Michael Wright vs. *Mario Cardenas*, et al. Supreme Court No._____

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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December 02, 2020

Michael J. Wright
13419 SUMMERTON DR
ORLANDO, FL 32824

Appeal Number: 19-14757-AA
Case Style: Michael Wright v. Mario Cardenas, et al
District Court Docket No: 6:17-cv-00436-CEM-DCI

Notice of receipt: Petition for Panel Rehearing and Petition for Hearing En Banc as to Appellant Michael J. Wright. NO ACTION WILL BE TAKEN - Case is closed.

Petition for Panel Rehearing was denied on November 10, 2020.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: T. L. Searcy, AA
Phone #: (404) 335-6180

MP-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14757-AA

MICHAEL J. WRIGHT,

Plaintiff - Appellant,

versus

MARIO CARDENAS,
IAN DOWNING,
FELIX ECHEVARRIA,
BRANDON LAYNE,
MICHAEL B. STRICKLAND, et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: JORDAN, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant Michael J. Wright is DENIED.

ORD-41

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 19-14757

District Court Docket No.
6:17-cv-00436-CEM-DCI

MICHAEL J. WRIGHT,

Plaintiff - Appellant,

versus

MARIO CARDENAS,
IAN DOWNING,
FELIX ECHEVARRIA,
BRANDON LAYNE,
MICHAEL B. STRICKLAND, et al.,

Defendants - Appellees.

Appeal from the United States District Court for the
Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: June 30, 2020
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna H. Clark

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14757
Non-Argument Calendar

D.C. Docket No. 6:17-cv-00436-CEM-DCI

MICHAEL J. WRIGHT,

Plaintiff-Appellant,

versus

MARIO CARDENAS,
IAN DOWNING,
FELIX ECHEVARRIA,
BRANDON LAYNE,
MICHAEL B. STRICKLAND, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Middle District of Florida

(June 30, 2020)

Before JORDAN, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

Michael Wright, proceeding *pro se*, sued the City of Kissimmee and several of its police officers under 42 U.S.C. § 1983. He alleged a number of constitutional violations related to his arrest in 2014.

As relevant here, the district court granted summary judgment in favor of the City on Mr. Wright's Fourth Amendment excessive force claim. This is Mr. Wright's appeal as to that claim. For the following reasons, we affirm.[1]

First, the district court did not err in permitting the City to amend its pre-trial statement, which contained a scrivener's error. In the pre-trial statement, the City said that it "denie[d] that its law enforcement used reasonable force during . . . the arrest," but the word "reasonable" should have been "unreasonable." A district court may allow a party to amend a pre-trial order, *see Sherman v. United States*, 462 F.2d 577, 579 (5th Cir. 1977), or a pre-trial statement, *see Cruz v. U.S. Lines Co.*, 386 F.2d 803, 804 (2d Cir. 1967), and here there was no abuse of discretion. The City notified the district court of the error just five days after the filing of the pre-trial statement, and each of the City's other filings denied wrongdoing. Mr. Wright was therefore not unfairly prejudiced by the amendment. *Cf. Perez v. Miami-Dade Cty.*, 297 F.3d 1255, 1264–67 (11th Cir. 2002) (holding, in a § 1983 case, that the district

[1] We assume the parties' familiarity with the record and set out only what is necessary to explain our decision. As to any issues not specifically discussed, we summarily affirm.

court should have permitted a municipality to withdraw its admission on the issue of custom/policy).

Second, we reject Mr. Wright's argument that the district court erred by relying on the reports of the police officers with respect to the force used and the reason force was necessary. The reason is that Mr. Wright expressly sued the officers only in their official capacities. *See* D.E. 157 at 2 ("this complaint is brought against all defendants in their **official capacity**") (emphasis in original). An official-capacity suit against a police officer or government official is a suit against the officer's employer—the government entity—so here the Fourth Amendment excessive force claims against the officers were municipal liability claims against the City. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

To hold the City liable for any excessive force used by its officers, Mr. Wright had to show that a custom, policy, or practice of the City caused the violations. *See, e.g., Hoefling v. City of Miami*, 811 F.3d 1271, 1279 (11th Cir. 2016). As the district court correctly explained, Mr. Wright did not present any evidence of a City custom, policy, or practice that caused the alleged excessive force. *See* D.E. 255 at 6–7. So there is no basis for municipal liability even if any of the officers used excessive force.[2]

AFFIRMED.

[2] Stated differently, the district court's consideration of the reports is at most harmless error.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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June 30, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-14757-AA
Case Style: Michael Wright v. Mario Cardenas, et al
District Court Docket No: 6:17-cv-00436-CEM-DCI

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call T. L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MICHAEL J. WRIGHT,

Plaintiff,

v.

Case No: 6:17-cv-436-Orl-41DCI

MARIO CARDENAS, IAN DOWNING, FELIX ECHEVARRIA, BRANDON LAYNE, MICHAEL B. STRICKLAND, BRADLEY A. WHEELER and CITY OF KISSIMMEE,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on Defendants' Motion for Summary Judgment Regarding Plaintiff's Fourth Amendment Excessive Force Claim ("Motion," Doc. 251). Plaintiff filed a Response in Opposition (Doc. 252) and an Amended Response in Opposition ("Amended Response," Doc. 253). The Court will consider the Amended Response. For the reasons stated herein, the Motion will be granted.

I. BACKGROUND

A. Arrest

On October 4, 2014, Felix Echevarria was working for the City of Kissimmee ("City") Police Department ("KPD") as a law enforcement officer. (Echevarria Report, Doc. 224-1, at 10).[1] At approximately 10:12 PM, Echevarria was patrolling an area known for illicit drug sales and

[1] Multiple KPD reports are included within the filing at Docket Entry 224-1. The Affidavit of Shannon Proco, KPD Records Supervisor, appears at pages 1–2. The Incident/Investigation Report and attachments appear at pages 4–9. The individual KPD officers' reports appear at pages 10–11 (Officer Echevarria), 12 (Officer Fundora), 13 (Officer Wheeler), 14 (Officer Layne), and 15–18 (Officer Downing).

drug use when he observed Plaintiff traveling on a bicycle with no lights, in violation of Florida law. (*Id.*; *see also* Pl.'s Dep., Doc. 224-6, at 20:10–13; Fla. Stat. § 316.2065(7) (noting that "[e]very bicycle in use between sunset and sunrise shall be equipped with a lamp on the front")). Echevarria activated his unmarked police vehicle's emergency lights and sirens and directed Plaintiff to stop. (Echevarria Réport at 10). Plaintiff looked back and took off on his bicycle. (*Id.*). Echevarria identified himself as a member of KPD and again ordered Plaintiff to stop. (*Id.*). Plaintiff continued to avoid apprehension, so Echevarria exited his vehicle and chased Plaintiff on foot. (*Id.*). While doing so, Echevarria relayed his location to dispatch. (*Id.*).

Echevarria eventually caught up to Plaintiff, who charged at Echevarria with a closed fist. (*Id.*). Echevarria dodged Plaintiff's punch and grabbed Plaintiff, resulting in them falling to the ground. (*Id.*). While on the ground, Plaintiff struck Echevarria in the head and continued to struggle as Echevarria commanded Plaintiff to stop resisting arrest. (*Id.*). Plaintiff broke free of Echevarria's grasp and fled on his bicycle. (*Id.*).

Two additional KPD police vehicles, driven by Officers Downing and Strickland (Downing Report, Doc. 224-1, at 16), approached the area to assist Echevarria. (Echevarria Report at 10). One of the vehicles, driven by Officer Strickland, stopped and blocked Plaintiff's path. (Echevarria Report at 10; Downing Report at 16). As Plaintiff tried to maneuver around Strickland's vehicle, Plaintiff struck the front passenger side bumper. (Echevarria Report at 10; Downing Report at 16). However, Plaintiff regained control of his bicycle and continued to evade the KPD officers. (Echevarria Report at 10; Downing Report at 16).

In the meantime, Officer Liusbel Fundora, who was patrolling nearby, heard Echevarria's call to dispatch regarding his pursuit of Plaintiff. (Fundora Report, Doc. 224-1, at 12). Fundora observed Echevarria chasing Plaintiff and joined in the pursuit. (*Id.*; Echevarria Report at 11). Fundora yelled "stop police" twice to Plaintiff, who continued to evade the officers. (Fundora

Report at 12). Fundora then deployed his taser but was uncertain if it made contact with Plaintiff. (*Id.*). Fundora continued to pursue Plaintiff. (*Id.*).

Officer Brandon Layne and Detective Mario Cardenas were patrolling in a nearby area and decided to assist with the apprehension of Plaintiff. (Layne Report, Doc. 224-1, at 14). The officers attempted to head off Plaintiff in their unmarked vehicle. (*Id.*). As Plaintiff approached them, Layne exited the vehicle and reached out to grab Plaintiff off his bicycle. (*Id.*). Plaintiff swerved to avoid Layne and struck a parking curb, causing him to fall onto the asphalt. (*Id.*; Fundora Report at 12). Layne and Cardenas then attempted to handcuff Plaintiff. (Layne Report at 14; Fundora Report at 12). While Layne and Cardenas were attempting to handcuff Plaintiff, and Plaintiff was still resisting, Officer Bradley Wheeler arrived on the scene and assisted with getting Plaintiff under control and in handcuffs. (Wheeler Report, Doc. 224-1, at 13).

B. Criminal Case

Plaintiff was criminally prosecuted in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida, for resisting an officer with violence, battery of a law enforcement officer, possession of cocaine, and possession of drug paraphernalia. (Am. Information, Doc. 224-2, at 1–4). After a non-jury trial, Plaintiff was found guilty of all four charges. (Trial Transcript, Doc. 224-5, at 159:23–160:17; Judgment, Doc. 224-2, at 45). Plaintiff raised a number of issues, including the constitutionality of his arrest, both during and after his criminal trial. (*See generally* Doc. 224-2). All of Plaintiff's claims for relief were denied. (*See generally id.*).

C. Motion for Summary Judgment

This Court previously granted summary judgment to Defendants on Plaintiff's Fourth Amendment false arrest claim, Fifth Amendment claim, Sixth Amendment claim, Eighth Amendment claim, and Fourteenth Amendment claim. (Aug. 16, 2019 Order, Doc. 236, at 8–9). However, the Court denied summary judgment with respect to Plaintiff's Fourth Amendment excessive force claim. (*Id.* at 9). The Court held a hearing on the Fourth Amendment excessive force claim on September 18, 2019. (Sept. 18, 2019 Min. Entry, Doc. 244). At the hearing, counsel for Defendants moved for leave to file a supplemental motion for summary judgment regarding Plaintiff's Fourth Amendment excessive force claim, (Sept. 18, 2019 Ore Tenus Motion, Doc. 247), which was granted, (Oct. 3, 2019 Order, Doc. 248, at 1). Defendants now move for summary judgment on Plaintiff's Fourth Amendment excessive force claim, which is the only claim remaining in the instant litigation. (Doc. 251 at 1).

II. LEGAL STANDARD

Summary judgment is appropriate when the moving party demonstrates "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). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it may "affect the outcome of the suit under the governing law." *Id.* "The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1313–14 (11th Cir. 2007). Stated differently, the moving party discharges its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

However, once the moving party has discharged its burden, the nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories.

and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quotation omitted). The nonmoving party may not rely solely on "conclusory allegations without specific supporting facts." *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985). Nevertheless, "[i]f there is a conflict between the parties' allegations or evidence, the [nonmoving] party's evidence is presumed to be true and all reasonable inferences must be drawn in the [nonmoving] party's favor." *Allen*, 495 F.3d at 1314.

III. ANALYSIS

Plaintiff has alleged Fourth Amendment excessive force claims individually against each of the officers involved and against the City. Each of these claims will be considered separately.

As a threshold matter, this Court finds that Defendants' Motion is not moot, as Plaintiff argues in his Amended Response. The Joint Final Pretrial Statement (Doc. 238) contains a statement by Defendants that "[t]he City of Kissimmee denies that its law enforcement officers used reasonable force during the Plaintiff's arrest." (*Id.* at 2). Plaintiff argues that this is an admission and that therefore Defendants' Motion is moot. However, the City filed a Notice of Scrivener's Error (Doc. 242), noting that the reference to "reasonable" force should have been a reference to "excessive" force, (*id.* at 1). The assertion of a scrivener's error is supported by the remainder of Defendants' filings, all denying any wrongdoing. *See Myers v. Toojay's Mgmt. Corp.*, No. 5:08-cv-365-Oc-10GRJ, 2008 U.S. Dist. LEXIS 127783, at *3 (M.D. Fla. Dec. 16, 2008) (holding that the defendant should be permitted to correct its inadvertent admission via scrivener's error when it was clear from the remainder of the pleading that the admission was in error). Thus, it is clear that the City denies that its law enforcement officers used excessive force during Plaintiff's arrest. (Doc. 242 at 1).

A. Municipal Liability for Excessive Force

It is axiomatic that municipalities cannot be "vicariously liable under § 1983 for their employees' actions." *Connick v. Thompson*, 563 U.S. 51, 60 (2011). "A municipality or other local

government may be liable under [section 1983] if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation." *Id.* (quoting 42 U.S.C. § 1983). Particularly, a plaintiff "must ultimately prove that the [municipality] had a policy, custom, or practice that caused the deprivation." *Hoefling v. City of Miami*, 811 F.3d 1271, 1279 (11th Cir. 2016) (citing *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)). A "policy" includes "decisions of [the municipality's] duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403–04 (1997) (citing *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 694 (1978)). A "custom" includes a practice that has "not been formally approved by an appropriate decisionmaker" but that "may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Id.* at 404 (citing *Monell*, 436 U.S. at 690–91); *cf. Grech v. Clayton Cty.*, 335 F.3d 1326, 1329 (11th Cir. 2003) (en banc) (describing an "unofficial custom" as "shown through the repeated acts of a final policymaker for the [municipality]"). Taken together, a "municipality . . . may be held liable only if [the alleged] constitutional torts result from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law." *Hill v. Cundiff*, 797 F.3d 948, 977 (11th Cir. 2015); *see also Connick*, 563 U.S. at 61 (defining "[o]fficial municipal policy" to "include[] the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law").

Defendant correctly asserts that Plaintiff has not produced any evidence that the City "had a policy, custom, or practice" that caused the alleged use of excessive force by KPD officers.[2]

[2] Plaintiff's only apparent reference to policy, custom, or practice regarding excessive force is a law review Comment submitted at Docket Entry 249. The filing appears to assert the unremarkable proposition that a municipality may be held liable for the actions of its employees when the municipality has a policy that caused the Constitutional depravation. This is not evidence.

Hoefling, 811 F.3d at 1279 (citing *City of Canton*, 489 U.S. at 385). Thus, as a matter of law, Plaintiff cannot prevail on his Fourth Amendment excessive force claim against the City, and summary judgment will be granted to the City.

B. Individual Liability for Excessive Force

"[A] free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 388 (1989). "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." *Id.* at 396 (quotation omitted).

"In determining the reasonableness of the force applied, we look at the fact pattern from the perspective of a reasonable officer on the scene with knowledge of the attendant circumstances and facts, and balance the risk of bodily harm to the suspect against the gravity of the threat the officer sought to eliminate." *Terrell v. Smith*, 668 F.3d 1244, 1251 (11th Cir. 2012) (quotation omitted). When determining the perspective of a "reasonable officer on the scene," courts must be careful not to use the "the 20/20 vision of hindsight." *Id.* (quoting *Graham*, 490 U.S. at 396). "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*, 490 U.S. at 396–97.

"Fourth Amendment jurisprudence has staked no bright line for identifying force as excessive." *Jackson v. Sauls*, 206 F.3d 1156, 1170 (11th Cir. 2000) (quotation omitted). "The hazy border between permissible and forbidden force is marked by a multifactored, case-by-case balancing test, and the test requires weighing of all the circumstances." *Id.* (quotation omitted);

see also Scott v. Harris, 550 U.S. 372, 383 (2007) (noting that in order to determine whether excessive force was used "we must . . . slosh our way through the factbound morass of 'reasonableness'"). Nevertheless, the Eleventh Circuit distilled three guiding factors from *Graham* to assist in balancing the analysis: "(i) the severity of the crime at issue, (ii) whether the suspect poses an immediate threat to the safety of the officers or others, and (iii) whether he is actively resisting arrest or attempting to evade arrest by flight." *Steen v. City of Pensacola*, 809 F. Supp. 2d 1342, 1349–50 (N.D. Fla. 2011) (citing *Brown v. City of Huntsville*, 608 F.3d 724, 738 (11th Cir. 2010)).

Considering the evidence presented, all of the *Steen* factors heavily balance in favor of the individual KPD officers in this case. 809 F. Supp. 2d at 1349–50. Plaintiff was actively fleeing from a law enforcement officer. When Officer Echevarria caught up to Plaintiff, Plaintiff charged at Echevarria with a closed fist. During Echevarria's attempt to get Plaintiff under control, Plaintiff struck Echevarria in the head. At this point, Plaintiff had committed serious crimes, was an immediate threat to law enforcement officers, and was actively resisting arrest and attempting to evade arrest by flight. After Plaintiff got away from Echevarria, Plaintiff continued his attempts to evade all of the KPD officers now in pursuit. Officer Strickland attempted to head off Plaintiff by blocking Plaintiff's path with his vehicle. Plaintiff again attempted to evade officers, at which time he hit Strickland's vehicle. When yet a third set of KPD officers, Officers Layne and Cardenas, attempted to apprehend Plaintiff, he still continued to resist. It took three officers—Layne, Cardenas, and Wheeler—to finally get control of Plaintiff and get him in handcuffs.

Considering these undisputed material facts and the factors set forth by the Eleventh Circuit, this Court finds that all of the KPD officers' actions in attempting to apprehend Plaintiff were objectively reasonable. *See Terrell*, 668 F.3d at 1251. None of the KPD officers employed excessive force considering the attendant circumstances, *id.*, and Plaintiff has put forth no evidence

to the contrary. Thus, summary judgment is due to be granted to each of the individual KPD officers as to the Fourth Amendment excessive force claim.

IV. CONCLUSION

For the reasons stated herein, it is **ORDERED** and **ADJUDGED** that:

1. Defendants' Motion for Summary Judgment Regarding Plaintiff's Fourth Amendment Excessive Force Claim (Doc. 251) is **GRANTED**.
2. The Clerk is directed to enter judgment in favor of Defendants and against Plaintiff, providing that Plaintiff shall take nothing on any of his claims against Defendants. Thereafter, the Clerk shall close this case.

DONE and **ORDERED** in Orlando, Florida on November 4, 2019.

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MICHAEL J. WRIGHT,

Plaintiff,

v.

Case No: 6:17-cv-436-Orl-41DCI

MARIO CARDENAS, IAN DOWNING, FELIX ECHEVARRIA, BRANDON LAYNE, MICHAEL B. STRICKLAND, BRADLEY A. WHEELER and CITY OF KISSIMMEE,

Defendants.

_____/

ORDER

THIS CAUSE is before the Court on Defendants' Motion for Summary Judgment ("Motion," Doc. 224), to which Plaintiff filed a Response (Doc. 230). Also before the Court is Plaintiff's Motion for Sanctions (Doc. 221), to which Defendants filed a Response (Doc. 227). For the reasons set forth herein, the Motion will be granted in part, and Plaintiff's Motion for Sanctions will be denied.

I. BACKGROUND[1]

A. Arrest

On October 4, 2014, Defendant Felix Echevarria was working for the City of Kissimmee Police Department ("KPD") as a law enforcement officer. (Praco Aff., Doc. 224-1, at 10). At approximately 10:12 p.m., Echevarria was patrolling an area known for illicit drug sales and drug use when he observed Plaintiff traveling on a bicycle with no lights, in violation of Florida law. (*Id.*; *see also* Pl.'s Dep., Doc. 224-6, at 20:10–13; Fla. Stat. § 316.2065(7) (noting that "[e]very

[1] Plaintiff disputes all of the factual allegations contained within Defendants' Motion for Summary Judgment.

bicycle in use between sunset and sunrise shall be equipped with a lamp on the front")). Echevarria activated his unmarked police vehicle's emergency lights and sirens and directed Plaintiff to stop. (Doc. 224-1 at 10). Plaintiff looked back and took off on his bicycle. (*Id.*). Echevarria identified himself as a member of the KPD and again ordered Plaintiff to stop. (*Id.*). Plaintiff continued to avoid apprehension, so Echevarria exited his vehicle and chased Plaintiff on foot. (*Id.*). While doing so, Echevarria relayed his location to dispatch. (*Id.*).

Echevarria eventually caught up to Plaintiff, who charged at Echevarria with a closed fist. (*Id.*). Echevarria dodged Plaintiff's punch and grabbed Plaintiff, resulting in them falling to the ground. (*Id.*). While on the ground, Plaintiff struck Echevarria in the head and continued to struggle as Echevarria commanded Plaintiff to stop resisting arrest. (*Id.*). Plaintiff broke free of Echevarria's grasp and fled on his bicycle. (*Id.*).

Two additional KPD police vehicles approached the area to assist Echevarria. (*See id.*). One of the vehicles stopped and blocked Plaintiff's path. (*Id.*). As Plaintiff tried to maneuver around the vehicle, he struck the front passenger side bumper and swerved out of control. (*Id.* at 10–11). However, Plaintiff regained control of his bicycle and continued to evade the KPD officers. (*Id.* at 11).

In the meantime, Officer Liusbel Fundora, who was patrolling nearby, heard Echevarria's call to dispatch regarding his pursuit of Plaintiff. (*Id.* at 12). Fundora observed Echevarria chasing Plaintiff and joined in the pursuit. (*Id.* at 11–12). Fundora yelled "stop police" twice to Plaintiff, who continued to evade the officers. (*Id.* at 12). Fundora then deployed his taser but was uncertain if it made contact with Plaintiff. (*Id.* at 11–12). Fundora continued to pursue Plaintiff. (*Id.* at 12).

Defendants Officer Brandon Layne and Detective Mario Cardenas were patrolling in a nearby area and decided to assist with the apprehension of Plaintiff. (*Id.* at 14). They attempted to head off Plaintiff in their unmarked vehicle. (*Id.*). As Wright approached them, Layne exited the vehicle and reached out to grab Plaintiff off his bicycle. (*Id.*). Plaintiff swerved to avoid Layne and

struck a parking curb, causing him to fall onto the asphalt. (*Id.* at 12, 14). Layne and Cardenas then apprehended Plaintiff. (*Id.* at 11–12, 14).

B. Criminal Case

Plaintiff was criminally prosecuted in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida, for resisting an officer with violence, battery of a law enforcement officer, possession of cocaine, and possession of drug paraphernalia. (Am. Information, Doc. 224-2, at 1–3). After a non-jury trial, Plaintiff was found guilty of all four charges. (Trial Transcript, Doc. 224-5, at 159:23–160:17; Doc. 224-2 at 45). Plaintiff raised a number of issues, including the constitutionality of his arrest, both during and after his criminal trial. (*See generally* Doc. 224-2). All of Plaintiff's claims for relief were denied. (*See generally id.*).

II. MOTION FOR SUMMARY JUDGMENT

A. Legal Standard

Summary judgment is appropriate when the moving party demonstrates "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). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it may "affect the outcome of the suit under the governing law." *Id.* "The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1313–14 (11th Cir. 2007). Stated differently, the moving party discharges its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

However, once the moving party has discharged its burden, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at

324 (quotation omitted). The nonmoving party may not rely solely on "conclusory allegations without specific supporting facts." *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985). Nevertheless, "[i]f there is a conflict between the parties' allegations or evidence, the [nonmoving] party's evidence is presumed to be true and all reasonable inferences must be drawn in the [nonmoving] party's favor." *Allen*, 495 F.3d at 1314.

B. Analysis

1. Rule 26 Initial Disclosures

As an initial matter, Plaintiff argues that summary judgment should not be granted in Defendants' favor because the facts relied upon in Defendants' Motion cannot be presented in a form that will be admissible in court. Specifically, Plaintiff notes that Defendants primarily rely on an affidavit produced by Shannon Praco, a records supervisor for the KPD, (Doc. 224-1 at 1), and Praco was not included Defendants' initial disclosures.

"If a party fails to provide information or identify a witness as required by Rule 26(a) . . . , the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P 37(c)(1). Here, the failure to disclose Praco for the limited purpose of authenticating the various KPD incident reports was harmless. First, it cannot be a surprise to Plaintiff that Defendants are relying upon the incident reports given the fact that the circumstances surrounding Plaintiff's arrest are at the center of this dispute. Second, Plaintiff does not argue that he did not have access to the incident reports or any other records authenticated by Praco. Moreover, Plaintiff does not appear to question the authenticity of those documents. "Given the harmlessness of allowing [Praco] to authenticate the document[s], the Court will not allow technicalities to impede a determination of the substantive issues in this case." *Budget Rent A Car Sys., Inc. v. Shea*, No. 6:17-cv-993-Orl-41GJK, 2018 WL 5920478, at *2 (M.D. Fla. Nov. 13, 2018).

2. Fourth Amendment Claims

Defendants argue that they are entitled to summary judgment on Plaintiff's Fourth Amendment claims pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, the Supreme Court held that:

> to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

512 U.S. 477, 486–87. Thus, when a plaintiff seeks damages in a § 1983 suit, "the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487. "But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed . . . ." *Id.* (emphasis omitted).

Here, Plaintiff asserts a claim for false arrest under the Fourth Amendment, arguing that Defendants lacked probable cause to initiate a traffic stop. However, a determination that the officers did not possess probable cause would imply the invalidity of Plaintiff's conviction for resisting an officer with violence. *See Quinlan v. City of Pensacola*, 449 F. App'x 867, 870 (11th Cir. 2011) ("[A] finding that the officers did not have probable cause [to execute a traffic stop] would imply the invalidity of [plaintiff's] conviction for resisting an officer without violence."). Therefore, Plaintiff's false arrest claim is barred by *Heck*, and summary judgment will be entered in favor of Defendants on this claim.

Plaintiff also asserts a claim for excessive force under the Fourth Amendment.[2] To the extent that Defendants argue Plaintiff's excessive force claim is barred by *Heck*, that is not the case. *See Dyer v. Lee*, 488 F.3d 876, 881 (11th Cir. 2007) ("In this circuit, we have previously allowed § 1983 suits for excessive force to proceed in the face of a *Heck* challenge."). Because Defendants raise no other grounds for challenging Plaintiff's excessive force claim under the Fourth Amendment, summary judgment is denied as to that claim.

3. Fifth Amendment Claim

Plaintiff's Amended Complaint asserts a claim for a violation of his Fifth Amendment rights. Defendants argue they are entitled to summary judgment on this claim because the Fifth Amendment does not apply to state actors. In his response, Plaintiff stipulates to the inapplicability of the Fifth Amendment to this case. (Doc. 228 at 7). Therefore, Defendants Motion for Summary Judgment will be granted as to this claim.

4. Sixth Amendment Claim

Defendants aver that they are entitled to summary judgment on Plaintiff's Sixth Amendment claim because the state attorney filed the allegedly defective charging document. The Amended Complaint does not explain how Defendants violated Plaintiff's Sixth Amendment rights, and Plaintiff does not elaborate on this claim in his Response. Therefore, Defendants are entitled to summary judgment as to this claim.

5. Eighth Amendment Claim

Defendants assert that they are entitled to summary judgment on Plaintiff's Eighth Amendment claim because it does not apply to the use of force during an arrest. The Court agrees that Plaintiff cannot state a claim under the Eighth Amendment for the allegedly excessive force

[2] Although Plaintiff mentioned in his deposition that he was bringing an excessive force claim under the Eighth Amendment, (*see* Doc. 244-6 at 41:4–8), the Court is obligated to liberally construe the allegations in Plaintiff's Amended Complaint. *See Haines v. Kerner*, 404 U.S. 519, 520–21 (1972).

he experienced while being arrest. *See Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (noting that claims involving the mistreatment of convicted prisoners are governed by the Eighth Amendment). Therefore, Defendants' Motion for Summary Judgment will be granted as to this claim.

6. Fourteenth Amendment Claim

Finally, Defendants argue that summary judgment should be entered in their favor on Plaintiff's Fourteenth Amendment due process claim because Plaintiff has not put forth facts necessary to demonstrate a deprivation of his procedural or substantive due process rights. As the Eleventh Circuit explained, a procedural due process violation occurs "only when the state refuses to provide a process sufficient to remedy the procedural deprivation." *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994). Here, Plaintiff has had multiple opportunities to contest his conviction, including before the Florida Fifth District Court of Appeals and the Florida Supreme Court, and Plaintiff has failed to explain how he was subjected to a procedural deprivation caused by Defendants. Therefore, Defendants are entitled to summary judgment as to Plaintiff's procedural due process claim.

To the extent that Plaintiff asserts a substantive due process claim, Plaintiff "cannot seek relief under a Fourteenth Amendment substantive due process theory for his arrest and claims of excessive force; those claims as alleged fall squarely within the protections of the Fourth Amendment and thus can only be brought under that Amendment." *Woods v. Valentino*, 511 F. Supp. 2d 1263, 1285 (M.D. Fla. 2007) (citing *Albright v. Oliver*, 510 U.S. 266, 274–75 (1994)). Because Plaintiff asserts no other theories of relief under the Fourteenth Amendment, Defendants are entitled to summary judgment on this claim.

III. MOTION FOR SANCTIONS

Plaintiff moves for sanctions against Defendants for allegedly failing to abide by the Court's Case Management and Scheduling Order (Doc. 168). Specifically, Plaintiff argues that

Defendants' counsel canceled the original mediation without justification, failed to provide the mediator with a written summary of the facts and issues of the case, and refused to agree to schedule a meeting to prepare the joint final pretrial statement.

Federal Rule of Civil Procedure 16(f) allows a court to impose sanctions for failure to obey a scheduling or other pretrial order. Fed. R. Civ. P. 16(f)(1)(C). "Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 16(f)(2). "The purposes of this wide range of sanctions authorized by Rule 16(f) are to allow for punishment of lawyers and parties for unreasonably delaying or otherwise interfering with the court's ability to manage trial preparation expeditiously, to prevent unfair prejudice to the litigants, and to ensure the integrity of the discovery process." *Hicks v. Client Servs., Inc.*, No. 07-61822-CIV-DIMITROULEAS/ROSENBAUM, 2009 WL 10667497, at *3 (S.D. Fla. Feb. 11, 2009). "Issuance of monetary and other sanctions under Rule 16(f) for violations of scheduling or other pretrial orders falls within the Court's discretion." *Vaughn v. GEMCO2, LLC*, No. 6:17-cv-1713-Orl-41KRS, 2018 WL 6620600, at *3 (M.D. Fla. Oct. 31, 2018), *report and recommendation adopted*, 2019 WL 1765051 (M.D. Fla. Apr. 22, 2019).

Here, Plaintiff has not shown that Defendants failed to obey any of the Court's orders, let alone that Defendants' conduct caused unreasonable delay or unfair prejudice. The parties conducted mediation, and the deadline to meet in person and prepare a joint final pretrial statement has not yet expired. Therefore, Plaintiff's Motion for Sanctions will be denied.

IV. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendants' Motion for Summary Judgment (Doc. 224) is **GRANTED in part**.

2. Defendants are entitled to summary judgment on Plaintiff's Fourth Amendment false arrest claim, Fifth Amendment claim, Sixth Amendment claim, Eighth Amendment claim, and Fourteenth Amendment claim.
3. The Motion is **DENIED** with respect to Plaintiff's excessive force claim under the Fourth Amendment.
4. Plaintiff's Motion for Sanctions (Doc. 221) is **DENIED**.
5. The parties shall personally attend a hearing on September 18, 2019 at 2:00 PM in Orlando Courtroom 5B before Judge Carlos E. Mendoza to present additional argument on Plaintiff's excessive force claim under the Fourth Amendment.

DONE and **ORDERED** in Orlando, Florida on August 16, 2019.

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MICHAEL J. WRIGHT,

Plaintiff,

v. **Case No: 6:17-cv-436-Orl-41DCI**

MARIO CARDENAS, IAN DOWNING, FELIX ECHEVARRIA, BRANDON LAYNE, MICHAEL B. STRICKLAND, BRADLEY A. WHEELER and CITY OF KISSIMMEE,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court upon *sua sponte* review. On April 19, 2019, the Court granted Defendants' Motion to Extend Dispositive Motions Deadline and set the deadline for May 1, 2019. (Apr. 19, 2019 Order, Doc. 220). The remaining deadlines in this case must also be amended to account for the extension of the dispositive motions deadline. Accordingly, it is **ORDERED** and **ADJUDGED** that the Case Management and Scheduling Order (Doc. 168) will be amended as follows:

1. All Other Motions Including Motions in Limine: August 1, 2019
2. Meeting in Person to Prepare Joint Final Pretrial Statement: September 3, 2019
3. Joint Final Pretrial Statement: September 13, 2019
4. Trial Status Conference: September 19, 2019, at 10:00 A.M.
5. Trial Term Begins: October 1, 2019.

DONE and **ORDERED** in Orlando, Florida on May 17, 2019.

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

Additional material from this filing is available in the Clerk's Office.