United States Court of Appeals
for the Eighth Circuit

No. 18-2617

Charles Jackson

Plaintiff - Appellant

v.

Billy D. Stair, III, individually and in his official capacity with Jacksonville Police Department;
Jacksonville Arkansas, City of;
Jacksonville Police Department

Defendants - Appellees

Appeal from United States District Court for the Eastern District of Arkansas – Little Rock

---

Submitted: November 8, 2019
Filed: December 3, 2019

Before ERICKSON, WOLLMAN, and GRASZ, Circuit Judges.

ERICKSON, Circuit Judge.

Charles Jackson brought an action for damages under 42 U.S.C. § 1983, alleging various constitutional violations against the City of Jacksonville, Arkansas,

the Jacksonville Police Department, and Jacksonville Police Officer Billy D. Stair, III, individually and in his official capacity, after Jackson was detained and tased by Officer Stair as part of an arrest. The district court granted summary judgment in favor of defendants, and Jackson appealed. In an earlier opinion, we affirmed in part, reversed in part, and remanded to the district court. See Jackson v. Stair, 938 F.3d 966 (8th Cir. 2019). We subsequently vacated that opinion and granted a petition for rehearing, to clarify our decision in light of this court's recent holdings in Kelsay v. Ernst, 933 F.3d 975 (8th Cir. 2019) (en banc), and Rudley v. Little Rock Police Dep't, 935 F.3d 651 (8th Cir. 2019). Our opinion today recites those portions of our earlier decision for which the substance has not changed. We issue a new, clarifying analysis on the excessive force and qualified immunity claims involving Officer Stair. For the reasons stated below, we again affirm in part, reverse in part, and remand.

I.

On July 23, 2013, Jacksonville Police Department (JPD) officers were dispatched to a dispute in progress at a local business, Vaughn Tire. The dispute arose because Jackson believed that Vaughn Tire had damaged a wheel lug during the course of a repair of Jackson's dump truck. Officer Stair was the first to respond on the scene, where he found Jackson walking with

another man. Video evidence[1] shows that Officer Stair asked, "What's going on guys?" In response, Jackson, who was obviously quite agitated, began to yell and point toward another group of men. Officer Stair instructed Jackson to relax, and Jackson replied, pointing at one of the men, "Get him, and I'm gonna relax." Officer Stair directed Jackson to go stand by the patrol car. Jackson began to comply, still yelling, when Officer Stair told him to keep his hands out of his pockets. Jackson reached his left hand into his pocket and stopped immediately in front of Officer Stair to shout that he did not have anything in his pockets. Officer Stair ordered Jackson to turn around. Jackson got louder and did not comply.

Officer Stair pulled out his Taser, pointed it at Jackson, and again ordered Jackson to turn around, or he would be tased. More yelling and pointing ensued from Jackson – at one point Jackson shouted: "You tase me and see what happens." Officer Stair ordered Jackson to turn around five more times before Jackson began to comply. Officer Stair told Jackson to put his hands up, and he did, but he was still facing Officer Stair. Officer Stair again ordered Jackson to turn around, and Jackson did so with his hands in the air, but Jackson continued to yell, asking for Officer Stair's badge number and threatening to file a complaint with his supervisor.

---

[1] The record contains video evidence from the patrol car dash camera, and from a camera mounted on Officer Stair's Taser.

Another officer, Kenneth Harness, approached Jackson and attempted to handcuff him. Jackson put his hands behind his back, and then he stated: "Don't hurt my arm." Jackson turned around to face Officer Harness and raised his right fist toward the officer's head. Officer Stair immediately deployed his Taser, and Jackson fell to the ground, kicking his legs. Moments later, and without another warning, Officer Stair deployed his Taser a second time. Officer Stair then ordered Jackson to turn on his stomach or he would be tased again. Officer Stair repeated the order, but Jackson rose to one knee, in the direction of Officer Stair. Officer Stair deployed his Taser a third time. Jackson finally complied with the order to lie on his stomach, and Officer Harness handcuffed him. Jackson was arrested for disorderly conduct.

Jackson filed a complaint under 42 U.S.C. § 1983 against Officer Stair, in his individual and official capacities, the City of Jacksonville (City), and the JPD, alleging that his constitutional rights were violated during the tasing incident.[2] The district court granted summary judgment in favor of the defendants, and Jackson filed a timely notice of appeal.

The record contains copies of the City's Taser policy and evidence of Officer Stair's completion of Taser-specific and general law enforcement trainings upon his hiring. The record also includes documentation of

[2] The complaint also alleged violations of the Arkansas Civil Rights Act and claimed that Officer Stair's conduct amounted to a felony under Arkansas law, entitling him to damages. Those allegations are not relevant to this appeal.

the JPD's "Use of Force Review" of the tasing incident at issue here. Following that investigation, Officer Stair received a written warning and additional use-of-force training.

II.

We review *de novo* a district court order granting summary judgment, viewing the evidence in the light most favorable to Jackson, and drawing all reasonable inferences in his favor. Schoelch v. Mitchell, 625 F.3d 1041, 1045 (8th Cir. 2010). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

We note at the outset that Jackson failed to make any meaningful argument on appeal regarding his claims against the JPD. Those claims are therefore waived. Ahlberg v. Chrysler Corp., 481 F.3d 630, 634 (8th Cir. 2007). Likewise, the complaint alleged violations of the First, Fourth, Fifth, Eighth, and Fourteenth Amendments. However, as noted by the district court, the Fifth Amendment applies only to the federal government or federal actions and does not apply to state and municipality actors as alleged here, Barnes v. City of Omaha, 574 F.3d 1003, 1005 n.2 (8th Cir. 2009); the Eighth Amendment applies only to convicted prisoners, Hott v. Hennepin County, 260 F.3d 901, 905 (8th Cir. 2001); and the Fourteenth Amendment does not apply to excessive force claims involving arrests, which are appropriately reviewed under a

Fourth Amendment analysis, Graham v. Connor, 490 U.S. 386, 394-95, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Accordingly, only the First and Fourth Amendment claims, and the claims against the City, are relevant here.

A. Claims Against the City

Jackson lodges several claims against the City of Jacksonville, including an official-capacity claim against Officer Stair. Jackson argues that the district court erred in granting summary judgment in favor of the City, because Officer Stair's conduct during the tasing incident was consistent with a City policy, custom, or practice, and because the City had been deliberately indifferent to Officer Stair's conduct. We disagree.

A municipality may be held liable for a constitutional violation under section 1983 if the violation resulted from "(1) an 'official municipal policy,' (2) an unofficial `custom,' or (3) a deliberately indifferent failure to train or supervise." Corwin v. City of Independence, MO., 829 F.3d 695, 699 (8th Cir. 2016) (citations omitted). See also Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); Mick v. Raines, 883 F.3d 1075, 1079-80 (8th Cir. 2018).

Here, Jackson has not presented any evidence to suggest that the City created, adopted, or supported any policy or custom that would demonstrate municipal liability. To the contrary, the City has submitted copies of its relevant policies and training manuals, and the City has shown that Officer Stair received

specific Taser training on top of his general law enforcement training. Moreover, the City investigated the tasing incident after the fact; as a result, Officer Stair received a written warning, and he was required to undergo additional use-of-force training.

Because Jackson fails to provide the evidence necessary to support his claims of municipal liability, the City is entitled to summary judgment.

B. First Amendment Claim Against Officer Stair

Likewise, summary judgment in favor of Officer Stair on Jackson's First Amendment claim is appropriate. The First Amendment protects freedom of speech, and Jackson argues that Officer Stair violated his First Amendment rights by detaining him based on his speech. While the video evidence clearly shows that Jackson was loud and profane during the minutes surrounding the tasing incident, it does not necessarily follow that his arrest was grounded in an effort by Officer Stair to restrain Jackson's right to express himself. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Otherwise, any foul-mouthed citizen could bring a constitutional claim against an arresting officer. In this case, there is no evidence to support a First

Amendment claim, and summary judgment was therefore appropriate.

C. Excessive Force Claims Against Officer Stair and Qualified Immunity

Jackson also claims that Officer Stair used excessive force during the tasings in violation of his constitutional rights. Officer Stair responds in the first instance that no excessive force violation occurred. Officer Stair also argues that the doctrine of qualified immunity shields him from any potential liability if excessive force did occur. This case requires us to revisit our jurisprudence governing qualified immunity and the use of force. We have recognized that these cases rely on a fact-intensive analysis, and this case is no exception. Kelsay, 933 F.3d at 980 (quoting Kisela v. Hughes, ___ U.S. ___, 138 S.Ct. 1148, 1153, 200 L.Ed.2d 449 (2018)) (per curiam).

The Fourth Amendment guarantees each citizen a right to be free from unreasonable searches or seizures. Where, as here, an excessive force claim is made against a law enforcement officer related to conduct involving an arrest, the Supreme Court has made clear that the conduct should be analyzed under an objective reasonableness standard. Graham, 490 U.S. at 394-96. Such an analysis requires the "careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." Id. at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8, 105 S.Ct. 1694,

85 L.Ed.2d 1 (1985)). Relevant considerations include the severity of the crime at issue, whether the suspect posed an immediate safety threat, and whether he was actively resisting arrest or attempting to flee. Id. See also Henderson v. Munn, 439 F.3d 497, 502 (8th Cir. 2006). We judge the relevant facts from the perspective of a reasonable officer on the scene, not with 20/20 hindsight vision. Carpenter v. Gage, 686 F.3d 644, 649 (8th Cir. 2012). "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them. . . ." Graham, 490 U.S. at 397.

Qualified immunity protects a government official from liability in a section 1983 action, unless the official's conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The court must follow a two-step inquiry in a qualified immunity analysis: "(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct." Brown v. City of Golden Valley, 574 F.3d 491, 496 (8th Cir. 2009). The first step of the analysis, therefore, requires us to consider whether a constitutional violation (here, excessive force) in fact occurred. If so, qualified immunity does not shield the officer from liability if the constitutional right was clearly established at the time of the violation.

A right is clearly established if its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Hope v. Pelzer, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). The relevant question is whether a reasonable officer would have fair warning that his conduct was unlawful. Brown, 574 F.3d at 499. We look for "either 'controlling authority' or a 'robust consensus of cases of persuasive authority' that 'placed the statutory or constitutional question beyond debate' at the times of the alleged violation." Kelsay, 933 F.3d at 979 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741-42, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." al-Kidd, 563 U.S. at 741.

A review of our precedent on this topic confirms, on the one hand, the inherent difficulty of analyzing these fact-intensive cases and, on the other hand, a true attempt to adjudicate them within the guidance of Graham and its progeny. 490 U.S. at 396 (excessive force analysis "requires careful attention to 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"). To that end, we have stated: "[I]t is clearly established that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public."

Brown, 574 F.3d at 499. We have also held that qualified immunity protects law enforcement from liability where the suspect was non-compliant and resisted arrest, Carpenter, 686 F.3d at 649-50, or ignored commands from law enforcement, Ehlers v. City of Rapid City, 846 F.3d 1002, 1011 (8th Cir. 2017). Where law enforcement was trying to control a rapidly escalating situation, we have held that the use of force was not unreasonable. See Rudley, 935 F.3d at 654; Cook v. City of Bella Villa, 582 F.3d 840, 851 (8th Cir. 2009). Thus, our challenge in these cases is to look carefully at the facts from the standpoint of a reasonable officer and determine whether the force was excessive, and – if so – whether the officer had fair warning that his actions violated a clearly established constitutional right.

Here, Officer Stair tased Jackson three times. At the beginning of their encounter, Jackson was aggressive and non-compliant in response to Officer Stair's directives. Jackson ignored multiple orders to turn around, arguing with Officer Stair and even threatening him. When Officer Harness attempted to handcuff Jackson, Jackson turned around toward Officer Harness and raised his right fist near Officer Harness's head. At that point, Officer Stair deployed his Taser. A reasonable officer in Officer Stair's position could have viewed Jackson's actions as threatening, resisting arrest, and endangering the safety of an officer. The evidence in the record therefore demonstrates that the first tasing was objectively reasonable.

The second tasing is a different story. When the electric probes from the first tasing struck Jackson, he immediately fell to the ground. Before Jackson could respond, and without warning, Officer Stair again deployed his Taser. At the time of this second tasing, Jackson did not appear to pose a threat to law enforcement, resist arrest, or flee – he was on his back, writhing on the ground. Based on the Taser-mounted video, Jackson did not have time to react with compliance or continued resistance before the second tasing was deployed. His physical body was still reeling from the initial tasing. Officer Stair argued that he perceived Jackson to kick his legs out and turn his body as if to confront the officers again. The video footage, however, refutes this statement. The video clearly shows that Jackson was several feet away from the nearest officer, unable to pose a threat from his position on the ground.

The district court ruled that Officer Stair's conduct *as a whole* was reasonable without considering whether the second tasing could be a constitutional violation on its own. See Blazek v. City of Iowa City, 761 F.3d 920, 925 (8th Cir. 2014) (separating each "discrete use of force for consideration under the Fourth Amendment"). See also Rudley, 935 F.3d at 653; Smith v. Conway County, 759 F.3d 853, 860-61 (8th Cir. 2014) (even if the initial tasing of detainee was justified because he had just kicked a guard, second tasing would be unreasonable under the Eighth Amendment if detainee was no longer acting aggressively, no longer posed any immediate security concern, and was trying to comply with guard's orders). Because we believe the second

tasing stands on its own, the district court erred by not analyzing it as a separate use of force.[3] In light of the video footage depicting the quick succession of the tasings and the dispute as to whether Jackson was resisting the officers or posing a threat at the time of the second tasing, we find that there is a genuine issue of material fact as to whether the second tasing amounted to excessive force. We hold that summary judgment was granted in error with regard to the second tasing.

Officer Stair argues that qualified immunity shields him from any potential liability related to the second tasing because Jackson did not have a clearly established right to [be free from] excessive force at the time. In support of this argument, Officer Stair cites to our recent decisions in Kelsay and Rudley.

In Kelsay, an en banc panel of this court held that qualified immunity protected an officer from liability in a case involving a non-compliant suspect who ignored instructions and walked away from the arresting officer, even though the suspect was not actively resisting arrest or posing a danger. 933 F.3d at 980. The district court had rejected the qualified immunity defense, finding that the officer violated a clearly

---

[3] The dissent states that, because the second tasing happened quickly, a "clearly punctuated interim of compliance" did not occur. We agree that Officer Stair acted with too much speed and without providing Jackson a chance to comply, but we also believe that it was unreasonable for Officer Stair to effectively "kick him while he was down" without considering whether a second tasing was excessive.

established right, but this court disagreed and distinguished the cases relied on by the district court, because of the unique facts at issue in Kelsay. Id. at 980-81. "Decisions concerning the use of force against suspects who were compliant or engaged in passive resistance are insufficient to constitute clearly established law that governs an officer's use of force against a suspect who ignores a command and walks away." Id. at 980. Unlike the plaintiff in Kelsay, however, at the time of the second tasing, Jackson did not ignore law enforcement commands; in fact, no commands were given. And, Jackson was writhing on the ground, physically unable to walk away or flee. Officer Stair's successive tasing of Jackson, when Jackson was several feet away from the nearest officer, was unnecessary and, in a word, *excessive.* Jackson did not appear capable of posing a danger to law enforcement, he was not actively resisting arrest, and he was not fleeing.

Likewise, in Rudley, this court determined that the evidence showed an ongoing, physical altercation "involving aggressive behavior and a 'chaotic and combative' scene" in which the plaintiff was actively resisting arrest. 935 F.3d at 654. Under those circumstances, Rudley was "more akin to the situation in Kelsay," and law enforcement was justified in tasing Rudley to keep control of the situation and avoid escalation. Id. "[T]he scene was a tumultuous one involving seemingly aggressive and noncompliant behavior, circumstances which we have previously held rendered officers' uses of tasers reasonable." Id. In the case before us, Jackson had been aggressive, and at first he was non-compliant.

On that basis, we have determined that the first tasing was objectively reasonable. However, once Officer Stair deployed his Taser, Jackson was reduced to the ground, unable to resist arrest or flee. No reasonable officer would have believed that the Fourth Amendment supported an additional, successive use of force.[4]

Some of the very cases distinguished by this court in Kelsay and Rudley supply us here with a clearly established right against excessive force. In 2013, when the tasings of Jackson occurred, there was sufficient case law to establish that a misdemeanor suspect in Jackson's position at the time of the second tasing – non-threatening, non-fleeing, non-resisting – had a clearly established right to be free from excessive force. See Brown, 574 F.3d at 496-97 (excessive force where misdemeanor suspect "posed at most a minimal safety threat" and "was not actively resisting arrest or attempting to flee"); Shannon v. Koehler, 616 F.3d 855, 862-63 (8th Cir. 2010) (more than de minimis force amounted to excessive force against a suspect who was not suspected of a serious crime, was not threatening, and was not resisting arrest); Montoya v. City of Flandreau, 669 F.3d 867, 871-72 (8th Cir. 2012) (excessive force found where disorderly conduct suspect was 10-15 feet from law enforcement and did not pose a threat). Moreover, we have held that "general constitutional principles against excessive force" are enough to create a clearly established right and to put a reasonable officer on notice that a particular tasing was

[4] Indeed, an internal department review of the tasing incident resulted in a reprimand of Officer Stair.

excessive. See Shekleton v. Eichenberger, 677 F.3d 361, 367 (8th Cir. 2012). We believe it is axiomatic that Jackson had a clearly established right against excessive force at the time of the second tasing.

The third tasing occurred after Officer Stair gave several clear orders for Jackson to stop moving and lay down on his stomach, or he would be tased. Afterward, Jackson moved in the direction of Officer Stair, and he rose to his knee in an apparent attempt to get off the ground. Officer Stair then deployed his Taser for the third and final time before Jackson complied with his demands and was arrested. While we are skeptical whether Jackson was physically capable of posing a danger to law enforcement at that very instance, a reasonable officer in Officer Stair's position could have perceived Jackson to be resisting arrest and could have feared for his safety. Based on our review of the record, we conclude the third tasing was objectively reasonable.

III.

In the instant case, Officer Stair tased Jackson three times. The district court ruled that Officer Stair used a reasonable amount of force to subdue Jackson, considering the officer's conduct as a whole. The court erred by not considering and analyzing each tasing individually. We find the first and third tasings were objectively reasonable, and no Fourth Amendment violation occurred. As to the second tasing, we find there are genuine issues of material fact regarding

whether Officer's Stairs [sic] use of force was excessive. If the second tasing amounted to excessive force, then Officer Stair is not entitled to qualified immunity. Jackson failed to present sufficient evidence to establish a First Amendment claim against Officer Stair or to establish municipal liability against the City. We affirm in part, reverse in part, and remand to the district court for proceedings consistent with this opinion.

WOLLMAN, Circuit Judge, concurring and dissenting.

I agree with the court that Officer Stair's first and third tasings were objectively reasonable and that Jackson's First and Fourth Amendment and municipal liability claims are without merit.

When viewed in light of his earlier manifestation of unceasing, rage-filled verbal and physical conduct, Jackson's momentary post-tasered position on the ground does not justify considering it as a clearly punctuated interim of compliance with Officer Stair's earlier commands, and thus the second tasing was not objectively unreasonable. Granted that Jackson had not at that point attempted to rise from the ground, his earlier-expressed threatened use of force against Officer Harness, when coupled with the nearly hysterical tone of his voice throughout his interaction with Stair and others nearby, justified the continued application of the taser. It may appear from our chambers-viewed observation of the entire encounter to have been a too-hasty application, but given Jackson's earlier

pretasing arm-waving, rant-filled anger and his reluctance to comply with Stair's several earlier-expressed commands and warnings, his momentarily supine position on the ground was hardly a guarantee of a no-longer aggressive subject, as was the case of the medical assistance-seeking detainee in Smith v. Conway. In a word, then, although Officer Stair's quickly applied application following Jackson's initial fall to the ground may have been ill-advised, I do not believe that it was objectively unreasonable in the circumstances, and so I respectfully dissent from the court's decision to remand the case for a further review of that issue.

United States Court of Appeals
For the Eighth Circuit

No. 18-2617

Charles Jackson

Plaintiff - Appellant

v.

Billy D. Stair, III, individually and in his official capacity with Jacksonville Police Department;
Jacksonville Arkansas, City of;
Jacksonville Police Department

Defendants - Appellees

Appeal from United States District Court for the Eastern District of Arkansas – Little Rock

---

Submitted: June 6, 2019
Filed: September 12, 2019

Before ERICKSON, WOLLMAN, and GRASZ, Circuit Judges.

ERICKSON, Circuit Judge.

Charles Jackson brought an action for damages under 42 U.S.C. § 1983, alleging various constitutional violations against the City of Jacksonville, Arkansas,

the Jacksonville Police Department, and Jacksonville Police Officer Billy D. Stair, III, individually and in his official capacity, after Jackson was detained and tased by Officer Stair as part of an arrest. The district court granted summary judgment in favor of defendants, and Jackson appealed. For the reasons stated below, we affirm in part, reverse in part, and remand.

I.

On July 23, 2013, Jacksonville Police Department (JPD) officers were dispatched to a dispute in progress at a local business, Vaughn Tire. The dispute arose because Jackson believed that Vaughn Tire had damaged a wheel lug during the course of a repair of Jackson's dump truck. Officer Stair was the first to respond on the scene, where he found Jackson walking with another man. Video evidence[1] shows that Officer Stair asked, "What's going on guys?" In response, Jackson, who was obviously quite agitated, began to yell and point toward another group of men. Officer Stair instructed Jackson to relax, and Jackson replied, pointing at one of the men, "Get him, and I'm gonna relax." Officer Stair directed Jackson to go stand by the patrol car. Jackson began to comply, still yelling, when Officer Stair told him to keep his hands out of his pockets. Jackson reached his left hand into his pocket and stopped immediately in front of Officer Stair to shout that he did not have anything in his pockets. Officer

[1] The record contains video evidence from the patrol car dash camera, and from a camera mounted on Officer Stair's Taser.

Stair ordered Jackson to turn around. Jackson got louder and did not comply.

Officer Stair pulled out his Taser, pointed it at Jackson, and again ordered Jackson to turn around, or he would be tased. More yelling and pointing ensued from Jackson – at one point Jackson shouted: "You tase me and see what happens." Officer Stair ordered Jackson to turn around five more times before Jackson began to comply. Officer Stair told Jackson to put his hands up, and he did, but he was still facing Officer Stair. Officer Stair again ordered Jackson to turn around, and Jackson did so with his hands in the air, but Jackson continued to yell, asking for Officer Stair's badge number and threatening to file a complaint with his supervisor.

Another officer, Kenneth Harness, approached Jackson and attempted to handcuff him. Jackson put his hands behind his back, and then he stated: "Don't hurt my arm." Jackson turned around to face Officer Harness and raised his right fist toward the officer's head. Officer Stair immediately deployed his Taser, and Jackson fell to the ground, kicking his legs. Moments later, and without another warning, Officer Stair deployed his Taser a second time. Officer Stair then ordered Jackson to turn on his stomach or he would be tased again. Officer Stair repeated the order, but Jackson rose to one knee, in the direction of Officer Stair. Officer Stair deployed his Taser a third time. Jackson finally complied with the order to lie on his stomach, and Officer Harness handcuffed him. Jackson was arrested for disorderly conduct.

Jackson filed a complaint under 42 U.S.C. § 1983 against Officer Stair, in his individual and official capacities, the City of Jacksonville (City), and the JPD, alleging that his constitutional rights were violated during the tasing incident.[2] The district court granted summary judgment in favor of the defendants, and Jackson filed a timely notice of appeal.

The record contains copies of the City's Taser policy and evidence of Officer Stair's completion of Taser-specific and general law enforcement trainings upon his hiring. The record also includes documentation of the JPD's "Use of Force Review" of the tasing incident at issue here. Following that investigation, Officer Stair received a written warning and additional use-of-force training.

II.

We review *de novo* a district court order granting summary judgment, viewing the evidence in the light most favorable to Jackson, and drawing all reasonable inferences in his favor. Schoelch v. Mitchell, 625 F.3d 1041, 1045 (8th Cir. 2010). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

---

[2] The complaint also alleged violations of the Arkansas Civil Rights Act and claimed that Officer Stair's conduct amounted to a felony under Arkansas law, entitling him to damages. Those allegations are not relevant to this appeal.

We note at the outset that Jackson failed to make any meaningful argument on appeal regarding his claims against the JPD. Those claims are therefore waived. Ahlberg v. Chrysler Corp., 481 F.3d 630, 634 (8th Cir. 2007). Likewise, the complaint alleged violations of the First, Fourth, Fifth, Eighth, and Fourteenth Amendments. However, as noted by the district court, the Fifth Amendment applies only to the federal government or federal actions and does not apply to state and municipality actors as alleged here, Barnes v. City of Omaha, 574 F.3d 1003, 1005 n.2 (8th Cir. 2009); the Eighth Amendment applies only to convicted prisoners, Hott v. Hennepin County, 260 F.3d 901, 905 (8th Cir. 2001); and the Fourteenth Amendment does not apply to excessive force claims involving arrests, which are appropriately reviewed under a Fourth Amendment analysis, Graham v. Connor, 490 U.S. 386, 394-95 (1989). Accordingly, only the First and Fourth Amendment claims, and the claims against the City, are relevant here.

A. Claims Against the City

Jackson lodges several claims against the City of Jacksonville, including an official-capacity claim against Officer Stair. Jackson argues that the district court erred in granting summary judgment in favor of the City, because Officer Stair's conduct during the tasing incident was consistent with a City policy, custom, or practice, and because the City had been deliberately indifferent to Officer Stair's conduct. We disagree.

A municipality may be held liable for a constitutional violation under section 1983 if the violation resulted from "(1) an 'official municipal policy,' (2) an unofficial 'custom,' or (3) a deliberately indifferent failure to train or supervise." Corwin v. City of Independence, MO., 829 F.3d 695, 699 (8th Cir. 2016) (citations omitted). See also Monell v. Dep't of Social Servs. of the City of New York, 436 U.S. 658, 690-91 (1978); Mick v. Raines, 883 F.3d 1075, 1079-80 (8th Cir. 2018).

Here, Jackson has not presented any evidence to suggest that the City has created, adopted, or supported any policy or custom that would demonstrate municipal liability. To the contrary, the City has submitted copies of its relevant policies and training manuals, and the City has shown that Officer Stair received specific Taser training on top of his general law enforcement training. Moreover, the City investigated the tasing incident after the fact; as a result, Officer Stair received a written warning, and he was required to undergo additional use-of-force training.

Because Jackson fails to provide the evidence necessary to support his claims of municipal liability, the City is entitled to summary judgment as to Jackson's claims.

B. First Amendment Claim Against Officer Stair

Likewise, summary judgment in favor of Officer Stair on Jackson's First Amendment Claim is appropriate. The First Amendment protects freedom of speech, and Jackson argues that Officer Stair violated

his First Amendment rights by detaining him based on his speech. While the video evidence clearly shows that Jackson was loud and profane during the minutes surrounding the tasing incident, it does not necessarily follow that his arrest was grounded in an effort by Officer Stair to restrain Jackson's right to express himself. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." U.S. v. O'Brien, 391 U.S. 367, 376 (1968). Otherwise, any foul-mouthed citizen could bring a constitutional claim against an arresting officer. In this case, there is no evidence to support a First Amendment claim, and summary judgment was therefore appropriate.

C. Excessive Force Claims Against Officer Stair

Jackson also claims that Officer Stair used excessive force during the tasings in violation of his constitutional rights. The Fourth Amendment guarantees each citizen a right to be free from unreasonable searches or seizures. Where, as here, an excessive force claim is made against a law enforcement officer related to conduct involving an arrest, the Supreme Court has made clear that the conduct should be analyzed under an objective reasonableness standard. Graham, 490 U.S. at 394-96. Such an analysis requires the "careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."

Id. at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)). Relevant considerations include the severity of the crime at issue, whether the suspect posed an immediate safety threat, and whether he was actively resisting arrest or attempting to flee. Id. See also Henderson v. Munn, 439 F.3d 497, 502 (8th Cir. 2006). We judge the relevant facts from the perspective of a reasonable officer on the scene, not with 20/20 hindsight vision. Carpenter v. Gage, 686 F.3d 644, 649 (8th Cir. 2012). "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them. . . ." Graham, 490 U.S. at 397.

Here, Jackson was aggressive and non-compliant in response to Officer Stair's directives. Jackson ignored multiple orders to turn around, arguing with Officer Stair and even threatening him. When Officer Harness attempted to handcuff Jackson, Jackson turned around toward Officer Harness and raised his right fist near Officer Harness's head. At that point, Officer Stair deployed his Taser. A reasonable officer in Officer Stair's position could have viewed Jackson's actions as threatening, resisting arrest, and endangering the safety of an officer. The evidence in the record demonstrates that the first tasing was objectively reasonable.

The second tasing is a different story. When the electric probes from the first tasing struck Jackson, he fell to the ground. Only moments later, and without warning, Officer Stair again deployed his Taser. At the time of this second tasing, Jackson did not appear to

pose a threat to law enforcement, resist arrest, or flee – he was on his back, on the ground. Based on the Taser-mounted video, Jackson did not have time to show compliance or continued resistance before the second tasing was deployed. Officer Stair argued that he perceived Jackson to kick his legs out and turn his body as if to confront the officers again. The video footage, however, shows that Jackson was several feet away from the nearest officer, unable to pose a threat from his position on the ground.

The district court ruled that Officer Stair's conduct *as a whole* was reasonable without considering whether the second tasing could be a constitutional violation on its own. See Smith v. Conway County, 759 F.3d 853, 860-61 (8th Cir. 2014) (even if the initial tasing of detainee was justified because he had just kicked a guard, second tasing would be unreasonable if detainee was no longer acting aggressively, no longer posed any immediate security concern, and was trying to comply with guard's orders). In light of the video footage depicting the quick succession of the tasings and dispute as to whether Jackson was resisting the officers or posing a threat at the time of the second tasing, we find that there is a genuine issue of material fact as to whether the second tasing amounted to excessive force.

The third tasing occurred after Officer Stair gave several clear orders for Jackson to stop moving and lay down on his stomach, or he would be tased. Afterward, Jackson moved in the direction of Officer Stair and rose to his knee in an apparent attempt to get off the

ground. Officer Stair then deployed his Taser for the third and final time before Jackson complied with his demands and was arrested. A reasonable officer in Officer Stair's position could have perceived Jackson to be resisting arrest and could have feared for his safety. Based on our review of the record, we conclude the third tasing was objectively reasonable.

D. Qualified Immunity

Officer Stair argues that the doctrine of qualified immunity shields him from any liability. Qualified immunity protects a government official from liability in a section 1983 action, unless the official's conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The court must follow a two-step inquiry in a qualified immunity analysis: "(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct." Brown v. City of Golden Valley, 574 F.3d 491, 496 (8th Cir. 2009). A right is clearly established if its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Hope v. Pelzer, 536 U.S. 730, 739 (2002). The relevant question is whether a reasonable officer would have fair warning that his conduct was unlawful. Brown, 574 F.3d at 499.

As explained above, because the first and third tasings were objectively reasonable, Jackson cannot show a violation of his constitutional rights. The second tasing, however, presents a closer question. If Officer Stair used excessive force during the second tasing, then qualified immunity will protect him from liability *only* if Jackson's constitutional rights were not clearly established at the time of the second tasing. When Officer Stair tased Jackson, however, it was well-settled law that the use of force against a non-violent detainee who was not actively fleeing or resisting arrest, or posing a security threat, was unlawful. Id. at 499-500; see also Smith, 759 F.3d at 860-61. If the second tasing amounted to excessive force, then Officer Stair is not entitled to qualified immunity.

III.

In the instant case, Officer Stair tased Jackson three times. The district court ruled that Officer Stair used a reasonable amount of force to subdue Jackson, considering the officer's conduct as a whole. The court erred by not considering and analyzing each tasing individually. We find the first and third tasings were objectively reasonable, and no Fourth Amendment violation occurred. As to the second tasing, we find there are genuine issues of material fact regarding whether Officer's Stairs [sic] use of force was excessive. Jackson failed to present sufficient evidence to establish a First Amendment claim against Officer Stair or to establish municipal liability against the City. We affirm in part,

reverse in part, and remand to the district court for proceedings consistent with this opinion.

WOLLMAN, Circuit Judge, concurring and dissenting.

I agree with the court that Officer Stair's first and third tasings were objectively reasonable and that Jackson's First and Fourth Amendment and municipal liability claims are without merit.

When viewed in light of his earlier manifestation of unceasing, rage-filled verbal and physical conduct, Jackson's momentary post-tasered position on the ground does not justify considering it as a clearly punctuated interim of compliance with Officer Stair's earlier commands, and thus the second tasing was not objectively unreasonable. Granted that Jackson had not at that point attempted to rise from the ground, his earlier-expressed threatened use of force against Officer Harness, when coupled with the nearly hysterical tone of his voice throughout his interaction with Stair and others nearby, justified the continued application of the Taser. It may appear from our chambers-viewed observation of the entire encounter to have been a too-hasty application, but given Jackson's earlier pretasing arm-waving, rant-filled anger and his reluctance to comply with Stair's several earlier-expressed commands and warnings, his momentarily supine position on the ground was hardly a guarantee of a no-longer aggressive subject, as was the case of the medical assistance-seeking detainee in Smith v.

Conway. In a word, then, although Officer Stair's quickly applied application following Jackson's initial fall to the ground may have been ill-advised, I do not believe that it was objectively unreasonable in the circumstances, and so I respectfully dissent from the court's decision to remand the case for a further review of that issue.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2617

Charles Jackson

Plaintiff - Appellant

v.

Billy D. Stair, III, individually and in his official capacity with Jacksonville Police Department;
Jacksonville Arkansas, City of;
Jacksonville Police Department

Defendants - Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Little Rock
(4:16-cv-00533-SWW)

JUDGMENT

Before ERICKSON, WOLLMAN, and GRASZ, Circuit Judges.

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

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part and reversed in part and the

case is remanded to the district court for proceedings consistent with the opinion of this Court.

September 12, 2019

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

_____
/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CHARLES JACKSON PLAINTIFF	*	
V.	*	CASE NO. 4:16CV00533 SWW
BILLY D. STAIR, III, ET AL. DEFENDANTS	*	

OPINION AND ORDER

(Filed Mar. 12, 2018)

Plaintiff Charles Jackson ("Jackson") brings this action under 42 U.S.C. § 1983, claiming that Jacksonville police officer Billy Stair ("Stair") used excessive force against him. Jackson sues Stair in his individual and official capacities, and he also names the City of Jacksonville (the "City") and the Jacksonville Police Department as defendants. Before the Court are (1) the City's motion for summary judgment [ECF Nos. 19, 20, 21], Jackson's response in opposition [ECF Nos. 33, 34, 35], and the City's reply [ECF No. 40] and (2) Stair's motion for summary judgment [ECF Nos. 22, 23, 24], Jackson's response in opposition [ECF Nos. 28, 29, 30], and Stair's reply [ECF No. 40]. After careful consideration, and for reasons that follow, the Court grants summary judgment in Defendants' favor, and the case is dismissed with prejudice.

I. Summary Judgment Standard

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As a prerequisite to summary judgment, a moving party must demonstrate 'an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the non-moving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986)

The non-moving party may not rest on mere allegations or denials of his pleading but must come forward with 'specific facts showing a genuine issue for trial. Id. at 587. "[A] genuine issue of material fact exists if: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine, that is, a reasonable jury could return a verdict for either party." *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co*., 49 F.3d 399, 401 (8th Cir. 1995).

II. Background

On July 23, 2013, Stair responded to a dispatch call regarding a physical disturbance then in progress at Vaughn Tire, a private business in Jacksonville. A dash cam on Stair's patrol car recorded the following

events.[1] Upon his arrival, Stair observed Jackson and another man walking in the parking lot, with several others following behind. Stair calmly asked, "What's going on guys," and Jackson, who appeared very agitated, began walking toward Stair while yelling and pointing toward another man. Stair told Jackson to relax, and Jackson shouted, "Get him, and I'll relax." Stair instructed Jackson to stand by his patrol car and to keep his hands out of his pockets. Jackson began walking toward the patrol car, but he stopped immediately in front of Stair, and shouted, "I don't have nothing in my pockets," while putting his left hand in the pocket of his shorts. Stair then ordered Jackson to turn around, and he took his Taser from his belt. Stair's dash cam and his Taser camera recorded that Jackson moved toward the patrol car, but he maintained an aggressive posture while facing Stair and yelling. Stair again ordered Jackson to "turn around" and face the front of the patrol car. Jackson failed to comply and continued yelling, and Stair warned Jackson that if he did not turn around, he would use his Taser. Jackson turned around for a moment but immediately turned his head toward Stair and continued yelling, asking for Stair's badge number and threatening to file a complaint against him. Stair repeatedly ordered Jackson to turn around, and Stair continued to yell, curse, and ignore Stair's orders.

---

[1] ECF No. 25. Defendant Stair submitted the dash cam video in support of his motion for summary judgment, and Plaintiff cites the video exhibit in opposition to summary judgment and argues that the recording supports his claims.

Another officer, Kenneth Harness ("Harness"), arrived at the scene and attempted to handcuff Jackson, who continued yelling at the officers. At first, Jackson appeared to put his hands behind his back and comply, but he abruptly turned around and raised his right arm, with a closed hand, toward Harness. Stair immediately deployed his Taser, striking Jackson, who fell to the ground. Jackson rolled on to his side, then to his back, while moving his legs and arms. Stair ordered Jackson to "stop," and he activated his Taser a second time when Jackson failed to stop moving. Officers then ordered Jackson to lie on his stomach, but Jackson began to stand up, which prompted Stair to activate his Taser a third time. Jackson finally complied with orders to lie on his stomach, and Harness handcuffed him. According to a related police report, the incident ended with Jackson's arrest for disorderly conduct.

On July 25, 2016, Jackson filed this lawsuit pursuant to 42 U.S.C. § 1983 and the Arkansas Civil Rights Act ("ACRA"), charging that Stair and the City, violated his constitutional rights. Jackson also claims that Stair's conduct amounted to a felony under Arkansas law, entitling him to damages under Arkansas Code § 16-118-107(a).

III. Stair's Motion for Summary Judgment

In support of his motion for summary judgment, Stair argues that he is entitled to qualified immunity and that there are no genuine issues for trial.

Qualified Immunity

Section 1983 provides a cause of action for constitutional deprivations caused by persons acting under color of state law. However, the doctrine of qualified immunity shields government employees acting within the scope of their duties from suit under § 1983 so long as their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would know." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Determining whether a defendant is entitled to qualified immunity involves a two-step inquiry. The first question is whether, taken in the light most favorable to the plaintiff, the facts show that the defendant's conduct violated a constitutional right. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001). If the answer is no, the inquiry is over because the defendant is entitled to qualified immunity. If the answer is yes, the second question is whether the constitutional right at issue was clearly established. Id.

Jackson claims that Defendants violated his First, Fourth, Fifth, Eighth, and Fourteenth Amendment rights by means of an illegal seizure, excessive force and silencing "his disagreement with the company or employees of the company that serviced his truck."[2] For reasons that follow, the Court finds an absence of genuine controversy regarding these claims.

---

[2] ECF No. 1, ¶ 45.

Applicable Constitutional Provision

Jackson's references to the Fifth, Eighth, and Fourteen Amendments are misplaced. First, while the particular rights contained in the Bill of Rights apply to the States through the Fourteenth Amendment, the Fifth Amendment's Due Process Clause applies exclusively to federal government action, which is not at issue in this case. Second, neither the Eighth Amendment nor the Fourteenth Amendment's Due Process Clause provide a remedy for Jackson's illegal seizure and excessive force claims. Jackson's allegations place him outside the protections of the Eighth Amendment's proscription against cruel and unusual punishment, which applies only to convicted prisoners. *Hott v. Hennepin County*, 260 F.3d 901, 905 (8th Cir. 2000). Likewise, the substantive portion of the Due Process Clause has no application in this case. "Where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Graham v. Connor*, 490 U.S. 386, 395 (1989). When an officer allegedly uses excessive force in the course of an investigatory stop or an arrest, the text of the Fourth Amendment, which addresses unreasonable searches and seizures, provides the pertinent source of constitutional protection. *Id.* If a plaintiff cannot prevail under the Fourth Amendment's standards, "it is a certainty he cannot win it under the seemingly more burdensome, and clearly no less burdensome, [shock-the-conscience]

standard that must be met to establish a Fourteenth Amendment substantive due process claim." *Wilson v. Spain*, 209 F.3d 713, 716 (8th Cir. 2000).

Illegal Seizure. The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and it generally requires probable cause for lawful searches and seizures. U.S. Const. amend. IV; *Katz v. United States*, 389 U.S. 347, 357 (1967). However, "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145-46, 92 S. Ct. 1921, 1923 (1972). "On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response." *Id.* (citing Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1879-80 (1968)).

Jackson contends that Stair committed an illegal seizure when he ordered him to turn around and face the patrol car. Accepting that Stair effected a seizure at that point, he was permitted to take such steps as were reasonably necessary to protect his personal safety and maintain the status quo during the course of his investigation. *See United States v. Jones*, 759 F.2d 633, 638 (8th Cir. 1985). Stair had been called to the scene of a physical disturbance in progress, and given the volatile circumstances, he took reasonable

measures to stabilize the situation and retain the *status quo.*

Excessive Force. All claims that law enforcement officials have used excessive force in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its objective, reasonableness standard. *Graham v. Conner*, 490 U.S. 386, 395, 109 S. Ct. 1865 (1989). The test is whether the amount of force used was objectively reasonable under the particular circumstances that confronted law enforcement officers. *See Littrell v. Franklin*, 388 F.3d 578, 583 (8th Cir.2004) (quoting *Greiner v. City of Champlin*, 27 F.3d 1346, 1354 (8th Cir.1994)). Relevant circumstances include the threat posed by the subject, the severity of the crime, and whether the suspect resisted arrest. *Foster v. Metro. Airports Com'n*, 914 F.2d 1076, 1082 (8th Cir.1990). Force that later seems unnecessary does not violate the Fourth Amendment if it was reasonable at the time. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 1872 (1989).

The undisputed evidence shows that Stair attempted to subdue Jackson with verbal commands and warnings, but to no avail. Jackson remained loud and confrontational during the entire incident. He refused to follow instructions, he put his hand in his pocket

after Stair instructed him otherwise, and he raised his arm and hand toward Harness. Faced with these circumstances, a reasonable officer in Stair's position would reasonably perceive that the extent of force employed was reasonably necessary.

First Amendment. Jackson cites the First Amendment in his complaint, alleging that he "had a right to state and otherwise express his disagreement with the company or employees of the company that serviced his truck."[3] And in opposition to Stair's motion for summary judgment, Jackson argues:

> Defendants' initial decision to escalate the encounter, use force, and seize his person was wholly based on his speech. Jackson's speech was not even directed toward the shop personnel. Rather, it was an explanation of the situation directed to Officer Stair, who asked about the situation. Maybe he did not want the answer Jackson gave. Regardless, Jackson was initially seized because of his protected speech. Maybe, speech combined with his presence.[4]

To establish a claim that Stair seized Jackson and used force against him because of his speech, a First Amendment retaliation claim, Jackson must show: (1) that he engaged in a protected activity, (2) that Stair took adverse action against him that would chill a person of ordinary firmness from continuing in the

---

[3] ECF No. 1, ¶ 45.

[4] ECF No. 29, at 13.

activity, and (3) that the adverse action was motivated at least in part by the exercise of the protected activity. *Bennie v. Munn*, 822 F.3d 392, 397 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 812, 196 [sic] (2017), *and cert. denied*, 137 S. Ct. 814 (2017). The record is void of evidence that Stair's actions were aimed at silencing Jackson, who continued to express himself loudly throughout the entire encounter. Instead, Jackson took reasonable measures to prevent violence and calm a tense situation, and his actions were in response to Jackson's *conduct*, not the content of his speech. Even assuming that Stair's intervention somehow limited Jackson's ability to express himself, Stair was carrying out legitimate police functions and the incidental impact on Jackson's speech was no more than necessary.

In sum, the Court finds that Jackson has failed to present an issue for trial regarding a constitutional violation. Jackson is entitled to qualified immunity and summary judgment in his favor on Jackson's claims under § 1983 and the ACRA.[5]

Arkansas Crime Victim Statute

Arkansas's crime victims civil liability statute, Ark. Code Ann. § 16-118-107, provides a civil cause of

[5] The Arkansas Civil Rights Act (ACRA) specifically provides that a court may look for guidance to state and federal decisions interpreting the federal Civil Rights Act, see Ark. Code Ann. § 16-123-105(c), and the Arkansas Court of Appeals has relied on federal precedent to analyze an excessive-force claim under the ACRA. See Martin v. *Hallum*, 2010 Ark. App. 193, 374 S.W.3d 152 (2010).

action to "[a]ny person injured or damaged by reason of conduct of another person that would constitute a felony under Arkansas law." Jackson asserts that he is entitled to relief under this provision because Stair's use of a Taser would constitute a felony under Arkansas law. Stair notes, correctly, that Jackson has failed to come forward with evidence demonstrating that his conduct was felonious under Arkansas law. A conviction for felony battery in Arkansas requires proof that, with the purpose of causing serious physical injury, Jackson inflicted serious physical injury. *See* Ark. Code Ann. §§ 5-13-201 & 202. No such evidence exists in this case, and the Court finds no issues for trial on this claim.

IV. City's Motion for Summary Judgment

It is well settled that a plaintiff may establish municipal liability under § 1983 by proving that his or her constitutional rights were violated by an "action pursuant to official municipal policy" or misconduct so pervasive among non-policymaking employees of the municipality "as to constitute a 'custom or usage' with the force of law." *Ware v. Jackson County, Mo.*, 150 F.3d 873, 880 (8th Cir. 1998) (quoting *Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658, 691 (1978)).

"Official policy involves 'a deliberate choice to follow a course of action . . . made from among various alternatives' by an official who [is determined by state law to have] the final authority to establish

governmental policy." *Id.* (quoting *Jane Doe A. v. Special Sch. Dist*, 901 F.2d at 642, 645 (8th Cir. 1990)). Alternatively, "custom or usage" is demonstrated by: (1) the existence of continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) the plaintiff's injury by acts pursuant to the governmental entity's custom, *i.e.*, proof that the custom was the moving force behind the constitutional violation. *Id.* (quoting *Jane Doe A.*, 901 F.2d at 646).

Jackson fails to allege facts or provide any evidence to support a claim for municipal liability. Furthermore, when alleged conduct does not deprive a plaintiff of a federally protected right, which is the case here, an attendant § 1983 claim against a municipal employer for causing the conduct must fail. *See Olinger v. Larson*, 134 F.3d 1362, 1367 (8th Cir. 1998) ("In light of our ruling that Detective Larson and Chief Satterlee did not violate Olinger's fourth amendment rights, Olinger's claims against the City . . . must also fail."); *Abbot v. City of Crocker*, 30 F.3d 994, 998 (8th Cir. 1994) ("The City cannot be liable . . . whether on a failure to train theory or a municipal custom or policy theory, unless [an officer] is found liable on the underlying substantive claim."); *Kohl v. Casson*, 5 F.3d 1141, 1148 (8th Cir. 1993) (holding that because defendant officers possessed probable cause to obtain an arrest warrant, no basis for liability existed for the city or county).

Accordingly, no issues for trial exist as to claims against the City.

V. Jacksonville Police Department

The City moves for dismissal of claims against the Jacksonville Police Department on the ground that the department is not a suable entity. The capacity to sue or be sued is determined by the law of the state in which the district court is held. *See* Fed. R. Civ. P. 17(b). Under Arkansas law, political subdivisions, including cities, are empowered to sue and be sued, *see* Ark. Code Ann. § 14-54-101, but police departments are merely divisions or departments of political subdivisions, without the capacity to sue or be sued. *See Ketchum v. City of West Memphis, Ark.*, 974 F.2d 81, 81 (8th Cir.1992) ("The West Memphis Police Department and West Memphis Paramedic Services are not juridical entities suable as such. They are simply departments or subdivisions of the City government.").

The Court agrees that the Jacksonville Police Department is not subject to suit and must be dismissed as a party to this action.

VI. Conclusion

For the reasons stated, Defendants' motions for summary judgment [ECF Nos. 19, 22] are GRANTED. There being no issues for trial, pursuant to the judgment entered together with this order, this action is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED THIS 12TH DAY OF MARCH, 2018.

/s/Susan Webber Wright
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CHARLES JACKSON	*	
PLAINTIFF	*	
	*	CASE NO.
V.	*	4:16CV00533 SWW
BILLY D. STAIR, III, ET AL.	*	
DEFENDANTS	*	

JUDGMENT

Consistent with the Order that was entered on this day, it is CONSIDERED, ORDERED, and ADJUDGED that this action is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED THIS 12TH DAY OF MARCH, 2018.

/s/Susan Webber Wright
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2617

Charles Jackson

Appellant

v.

Billy D. Stair, III, individually and in his official capacity with Jacksonville Police Department, et al.

Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Little Rock
(4:16-cv-00533-SWW)

ORDER

(Filed Mar. 26, 2020)

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

Judge Colloton would grant the petition for rehearing *en banc.* Judge Loken joins.

COLLOTON, Circuit Judge, with whom LOKEN, Circuit Judge, joins, dissenting from denial of rehearing *en banc.*

Four judges have considered whether Officer Stair used reasonable force in apprehending appellant Jackson. Two judges (the district judge and the dissenting panel judge) concluded that the force was reasonable

under the Fourth Amendment; two judges (the panel majority) concluded that the force was unreasonable. *Jackson v. Stair*, 944 F.3d 704 (8th Cir. 2019). Yet the panel majority did not merely decide the reasonableness issue in a way that "promotes the development of constitutional precedent." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The panel opinion went further on the question of qualified immunity and concluded that a contrary conclusion about reasonableness was so clearly wrong that the issue was "beyond debate." 944 F.3d at 711 (quoting *Aschroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Under qualified immunity doctrine, therefore, the panel decision necessarily determined that a police action deemed constitutionally reasonable by the district judge and the dissenting panel judge would have been undertaken by only "the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). I would rehear the case "to secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35(b)(1)(A).

Qualified immunity has been a point of emphasis for the Supreme Court over the last decade, particularly in cases involving alleged use of excessive force by police officers. In 2017, the Court explained that, in the preceding five years, it had issued a number of opinions reversing federal courts in qualified immunity cases. *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *see City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (collecting cases). This was "necessary both because qualified immunity is important to society as a whole, and because as an

immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *White*, 137 S. Ct. at 551 (internal quotations omitted). The Court's attention to this topic, and the string of reversals, continued in the last two years. *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam). The Eighth Circuit thus far has avoided reversal in a qualified immunity case, although it may be noteworthy that no petition for writ of certiorari was filed from several divided panel decisions. *E.g.*, *Robinson v. Hawkins*, 937 F.3d 1128 (8th Cir. 2019); *Z.J. ex rel. Jones v. Kansas City Bd. of Police Comm'rs*, 931 F.3d 672 (8th Cir. 2019); *Michael v. Trevena*, 899 F.3d 528 (8th Cir. 2018); *Hoyland v. McMenomy*, 869 F.3d 644 (8th Cir. 2017); *Duffie v. City of Lincoln*, 834 F.3d 877 (8th Cir. 2016); *Atkinson v. City of Mountain View*, 709 F.3d 1201 (8th Cir. 2013); *Johnson v. Carroll*, 658 F.3d 819 (8th Cir. 2011).

The Supreme Court has enunciated several principles that should guide a court in evaluating qualified immunity in a case involving alleged use of excessive force:

- The Court "has repeatedly told courts . . . not to define clearly establish law at a *high level of generality*." *Emmons*, 139 S. Ct. at 503 (emphasis added) (internal quotation omitted); *Kisela*, 138 S. Ct. at 1152; *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *White*, 137 S. Ct. at 552; *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam); *Sheehan*, 135 S. Ct.

at 1775-76; *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014); *Reichle v. Howards*, 566 U.S. 658, 665 n.5 (2012); *al-Kidd*, 563 U.S. at 742.

- "The dispositive question is whether the violative nature of the *particular* conduct is clearly established." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (internal quotation omitted); *Mullenix*, 136 S. Ct. at 308; *al-Kidd*, 563 U.S. at 742.

- *"[S]pecificity is especially important in the Fourth Amendment context*, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Emmons*, 139 S. Ct. at 503 (emphasis added) (internal quotation omitted); *Kisela*, 138 S. Ct. at 1152-53; *Mullenix*, 136 S. Ct. at 308.

- "Use of excessive force is an area of the law in which the result depends very much on the facts of the case, and thus *police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." Emmons*, 139 S. Ct. at 503 (emphasis added) (internal quotations omitted); *Kisela*, 138 S. Ct. at 1153.

All of these propositions were discussed and applied in this court's recent en banc decision in *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019) (en banc), albeit with four judges dissenting. None of the propositions is even mentioned by the panel majority.

Officer Stair deployed a taser device three times to subdue Jackson after he refused to comply with commands and raised his fist toward another police officer's head. The panel majority ruled that the first and third deployments were reasonable, but that the second deployment was unreasonable *and* violated a clearly established right of Jackson. The panel opinion cited no comparable decision involving application of a taser against a non-compliant subject who threatened use of force against a police officer, and no decision holding that a subject's "momentary post-tasered position on the ground" requires an officer to consider it "a clearly punctuated interim of compliance" that makes another use of the taser unreasonable under the Fourth Amendment. *See* 944 F.3d at 714 (Wollman, J., dissenting).

Instead, to justify reversing the district court's grant of qualified immunity, the panel majority reasoned that "'general constitutional principles against excessive force' are enough to create a clearly established right and to put a reasonable officer on notice that a particular tasing was excessive." 944 F.3d at 713 (quoting *Shekleton v. Eichenberger*, 677 F.3d 361, 367 (8th Cir. 2012)). The opinion does not attempt to reconcile its reliance on "general constitutional principles" with the rule that clearly established law should not be defined at "a high level of generality."

The panel opinion also relied on decisions involving different legal inquiries or materially different circumstances that do not squarely govern the specific facts of this case. One authority, *Brown v. City of*

Golden Valley, 574 F.3d 491, 496 (8th Cir. 2009), held that use of a taser against a "seat-belt restrained passenger cowering in her automobile" was unreasonable. *See Rudley*, 935 F.3d at 654. The panel cited *Smith v. Conway County*, 759 F.3d 853 (8th Cir. 2014), which examined—under the *Eighth* Amendment—a taser shot fired as a "corporal inducement" against a nonviolent detainee who was in pain, seeking medical assistance, and attempting to comply with a jailer's orders. *Id.* at 860. The opinion referenced *Shekleton*, which addressed an officer's use of a taser against a compliant, nonviolent, nonfleeing misdemeanant after the officer unsuccessfully sought to handcuff the suspect and the two men accidentally fell to the ground. 677 F.3d at 366-67; *see Kelsay*, 933 F.3d at 980. And the panel majority relied on two decisions—*Shannon v. Koehler*, 616 F.3d 855 (8th Cir. 2010), and *Montoya v. City of Flandreau*, 669 F.3d 867 (8th Cir. 2012)—that did not even involve deployment of a taser, much less the question whether the Fourth Amendment forbids two five-second deployments of a taser to subdue a rage-filled subject who threatens force against an officer.*

---

* In a footnote, the panel opinion suggests that its holding is supported by the fact that "an internal department review of the tasing incident resulted in a reprimand of Officer Stair." 944 F.3d at 713 n.4. Stair's supervisor, however, reasoned only from a high level of generality that the second application of the taser was unreasonable under the standard of *Graham v. Connor*, 490 U.S. 386 (1989). Whatever the merit of that conclusion, the supervisor did not purport to apply the law of qualified immunity. *See* R. Doc. 33-1.

Whether the panel's reasoning is consistent with the Supreme Court's admonitions—including that clearly established law should not be defined "at a high level of generality," and that "police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue," *Emmons*, 139 S. Ct. at 503—is a matter that warrants further review.

March 26, 2020

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2617

Charles Jackson

Appellant

v.

Billy D. Stair, III, individually and in his official capacity with Jacksonville Police Department, et al.

Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Little Rock
(4:16-cv-00533-SWW)

ORDER

The court's order of December 6, 2019 is vacated and the following amended order issued.

The court's order of November 8, 2019 is amended as follows:

Appellee's petition for rehearing by the panel has been considered by the Court and is granted. The opinion and judgment of this Court filed on September 12, 2019, are vacated. The petition for rehearing en banc is moot.

December 09, 2019

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

_____
/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2617

Charles Jackson

Appellant

v.

Billy D. Stair, III, individually and in his official capacity with Jacksonville Police Department, et al.

Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Little Rock
(4:16-cv-00533-SWW)

AMENDED ORDER

Appellee's petition for rehearing by the panel has been considered by the Court and is granted. The opinion and judgment of this Court filed on September 12, 2019, are vacated. The petition for rehearing en banc is moot.

December 06, 2019

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

/s/ Michael E. Gans