UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT ZIOLKOWSKI,

Plaintiff,

Case Number 12-10395
Honorable David M. Lawson

v.

CITY OF TAYLOR, DAVID STROMINGER, JOSEPH TRIGG, TIMOTHY CULP, PAUL O'CONNOR, MICHAEL MILKA, and JOHN MARIMPIETRI,

Defendants.
_____/

OPINION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Plaintiff Robert Ziolkowski has sued the City of Taylor and several of its police officers for violating his rights under the Fourth Amendment and state law when they subdued and arrested him during a violent episode involving armed assaults and destruction of property in Ziolkowski's neighborhood. The defendants acknowledge that they used substantial force against Ziolkowski, including deployment of Tasers and an attack dog. But they argue that the undisputed facts demonstrate that such force was necessary to subdue the plaintiff, who had lost touch with reality and control of his conduct and was behaving dangerously. The defendants moved for summary judgment, contending that the undisputed facts show that they acted reasonably within the law and the individual defendants are entitled to qualified immunity. After reviewing the record and hearing the parties' oral argument on May 10, 2013, the Court must agree. Therefore, the Court will grant the defendants' motion for summary judgment and dismiss the complaint.

I.

On January 30, 2010, the plaintiff, a combat veteran who suffers from PTSD, lost touch with reality. Apparently believing that armed men were coming to his street and threatening his family, the plaintiff, carrying a rifle, broke the windows on neighbors' houses and behaved in a threatening manner. After receiving multiple 911 calls about the plaintiff, police arrived on the scene and stopped their cars at the end of the plaintiff's block. The plaintiff drove his van into one of the police cars. A struggle ensued, about which the plaintiff and the defendants give somewhat varying accounts. What is uncontested, however, is that the plaintiff was Tasered multiple times and bitten twice by a police dog. The plaintiff has sued the City of Taylor and officers David Strominger, Joseph Trigg, Timothy Culp, Paul O'Connor, Michael Milka, and John Marimpietri in their individual and official capacities.

The record discloses the following facts, which are not in dispute unless specifically noted. Robert Ziolkowski is a Marine veteran who served in Yugoslavia and was honorably discharged in 2000. Before the incident, the plaintiff suffered from nightmares about his time in Yugoslavia; since the incident, he has been diagnosed with post-traumatic stress disorder (PTSD). At the time of the incident, the plaintiff lived with his wife and three children on Syracuse Street in Taylor, Michigan.

The night before the incident, the plaintiff said he had racing thoughts and dreams about an Arabic "militia coming down the street ready to shoot up the block." Defs.' Mot. for Summ. J. Ex. H1, Ziolkowski Dep. at 90-91. On January 30, 2010, the plaintiff woke at 5:00 or 6:00 a.m. and began watching Fox News. The plaintiff realized that his "mental state wasn't right" and tried to "get some self-control." *Id*. at 94-95. However, at some point, the plaintiff began to feel that his "life was in danger, and the life of [his] family was in danger." *Id*. at 98. He returned to his

bedroom and retrieved a seven-millimeter hunting rifle from underneath his bed. At that point, the plaintiff stated that he was not "in reality" and that he believed that he was "guarding a post and securing the welfare" of himself and his family. *Id.* at 102. The plaintiff's then-wife, Heather Ziolkowski, stated that the plaintiff was yelling that they had to get out of there because people were coming for them and that they had to pack and leave for Metro Airport. Heather tried to calm the plaintiff, but she eventually left the house and went to the home of her neighbors, Anthony Kozlowski and Betty Lindsey.

The plaintiff left his home carrying the rifle and went to the home of Robert Hubbard. Hubbard saw the plaintiff on the front lawn; the plaintiff screamed "the niggers are coming," and "I am going to shoot you first." Defs.' Mot. for Summ. J. Ex. I, Hubbard Aff. ¶ 6. The plaintiff smashed Hubbard's front window. Hubbard called 911 and told the dispatcher that if the police did not arrive soon, he would have to shoot the plaintiff. Hubbard stated that he was afraid for his life and the life of his mother. The plaintiff does not remember doing any of that (although he does not deny it), but does remember standing on his front yard yelling that people needed to evacuate or they would die.

The plaintiff then went to the house of Anthony Kozlowski and Betty Lindsey, still carrying his rifle. The plaintiff's recollection of that part of the episode is scant, but he recalls that he had his rifle and that he told Lindsey that she needed to "get the fuck out of here" or she was going to die. Defs.' Mot. for Summ. J. Ex. H1, Ziolkowski Dep. at 107. At his deposition, the plaintiff acknowledged that he was a threat to his neighbor's safety. Kozlowski and Lindsey told police that the plaintiff came in the side door of their house and pointed his rifle at Lindsey. Kozlowski pushed the plaintiff out of the side door. The plaintiff tried to reenter but Kozlowski held the door shut.

The plaintiff then smashed the window next to the side door with his rifle. He apparently left the rifle under the window. He then entered the house through the front door, where his wife was on the phone with police. The plaintiff grabbed the phone and smashed it. Kozlowski told the plaintiff to leave and the plaintiff complied and went to his van.

Around that time, the police had arrived at the scene. Defendant Strominger, then a corporal with the City of Taylor Police Department, parked his car in the middle of Syracuse Street, about 500 to 700 feet from the plaintiff. He observed the plaintiff standing behind the door of his van at the end of Syracuse; the van was facing Strominger. The plaintiff then got into his van and starting driving southbound on Syracuse toward Strominger. Apparently at about the same instant, defendant Corporal Trigg turned the corner from Cypress onto Syracuse and stopped his car next to Strominger's car in the southbound lane of Syracuse; the two police cars blocked traffic on Syracuse. The plaintiff drove his van into Trigg's police car, causing significant damage. Trigg and Strominger estimate that the plaintiff's van was traveling at 40 to 45 miles per hour at the time of the collision.

The plaintiff and Strominger exited their vehicles. From this point forward, although the general course of the incident is generally agreed upon and all parties agree that events moved quickly, they disagree about important specifics.

According to the defendants, when the plaintiff exited his van, he ran toward Trigg's car. Trigg remembers the plaintiff yelling at him; Strominger remembers hearing the plaintiff yelling about killing defendant Trigg. The plaintiff attempted to open the driver's side door of Trigg's car, but was unable to open the door because of damage resulting from the crash. Strominger yelled at the plaintiff to get down, but the plaintiff did not comply. The plaintiff then ran to the front of

Trigg's car, and Strominger believes that he warned the plaintiff that he was going to Tase him. When the plaintiff did not comply, Strominger shot the prongs of his Taser at the plaintiff. According to Strominger, the plaintiff did not react. Trigg heard the plaintiff yelling about the Marines and about killing "niggers" and "Jews." Strominger then "drive-stunned" the plaintiff with the Taser, which caused the plaintiff to fall to the ground.

Strominger struggled with the plaintiff, who was trying to push up off of the ground with his hands, which were under his body. Strominger yelled at the plaintiff to put his hands behind his back, but the plaintiff did not comply and continued to struggle, kicking his legs. Strominger Tased the plaintiff again. Trigg was able to leave his car and joined Strominger, holding down the plaintiff's left side and attempting to pull the plaintiff's left hand behind his back. The plaintiff was yelling that the officers were going to have to kill him. The plaintiff continued to struggle and kept his hands under his body; Strominger Tased the plaintiff again. The plaintiff kept fighting and attempting to push up with his hands underneath his chest. Defendant Milka then arrived with his dog, Xanto. The plaintiff yelled at the defendants that they would have to kill him, that he would soon be with his father, and that God was coming. Milka warned the plaintiff that if he did not give up his hands the dog would be sent in, but the plaintiff continued to struggle. Milka sent Xanto in and Xanto bit the plaintiff's right leg. Trigg was then able to grab the plaintiff's left arm and put a handcuff on it. Milka grabbed the plaintiff's right arm and "outed" Xanto, who laid down about two feet away. Trigg then collapsed, releasing the plaintiff's left arm. The plaintiff pulled his arm back under his body and continued to struggle.

At this point, Strominger was holding down the plaintiff's upper body while Milka attempted to get control of the plaintiff's arms. Milka again warned the plaintiff to stop resisting or the dog

would be sent in. When the plaintiff continued to resist, Milka re-engaged Xanto who bit the plaintiff on his right leg. Defendant O'Connor arrived and tried to grab the plaintiff's legs; the plaintiff kicked him. After a few more seconds of struggle, the officers were able to get the plaintiff handcuffed and Milka outed Xanto once again. O'Connor handcuffed the plaintiff's ankles.

Defendant Culp arrived at the end of the struggle and immediately checked on Trigg. Defendant Marimpietri arrived after the plaintiff was handcuffed. He observed the plaintiff flailing and yelling "kill me."

The defendants presented an affidavit from Carol Kuchar-Totte, who at the time lived at the corner of Syracuse and Cypress streets. Kuchar-Totte states that she heard the crash and went outside to see what was going on. She saw police officers struggling with the plaintiff. She heard the plaintiff "ranting, raving, and yelling out things that didn't make sense" and heard officers telling the plaintiff to stop resisting. Defs.' Reply Ex. A, Kuchar-Totte dep. at 6. She stated that she saw one of the officers lie down, apparently in pain. She also saw the dog called in to assist the officers and states that in her opinion, it took the help of the police dog to get the plaintiff handcuffed. According to Kuchar-Totte, the dog was called off once the plaintiff was handcuffed.

According to the plaintiff, he did not intend to hit Trigg's car. However, the plaintiff acknowledges that the accident was his fault because he was out of touch with reality. The plaintiff remembers going to the door of the police car after the collision and trying to open it. The plaintiff testified that he thought he might have hurt Trigg and wanted to see whether the officer was injured. He did not know whether he was yelling or screaming at that point. The plaintiff testified that the next thing he remembered was that his face was on the asphalt. He recalled that there were a lot of bodies on him, that he had difficulty moving and breathing, and that he was in significant pain. The

plaintiff stated that he remembered his hands being behind his back while he was "being electrocuted" but he did not remember when or how they got there. He did not remember whether he was yelling. He did not remember what any individual officer did.

Heather Ziolkowski testified at deposition that she heard "[T]asering going on." Pl.'s Resp. Ex. B, Heather Ziolkowski Dep. at 141. She was about five houses away from her husband and the police at the time. She heard a lot of yelling but could not tell who was yelling or make out what was being said. She testified that she saw the plaintiff in the middle of the street, lying face down, handcuffed, with five or six officers on top of him and a dog biting his leg. She yelled for the officers to stop but they did not call the dog off.

Once the plaintiff was handcuffed and the Tasing and biting ceased, the remaining events are not in dispute. EMS was called and the plaintiff was transported to Heritage Hospital. The EMS report notes that the responders were unable to obtain any information from the plaintiff due to "extreme combative manic behavior" and that because the plaintiff was "yelling and moving around in [a] psychotic manner" they were unable to provide any care while on route to the hospital. Defs.' Mot. for Summ. J. Ex. K. When he arrived at Heritage Hospital, the plaintiff was placed in restraints because he was "yelling, violently thrashing" and "spitting on staff." *Ibid*. The plaintiff was given a violent restraint order due to hitting, kicking, and biting. The plaintiff testified that he believed he was in the hospital for three days and did not come back to reality until the day before he was discharged.

The plaintiff was charged with home invasion, attempted home invasion, assault/resisting/obstructing a police officer causing injury, four counts of felonious assault, assault/resisting police officer, felony firearm, assault with great bodily harm and assault with intent

to murder. He was found not guilty by reason of insanity on January 4, 2011 and was admitted to the Center for Forensic Psychiatry on January 10, 2011. While the plaintiff was institutionalized, the plaintiff wrote a letter discussing the incident in which he accepted responsibility for his actions and apologized to law enforcement.

The plaintiff's complaint states a claim against the City of Taylor based on allegations that its police officers were trained and supervised inadequately. The Taylor Police Department's use of force policy, dated June 14, 1999, states that officers shall receive training in any weapons they carry and that officers are to use the minimum amount of force necessary in making arrests. Strominger testified that he received training on the use of force intermittently; sometimes once a month, sometimes every six months. He testified that he received training on the Taser when he first received it but does not know whether he was trained on the use of the Taser subsequently. Strominger testified that his last performance evaluation was about ten years ago. Trigg testified that he received training on the use of Tasers and was certified as a Taser instructor. According to Trigg, the Taser policy in place at the time required a warning be given prior to using a Taser, if possible. Trigg testified that he did not recall receiving any performance evaluations. Culp testified that officers were trained yearly on the use of force, had annual gun training, and were enrolled in training seminars periodically. Culp said that he had two written performance evaluations, but that they occurred more than five years prior to his retirement. O'Connor testified that he had received two performance reviews, that they would last for a year and then be discontinued. O'Connor also stated that officers are evaluated daily by their supervisors. Milka testified that he trained weekly as a K-9 officer and had a training on the use of force in general within the past 18 months. Milka discussed his training when he first became a K-9 officer, which involved four-months of full-time

training and then eight hours per week for three years after that. After that three year period, he trained twice a month. Milka testified that he received training on the use of Tasers when they were first issued. According to Milka, the department had a performance evaluation program earlier in his career, and that at one point supervisors discussed monthly statistics with officers. Finally, Marimpietri testified that his last training on the use of force was within the last year.

The plaintiff's complaint contains counts alleging excessive force in violation of the Fourth Amendment via 42 U.S.C. § 1983, municipal liability against the City of Taylor under section 1983 for failure to train and supervise, and state law claims for assault and battery and gross negligence. The defendants moved for summary judgment, and after the plaintiff's response, the Court heard oral argument on May 14, 2013.

II.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As the Sixth Circuit has explained:

> Both claimants and parties defending against a claim may move for summary judgment "with or without supporting affidavits." Fed. R. Civ. P. 56(a), (b). Such a motion presumes the absence of a genuine issue of material fact for trial. The court must view the evidence and draw all reasonable inferences in favor of the non-moving party, and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

Alexander v. CareSource, 576 F.3d 551, 557-58 (6th Cir. 2009).

"The party bringing the summary judgment motion has the initial burden of informing the district court of the basis for its motion and identifying portions of the record that demonstrate the absence of a genuine dispute over material facts." *Id*. at 558. (citing *Mt. Lebanon Personal Care*

Home, Inc. v. Hoover Universal, Inc., 276 F.3d 845, 848 (6th Cir. 2002)). "Once that occurs, the party opposing the motion then may not 'rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact' but must make an affirmative showing with proper evidence in order to defeat the motion." *Ibid*. (quoting *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)).

"[T]he party opposing the summary judgment motion must do more than simply show that there is some 'metaphysical doubt as to the material facts.'" *Highland Capital, Inc. v. Franklin Nat'l Bank*, 350 F.3d 558, 564 (6th Cir. 2003) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)) (internal quotation marks omitted). A party opposing a motion for summary judgment must designate specific facts in affidavits, depositions, or other factual material showing "evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. If the non-moving party, after sufficient opportunity for discovery, is unable to meet his or her burden of proof, summary judgment is clearly proper. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "Thus, the mere existence of a scintilla of evidence in support of the [opposing party]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [opposing party]." *Highland Capital*, 350 F.3d at 564 (quoting *Anderson*, 477 U.S. at 252) (quotations omitted).

Irrelevant or unnecessary factual disputes do not create genuine issues of material fact. *St. Francis Health Care Centre v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000). A fact is "material" if its resolution affects the outcome of the lawsuit. *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001). "Materiality" is determined by the substantive law claim. *Boyd v. Baeppler*, 215 F.3d 594, 599 (6th Cir. 2000). An issue is "genuine" if a "reasonable jury could

return a verdict for the nonmoving party." *Henson v. Nat'l Aeronautics & Space Admin.*, 14 F.3d 1143, 1148 (6th Cir. 1994) (quoting *Anderson*, 477 U.S. at 248).

In a defensive motion for summary judgment, the party who bears the burden of proof must present a jury question as to each element of the claim. *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000). Failure to prove an essential element of a claim renders all other facts immaterial for summary judgment purposes. *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 895 (6th Cir. 1991).

A.

The essence of the plaintiff's excessive force claim is that the defendants deployed the Taser and the dog after the plaintiff was subdued. He says the record contains facts that create a genuinely contested issue on these points. The Court disagrees. The plaintiff has not offered evidence that would permit a reasonable jury to conclude that the defendants used excessive force. The only evidence the plaintiff offers as to Strominger's use of the Taser is the plaintiff's testimony, which is of extremely limited value because the plaintiff admittedly has little recollection of the events. Because the evidence demonstrates that the plaintiff was resisting arrest, Strominer's use of the Taser was objectively reasonable. As for Milka's use of the dog, the plaintiff offers the testimony of his then-wife, who states that she saw a dog biting the plaintiff's leg for several seconds after the plaintiff was handcuffed. Taking that testimony as true, Milka's use of the dog was objectively reasonable under Sixth Circuit case law. Because the plaintiff has not demonstrated a genuine issue of material fact as to whether Strominger's or Milka's use of force was excessive, the plaintiff's claims against Trigg, Culp, and O'Connor based on their failure to intervene, and against the City of Taylor for its failure to train and supervise, must also fail. Finally, the plaintiff appears to have

abandoned his claim against Marimpietri; in any event, the plaintiff's claim against that defendant likewise fails because of the lack of a constitutional violation. Because the Court finds no constitutional violation, the Court need not reach the question of the individual defendants' qualified immunity.

The Court reaches these conclusions despite the defendants' insistence that the Court disregard the plaintiff's testimony in full. They argue that the plaintiff's version of events is so blatantly contradicted by the record that no reasonable jury could believe it and therefore the Court should decline to view the facts in the light most favorable to the plaintiff, citing *Scott v. Harris*, 550 U.S. 372 (2007). That argument is not persuasive. *Scott* is a case in which the Supreme Court held that the plaintiff's testimony about his version of a car chase could be disregarded at a summary judgment motion because it was "blatantly contradicted by the record." 550 U.S. at 380. But the record contradiction was a video tape that was so clear that it gave the lie to the plaintiff's testimony. That case does not apply here. There are no video recordings of the event in question; instead, the defendants rely on the 911 call recordings, bystander affidavits, the state criminal court settled record, medical records, and officer testimony. The only audio recording — the 911 call — does not concern the portion of events that is disputed; nor does the settled record provide much detail on the disputed events. The defendants have pointed to no case indicating that a plaintiff's version of events can be "blatantly contradicted" by the testimony of others. The Court will consider the record — including the plaintiff's testimony — in the light most favorable to the plaintiff.

An excessive force claim that arises in the context of an arrest or investigative stop of a free citizen is analyzed under the Fourth Amendment's "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 394-95 (1989). The Fourth Amendment standard is objective, and it is applied

without reference to the officer's subjective motivations. *Graham*, 490 U.S. at 397. The "'proper application' of the reasonableness inquiry 'requires careful attention to the facts and circumstances of each particular case . . . .'" *St. John v. Hickey*, 411 F.3d 762, 771 (6th Cir. 2005) (quoting *Graham*, 490 U.S. at 396). Factors to be considered in determining whether a use of force was excessive include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. The standard "contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002). A court must recognize that "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 397. At the summary judgment stage of an excessive force claim, once the court has "determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record . . . the reasonableness of [the defendant's] actions . . . is a pure question of law." *Dunn v. Matata*, 549 F.3d 348, 353 (6th Cir. 2008) (quoting *Scott*, 550 U.S. at 381 n. 8 (emphasis omitted).

A. Defendant Strominger

The plaintiff's claim against David Strominger is based on Strominger's use of his Taser. It is unclear precisely how many times Strominger deployed his Taser against the plaintiff, but the deposition testimony suggests that it was at least five times: once while the plaintiff was standing, and about four times while the plaintiff was on the ground. The plaintiff states that he had his hands behind his back and could not move while being Tased; the defendants contend that the plaintiff was

struggling and that his hands were underneath his chest. The plaintiff argues that Strominger initially Tased him without warning, but the page of the record that the plaintiff cites to support that assertion does not say that. The closest facts in the record are that the plaintiff does not recall whether he was warned and that Trigg, who was in his car at the time, did not hear Strominger warn the plaintiff.

Whether an officer's use of a Taser is reasonable essentially depends on whether the suspect is actively resisting. "It is clearly established that suspects have the right to be free from [T]asing where they are fully compliant with officers' orders, not resisting arrest, or immobilized and posing no threat of danger." *Watson v. City of Marysville*, No. 12-3478, 2013 WL 1224089, at *3 (6th Cir. Mar. 26, 2013) (unpublished) (citing *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 509 (6th Cir. 2012)). However, "[i]f a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a [T]aser to subdue him," even if the Taser is used repeatedly. *Hagans*, 695 F.3d at 509. The bounds of reasonable conduct when a suspect is resisting arrest is relatively broad. The Sixth Circuit has held that it was reasonable for officers to Tase a resisting suspect thirty-seven times, as well as use batons and pepper spray, where the suspect was behaving erratically. *Williams v. Sandel*, 433 F. App'x 353, 362-63 (6th Cir. 2011).

In this case, two of the *Graham* factors clearly cut in favor of the reasonableness of Strominger's actions. The crime was serious, and the officers could reasonably have believed that the plaintiff posed a serious threat of harm to the officers and to others. It is undisputed that the officers had received reports that the plaintiff was threatening neighbors with a gun and that immediately before Strominger's use of the Taser, the plaintiff had driven into another officer's car. Those two factors, therefore, suggest that Strominger's use of force was reasonable.

The plaintiff argues that Strominger's use of the Taser was unreasonable because the plaintiff was subdued at the time. However, the plaintiff has offered very little to rebut the officers' testimony that the plaintiff continued to struggle with officers while on the ground. The plaintiff himself offers only a patchy recollection of events, as he admittedly was disconnected from reality during the incident. The plaintiff does state that at one point his hands were behind his back and that he was being electrocuted, but was unable to say at what point that occurred and could not remember where his hands were between the time he fell to the ground and the time his hands got behind his back. Moreover, the defendants' account of the plaintiff's resistance is bolstered by the EMS report indicating that the plaintiff was moving in a "psychotic manner" and had to be restrained due to combative behavior, and resisted even when he was at the hospital. It is extremely difficult to believe that the plaintiff was compliant during the struggle and only became violent upon the arrival of medical personnel, and the record simply does not support that version of events.

In *Caie v. West Bloomfield Township.*, 485 F. App'x 92 (6th Cir. 2012), the Sixth Circuit examined a factual situation somewhat analogous to this case. Officers received calls that an intoxicated, suicidal suspect was in a rowboat in the middle of a lake. When officers arrived on the scene, the plaintiff refused to leave the lake and asked the officers what he would have to do to get them to shoot him. Eventually, the plaintiff left the water, where he continued to make comments about fighting the police and "exhibited dramatic mood swings." *Id.* at 94. The plaintiff did not comply with requests that he go with firemen to the hospital, and officers attempted to gain physical control of the plaintiff. The plaintiff was taken to the ground with his arms underneath his body. Officers repeatedly ordered the plaintiff to put his hands behind his back. When the plaintiff did not comply, one of the officers drive-stunned the plaintiff with a Taser. The Sixth Circuit found the use

of the Taser reasonable under the circumstances, even though the plaintiff was on the ground when the Taser was deployed. The court commented that the plaintiff "continued to be uncooperative by actively resisting the officers' attempts to secure his arms behind his back." *Id*. at 97.

In this case, similarly, the evidence demonstrates that the plaintiff was unstable, was yelling at police to kill him, and was resisting officers' attempts to handcuff him. Although the force Strominger used was greater that the force in *Caie*, the threat posed by the plaintiff was also greater. The officers had reason to believe that the plaintiff might be armed because they had received reports that he was threatening neighbors with a gun, and the plaintiff, unlike the plaintiff in *Caie*, continued to resist after the first application of the Taser. The Court concludes from the facts taken in the light most favorable to the plaintiff, and the deference granted to officers' on-the-spot judgments about the amount of force necessary in a particular situation, there is no genuine issue of material fact as to the plaintiff's excessive force claim against Strominger, and Strominger's use of force was within the bounds of the Fourth Amendment.

B. Michael Milka

The plaintiff's claim against defendant Milka is based on Milka's deployment of his dog, Xanto, which bit the plaintiff on the leg twice while the plaintiff was on the ground, and Milka's "knee strike" to the plaintiff. The plaintiff also argues, based on Heather Ziolkowski's testimony, that Xanto was still biting the plaintiff after he was handcuffed. The plaintiff stated in his brief that he testified at deposition that he felt his leg being bitten while handcuffed. That is not a correct characterization of the plaintiff's testimony. The plaintiff did testify that he felt his leg being bitten, but did not state that he was handcuffed at the time.

It is well established that an attack by an unreasonably deployed police dog in the course of an arrest is a Fourth Amendment excessive force violation. *Campbell v. City of Springsboro, Ohio*, 700 F.3d 779, 787-89 (6th Cir. 2012). The Sixth Circuit has addressed the use of police dogs in four main cases. In *Campbell*, the Sixth Circuit held that a reasonable jury could find that it was unreasonable for an officer to engage a police dog without any warning on a suspect who was lying face down with his arms at his side where there was evidence that the dog previously had engaged in excessive biting and had not been trained properly. *Campbell*, 700 F.3d at 787. In that case, the officer did not know what crime the plaintiff had committed and was not aware of a specific threat to anyone posed by the plaintiff. *Ibid*. In *Dunigan v. Noble*, 390 F.3d 486 (6th Cir. 2004), the Sixth Circuit concluded that it was not an unreasonable use of force for an officer to push a suspect's mother while in pursuit of a suspect, resulting in a police dog biting the suspect's mother. *Id*. at 494. In *White v. Harmon*, 65 F.3d 169 (6th Cir. 1995) (Table), the court held that an officer's use of an untrained police dog to bite the plaintiff when he was already handcuffed and in the police car constituted excessive use of force. *Id*. at *3. Finally, in *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), the Sixth Circuit determined that it was not an unreasonable use of force to send a police dog to find a suspect where the suspect was hiding in a building that was unfamiliar to the officer. *Id*. at 914.

As discussed above, the first two factors — the severity of the crime at issue, and whether the suspect poses an immediate threat to the safety of the officers or others — clearly favor the reasonableness of Milka's use of force in this case. The officers had reason to believe that the crime involved was serious and that the plaintiff posed a substantial threat of harm to officers and bystanders. Moreover, as discussed above, the evidence demonstrates that the plaintiff was resisting

arrest and handcuffing by the officers. The question with respect to Milka is whether Heather Ziolkowski's testimony that she observed Xanto biting the plaintiff's leg after he was handcuffed creates a genuine fact issue whether Milka's use of force was reasonable. Heather Ziolkowski did not testify that Xanto *began* to bite the plaintiff after he was handcuffed. She testified that "Rob was in the middle of the street laying face down, handcuffed. There was about five or six officers on top of him. He was — Rob was — Robert was face down. The dog was chewing on his leg. I yelled for them to stop and they did not command the dog to stop." Pl.'s Resp. Ex. B, Heather Ziolkowski dep. at 146. She said that she saw the dog gnawing on the plaintiff's leg for a couple seconds.

Heather Ziolkowski's testimony is contradicted by the testimony of the officers involved and by the affidavit of a bystander, Carol Kuchar-Totte, who stated that the police dog was called off the plaintiff once he was handcuffed. Moreover, Heather Ziolkowski was, by her own admission, about three houses away from the struggle as it occurred. However, for the purpose of this motion, the Court assumes that Heather Ziolkowski's testimony is accurate and that Xanto was still biting the plaintiff for "a couple seconds" after the plaintiff was handcuffed.

Even with this indulgence, however, there is no genuine issue of material fact as to whether Milka used excessive force. This case is dissimilar to other cases in which the Sixth Circuit has found that a dog bite constituted excessive force. In *Campbell*, the Sixth Circuit found that a dog bite could constitute excessive force where "the officers did not know the extent of the crime, if any, that [the plaintiff] had committed, or if he was actually armed" and where the plaintiff "was lying face down with his arms at his side" and "[a]t no point . . . actively resisting arrest." *Campbell*, 700 F.3d at 787. In contrast, here, the officers had information that the plaintiff had threatened his neighbors with a gun and could reasonably have believed he was armed. Moreover, as discussed

above, the record demonstrates that the plaintiff was resisting arrest at least at some point during the struggle.

White presents a more closely analogous situation, because it involved an already-handcuffed suspect. In *White*, a dog was sent to track the plaintiff. Before the dog succeeded, two other officers handcuffed the plaintiff and took him to the squad car. The officer in charge of the dog told the other two officers not to take the plaintiff away until the dog had tracked the plaintiff. When the dog arrived, the officers pulled the plaintiff to his feet and the dog bit the plaintiff. The Sixth Circuit concluded that it was unreasonable for the officer to request "for no apparent reason . . . that other officers postpone taking the plaintiff away so that he could bring a little-trained canine to the arrest scene . . . close enough to permit the dog to bite the plaintiff." *White*, 65 F.3d at *3. Although *White* is similar to the present case in that both plaintiffs were bitten while handcuffed, the situations are distinct in all other important respects. In *White*, there was no indication that the plaintiff was still resisting when the dog bit him, while here, there is a great deal of evidence to suggest that the plaintiff was resisting arrest and continued to resist even after being handcuffed. Nor is there any indication in Heather Ziolkowski's testimony that Xanto *began* biting the plaintiff after he was already handcuffed. Instead, she testified that Xanto was biting the plaintiff for a few seconds while the plaintiff was handcuffed. That is consistent with Milka's testimony that he called Xanto off after the plaintiff was handcuffed. At most, one might conclude that a few seconds elapsed between the plaintiff's being handcuffed and Xanto being outed. This is a far cry from *White*, in which the plaintiff apparently had been handcuffed for some time before being bitten. Finally, unlike in *Campbell* and *White*, in which the Sixth Circuit found the use of a police dog unreasonable, there is no evidence that Xanto was improperly or insufficiently trained or that he was prone to excessive

biting. The plaintiff has not offered evidence that creates a fact question on his claim of excessive force against defendant Milka, and the defendant is entitled to summary judgment.

C. Timothy Culp, Paul O'Connor, Joseph Trigg, and John Marimpietri

The plaintiff has presented no evidence to suggest that officers Culp or Marimpietri had any physical contact with the plaintiff. It appears that Culp arrived toward the end of the incident and Marimpietri arrived after the plaintiff already was handcuffed. In addition, the plaintiff does not argue that the force used by O'Connor or Trigg — namely, holding the plaintiff down or attempting to handcuff him — was excessive. The plaintiff argues that Culp, O'Connor, and Trigg may be held liable for their failure to intervene to prevent Strominger and Milka's use of excessive force. The plaintiff apparently has abandoned his claim against Marimpietri, because the plaintiff has offered no argument as to that defendant.

In order to hold an individual officer liable for the use of excessive force, a plaintiff must prove that the officer "(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force." *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997). "As a general rule, mere presence . . . , without a showing of direct responsibility for the action, will not subject an officer to liability." *Ghandi v. Police Dep't of City of Detroit*, 747 F.2d 338, 352 (6th Cir. 1984). However, an individual officer may be held liable for failure to prevent the use of excessive force where "(1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring." *Turner*, 119 F.3d at 429. "Each defendant's liability must be assessed individually based on his own actions." *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010). The plaintiff could conceivably

present a claim against Trigg, Culp, or O'Connor based on their failure to prevent the use of excessive force when they were present on the scene. However, because there is no genuine issue of material fact as to whether Strominger or Milka employed excessive force, there can be no viable claim against Trigg, Culp, O'Connor, and Marimpietri.

D. City of Taylor

The plaintiff argues that the City of Taylor is also liable for the defendant officers' alleged use of excessive force because of its failure to train or supervise its officers. However, because the Court finds that those officers did not violate the plaintiff's Fourth Amendment rights, the city cannot be liable either. It is well established that "[i]f no constitutional violation by the individual defendants is established, the municipal defendants cannot be held liable under § 1983." *Watkins v. City of Battle Creek*, 273 F.3d 682, 687 (6th Cir. 2001); *see also Peet v. City of Detroit*, 502 F.3d 557, 566 (6th Cir. 2007) (dismissing municipal liability claim because conduct of individual officers did not violate plaintiffs' right under Fourth Amendment to be free from unreasonable seizure); *see also City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (stating that "neither Monell [], nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm").

E. State law claims

The disposition of the plaintiff's federal excessive force claims foretells the outcome of his state law claims as well. The plaintiff argues that the conduct that gave rise to his excessive force claim also gives rise to a claim for assault and battery against defendants Strominger and Milka.

The defendants respond that there is no genuine issue of material fact as to the plaintiff's assault and battery claim and that in any event they are entitled to governmental immunity.

Under Michigan law, "[a]n assault is defined as any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Espinoza v. Thomas*, 189 Mich. App. 110, 119, 472 N.W.2d 16, 21 (1991) (citing *Tinkler v. Richter*, 295 Mich. 396, 401, 295 N.W. 201, 203 (1940)). To establish a viable claim for battery, the plaintiff must demonstrate a "willful and harmful or offensive touching of another person which results from an act intended to cause such a contact." *Ibid*. However, "[i]t is well-settled in our state's jurisprudence that 'a police officer may use reasonable force when making an arrest.'" *VanVorous v. Burmeister*, 262 Mich. App. 467, 480-81, 687 N.W.2d 132, 141 (2004) (quoting *Brewer v. Rerrin*, 132 Mich. App. 520, 528, 349 N.W.2d 198, 202 (1984)). The Court has determined that the amount of force used by the defendants in this case was not excessive under the circumstances. In other words, it was "reasonable." Therefore, under *VanVorous*, the assault and battery claim must fail as well.

The plaintiff's gross negligence claims are based on the intentional conduct of arresting officers Strominger and Milka. However, Michigan courts "reject[] attempts to transform claims involving elements of intentional torts into claims of gross negligence." *VanVorous*, 262 Mich. App. at 483-84, 687 N.W.2d at 143. In *VanVorous*, the court of appeals dismissed a gross negligence claim that was "fully premised on [the plaintiff's] claim of excessive force." *Id*. at 483, 687 N.W.2d at 143. Where "the gravamen of [a] plaintiff's claim against [a] defendant is that he intentionally and improperly" used excessive force, the plaintiff's claim "is one of an intentional

tort, and no amount of artful pleading can change that fact." *Latits v. Phillips*, 298 Mich. App. 109, 120, 826 N.W.2d 190, 197 (2012). Michigan courts routinely dismiss gross negligence claims premised on the same facts as excessive force claims. *See, e.g.*, *Parker ex rel. Peters v. School Dist. of City of Pontiac*, No. 305330, 2013 WL 1316742, at *6 (Mich. Ct. App. Apr. 2, 2013); *Johnson ex rel. Steward v. Driggett*, No. 306560, 2013 WL 375701, at * 7 (Mich. Ct. App. Jan. 31, 2013); *Mahl v. Maguire*, No. 287130, 2009 WL 3199153, at *3 (Mich. Ct. App. Oct. 6, 2009).

The plaintiff concedes that his gross negligence claim relies on the same facts as his excessive force claim. However, the plaintiff argues that his claim should not be dismissed for that reason. The case upon which the plaintiff relies, however, was decided before *VanVorous* and *Latits*, and therefore is not instructive as to the proper disposition of the plaintiff's gross negligence claim under Michigan law. *See Kostrzewa v. City of Troy*, 247 F.3d 633, 642-43 (6th Cir. 2001). Because the plaintiff concedes that his gross negligence claim is "fully premised" on his claim of excessive force, his gross negligence claim must be dismissed.

III.

There is no question that the officers in this case used a substantial amount of force to subdue and arrest the plaintiff. However, based on all the circumstances, the amount of force used was justified. No reasonable juror could come to any other conclusion. The defendants, therefore, are entitled to judgment in their favor as a matter of law.

Accordingly, it is **ORDERED** that the defendants' motion for summary judgment [dkt. #16] is **GRANTED**.

It is further **ORDERED** that the complaint is **DISMISSED WITH PREJUDICE**.

It is further **ORDERED** that the pending motions *in limine* [dkt. # 28, 29] are **DISMISSED as moot**.

. s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: July 24, 2013

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on July 24, 2013.

s/Shawntel Jackson
SHAWNTEL JACKSON