d at 561. Although what happened here was violent, it is not in the same league as the knee-drop maneuver from *Gill*. *See Mann v. Yarnell*, 497 F.3d 822, 826 (8th Cir. 2007) (explaining that we consider the injuries suffered when evaluating the level of force).

The second, *Krout*, is not even close. It involved extreme levels of "gratuitous" force against a "fully[-]subdued," non-resisting arrestee who eventually died. 583 F.3d at 563, 566. An officer "hip toss[ed]" him to the ground, and then, together with other officers, beat him. *Id.* at 561. The use of force in this case, by contrast, falls well short of *Krout*. And perhaps most importantly, McManemy admits that he suffered his injuries during a struggle to handcuff him, not when he was "fully subdued." *Id.* at 566; *see Kelsay*, 933 F.3d at 980 (drawing a similar distinction).

2.

This analysis extends to the other deputies, too. To hold them liable for their failure to intervene, McManemy had to establish that they knew "or had reason to know that excessive force would be or was being used." *Hollingsworth*, 800 F.3d

at 991 (citation omitted). If Deputy Tierney did not violate a clearly established right, then the other deputies would not have had "fair notice" that he was using *unconstitutionally* excessive force against McManemy either. *Id.*

III.

One loose end remains. The district court declined to exercise supplemental jurisdiction over McManemy's Iowa state-law claims after it had "dismissed all [the] claims over which it ha[d] original jurisdiction." 28 U.S.C. § 1367(c)(3). The defendants wanted the court to decide those on the merits too, rather than just dismissing them without prejudice.

We rarely overturn this "purely discretionary" call. *Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 359 (8th Cir. 2011) (citation omitted) (reviewing for an abuse of discretion). In fact, when a district court has dismissed every federal claim, as here, "judicial economy, convenience, fairness, and comity" will usually "point toward declining to exercise jurisdiction over the remaining state-law claims." *Wilson v. Miller*, 821 F.3d 963, 970–71 (8th Cir. 2016) (citation omitted). This case is no exception. *See, e.g.*, *Zubrod v. Hoch*, 907 F.3d 568, 572–73, 580–81 (8th Cir. 2018) (affirming in a similar case).

IV.

We accordingly affirm the judgment of the district court.

GRASZ, Circuit Judge, concurring in part and dissenting in part.

"It [is] clearly established . . . that when a person is subdued and restrained with handcuffs, a 'gratuitous and completely unnecessary act of violence' is unreasonable and violates the Fourth Amendment." *Blazek v. City of Iowa City*, 761 F.3d 920, 925 (8th Cir. 2014) (quoting *Henderson v. Munn*, 439 F.3d 497, 503

(8th Cir. 2006)). Viewed in a light most favorable to McManemy, the facts establish Deputy Tierney repeatedly — twenty to thirty times — kneed McManemy in the eye area *after* he was subdued and restrained. Therefore, I do not believe Tierney is entitled to qualified immunity for this gratuitous use of force and I dissent from Section II.B. of the court's opinion.

When defining the context surrounding the challenged use of force for purposes of either prong of the qualified immunity analysis, we are required to grant inferences in favor of the non-moving party. *See Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014). Failure to do so results in the impermissible invasion into the province of the fact-finder by weighing the evidence. *Id.* at 657.

Here, I believe the context surrounding Tierney's use of force is particularly important. McManemy led police officers on a long, high-speed chase. This put both the participants and the public at risk. But ultimately he laid facedown in the middle of the road with his arms and legs spread, giving himself up for arrest. According to McManemy, the resulting melee occurred because the officers incorrectly thought he was resisting arrest when they tried to handcuff him, when in fact a preexisting shoulder injury and an involuntary response to tasing caused the appearance of resistence. Regardless of the reason for the struggle, I agree with the court it was reasonable for the officers to believe otherwise and this justifies some of the physical force used.

But I do not believe Tierney's repeated kneeing of McManemy in the eye was within that justified use of force. The video evidence presented showed Tierney arrived at the scene after McManemy had laid down and after at least four officers were already on top of him. Tierney arrived, first kicked or stomped on McManemy's leg, and then moved to the left side of McManemy's head. As the court explains, the video does not show what Tierney then does for the next minute or so. But if we are to believe McManemy, Tierney repeatedly — up to twenty or thirty times — kneed him, resulting in demonstrable injury to the eye.

The court distinguished what happened to McManemy from cases like *Gill v. Maciejewski*, 546 F.3d 557 (8th Cir. 2008), and *Krout v. Goemmer*, 583 F.3d 557 (8th Cir. 2009), by noting that the plaintiffs in those cases were subdued and offered no resistence. But in light of the above-mentioned evidence and our duty to draw inferences in McManemy's favor, a jury could conclude that some of the strikes from Tierney's knee occurred after McManemy was handcuffed and after any reasonable belief in resistance would cease. That is, a jury could find that Tierney struck McManemy's face when he was subdued and offered no resistence. If true, such actions were completely unnecessary to effect the arrest. This circuit has clearly established that gratuitous force after a subdued suspect no longer poses a threat violates the Fourth Amendment. *See Blazek*, 761 F.3d at 925 (holding that jerking a non-resisting suspect from the floor to his bed after he was handcuffed and posed no threat violated clearly established law); *Krout*, 583 F.3d at 566 ("It was clearly established that the use of this type of gratuitous force against a suspect who is handcuffed, not resisting, and fully subdued is objectively unreasonable under the Fourth Amendment."); *Gill*, 546 F.3d at 562 (explaining an officer used excessive force where he smashed his knee into a suspect's head when the suspect was not resisting and was already pinned down by multiple officers). Thus, I believe there is sufficient evidence of a clearly established Fourth Amendment violation and would reverse the district court's grant of summary judgment in favor of Tierney.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3519

Charles McManemy

Plaintiff - Appellant

v.

Bruce Tierney; Kiley Winterberg; Curt Lubben; Jennifer Degroote; Karson Roose; Dewayne Viet; John/Jane Doe(s), in each individual's capacity as a law enforcement officer/jailer/dispatcher for the Butler County Sheriff's Office; Jennifer Becker, in her individual capacity as a nurse for Butler County, Iowa; Kirk Dolleslager, in his individual capacity as a law enforcement officer for the Grundy County Sheriff's Office; Sheriff Jason Johnson, in his individual capacity; Sheriff Rick Penning; Butler County; Grundy County

Defendants - Appellees

No: 18-3520

Charles McManemy

Plaintiff - Appellee

v.

Bruce Tierney; Kiley Winterberg; Curt Lubben

Defendants - Appellants

Jennifer Degroote; Karson Roose; Dewayne Viet

Defendants

John/Jane Doe(s), in each individual's capacity as a law enforcement officer/jailer/dispatcher for the Butler County Sheriff's Office

Defendant - Appellant

Jennifer Becker, in her individual capacity as a nurse for Butler County, Iowa; Kirk Dolleslager, in his individual capacity as a law enforcement officer for the Grundy County Sheriff's Office

Defendants

Appendix B

Sheriff Jason Johnson, in his individual capacity

Defendant - Appellant

Sheriff Rick Penning

Defendant

Butler County

Defendant - Appellant

Grundy County

Defendant

No: 18-3554

Charles McManemy

Plaintiff - Appellee

v.

Bruce Tierney; Kiley Winterberg; Curt Lubben; Jennifer Degroote; Karson Roose; Dewayne Viet; John/Jane Doe(s), in each individual's capacity as a law enforcement officer/jailer/dispatcher for the Butler County Sheriff's Office; Jennifer Becker, in her individual capacity as a nurse for Butler County, Iowa

Defendants

Kirk Dolleslager, in his individual capacity as a law enforcement officer for the Grundy County Sheriff's Office

Defendant - Appellant

Sheriff Jason Johnson, in his individual capacity

Defendant

Sheriff Rick Penning

Defendant - Appellant

Butler County

Defendant

Grundy County

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Ft. Dodge
(3:17-cv-03020-LTS)

JUDGMENT

Before BENTON, GRASZ and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 17, 2020

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____
/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3519

Charles McManemy

Appellant

v.

Bruce Tierney, et al.

Appellees

No: 18-3520

Charles McManemy

Appellee

v.

Bruce Tierney, et al.

Appellants

Jennifer Degroote, et al.

John/Jane Doe(s), in each individual's capacity as a law enforcement officer/jailer/dispatcher for the Butler County Sheriff's Office

Appellant

Jennifer Becker, in her individual capacity as a nurse for Butler County, Iowa and Kirk Dolleslager, in his individual capacity as a law enforcement officer for the Grundy County Sheriff's Office

Sheriff Jason Johnson, in his individual capacity

Appellant

Sheriff Rick Penning

Butler County

Appellant

Grundy County

Appendix C

No: 18-3554

Charles McManemy

Appellee

v.

Bruce Tierney, et al.

Kirk Dolleslager, in his individual capacity as a law enforcement officer for the Grundy County Sheriff's Office

Appellant

Sheriff Jason Johnson, in his individual capacity

Sheriff Rick Penning

Appellant

Butler County

Grundy County

Appellant

Appeals from U.S. District Court for the Northern District of Iowa - Ft. Dodge
(3:17-cv-03020-LTS)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judges Kelly, Erickson, and Grasz would grant the petition for rehearing *en banc*.

October 23, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CHARLES McMANEMY, Plaintiff, vs. BRUCE TIERNEY, et al., Defendants.	No. C17-3020-LTS **MEMORANDUM OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This case is before me on two motions: (1) a motion (Doc. No. 57) for summary judgment filed by defendants Bruce Tierney, Kiley Winterberg, Curt Lubben, Jason Johnson and Butler County, Iowa,[1] and (2) a motion (Doc. No. 74) for summary judgment filed by defendants Kirk Dolleslager, Rick Penning, and Grundy County, Iowa.[2] Plaintiff Charles McManemy has resisted both motions (Doc. No. 67, 79) and both sets of defendants have replied (Doc. No. 71, 87). I find that oral argument is not necessary on either motion. *See* N.D. Ia. L.R. 7(c).

[1] Johnson was the Butler County Sheriff at the time of McManemy's arrest. Doc. No. 2 at ¶ 4. Tierney, Winterberg and Lubben were law enforcement officers with the Butler County Sherriff's Office. *Id.* at ¶ 6-8. I previously granted summary judgment against McManemy as to defendants Jennifer DeGroote, Karson Roose, Dewayne Viet and Jennifer Becker, as well as the unnamed "John/Jane Doe" defendants. *See* Doc. No. 54. The claims against Johnson and Butler County arising from the treatment McManemy received for his various ailments while incarcerated were also dismissed by my order at Doc. No. 54, although negligent hiring, training and supervision claims arising from the arrest remain against these defendants under Count VII.

[2] Penning was the Grundy County Sheriff at the time of McManemy's arrest and Dolleslager was a law enforcement officer with the Grundy County Sheriff's Office. Doc. No. 2 at ¶¶ 5, 14.

II. PROCEDURAL HISTORY

McManemy filed a complaint (Doc. No. 2) on March 16, 2017, and defendants answered, denying liability and raising various affirmative defenses. Doc. Nos. 14, 15, 17. The complaint asserts several constitutional claims brought under 42 U.S.C. § 1983, as well as claims brought under Iowa law against various state employees and two Iowa counties. All of the claims arise from the events that transpired during McManemy's March 18, 2015, arrest by officers from Butler and Grundy County, Iowa, and during his subsequent period of incarceration in the Butler County jail from March 18, 2015, to October 7, 2015. On June 5, 2018, I granted defendants' motion for summary judgment as to Counts V, VI, parts of Count VII, and Count IX. Doc. No. 54. The following claims are subject to the present motion:

> Count I: Violation of Right to be Free from Excessive Force and Unreasonable Seizures (§ 1983) against Dolleslager – Taser Bursts.
>
> Count II: Violation of Right to be Free from Excessive Force and Unreasonable Seizures (§ 1983) against Lubben – Bystander Liability for Count I.
>
> Count III: Violation of Right to be Free from Excessive Force and Unreasonable Seizures (§ 1983) against Tierney – Assault.
>
> Count IV: Violation of Right to be Free from Excessive Force and Unreasonable Seizures (§ 1983) against Lubben and Dolleslager – Bystander Liability for Count III.
>
> Count VII: Negligent Hiring, Training and Supervision (Iowa law) against Johnson, Penning, Butler County and Grundy County.
>
> Count VIII: Assault and Battery (Iowa law) against Dolleslager, Lubben, Tierney and Winterberg.
>
> Count IX: Negligence (Iowa law) against Dolleslager, Lubben, Tierney, Winterberg and Johnson.

III. SUMMARY JUDGMENT STANDARDS

Any party may move for summary judgment regarding all or any part of the claims asserted in a case. Fed. R. Civ. P. 56(a). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A material fact is one "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, "the substantive law will identify which facts are material." *Id.* Facts that are "critical" under the substantive law are material, while facts that are "irrelevant or unnecessary" are not. *Id.* "An issue of material fact is genuine if it has a real basis in the record," *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)), or "when 'a reasonable jury could return a verdict for the nonmoving party' on the question," *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson*, 477 U.S. at 248). Evidence that only provides "some metaphysical doubt as to the material facts," *Matsushita*, 475 U.S. at 586, or evidence that is "merely colorable" or "not significantly probative," *Anderson*, 477 U.S. at 249-50, does not make an issue of material fact genuine. Put another way, "[e]vidence, not contentions, avoids summary judgment." *Reasonover v. St. Louis Cnty.*, 447 F.3d 569, 578 (8th Cir. 2006) (citation omitted). The parties "may not merely point to unsupported self-serving allegations." *Anda v. Wickes Furniture Co.*, 517 F.3d 526, 531 (8th Cir. 2008).

As such, a genuine issue of material fact requires "sufficient evidence supporting the claimed factual dispute" so as to "require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 249 (quotations omitted). The party moving for entry of summary judgment bears "the initial responsibility of

informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." *Hartnagel*, 953 F.2d at 395 (citing *Celotex*, 477 U.S. at 323). Once the moving party has met this burden, the nonmoving party must go beyond the pleadings and by depositions, affidavits, or otherwise, designate specific facts showing that there is a genuine issue for trial. *Mosley v. City of Northwoods*, 415 F.3d 908, 910 (8th Cir. 2005). The nonmovant must show an alleged issue of fact is genuine and material as it relates to the substantive law. *Id.* If a party fails to make a sufficient showing of an essential element of a claim or defense with respect to which that party has the burden of proof, then the opposing party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322.

To determine whether a genuine issue of material fact exists, I must view the evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587-88. Further, I must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the facts. *Id.* However, "because we view the facts in the light most favorable to the nonmoving party, we do not weigh the evidence or attempt to determine the credibility of the witnesses." *Kammueller v. Loomis, Fargo & Co.*, 383 F.3d 779, 784 (8th Cir. 2004) (citing *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996)). Instead, "the court's function is to determine whether a dispute about a material fact is genuine." *Quick*, 90 F.3d at 1377.

IV. RELEVANT FACTS

Unless otherwise noted, the parties do not dispute the following facts:

On March 18, 2015, McManemy borrowed a truck from his friend Janet. Doc. No. 67-3 at 5. McManemy took this truck to go visit his girlfriend and get his motorcycle fixed in Iowa Falls, Iowa. Doc. No. 61 at 8; Doc. No. 67-3 at 4-5. McManemy attached an open air trailer to the truck while in Iowa Falls, and began driving back towards Janet's house in Ackley, Iowa, at approximately 3:30 p.m. *Id.* at 5. At some point on this drive, McManemy's mother informed him over the phone that his father had been admitted to

the hospital in Iowa City for congestive heart failure, and that his father was on his death bed. *Id.* McManemy testified that his plan was to return the truck to Janet, drive to Waterloo and then get a ride from a friend to Iowa City. *Id.*

Meanwhile, officers from Grundy and Butler Counties were engaged in a narcotics investigation involving McManemy. Doc. No. 61 at 120-21. The officers believed McManemy was making a delivery of narcotics and they intended to conduct a traffic stop before he made the delivery. *Id.* Lubben's police report states that "because of prior interaction with [McManemy] it was anticipated that he could try to elude us if he was the driver of the vehicle." *Id.* at 120.

McManemy was first observed by officers about two miles outside of Ackley, Iowa, around 7:20 p.m. Dolleslager's dash camera captures McManemy travelling the opposite direction. Dolleslager Video at 19:26. Dolleslager turned around, activated his lights, and began to pursue McManemy. *Id.* at 19:26-19:28. McManemy testified that he believed Dolleslager saw him run a stop sign. Doc. No. 67-3 at 5. Dolleslager testified that he intended to pull McManemy over for speeding. *Id.* at 26. McManemy agreed that Dolleslager had the right to pull him over and that there was probable cause for an arrest. *Id.* at 7. However, McManemy testified that he did not stop his car because he was scared and because he wanted to return to Iowa City to see his father. *Id.* at 7-8.

The ensuing chase, which reached speeds of 80 to 90 miles per hour, resulted in McManemy's vehicle being rammed twice and involved a detour through a plowed cornfield, followed by McManemy dragging a hundred feet of barbed-wire fencing that sparked and whipped against the road behind him. *See generally*, Dolleslager Video, Lubben Video. At one point, Winterberg attempted to throw a spike strip in McManemy's path. Doc. No. 67-3 at 30. This event does not appear on video. However, Winterberg and McManemy agree that the spike strip went through McManemy's front windshield. *Id.* at 7, 30.

McManemy came to a stop after about 12 minutes. *See* Dolleslager Video from 19:26 to 19:38. Several police vehicles surrounded McManemy's truck and an officer

yelled at McManemy to get out of the car. Lubben Video at 8:50. Other police cars parked between McManemy's truck and Lubben's dash cam, such that Lubben's dash cam captured only audio of the arrest. McManemy's testimony is that he stopped, attempted to make a phone call but realized that his phone was dead, set aside a knife, and lit a cigarette before getting out of the car. Doc. No. 67-3 at 9. Dolleslager's dash cam recorded the visual (but limited audio) of McManemy as he got out of the truck and laid spread-eagle on the ground. Dolleslager Video at 19:38. Lubben testified that as he approached, he saw McManemy place something behind him, potentially in his pocket. Doc. No. 67-3 at 33. This event is not visible on the dash cam.

There is some disagreement over what happened next. McManemy states that he spread his arms and legs and waited to be handcuffed. Doc. No. 67-3 at 9. However, due to a prior shoulder injury, McManemy alleges that he was unable to comply with the officers pulling his right arm behind his back and that he asked the officers to cuff him with two pairs of handcuffs. *Id.* McManemy claims that Lubben knew of his shoulder injury and should have known from prior arrests that two sets of handcuffs were required and, indeed, that McManemy was screaming at the deputies to use two sets of handcuffs. *Id.* McManemy states that his left arm was lying on the ground, touching the side of his body. Doc. No. 61 at 22-23. At least one officer was holding McManemy's head down from the right side. Doc. No. 67-3 at 9 ("And the one's got his knee right on the side of my head (indicating)."). As the group continued to struggle, McManemy argues that Tierney aggressively stepped on and kicked McManemy's right leg. Tierney then placed himself on the left side of McManemy's body, near his head, where he began to knee McManemy's head as it was being held down, doing damages to his left eyeball:

> Q. What are you claiming happened that caused your left eye to swell up and close?
>
> A. Him (pointing to Deputy Tierney) putting his knee into my eyeball about 20, 30 times.
>
> Q. 20 or 30 times?

A. That I – I think. I'm being jerked from the back and being jerked from the side. He's kneeing me in the face.

Q. So he's taking his knee and he's kind of ramming it?

A. Yeah, he's on his knees.

Q. Okay. So you claim the deputy that had brown pants was on his knees?

A. Yes.

Q. And that he was lifting up a knee and kind of smacking it on your eye?

A. Right.

Id. at 24. Throughout this interaction, McManemy states that he was screaming for the officers to use two sets of handcuffs and that he was being thrashed around. Officers continued wrenching his arm and there were six deputies "hands-on" McManemy when McManemy states he was tased for the first time. Doc. No. 67-3 at 11. Finally, officers handcuffed McManemy using two sets of handcuffs. McManemy asserts that he was tased at least one more time after he was handcuffed.[3] *Id.*

The officers' version of the arrest differs primarily in that they state McManemy did not remain still when they attempted to cuff them. Although Lubben, Tierney and Johnson each testified that they had control over McManemy's right arm, his left arm was tucked beneath his body, resisting handcuffs. Doc. No. 61 at 35, 43, 47. Dolleslager indicated in his report that McManemy was resisting handcuffs with both arms. Doc. No. 75-1 at 35. Further, the officers denied knowledge that McManemy's shoulder was injured at the time of this arrest. From the audio on Lubben's dashboard camera, the

[3] McManemy's testimony has been inconsistent on this point. In the complaint, he alleges being tased upwards of five times. *See* Doc. No. 2 at ¶¶ 24, 26-27. By the time he was deposed in January 4, 2018, his testimony was that he was tased three times: twice in the back and once on his thigh. Doc. No. 61 at 21. This testimony is contradicted by the data readout from the device used to tase McManemy, which indicates he was tased only twice. Doc. No. 75-1 at 33.

officers can be heard telling McManemy not to move at the 10:30 and 11:23 time stamps. Winterberg testified that McManemy was flailing his legs trying to kick Dolleslager. Doc. No. 61 at 58. At 8:22:58 p.m., the readout for Dolleslager's taser indicates that Dolleslager tased McManemy for three seconds. Doc. No. 75-1 at 31. Dolleslager's report indicates that he was able to cuff McManemy's right arm after tasing him in "drive mode,"[4] but that another officer was still struggling to cuff the other arm and requested a second application of the taser. *Id.* at 35. Dolleslager tased McManemy's thigh at

[4] Tasers can be used in "drive mode" or in "probe mode:"

> When the officer deploys the TASER ECW in probe mode, and the two probes attach to the suspect's clothing or skin, the device will send a pulsating electrical charge. When there is a successful probe deployment, the subject typically is disabled for the duration of the cycle. The high-voltage, low amperage electrical charge is designed to induce motor-nerve mediated involuntary muscle contractions (NMI) by sending impulses that override the signals of the sensory and motor nervous systems that are sent to and from the central nervous system (CNS). Should only one probe strike the suspect and the other probe fail to make contact, or if one probe attaches to clothing but is more than two inches away from the body, or if one or both probes lose contact with the subject for any reason, or if the probes are too close together on the body, the CED will typically not incapacitate the subject unless the officer is able to approach the subject and do a follow-up "drive-stun" on the subject, which will complete the circuit with the wire(s) that attached during the 'probe' mode attempt.
>
> The "drive-stun" mode is generally considered to be a "pain-compliance" technique, thus a lesser quantum of force that using the probes. . . . Officers generally should not expect NMI to result from a drive-stun. . . . In addition, in a dynamic altercation it is very difficult for an officer to apply and maintain the application of a drive-stun to a person who is resisting or who is reacting to the pain-compliance technique. The drive-stun contact points typically touch the body for part of the time, but are out of contact with the body for part of the time during the dynamic struggle to subdue the suspect.

Greg Meyer, *TASER basics: What every judge and jury should know* (Nov. 14, 2011), https://www.policeone.com/less-lethal/articles/4558608-TASER-basics-What-every-judge-and-jury-should-know/ (accessed 9/28/18). Officer Lubben testified that if a suspect is tased in probe mode, officers must follow protocol for removing the probes from the suspect's skin. Doc. No. 61 at 38. If a suspect is tased in drive mode, only a visual inspection is necessary. *Id.*

8:23:13 p.m. for three seconds, again in drive mode. *Id.* at 31, 35. Officers were able to cuff McManemy after the second taser burst. He was not tased again. *Id.*

During this struggle, Tierney is visible on the Dolleslager video walking around and over Tierney to the left side of his head. Tierney does not appear to dispute that he stepped on or near McManemy's leg before walking around to the left side of McManemy's head but asserts that he may have tripped. Doc. No. 61 at 43. Tierney states that he could not have kicked McManemy's head from his position in the ditch, and that although his knee may have been in contact with McManemy's head while he was trying to secure him, he did not knee McManemy in the face 20 to 30 times as alleged. *Id.* The video shows that Tierney was on his knees by McManemy's head for approximately 41 seconds.[5] Lubben confirmed that he did not see Tierney kick or knee McManemy in the head. *Id.* at 38. While officers were searching McManemy, they found a pair of "brass knuckles" in his rear pocket. *Id.* at 39.

The two dash cam videos submitted with the motion for summary judgment do not clearly support either version of the nights' events. McManemy is seen exiting his truck as officers yell at him and lies down on the ground with his legs spread (his arms are not fully visible) for a few seconds before the first officer reaches him. Over the next minute, five or six more officers join the struggle. The road is stirred up with dust from the car chase and the officers' vehicles' lights are flashing, further obscuring the scene. It is impossible to see or hear when or whether McManemy is tased. It is also impossible to determine whether his legs were kicking voluntarily or involuntarily and his arms are not visible at all. Further, while some of the officers' commands are clearly audible (i.e., "stop resisting"), it is impossible to determine what McManemy may have been saying. After the arrest, officers are seen on the Dolleslager video celebrating.

[5] Tierney is visible on the Dolleslager Video from 19:39:18 to the end of the struggle at 19:39:55. However, his knees are not visible during the vast majority of that time.

McManemy was booked into the Butler County Jail. A medical exam found that he was scraped and bruised, but McManemy denied a need for immediate medical attention. Later, McManemy was diagnosed with a contusion and nodular episcleritis in his left eye after he reported symptoms of light sensitivity, headache and "floaters." Medical records from July 7, 2015, indicate that this condition was improved, with treatment no longer needed. Doc. No. 67-3 at 72. No other lasting injuries were reported from the arrest. McManemy was ultimately convicted in state court of felony eluding in violation of Iowa Code § 321.279(b) and operating while under the influence (second offense) in violation of Iowa Code § 321J.2(2)(b). *See Iowa v. McManemy*, 2121 OWCR010317 (Butler County, Iowa).

McManemy and the officers from Butler County are familiar with each other. Prior to the March 18, 2015 arrest, McManemy has been arrested at least three times in Butler County. Doc. No. 61 at 115-119. Officer Lubben testified that he was aware that McManemy has access to weapons. *Id.* at 39.

V. DISCUSSION

Defendants argue they are entitled to summary judgment on the § 1983 claims because the undisputed facts demonstrate that McManemy's constitutional rights were not violated and that they are entitled to qualified immunity. As for the state law claims, defendants argue that Iowa law immunizes them against claims for assault and battery and negligence and, in the alternative, that no reasonable jury could find in favor of McManemy on the undisputed facts. McManemy generally resists.

A. Qualified Immunity Standards

"[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (citation omitted). The Eighth Circuit Court of Appeals has stated:

> "What this means in practice is that whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Wilson v. Layne*, 526 U.S. 603, 614 (1999). The Supreme Court has generously construed qualified immunity protection to shield "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

Davis v. Hall, 375 F.3d 703, 711 (8th Cir. 2004) (internal citations cleaned up). For the "clearly established" prong of the qualified immunity analysis,

> A legal principle must have a sufficiently clear foundation in then-existing precedent. Normally this requires us – outside of an "obvious" constitutional violation – "to identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment." *White v. Pauly*, 137 S. Ct. 548, 552 (2017). While the case need not be "directly on point, existing precedent must place the lawfulness of the particular [act] beyond debate." *Wesby*, 138 S. Ct. at 590.

Johnson v. City of Minneapolis, 901 F.3d 963, 972 (8th Cir. 2018) (internal citations cleaned up).

Whether an officer is entitled to qualified immunity is a fact-dependent inquiry. The Supreme Court has explained:

> The first step in assessing the constitutionality of [the officers'] actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from [the officers'] version. When things are in such a posture, courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion. In qualified immunity cases, this usually means adopting the plaintiff's version of the facts.

Scott v. Harris, 550 U.S. 372, 377 (2007) (internal citations omitted). In *Scott*, the lower court had accepted the plaintiff's version of the events. However, the Supreme Court

clarified that the plaintiff-friendly summary judgment standard does not require courts to ignore contrary evidence: "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380.

McManemy's case is one of the "usual" cases.[6] As discussed above, the parties dispute whether McManemy resisted being cuffed. The dash cam videos in this case, while providing a spectacular view of the car chase, provide very little information about the disputed arrest. Therefore, for the purposes of this motion, I will accept as true the fact that McManemy did not purposefully resist being handcuffed, but rather that his right arm was unable to move as directed and that his left arm was touching the side of his body. Further, I will assume that Tierney did place his knee[7] on McManemy's face while kneeling next to him, with at least as much force as necessary to cause the black eye that was documented during McManemy's first week at the Butler County Jail. However,

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[6] The Butler County defendants argue that the ambiguity of the video cannot be used to create a "genuine dispute of material fact" upon which summary judgment can be denied. *See* Doc. No. 59 at 19-20. In *Mann v. Yarnell*, 497 F.3d 826, 827 (8th Cir. 2007), the Eighth Circuit held that "a dark and often unintelligible video coupled with [Mann's] entirely speculative and wishful recitation of events that is neither substantiated by anything displayed in the video nor by the memory of any observer or participant present at the altercation" failed to create a genuine issue of fact because it amounted to "mere allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions." (citations omitted). This case is distinguishable from *Mann*. Here, it is clear from the video that Tierney is on the ground near the left side of McManemy's head. Tierney agrees that his knee may have made contact with McManemy's head, and indeed, McManemy suffered a black eye with lasting symptoms. The fact that the video does not clearly demonstrate how much force was used and Tierney's intent in using that force means that resolving this issue depends on a credibility judgment. Issues of credibility are not appropriately resolved on a motion for summary judgment.

[7] It is at least clear from the video that Tierney did not kick McManemy in the face. Additionally, the Butler County defendants argue that the truck's driver's side airbag was deployed and caused the injury to the left side of McManemy's face. *See* Doc. No. 59 at 23 n.5 (citing Doc. No. 61 at 48). However, as there is no direct evidence other than Johnson's supposition during his deposition that the airbag caused the injury, I must assume for the purposes of this motion that Tierney did so.

given the undisputed documentary evidence of the times at which the taser was deployed – two bursts of three seconds each, 15 seconds apart – and the fact that McManemy agrees that the first taser burst came before he was handcuffed, I do not find that McManemy was tased after he was handcuffed.

B. The Excessive Force Claims

McManemy makes the following allegations that the defendants violated his Fourth Amendment right to be free from excessive force: (1) Dolleslager, by tasing him repeatedly (Count I), (2) Lubben, by failing to intervene to protect McManemy from this tasing (Count II), (3) Tierney, by kneeing him in the face (Count III) and (4) Lubben and Dolleslager, by failing to protect him from this use of force (Count IV). McManemy argues that the force used was unjustified, unreasonable and demonstrated a willful and wanton disregard for his Fourth Amendment rights. Defendants contend that the force used in arresting McManemy was de minimis and objectively reasonable based on the circumstances the deputies faced.

The standard to apply in excessive force cases is well-settled:

> The reasonableness of a use of force turns on whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his subjective intent or motivation. [*Graham v. Connor*, 490 U.S. 386, 397 (1989)]. We must consider the totality of the circumstances, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether the suspect is actively fleeing or resisting arrest. *Id.* at 396.

Malone v. Hinman, 847 F.3d 949, 952 (8th Cir. 2017) (citation omitted). "This calculus allows for the fact that police officers are often forced to make split-second decisions—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009) (citation omitted).

This reasonableness standard "is viewed from the vantage point of the police officer at the time of arrest or seizure." *Gill v. Maciejewski*, 546 F.3d 557, 562 (8th Cir. 2008) (citation omitted); *see also Billingsley v. City of Omaha*, 277 F.3d 990, 993 (8th Cir. 2002) ("The aforementioned reasonableness of force is judged from the perspective of the officer on the scene, taking into consideration the facts known to him, as opposed to one possessing the illuminating power of hindsight." (citation omitted)). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Howard v. Kan. City Police Dep't*, 570 F.3d 984, 989 (8th Cir. 2009) (quoting *Graham*, 490 U.S. at 396). "Circumstances relevant to the reasonableness of the officer's conduct 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.* (quoting *Graham*, 490 U.S. at 396). The court may also "consider the result of the force," *id.* (citation omitted), "the extent of the suspect's injuries" and "standard police procedures." *Mann*, 497 F.3d at 826 (citation omitted).

The use of force to effect an arrest is not reasonable when a suspect does not "pose an immediate threat to the safety of the officers or others," and is "not in flight or resisting arrest." *Small v. McCrystal*, 708 F.3d 997, 1005 (8th Cir. 2013); *see also Bauer v. Norris*, 713 F.2d 408, 412 (8th Cir. 1983) ("Force can only be used to overcome physical resistance or threatened force."). Although some force may be justified when an arrestee refuses commands or passively resists arrest (i.e., refusing to stand), the force must be proportionate to the situation. *Compare Rokusek v. Jansen*, 899 F.3d 544, 547-48 (8th Cir. 2018) (when suspect was unarmed and fully within officer's control, but refused order to stand up to be handcuffed, officer used "more than 'the force necessary' to handcuff" the suspect when he lifted him off of the ground and slammed his head into the floor) *with Carpenter v. Gage*, 686 F.3d at 649-50 (when plaintiff suspected of

assaulting first responders "refused to offer his hands when ordered to do so, and . . . reached for the couch in an effort to lift himself from the floor . . . deputies on the scene reasonably could have interpreted [his] actions as resistance and responded with an amount of force that was reasonable to effect the arrest."). However, the fact that a suspect may have briefly stopped resisting or briefly complied with arrest does not end the analysis. *See Nelson v. Cnty of Wright*, 162 F.3d 986, 991 (8th Cir. 1998) ("Nelson now tries to analyze the brief struggles as if the incident were composed of distinct and separate segments. At the time, however, it was uncertain what would happen next. The situation was tense and 'rapidly evolving.'" (citing *Graham*, 490 U.S. at 397).).

Finally, "an officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer may be held liable for violating the Fourth Amendment." *Nance v. Sammis*, 586 F.3d 604, 612 (8th Cir. 2009). "To establish a failure to intervene claim . . . the plaintiff must show that the 'officer observed or had reason to know that excessive force would be or was being used.'" *Hollingsworth v. City of St. Ann*, 800 F.3d 985, 991 (8th Cir. 2015) (citing *Nance*, 586 F.3d at 612). In other words, there must be a clearly-established constitutional violation underlying the failure-to-intervene.

1. Dolleslager's Actions (Counts I & II)

Accepting McManemy's version of the events as true (except as clearly contradicted by record evidence), but viewing the arrest and the use of force from the vantage point of the arresting officers, the use of the taser was objectively reasonable. From the officers' point of view, it was not unreasonable to confuse McManemy's inability to bring his arms together behind his back – whether due to injury or resistance – with active, intentional resistance. *See Ehlers v. City of Rapid City*, 846 F.3d 1002, 1011 (8th Cir. 2017) ("an arrestee's subjective motive does not bear on how reasonable officers would have interpreted his behavior" (citing *Carpenter*, 686 F.3d at 650)). Particularly here, where the officers were faced with McManemy's apparent resistance

following a lengthy car chase, it was not unreasonable to believe that McManemy was still actively resisting arrest. *See Schoettle v. Jefferson Cnty*, 788 F.3d 855, 860-61 (8th Cir. 2015) (officer's use of force was reasonable although plaintiffs' belligerence was caused by a medical condition, and not by intentional resistance).

McManemy's perceived resistance was sufficient to justify Dolleslager in tasing him twice before he was handcuffed. "Law enforcement officers may use physical force to subdue an arrestee when he fails to comply with orders to lie still during handcuffing." *Carpenter*, 686 F.3d at 649 (citing *Mann*, 497 F.3d at 826). In *Carpenter*, the Eighth Circuit held that the defendant officers "reasonably could have interpreted Carpenter's actions as resistance" when the plaintiff "had his arms underneath him, just huddled up under his chest laying on top of them," and the plaintiff ignored orders and physical attempts by the officers to retrieve his hands for cuffing. 686 F.3d at 649-50. Under those circumstances, the use of a taser in "drive mode" for a five second burst was "reasonable to effect the arrest." *Id.* at 649-50. Similarly, in *Ehlers* the Eighth Circuit held that the use of a taser was reasonable when "Ehler's behavior of continuing to lay on his hand and refusing to comply with instructions" could reasonably be interpreted as resistance. 846 F.3d at 1011.

This case is substantially similar to *Ehlers* and *Carpenter*. It would be unreasonable to require officers to determine, in the midst of an arrest, that an (alleged) injury of which they were not aware prevented McManemy from complying. Further, given the officers' consistent testimony that McManemy's left arm was moving below his body and that he has a history of being armed and fighting (along with McManemy's testimony that he put his left arm against the side of his body), it was not unreasonable to believe that McManemy was actively resisting. This interaction occurred after a 12 minute, high speed car chase, during which officers reasonably suspected that McManemy was armed and carrying controlled substances. Under these circumstances, Dolleslager's use of a taser was reasonable.

Because Dolleslager's actions did not violate McManemy's constitutional rights, Lubben likewise did not violate McManemy's constitutional rights by failing to intervene. Defendants are therefore entitled to qualified immunity with regard to Counts I and II, as there was no constitutional violation.

2. Tierney's Actions (Counts III & IV)

As to the allegation that Tierney kneed McManemy in the face during the course of the arrest, causing a black eye and nodular episcleritis, it is not as clear that Tierney's actions were reasonable. Tierney alleges that the use of force was incidental to his attempt to restrain McManemy as he resisted, and was therefore reasonable. He further contends that he is entitled to qualified immunity for the use of a knee while restraining McManemy because the Eighth Circuit has previously upheld the use of an officer's knee during an arrest when the suspect was perceived to be actively resisting. *See White v. Jackson*, 865 F.3d 1064, 1080 (8th Cir. 2017) ("[W]e conclude that it was not an unreasonable use of force to push [the plaintiff] to the ground and place a knee on his back."). McManemy responds that Tierney's actions were similar to the gratuitous use of force in *Gill*, 546 F.3d 557.

In *Gill*, the Eighth Circuit upheld an award of damages against an officer when "[t]he evidence show[ed that] Gill did not resist and complied with the officers' demands. While Gill was pinned to the ground by multiple officers, Maciejewski approached and smashed his knee into the hapless suspect's head." *Id.* Under those circumstances, the "knee-drop maneuver" constituted excessive force. *Id.* Similarly, in *Krout v. Goemmer*, 583 F.3d 557, 566 (8th Cir. 2009), the Eighth Circuit held that kneeing the plaintiff five to six times in the back after he was "handcuffed , not resisting, and fully subdued" was a "gratuitous" use of force that could not be justified by the need to effect an arrest.

The actions taken by Tierney are not comparable in force to the "knee-drop maneuver" on a fully-restrained suspect in *Gill*. Nor are Tierney's actions comparable to the "gratuitous" use of force held to be unreasonable in *Krout*, wherein the officer

appeared to be punishing a prone suspect. Instead, Tierney approached McManemy from the side and kneeled by his head in an attempt to get him under control. From this position, his knee is alleged to have made contact with McManemy's head from the side as he attempted to restrain McManemy pursuant to a lawful arrest. Unlike the plaintiffs in *Gill* and *Krout*, McManemy was not restrained and subdued at the time Tierney's knee made contact. He had not submitted to being handcuffed and, from the officers' perspective, was still actively resisting the handcuffs.

White is closer to the scenario presented in this case. In that case, the Eighth Circuit held that an officer did not use excessive force when he pushed the plaintiff to the ground and placed a knee on his back while he was being handcuffed, because "[t]he right to make an arrest necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." 865 F.3d at 1080 (citation omitted). Although the knee in *White* was placed on the suspect's back rather than his face, the purpose of the officer using his knee was the same: to restrain the subject for the purpose of arrest. Further, unlike the plaintiff in *White*, who was not resisting handcuffs at the time he was taken to the ground for arrest, the undisputed evidence in this case indicates that a reasonable officer would believe that McManemy was resisting. McManemy agreed that he was thrashing and screaming, and that he did not give his left arm for cuffing because he wanted the officers to use two sets of hand cuffs and because his shoulder was in pain. As discussed above, McManemy's subjective motive in withholding his arm is not relevant, as I must observe his actions from the point of view of a reasonable officer.

In short, I find that the undisputed facts of this case entitle Tierney to qualified immunity. It is doubtful that he violated McManemy's constitutional rights, and there is no existing precedent that places the lawfulness of Tierney's actions beyond debate. Although it is clear that gratuitous acts of violence, such as the knee-drop described in *Gill*, serve no lawful purpose in an arrest, Tierney's actions in kneeling near McManemy's face and making contact with his face – whether intentional or not – were incidental to his attempts to restrain McManemy as he was resisting arrest.

The fact that Tierney is entitled to qualified immunity ends the analysis of the bystander liability claims against Dolleslager and Lubben. Because it was not clearly established that Tierney's actions constituted excessive force, Dolleslager and Lubben were not on fair notice that their alleged failure to intervene may violate McManemy's Fourth Amendment rights. Thus, the defendants are entitled to summary judgment on Counts III and IV.

C. Counts VII, VIII and IX (State Law Claims)

McManemy also asserts the following state law claims: negligent hiring, training and supervision against Johnson and Butler County (Count VII), assault and battery against Lubben, Tierney and Winterberg (Count VIII) and negligence against Lubben, Tierney, Winterberg and Johnson (Count IX). Because I am dismissing all claims brought under federal law, I must consider whether to retain or decline supplemental jurisdiction over the state law claims.

A district court may decline to exercise supplemental jurisdiction when the court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). "A district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary." *Crest Const. II, Inc. v. Doe*, 660 F.3d 346, 359 (8th Cir. 2011) (quoting *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009)). While the determination of whether to dismiss state-law claims pursuant to § 1367(c)(3) is a matter of discretion for a district court, "[i]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Barstad v. Murray Cnty*, 420 F.3d 880, 888 (8th Cir. 2005) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)). Among other things, this reflects a policy that federal courts should avoid addressing state law issues when possible. *Gregoire v. Class*, 236 F.3d 413, 419-20 (8th Cir. 2000).

For all of these reasons, I find that it is not appropriate to exercise supplemental jurisdiction over the remaining state law claims. Those claims will be dismissed without prejudice.

VI. CONCLUSION

For the foregoing reasons:

1. The motions for summary judgment filed by defendants Bruce Tierney, Kiley Winterberg, Curt Lubben, Jason Johnson and Butler County (Doc. No. 57), and by defendants Kirk Dolleslager, Rick Penning and Grundy County (Doc. No. 74), are **granted in part** and **denied in part**, as follows:

   a. The motions are **granted** as to Counts I, II, III and IV, of the complaint, all of which were brought pursuant to 42 U.S.C. § 1983. Those claims are **dismissed with prejudice**. Judgment in favor of the defendants shall enter with regard to Counts I, II, III and IV.

   b. The motions are **denied** as to Counts VII, VIII and IX, as I decline to exercise supplemental jurisdiction over those state law claims.

2. Counts VII, VIII and IX, which are brought pursuant to state law and are the only remaining claims in this action, are hereby **dismissed without prejudice**.

3. Because this order disposes of all remaining claims, the Clerk shall **close this case**.

IT IS SO ORDERED.

DATED this 23rd day of October, 2018.

Leonard T. Strand, Chief Judge