

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DEVIN LAROY MOORE,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
SERGEANT MICHAEL JOHN	:	
VANGELO, et al,	:	
Defendants	:	NO. 03-4718

MEMORANDUM AND ORDER

Gene E.K. Pratter, J.

September 6, 2005

Defendants Sergeant Michael Vangelo, Officer Michael Weston, former Chief of Police Lawrence Palmer, former Mayor Thomas F. Goldsmith, and the City of Easton¹ filed a Motion for Summary Judgment on June 17, 2005. Plaintiff Devon Moore filed his response to the Motion on July 21, 2005.²

¹ Plaintiff included an “Officer John Doe” in his Complaint. The Complaint was filed on August 14, 2003. Certainly, two years is a reasonable length of time for Plaintiff to identify “Officer John Doe,” but he has not done so. Therefore, the Court dismisses the claims against “Officer John Doe.”

Further, in the Complaint, Mr. Moore describes Captain Douglas H. Schlegel as “Defendant Captain H. Schlegel.” (Pl.’s Compl., at ¶ 7). However, from a review of the docket, it does not appear that Captain Schlegel has ever been properly served or properly identified as a Defendant. Therefore, the Court dismisses any claims asserted against Captain Schlegel.

The remaining Defendants, Sergeant Vangelo, Officer Weston, Mr. Palmer, Mr. Goldsmith, and the City of Easton, jointly have filed the instant Motion for Summary Judgment. Reference to “Defendants” in this Memorandum will describe these remaining Defendants.

² Mr. Moore’s response was originally due on July 1, 2005. On July 7, 2005, Mr. Moore filed an unopposed Motion for Extension of Time requesting an extension to file his response by July 18, 2005. The Court granted the Motion, allowing Plaintiff to file a response by July 19, 2005. Nonetheless, the response arrived late. The primary basis for the requested extension was Mr. Moore’s contention that a new 127-page report recently had been uncovered that was “material to many of the issues raised in the case sub judice.” (Pl.’s Mot. for Extension of Time, at ¶ 6). The Court notes that Mr. Moore does not cite to this report at any point in his response to the Motion.

In Count One of his Complaint, Mr. Moore asserts a claim pursuant to 42 U.S.C. § 1983 against Sergeant Vangelo and Officer Weston for violating his Fourth Amendment rights by using excessive force. Mr. Moore also asserts a Monell claim³ against the City of Easton, Mr. Palmer, and Mr. Goldsmith. Mr. Moore also asserts, in Count Two, an intentional infliction of emotional distress claim against all the Defendants and, in Count Three, an assault and battery claim against Sergeant Vangelo.⁴

Defendants argue that summary judgment is appropriate here. As to the excessive force claim against Officer Weston, Defendants argue that there is no evidence that Officer Weston used excessive force against Mr. Moore. As to the excessive force claim against Sergeant Vangelo, Defendants assert that Sergeant Vangelo's ordering his canine companion, Bere, to "bite and hold" Mr. Moore is not, as a matter of law, excessive force. Defendants also contend that Sergeant Vangelo is entitled to qualified immunity because his actions were not clearly established to be unlawful. According to Defendants, summary judgment should likewise be granted as to the Monell claim against Mr. Palmer, Mr. Goldsmith, and the City of Easton

³ Under Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978), a municipality or other local government and its officials can be liable for a Section 1983 violation by employees of that municipality if a plaintiff demonstrates that: 1) the municipal employees deprived plaintiff of a constitutional right; 2) the action of the municipal employees was done pursuant to a custom or policy of the municipality; and 3) such action was the cause of the deprivation. Monell, 436 U.S. at 691.

⁴ Mr. Moore withdrew Count Two, the intentional infliction of emotional distress claim, "in as much as the emotional distress damages claimed therein are subsumed in his Section 1983 count." (Pl.'s Resp., at 12 n.1). In his Complaint, Mr. Moore also asserted, in Count Four, a negligent infliction of emotional distress claim against all Defendants and, in Count Five, a negligence claim against all Defendants. Counts Four and Five were dismissed by then United States District Judge Franklin S. Van Antwerpen on February 13, 2004. Therefore, the only remaining counts for the Court to address in this Memorandum are Counts One and Three.

because Mr. Moore's constitutional rights were not violated. Finally, Defendants contend that summary judgment should be granted as to Mr. Moore's claim of assault and battery against Sergeant Vangelo because the force used in the arrest of Mr. Moore was justified.

For the reasons explained below, the Motion for Summary Judgment is granted and this case is dismissed in its entirety.

I. FACTUAL SUMMARY⁵

In the early hours of March 2, 2002, at approximately 2:30 a.m., a fight broke out on the streets of Easton. (Deposition of Devin Moore, at pp. 31-32, 41); (Police Incident Investigation Report of Sergeant Vangelo). The fight was violent and lasted for several minutes. (Deposition of Devon Moore, at pp. 37-39, 42). According to Mr. Moore, the fight was between two men,

⁵ According to the Court's General Pretrial and Trial Procedures, when filing a Motion for Summary Judgment, the movant must file "a numbered paragraph-by-paragraph recitation of facts with specific citations to the record for the support of such facts." J. PRATTER'S GEN. PRETRIAL AND TRIAL PROCEDURE § II.G. The respondent to a motion for summary judgment is directed to "state in similar paragraph form whether it agrees or disagrees that the facts as stated by the moving party are undisputed." *Id.* A respondent's failure to address the moving party's factual contentions "will lead to the Court's consideration of the moving party's factual assertion(s) as undisputed." *Id.*

In this case, Defendants filed a "Statement of Undisputed Material Facts," which provided the proper recitation of facts and citation, but were bulleted rather than numbered. In his response, Mr. Moore fails to note any specific disagreement with the Defendants' facts, but simply provided a narrative "Factual Background." A review of this narrative, outside of hyperbole and the statement that Mr. Moore was not a combatant but merely trying to break up the fight, does not reveal significantly different facts as to the events of March 2, 2002. In Defendants' reply, they cite to the section of the Court's General Pretrial and Trial Procedures discussed above and assert that "Plaintiff does not dispute and thus, accepts Defendants' Statement of Facts." Mr. Moore has not responded to this assertion.

The Court is cognizant that Defendants themselves, as well as Mr. Moore, failed to strictly abide by the Court's Procedures. However, Defendants' error could be quickly corrected by merely altering the bulleted paragraphs into numbered paragraphs. Mr. Moore's failure to respond, in any manner, to the factual assertions of Defendants is, under the Court's procedures, an acquiescence to the facts as asserted by Defendants. Therefore, the facts as asserted by Defendants are considered undisputed.

Saddiquie Williams and Isaac Holmes. (Deposition of Devon Moore, at p. 31). Mr. Moore claims to have entered the fight only to break it up, but admits to pushing the combatants after the police had arrived. (Deposition of Devon Moore, at pp. 37-39).

Sergeant Vangelo, one of the police officers who had arrived and observed the fight, warned the men to stop fighting, but the fight continued. (Police Incident Investigation Report of Sergeant Vangelo). Sergeant Vangelo then gave a command to his canine partner, Bere, to “bite and hold” Mr. Moore, who Sergeant Vangelo perceived to be a combatant. (Police Incident Investigation Report of Sergeant Vangelo). Bere bit Mr. Moore on the right forearm and held him for several seconds until ordered off by Sergeant Vangelo. (Deposition of Devon Moore, at p. 50); (Police Incident Investigation Report of Sergeant Vangelo). Sergeant Vangelo then ordered Mr. Moore to calm down and, after a short time, commanded Bere to release his bite on Mr. Moore. (Deposition of Devon Moore, at pp. 49-51); (Police Incident Investigation Report of Sergeant Vangelo). The dog complied.

Officer Weston, who was also on the scene, was the police officer who physically arrested Mr. Moore. (Deposition of Devon Moore, at p. 53); (Police Incident Investigation Report of Sergeant Vangelo). In order to place handcuffs on Mr. Moore, Officer Weston grabbed him and kicked his legs out, resulting in Mr. Moore falling to the ground. (Deposition of Devon Moore, at p. 53); (Police Incident Investigation Report of Sergeant Vangelo).

After being taken to a police station, Mr. Moore was asked if he wanted to go to a hospital to have his wounds from Bere’s bite treated. (Deposition of Devon Moore, at p. 55-56). Mr. Moore was taken to Easton Hospital by an officer. (Deposition of Devon Moore, at p. 58). At the hospital, Mr. Moore underwent an examination by a Doctor Mario Visperas. (Easton

Hospital examination report). Dr. Visperas cleansed and bandaged the wound. (Easton Hospital examination report). Mr. Moore also underwent an x-ray by Northampton Imaging Specialists. The x-ray showed no fractures or evidence of a foreign body. (Radiology Consultation Report by Northampton Imaging Specialists). One or two days later, Mr. Moore went to St. Luke's Hospital for further examination. (Deposition of Devon Moore, at p. 61-62). Mr. Moore did not receive any additional treatment at St. Luke's. (Deposition of Devon Moore, at p. 62). Mr. Moore sought no further treatment thereafter. (Deposition of Devon Moore, at p. 62-63).

Mr. Moore was charged with simple assault, resisting arrest, mutual combat, and disorderly conduct. (Deposition of Devon Moore, at p. 64). Mr. Moore was found not guilty on the simple assault and mutual combat charges, but was found guilty on the disorderly conduct charge. (Deposition of Devon Moore, at p. 64).

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Reviewing the record, the Court is obliged to "resolve all reasonable inferences in [the non-moving party's] favor." Jones v. Sch. Dist. of Phila., 198 F.3d 403, 409 (3d Cir. 1999). The moving parties, here Sergeant Vangelo, Officer Weston, Mr. Palmer, Mr. Goldsmith, and the City of Easton, bear the burden of showing that the record reveals no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Once the moving party has met its burden, the non-moving party, here Mr. Moore, must go beyond the pleadings to set forth specific facts showing that there is a

genuine issue for trial. Id. However, the party opposing summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts,” but must produce *competent evidence* supporting opposition. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The Court will not consider evidence on a motion for summary judgment that would not be admissible at trial. Pamintuan v. Nanticoke Mem’l Hosp., 192 F.3d 378, 387 n.13 (3d Cir. 1999).

To defeat a motion for summary judgment, factual disputes must be both material and genuine. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is “material” if it is predicated upon facts that are relevant and necessary and that may affect the outcome of the matter pursuant to the underlying law. Id. An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving parties. Id. at 248-49. Summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, because such a failure as to an essential element necessarily renders all other facts immaterial. Celetox Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Thus, if there is only one reasonable conclusion from the record regarding the potential verdict under the governing law, summary judgment must be awarded to the moving party. Anderson, 477 U.S. at 250.

III. DISCUSSION

Defendants raise several arguments in favor of summary judgment. Their first argument concerns the excessive force claim against Officer Weston. The second argument concerns the excessive force claim against Sergeant Vangelo. The third argument concerns the Monell claim against Mr. Palmer, Mr. Goldsmith, and the City of Easton. The fourth argument concerns the

claim of assault and battery against Sergeant Vangelo. The fifth and final argument concerns the intentional infliction of emotional distress claim against all Defendants. The Court will address each of these arguments in turn, except the final argument which concerns a claim Mr. Moore has withdrawn.

A. Excessive Force Claim Pursuant to 42 U.S.C. § 1983

An excessive force claim under § 1983 arising out of law enforcement conduct is based on the Fourth Amendment's protection from unreasonable seizures of the person. Graham v. Connor, 490 U.S. 386, 394-95 (1989). A cause of action exists under § 1983 when a law enforcement officer uses force so excessive that it violates the Fourth and Fourteenth Amendments to the United States Constitution. Brown v. Borough of Chambersburg, 903 F.2d 274, 277 (3d Cir. 1990). Police officers are privileged to commit a battery pursuant to a lawful arrest, but the privilege is negated by the use of excessive force. Edwards v. City of Phila., 860 F.2d 568, 572 (3d Cir. 1988). When a police officer uses force to effectuate an arrest, the force must be reasonable. Graham, 490 U.S. at 396. A court must judge the reasonableness of particular force “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Id.

The reasonableness of the officer's use of force is measured by “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.” Id. The reasonableness inquiry is objective, but should give appropriate consideration to the circumstances of the police action, which are often “tense, uncertain, and rapidly evolving.” Id. at 397.

1. Alleged excessive force by Officer Weston

Defendants contend that Officer Weston's sole involvement in this matter was the arrest of Mr. Moore. According to Defendants, Mr. Moore concedes that he suffered no injury from that arrest and the arrest was reasonable. Finally, in response to Mr. Moore's contention that Officer Weston is liable for failing to stop Sergeant Vangelo's excessive force, Defendants do not deny that an officer's failure to stop another officer's excessive force would make the unresponsive officer equally liable as the primary actor, but Defendants argue that Mr. Moore has not demonstrated that the actions of Sergeant Vangelo were unreasonable and a violation of Mr. Moore's constitutional rights.

Mr. Moore contends that Officer Weston's actions when arresting Mr. Moore were unreasonable and excessive. Mr. Moore cites to Bodine v. Warwick, 72 F.3d 393 (3d Cir. 1995), in which the Court of Appeals for the Third Circuit held that conflicting stories of how an arrest was effectuated precluded summary judgment. In Bodine the arrestee claimed to have offered no resistance and was thrown around the room while the officers claimed they simply handcuffed the arrestee. Thus, the Court of Appeals ruled that there was a material issue for a jury to resolve. Bodine, 72 F.3d at 400. Presumably, Mr. Moore suggests Bodine should apply here, but he has not delineated an account of events materially at odds with the account offered by Defendants.

Mr. Moore further contends that, even if Officer Weston did not use excessive force, his "failure to protect" Mr. Moore from Sergeant Vangelo makes him liable. See Wilson v. Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002) ("An officer may be held liable not only for his personal use of excessive force, but also for his failure to intervene in appropriate circumstances to protect

an arrestee from the excessive use of force by his fellow officers”); Galatino v. Formica, Nos. 88-4262, 89-935, 1989 WL 151164, at *2 (E.D. Pa. Dec. 13, 1989) (VanArtsdalen, J.) (“A police officer, whether supervisory or not, who ‘fails or refused to intervene when a constitutional violation such as an unprovoked beating takes place in his presence’ is subject to liability under 42 U.S.C. § 1983” (citing Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir. 1986))).

In Mr. Moore’s response, he fails to cite to any evidence from the record, but instead cites to the holding of the Court when it addressed Defendants’ Motion to Dismiss. Mr. Moore states “Judge Vanantwerpen [sic] found that a constitutional violation on the part of Defendant Weston had been sufficiently pled as a matter of law.” (Pl.’s Resp., at 14). Mr. Moore then cites to six paragraphs from the Complaint that allege facts which Mr. Moore contends demonstrate Officer Weston’s liability. Needless to say, neither the Court’s earlier analysis of the Motion to Dismiss nor the allegations in the Complaint govern the Court’s discussion of the instant Motion for Summary Judgment.

A review of the record shows that Mr. Moore concedes in his deposition that Officer Weston’s force during Mr. Moore’s arrest was not excessive. According to Mr. Moore: “[Officer Weston] came and grabbed me and tried to put handcuffs on me. And then, I don’t know, I think he grabbed the arm I was bit on, I don’t know, then he kind of tackled me or like swept my leg and tackled me to the ground and put handcuffs on me.” (Deposition of Devin Moore, at 53). Mr. Moore further conceded that he suffered no injury from this “tackle.” (Deposition of Devin Moore, at 53). The facts as alleged by Mr. Moore demonstrate a reasonable use of force by Officer Weston under the circumstances at the time. After initially attempting to place handcuffs on Mr. Moore while he was standing, Officer Weston used fairly minimal force to put Mr. Moore

onto the ground and handcuff him, all standard law enforcement tactics.

The Court finds that Officer Weston's use of force was reasonable and that Officer Weston did not personally violate Mr. Moore's constitutional rights. The Court finds further that, for the reasons discussed below, Sergeant Vangelo did not use excessive force. Therefore, Officer Weston cannot be held liable for his "failure to protect" Mr. Moore. The Court grants the Motion for Summary Judgment as to the excessive force claim against Officer Weston.

2. Alleged excessive force by Sergeant Vangelo

Defendants argue that the excessive force claim against Sergeant Vangelo fails because a single dog "bite and hold" is not constitutionally excessive force and, even if the "bite and hold" were found to be excessive, Sergeant Vangelo is entitled to qualified immunity. Defendants cite to a series of cases which all held that it was not objectively unreasonable to utilize a dog to effect an arrest.⁶ See Jarrett v. Town of Yarmouth, 331 F.3d 140, 150 (1st Cir. 2003) (holding that, in order to arrest a fleeing traffic violator, "after reviewing [Officer] McClelland's actions without 'the 20/20 vision of hindsight,' we simply do not find that [Officer] McClelland's decision to release Shadow [Officer McClelland's canine companion] was an exercise of objectively unreasonable force") (citations omitted); Mendoza v. Block, 27 F.3d 1357, 1363 (9th Cir. 1994) (holding "[u]sing a police dog to find [a fleeing bank robber believed to be armed], and to secure him until he stopped struggling and was handcuffed, was objectively reasonable under these circumstances" despite the fact that the dog bit both arms, due to the suspect struggling, and severely injured him); Matthews v. Jones, 35 F.3d 1046, 1052 (6th Cir. 1994)

⁶ One of the cases cited by Defendants is Tilson v. City of Elkhart, 96 Fed. Appx. 413 (7th Cir. 2003), which is marked as "Not to be cited per Circuit Rule 53." Therefore, it would be inappropriate for the Court to rely on this particular case and will not do so.

(holding that use of a dog to apprehend a suspect fleeing into woods was objectively reasonable); Carita v. Kandianis, No. 93-2850, 1994 WL 583213, at *11 (E.D. Pa. Oct. 20, 1994), *aff'd*, 65 F.3d 161 (3d Cir. 1995) (holding that it was reasonable to have a dog chase and tackle a suspect who was arrested for drunk driving and then escaped police custody);⁷ Barton v. Eichelberger, 311 F. Supp. 1132, 1145 (E.D. Pa. 1970) (holding that the use of a dog to grab and hold a fleeing suspect was objectively reasonable). Defendants further argue that they have found no case that would support that the actions of Bere were excessive as to Mr. Moore.

Defendants also argue that, even if there is a genuine issue of material fact as to whether Sergeant Vangelo's use of Bere was excessive force, he is entitled to the privilege of qualified immunity. In general, government officials performing discretionary functions are shielded from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982). To determine whether qualified immunity applies in a particular case, a court must apply a two-part test. First, a court must consider whether the facts, considered in a light most favorable to the allegedly injured party, show that the official's conduct violated a constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001); Carswell v. Borough of Homestead, 381 F.3d 235 (3d Cir. 2004). Once it is shown that a constitutional right was violated, a court must then consider whether the right was clearly established, such that the

⁷ Mr. Moore correctly notes that this opinion does not address a dog bite, but actually a dog tackle. Mr. Moore also notes that two cases relied on by the Court in Carita are Marley v. City of Allentown, 774 F. Supp. 343 (E.D. Pa. 1991), and Nelson v. Mattern, 844 F. Supp. 216 (E.D. Pa. 1994). In both of these cases, the courts found that police dogs were used in a manner that violated a suspect's rights because the dogs went beyond mere apprehension. These cases follow the Graham analysis that the Court will apply to the facts in this case.

official had reason to know the consequences of his specific actions. See Saucier, 533 U.S. at 201; Anderson v. Creighton, 483 U.S. 635, 636-37 (1987); see also Berg v. County of Allegheny, 219 F.3d 261, 272 (3d Cir. 2000).

Mr. Moore contends that the fact that he was bitten and held by Bere was excessive force. According to Mr. Moore, because Mr. Moore was not actually a combatant, but merely trying to break up the fight, it was unreasonable to have Bere bite and hold him. Mr. Moore cites to Rosenberg v. Vangelo, 93 Fed. Appx. 373 (3d Cir. 2004) and Ricker v. Weston, 27 Fed. Appx. 113 (3d Cir. 2002), in which the officers in this case were found liable by a jury for use of their canine companions in an excessive manner.⁸ In Rosenberg, Sergeant Vangelo was found liable for allowing Bere to bite a suspect after he had been handcuffed and was lying face down on the ground. Rosenberg, 93 Fed. Appx. at 375. In Ricker, Officer Weston and other officers improperly released their canine companions on a crowd in order to disperse the crowd without any warning and without any attempt to control the dogs. Ricker, 27 Fed. Appx. at 115-16. As to the claim of qualified immunity, Mr. Moore argues that both prongs of the test are satisfied, because Mr. Moore's constitutional right was violated and Sergeant Vangelo had reason to know his use of Bere in this manner was a constitutional violation in light of past judicial decisions involving the Easton police, including Rosenberg and Ricker.

Here, neither party has presented any case law that controls in these precise circumstances. The cases relied upon by Defendants address the use of a dog to stop a fleeing

⁸ Mr. Moore was quick to point out Defendants' error in citing to Tilson, discussed in footnote 6, *supra*, but he failed to mention when he cited to and relied on Rosenberg and Ricker that the Court of Appeals for the Third Circuit has designated both of these cases as "Not Precedential."

suspect. There is no evidence supporting that Mr. Moore was fleeing prior to Sergeant Vangelo's use of Bere to "bite and hold" Mr. Moore. Mr. Moore relies on non-precedential opinions that have noticeably different facts. In Rosenberg and Ricker, the dogs were used on individuals who were not presently a threat or in flight.

Therefore, the Court applies the Graham factors to determine if a reasonable jury could find Sergeant Vangelo's actions were unconstitutional. These factors 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. Mr. Moore argues that, because the Court must infer all facts in his favor during a summary judgment analysis, the Court is limited to the assumption that Mr. Moore was a non-combatant. This argument is without merit. The Court must only make all *reasonable inferences* in favor of Mr. Moore, not blindly adopt unsubstantiated allegations by a plaintiff as true. Jones v. Sch. Dist. of Phila., 198 F.3d 403, 409 (3d Cir. 1999). The facts, including Mr. Moore's own deposition testimony, are that Mr. Moore was seen by police officers involved in a violent fight involving three men. (Deposition of Devin Moore, at p. 37-38). Mr. Moore concedes he was pushing and shoving. (Deposition of Devin Moore, at p. 39). Further, Mr. Moore has not stated that he called out to the police or in any other manner identified himself as attempting to break up the fight rather than as an involved combatant.

Therefore, the uncontested facts are that Mr. Moore appeared to the police officers to be a combatant in a violent fight. This fight persisted for several minutes and none of the participants responded to the police officer's warnings. While Mr. Moore may not have heard the warnings, there is no evidence contradicting that the police officer gave warnings. At that point in the

events, Sergeant Vangelo released Bere on the combatants to remove one of the fighters. Mr. Moore was bitten and held by Bere.

A fight of the magnitude described in this record is a serious crime that places the combatants, the police, any bystanders, and property in immediate danger. Therefore, the first two factors of the Graham analysis apply, and Sergeant Vangelo was justified in using canine force to break up the fight. The force used, while admittedly not minor, was entirely reasonable to the level of threat presented by the conduct of the perceived combatants. Three men were involved and did not respond to warnings. Clearly, some physical force was necessary to quickly end the fight before serious injury occurred. Sergeant Vangelo's use of his canine companion, Bere, to remove one of the perceived combatants was reasonable to end the fight with the least risk to the other combatants and the officer. As such, the Court finds that Sergeant Vangelo's use of Bere was not a violation of Mr. Moore's constitutional rights. The Court need not address the remainder of the qualified immunity argument, because Mr. Moore's constitutional rights were not violated. See Saucier, 533 U.S. at 201 (holding that qualified immunity requires, initially, an official's conduct violated a constitutional right).

Therefore, the Court grants Defendants' Motion for Summary Judgment as to the excessive force claim against Sergeant Vangelo.

B. Excessive Force Monell Claims Against Mr. Palmer, Mr. Goldsmith, and the City of Easton

For a municipality or its managers to be liable for the actions of a police officer, the plaintiff must establish that not only did the individual police officer violate a constitutionally-protected right, but the violation resulted from a municipal "custom" or "policy" of *deliberate*

indifference to rights of citizens. Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 694-95 (1978); Andrews v. City of Phila., 895 F.2d 1469, 1480 (3d Cir. 1990). A “custom” arises from practices engaged in by state officials that are entrenched behavior in the municipal employees. Monell, 436 U.S. at 691. A plaintiff must “present scienter-like evidence of indifference on part of a particular policymaker or policymakers.” Simmons v. City of Phila., 947 F.2d 1042, 1060-61 (3d Cir. 1991).

Because the Court has found that no constitutionally-protected right was violated in this instance by either Sergeant Vangelo or Officer Weston, there is no basis for a Monell claim against Mr. Palmer, Mr. Goldsmith, or the City of Easton. The Court will not address whether the City of Easton had a municipal “custom” or “policy” of deliberate indifference to rights of its citizens.⁹ Therefore, the Court grants Defendants’ Motion for Summary Judgment as to the excessive force claims against Mr. Palmer, Mr. Goldsmith, and the City of Easton.

C. Assault and Battery Claim Against Sergeant Vangelo

⁹ Mr. Moore cited to numerous cases that describe prior violations by police officers of the City of Easton. Defendants state, in their Reply to Plaintiff’s Response, that Mr. Moore “[a]ttempts to cloud the examination of the facts of this case by recounting other lawsuits..., none of which are relevant to the threshold issue in this case, namely, *was it excessive force to use a police canine to bite and hold one of three men to break up... a violent street fight.*” (Def.’ Reply, at p. 2 (emphasis in original)). While Defendants are right that these cases did not address the issue of whether a constitutional violation was applicable, the cases were being used by Mr. Moore to demonstrate a “custom” or “policy” of using police canines in an excessive force manner.

Mr. Moore also relies on an expert report that was not provided to Defendants until filing of this response on July 21, 2005. In the Court’s Scheduling Order of December 15, 2004, any expert reports on behalf of Mr. Moore were to be provided by May 13, 2005, some two months before it was first disclosed. No excuse was offered for the lengthy delay. The Court has granted Defendants’ Motion to Strike Plaintiff’s Expert and Report as Untimely. As such, the expert report is not evidence that would be admissible at trial and cannot be considered in the Court’s summary judgment analysis. Pamintuan v. Nanticoke Mem’l Hosp., 192 F.3d 378, 387 n.13 (3d Cir. 1999).

A police officer is “justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making [an] arrest.” 18 PA. CON. STAT. § 508. “The reasonableness of the force used in making the arrest determines whether the police officer's conduct constitutes an assault and battery.” Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994). The Court, for the reasons discussed above, find Sergeant Vangelo’s actions were reasonable and, therefore, the Motion for Summary Judgment is granted as to this claim.

IV. CONCLUSION

For the foregoing reasons, the Court grants the Defendants’ Motion for Summary Judgment. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

/S/ _____
GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DEVIN LAROY MOORE,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
SERGEANT MICHAEL JOHN	:	
VANGELO, et al,	:	
Defendants	:	NO. 03-4718

ORDER

Gene E.K. Pratter, J.

September 6, 2005

AND NOW, this 6th day of September, 2005, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 27) and the responses thereto, it is hereby ORDERED that the Motion for Summary Judgment is GRANTED.

BY THE COURT:

/S/ _____
GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE