IP 03-0755-C M/S Pond v Ball State [2]
Judge Larry J. McKinney Signed on 9/9/04

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHARLEY A. POND, IV,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:03-cv-00755-LJM-VSS
	)	
BOARD OF TRUSTEES, BALL STATE UNIVERSITY,	)	
OFFICER CRAIG HODSON,	)	
OFFICER MIKE REHFUS,	)	
POLICE OFFICER GENE BURTON,	)	
MUNCIE POLICE DEPARTMENT,	)	
POLICE CHIEF JOSEPH WINKLE,	)	
	)	
Defendants.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHARLEY A. POND, IV, Plaintiff,	)	
vs.	)	1:03-cv-755-LJM-VSS
BOARD OF TRUSTEES, BALL STATE UNIVERSITY, et al., Defendants.	)	

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants', Board of Trustees of Ball State University ("Trustees"), Ball State Police Officers Craig Hodson ("Officer Hodson") and Mike Rehfus ("Officer Rehfus"), the Ball State Police Department ("Ball State"), and Ball State Police Chief Gene Burton ("Chief Burton") (collectively "Defendants"), Motion for Summary Judgment. Pond's suit arises from injuries sustained incident to his arrest on May 23, 2002, in Muncie, Indiana.

At the heart of Pond's complaint is the claim that Officers Hodson and Rehfus used excessive force to apprehend him. All of his other claims are collateral to that excessive force claim. They include federal claims pursuant to 42 U.S.C. § 1983, including: deprivation of his civil rights under the Fourth Amendment and negligence in promulgating and approving policy with respect to the use of police dogs, and negligent training and supervision of police officers. They also include state tort claims: negligence, assault and battery, and intentional infliction of emotional distress.

For the reasons set forth below, the Court **GRANTS** Defendants' motion in its entirety.

I. MOTION TO STRIKE PROFFERED EVIDENCE

Before ruling on Defendant's Motion for Summary Judgment, the Court will address

Defendants' request to strike two pieces of evidence submitted in Plaintiff's Reply Brief in Opposition to Motion for Summary Judgment: (1) The Affidavit of D.J. Van Meter, Ph.D. Pl.'s Exh. O; and (2) the Affidavit of the Plaintiff, Charles A. Pond, IV. Pl.'s Exh. L. The Defendants assert that the Van Meter affidavit should be stricken because it was served in violation of the schedule set forth in the Case Management Plan ("CMP") and that the Pond Affidavit should be stricken because Pond testifies in the proffered affidavit about issues he refused to testify about in his deposition. For the reasons set forth below, the Court **GRANTS** Defendants' Motion as to both pieces of evidence.

A. VAN METER'S AFFIDAVIT

With respect to Van Meter's Affidavit, containing the sum and substance of his expert's report, the Court finds it must be struck for untimeliness. Pond disclosed Van Meter as an expert on June 21, 2004, approximately two months after the summary judgment deadline. *See* CMP ¶ III.F. (entered August 19, 2003, and approved August 29, 2003) (requiring Pond to disclose experts to be used at the summary judgment stage sixty days prior to the summary judgment deadline); *Id.* ¶ IV.B. (setting summary judgment deadline at April 21, 2004). The exclusion of non-disclosed evidence is automatic and mandatory under Fed. R. Civ. P. 37(c)(1) unless non-disclosure is justified or harmless. *See Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004). When one party fails to comply with a court's pre-hearing order without justifiable excuse, thus frustrating the purposes of the pre-hearing order, the Court is certainly within its authority to prohibit that party from introducing witnesses or evidence as a sanction. *See Hill v. Selya*, 90 F.3d 220, 224 (7th Cir. 1996); *In re Maurice*, 21 F.3d 767, 773 (7th Cir. 1994).

The appropriate inquiry is whether Pond had a "substantial justification" for failing to

disclose his expert witness, and whether the failure was "harmless" to the Defendants. Rule 37(c)(1). Pond presents no justification for failure to disclose his expert witness and instead asserts that the plain text of the CMP does not (or should not) mean what it explicitly says.[1] Pond claims, without the support of case law, that disclosure requirement of CMP ¶ III.F. only "makes sense" if the Plaintiff files the motion for summary judgment, but not when a motion for summary judgment is filed by one or more of the Defendants, and that the disclosure requirement promotes "old concepts of trial by ambush." Pl.'s Resp. to Def.s' Mot. to Strike at 2. To the contrary, the very nature of expert witness disclosure requirements for summary judgment purposes is to require parties to reveal their respective cases, along with supporting evidence.[2] Disclosure of parties' experts provides an opportunity to depose any expert witness to prepare for a summary judgment filing. At the opposite end of the spectrum, the ability to depose an adverse party's expert witness may prompt the opposing party to refrain from moving for summary judgment. Furthermore, the Defendants had no time to depose or otherwise interview Van Meter prior to finalizing briefing on summary judgment.

The Court cannot find that Van Meter's declaration is timely served with respect to the summary judgment motion at issue now. For these reasons, Van Meter's declaration is hereby STRUCK from the summary judgment record; Defendants' motion to strike Van Meter's declaration is hereby **GRANTED**.

B. <u>POND AFFIDAVIT</u>

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[1] The CMP, in pertinent part, states:

> Plaintiff(s) shall disclose the name, address, and vita of all expert witnesses and shall serve the report required by Fed. R. Civ. P. 26(a)(2)(B) on or before June 21, 2004. However, if Plaintiff uses expert testimony at the summary judgment stage, such disclosures must be made no later than 60 days prior to the summary judgment deadline.

CMP ¶ III.F.

[2] Defendants are likewise required to disclose expert witness testimony at the summary judgment stage no later than 30 days prior to the summary judgment deadline. CMP ¶ III.G.

When the defendants deposed Pond on February 16, 2004, criminal charges were pending against him concerning his participation in the events of the evening of May 22-23, 2004. In the course of his deposition, Pond refused to answer all questions concerning the events of that evening which could incriminate him in then-pending criminal charges. Pond Dep. at 24, 31-50, 76-77. The Defendants propose that while Mr. Pond had every right to assert his privilege against self-incrimination, he must also accept the consequences of doing so. Def.s' Rep. Br. Supp. at 5. Pond responds by asserting the affidavit pertains to facts different than were the subject of inquiry during Pond's deposition when he asserted his Fifth Amendment privilege.[3]

It is apparent, upon review of Pond's deposition testimony, that paragraphs 2-8 of the proffered affidavit seek to establish facts about which he refused to testify in his deposition. Pl.'s Exh. L. In his deposition, Pond was asked: "Q: If I ask you other questions on the same subject matter pertaining to what you knew about that property, its ownership, its status and so forth, would you similarly exercise your Fifth Amendment Privilege and decline to answer? A: Yes." Pond Dep. at 24. In Pond's proffered affidavit, he affirms:

> I observed that the exterior doors had been removed from the structures and that they were standing open. There were no barriers, warning signs, or "no trespassing" signs to keep members of the public out of the structures. . . There were no doors on the hinges and the building was standing open. There was no furniture in the structure and it was empty of all evidence of habitation.

Pond Aff. ¶¶ 3-4.

In his deposition, Pond expressly refused to testify about *any* issue arising from the moment that Officer Rehfus confronted him at the back door of the house until he was apprehended.

[3] The Plaintiff also revisits an issue ruled upon in Magistrate Judge V. Sue Shields' February 2, 2004, entry, asserting that Defendants' opposition to Plaintiff's Motion to Stay Discovery Plan and Trial Schedule and related Motion for Protective Order Barring Taking of Noticed Deposition created the very circumstances that are now the subject of further objection. It was entirely unclear to the Magistrate Judge how the resolution of the criminal charges are relevant to the issue in this case. Judge Shields denied Plaintiff's motion to stay discovery proceedings and bar the taking of Pond's deposition, and reconsideration is unnecessary.

Q: All right: We're sort of chronologically at the point in time where my next questions would have to do with what happened at 518 North Calvert. If I ask you questions about what you did while you were at this house at 518 North Calvert next to your home, would you decline to answer those questions on the basis of your Fifth Amendment privilege?

A: Yes.

Q: Do you recall encountering any police officers at or in the proximity of this house on North Calvert Street that evening?

MR. GREEN [on behalf of Pond]: Objection. Assert the Fifth Amendment.

* * *

Q: So if I ask you questions about any kind of interaction between yourself and officers of the Ball State Police Department at or in the vicinity of 518 North Calvert Street that night, would you similarly decline on the advice of counsel to do so?

A: Yes.

* * *

MR. SHOCKLEY [on behalf of Defendants]: Rather than ask him a series of specific questions all having to do with the events at the North Calvert Street address and the police and the police dog, are you going to require me to do so or would it be your intention to assert the Fifth as to all of those?

MR. GREEN [on behalf of Pond]: It would be our intention to assert the Fifth as to all events that may have anything to do with the elements of the offenses with which he is charged.

* * *

Q: So if I ask you questions specifically what happened between you and the police dog that evening, you would exercise your Fifth Amendment right and decline to answer my questions?

A: Correct.

Pond Dep. at 32-33. In Pond's proffered affidavit, he affirms:

5. While we were in the structure, someone who I did not know came to the back door where we had entered and told me to stop. Not knowing who this person was I decided to run out the front door and did so . . . I was confronted by another individual who I did not know and who had a dog with him. I turned north on the

> sidewalk on the east side of Calvert Avenue and that person then released the dog.
>
> 6. At no time did the person who was at the rear entrance to the structure . . . identify himself verbally as an officer.
>
> 7. At no time until after I was attacked by the dog did the person located at the front entrance to the structure . . . verbally identify himself to me as a police officer.
>
> 8. When the do[g] leaped on me and attacked me, he knocked me to the ground and my face hit the pavement, knocking out my front teeth. The dog continued to bite me repeatedly and, despite m[y] cries for help, the officers refused to call the dog off.

Pond Aff. ¶¶ 5-8.

The Court may strike an affidavit in support of or in opposition to a motion for summary judgment when such affidavit seeks to establish facts about which the affiant refused to testify under invocation of his Fifth Amendment rights. *See United States v. All Assets & Equip. of West Side Bldg. Corp.*, 843 F. Supp. 377, 382-83 (N.D. Ill. 1993), *aff'd*, 58 F.3d 1181 (7th Cir. 1995) (holding that district court need not consider evidence claimant presented to show that property subject to forfeiture proceedings was not acquired with proceeds of claimant's husband's drug trafficking activity, where claimant refused, on Fifth Amendment grounds, to answer government's deposition questions concerning same topics).[4] In fact, "the Fifth Amendment privilege cannot be invoked as a shield to oppose depositions while discarding it for the limited purpose of making statements to support [or oppose] a motion for summary judgment." *In re Edmond*, 934 F.2d 1304, 1308 (4th Cir.

[4] *See also In re Edmond*, 934 F.2d at 1308-09 (holding that debtor's refusal to submit to a deposition, based upon assertion of privilege against self-incrimination, justified bankruptcy judge's decision to strike the debtor's affidavit in support of his motion for summary judgment); *U.S. v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990) (holding that district court had ample authority to strike claimant's affidavit offered in opposition to government's motion for summary judgment in forfeiture action after claimant invoked Fifth Amendment and refused to answer government's deposition questions); *Pedrina v. Han Kuk Chun*, 906 F. Supp. 1377, 1398 (D. Haw. 1995), *aff'd*, 97 F.3d 1296 (9th Cir.1996), *cert. denied*, 520 U.S. 1268 (1997) (holding that party may not rely on its own testimony or affidavits to support its version of disputed fact issue in connection with summary judgment motion where party has asserted Fifth Amendment right not to answer questions concerning that very issue).

1991). After all, the Fifth Amendment is "not a positive invitation to mutilate the truth a party offers to tell." *Brown v. United States*, 356 U.S. 148, 156 (1958). A civil litigant is free to invoke his Fifth Amendment privilege on an issue, but once invoked to oppose discovery, the privilege cannot be tossed aside to support a party's assertions during trial or during summary judgment proceedings. *S.E.C. v. Zimmerman*, 854 F. Supp. 896 (N.D. Ga. 1993) (citations omitted). Federal courts find such a preclusive effect grounded in the reasoning that a defendant may not use the Fifth Amendment to shield himself from the opposition's inquiries during discovery only to impale his accusers with surprise testimony in the summary judgment stage.

Because Pond has invoked his Fifth Amendment privilege in discovery, the Court holds that he may not now submit affidavits in opposition to the Defendant's motion for summary judgment. For these reasons, Pond's affidavit is hereby STRUCK; Defendants' motion to strike Pond's declaration is hereby **GRANTED**.

II. BACKGROUND

The facts in this case are largely undisputed. By failing to provide the Court with admissible evidence by invoking his Fifth Amendment right to counsel during his deposition and failing to make timely disclosure of an expert witness according to the CMP, Pond leaves the Court with but one version of the pertinent facts surrounding his alleged constitutional depravation and injuries.

Pond was, at the time, living at 517 North Martin Street, Muncie, Indiana. Pond Dep. at 13. On May 22, 2002, Pond began drinking beer at his residence and later met some friends, including Alex Andrews ("Andrews"), at a local restaurant/bar and continued drinking. Pond Dep. at 27-28. Later that night, Pond and Andrews entered the rear of the structure located immediately behind Pond's residence, an abandoned building ("Building") located at 518 North Calvert Street, Muncie,

Indiana. Comp. ¶ 17; Andrews Aff. ¶ 5.

At around 2:50 a.m. on May 23, 2002, Officer Rehfus of the Ball State Police Department heard the sound of glass breaking, reported over the radio what he heard, and proceeded to drive to the area where he suspected the glass breaking originated. Comp. ¶ 19. He drove to the area where he heard the sounds and, while in the 500 block of Calvert Street, he saw glass falling to the ground from the house located at 518 North Calvert Street. Rehfus Aff. ¶ 6. Officer Rehfus was dressed in his police-issued uniform. *Id.* ¶ 4.

Officer Hodson responded to a dispatch advisory about the sounds of breaking glass. He arrived at the intersection of Calvert Street and Ashland Avenue and parked his patrol car near the intersection. Officer Hodson was dressed in his police-issued uniform. Hodson Aff. ¶¶ 14-16.

After arriving near the Building, Officer Rehfus proceeded to the rear of the structure. Comp. ¶ 20. Officer Rehfus continued to hear the sound of glass breaking. Rehfus Aff. ¶¶ 7-9. Officer Rehfus noticed Pond standing in an open doorway at the rear of the Building. Comp. ¶ 21. Pond had something in his hand. Rehfus Aff. ¶ 10. Officer Rehfus drew his weapon and ordered the individual to stop and raise his hands. Pond stopped briefly, dropped the object in his hand, turned from the open doorway, and ran through the Building to the front door, which was also open. Officer Rehfus pursued him. *Id*. ¶¶ 11-13. Officer Rehfus reported such information on the police radio. *Id*. ¶ 13. Pond exited the Building through the front door to find Officer Hodson waiting with his police dog, K-9 Boyka. Comp. ¶ 23.

Officer Hodson ordered Pond to stop or he would release K-9 Boyka. Disregarding the warning, Pond changed direction and began running west across Calvert Street. Officer Hodson again shouted for Pond to stop and again warned that he would release the dog. Pond kept running. Officer Hodson released K-9 Boyka and ordered him to apprehend Mr. Pond. Hodson Aff. ¶¶ 21-23.

K-9 Boyka caught up with Pond in a nearby parking lot. K-9 Boyka bit Pond's right arm. Pond fought off the dog, broke free, and began to run again. Officer Hodson ordered Pond to stop running and the dog would be "called off." Pond continued to run and Officer Hodson once again ordered K-9 Boyka to apprehend Pond. K-9 Boyka bit Pond on his left arm. Hodson Aff. ¶¶ 24-28; Rehfus Aff. ¶¶ 16-17.

Ball State Police Sergeant Grant de la Garza, responding to radio calls, arrived on the scene shortly after K-9 Boyka bit Mr. Pond's left arm. Pond repeatedly struck the dog's head with his right fist and grabbed the dog around its neck. Officers Hodson and Rehfus repeatedly told Pond that K-9 Boyka would be called off if Pond stopped resisting. Hodson Aff. ¶¶ 29-30; Rehfus Aff. ¶¶ 18-20; De La Garza Aff. ¶¶ 6-9.

Pond continued to resist and K-9 Boyka pulled him to the ground. Pond's face hit the pavement and he continued to struggle. When Pond stopped resisting, Officer Hodson called K-9 Boyka off and Officer Rehfus handcuffed Mr. Pond. Mr. Pond continued to yell at the officers and had to be restrained by Officer Rehfus even after being handcuffed. Rehfus Aff. ¶¶ 22-26; Hodson Aff. 31-33; De La Garza Aff. ¶¶ 9-14. Officer Hodson felt that his safety, as well as the safety of the other officers, would be compromised if he called off K-9 Boyka while Pond fought so violently with the dog. Hodson Aff. ¶¶ 36-38. Rehfus could smell a strong odor of alcohol on Pond's breath and Pond's speech was slurred. Rehfus Aff. ¶ 29.

Pond was arrested and taken by ambulance to the Ball State Memorial Hospital Emergency Room for medical treatment. Comp. ¶ 32. Pond was charged with striking a law enforcement animal, criminal mischief, disorderly conduct (two counts), resisting law enforcement (two counts), and public intoxication. *Id*. ¶ 36.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Ill. Cent. R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813, 816 (7th Cir. 2003). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. *Abrams v. Walker*, 307 F.3d 650, 653 (7th Cir. 2002), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court construes all facts and draws all reasonable inferences in the light most favorable to the nonmoving party. *See Butera v. Cottey*, 285 F.3d 601, 605 (7th Cir. 2002).

Because the purpose of summary judgment is to isolate and dispose of factually unsupported claims, the non-movant must respond to the motion with evidence setting forth specific acts showing that there is a general issue for trial. *See Michael v. St. Joseph County*, 259 F.3d 842, 845 (7th Cir. 2001). To successfully oppose the motion for summary judgment, the non-movant must do more than raise a "metaphysical doubt" as to the material facts. *See Wolf v. N.W. Ind. Symphony Soc'y*, 250 F.3d 1136, 1141 (7th Cir. 2001). A scintilla of evidence in support of the non-movant's position is not sufficient to defeat a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252. If a reasonable fact finder could find for the opposing party, then summary judgment is inappropriate. *See Shields Enters., Inc. v. First Chi. Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992). When the standard embraced in Rule 56(c) is met, summary judgment is mandatory. *See id.*

IV. DISCUSSION

A. POND'S FEDERAL LAW CLAIMS

1. Excessive Force Claim Against Officers Hodson and Rehfus

In general, the use of excessive force to effect an arrest is evaluated under the Fourth Amendment reasonableness standard, assessing the objective facts that confronted an officer at the time and taking into account, 1) the severity of the crime, 2) the immediate threat to the safety of the officers or others posed by the suspect, and 3) the resistance by the suspect, including active resistance or attempting to resist arrest by flight. *See Graham v. Conner*, 490 U.S. 386, 396 (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*. (citation omitted).

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *See Terry v. Ohio*, 392 U.S. 1, 20-22, (1968); *Johnson v. LaRabida Children's Hosp.*, 372 F.3d 894, 898 (7th Cir. 2004). With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" violates the Fourth Amendment. *Graham*, 490 U.S. at 386. "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." *Id*. at 386-87.

The record leads the Court to conclude that the Officers used objectively reasonable force. They suspected that Pond and a second accomplice had been engaged in one or more felonies; they

were apprehensive about their own physical safety; and Pond sought to evade arrest by both flight and active resistance.

a. Severity of the Crime

As a preliminary matter, Pond contends that Officers Rehfus and Hodson, as University police officers, lacked statutory authority to effect an arrest in the instant case. Pond cites Indiana Code § 20-12-3.5-2(a), the statute governing university police officers, which provides in pertinent part: "Police officers appointed under this chapter have general police powers including the power to arrest, without process, all persons who within their view commit any offense." Pond argues that Officers Hodson and Rehfus lack arrest powers based on "probable cause," possessing far lesser power than other police officers. Accordingly, Pond asserts that Officers Rehfus and Hodson had only heard the breaking of glass and did not witness a crime being committed and therefore lacked authority to arrest. However, Pond fails to recognize that his flight from Officer Hodson, after his command to stop, constituted resisting law enforcement, a misdemeanor under Indiana law, resulting in Officer Hodson's "witness" to a crime.

Nevertheless, Pond's interpretation of the statute is overly-restrictive and unfounded. First, Indiana Code § 20-12-3.5-2(a) states that university police officers have "general police powers *including* the power to arrest, without process, all persons who within their view commit any offense." (emphasis added). The use of inclusive language does not indicate that university police are limited to arrests for crimes within their view. Additionally, the next sentence of the statute accords campus police "the same common law and statutory powers, privileges, and immunities as sheriffs and constables. . . ." *Id.* Pond's contention is unsupported by case law, and none appears to exist to support his contention.

Pond extends considerable effort asserting that Officers Rehfus and Hodson could only have suspected Pond of committing a misdemeanor, which would make use of K-9 Boyka a violation of Ball State's November 1, 1996, General Order and Policy establishing procedures for necessary use of a departmental canine as reasonable force necessary to effect a lawful arrest only:

> 1. When an officer has probable cause to believe the person has committed or attempted to commit, or is committing or attempting to commit a felony; or
>
> 2. To prevent injury, harm, or potential harm to the officers or other persons during the commission or attempted commission of any criminal act including offenses related to a major civil disorder.

Burton Aff., Exh. B at E(1)-(2). However, the record indicates that the policy was revised on April 24, 2002, removing language limiting use of K-9 units to felonies, and instead including "Pursuit/Apprehension at vehicle and foot pursuits" in a nonexclusive list of areas for potential K-9 deployment and further making use of K-9 units in pursuits and apprehensions a discretionary decision for the handler. Burton Aff., Exh. B at II(B), (D).

Even if Officer Hodson's actions had been in direct violation of departmental policy, which they do not appear to be, breach of internal policy is not one of the *Graham* factors used to evaluate an excessive force claim under the Fourth Amendment reasonableness standard.

Pond additionally argues that Officers Hodson and Rehfus' belief that Pond had committed even a misdemeanor was unsupported by probable cause. However, the uncontroverted record indicates otherwise. Pond's lengthy discussions in his Reply Brief in Opposition are ripe with speculation and run afoul of the Supreme Court's warning to avoid second-guessing officers' decisions with the benefit of 20/20 hindsight.

As Officer Hodson was standing in Calvert Street with K-9 Boyka, he heard Officer Rehfus command someone to show his hands. Officer Rehfus radioed that the fleeing subject was running

out of the house. It occurred to Officer Hodson that they might have been burglarizing the house and that 83% of burglars are armed. Hodson Aff. ¶¶ 17-18, 37-38. As Officer Hodson approached the front of the house, he saw two individuals run from it. *Id*. ¶ 19. Officer Hodson ordered Mr. Pond to stop or he would release K-9 Boyka. Disregarding the warning, Pond changed direction and began running west across Calvert Street. Officer Hodson again shouted for Pond to stop and again warned that he would release the dog. Pond kept running. Officer Hodson then released K-9 Boyka and ordered him to apprehend Pond. *Id*. ¶¶ 21-23.

Officers Rehfus and Hodson believed that Pond and the second individual, later identified as Andrews, were in the act of committing a felony. Hodson heard glass breaking, knew that Officer Rehfus heard glass breaking, saw Pond and the other suspect run out of the house, and knew Officer Rehfus was pursuing one of the suspects. It occurred to Officer Hodson that the suspects were probably committing burglary in the house. *Id*. ¶¶ 17, 37.

Pond makes a strong showing that the Building was, in fact, not occupied and was scheduled for demolition. Pond uses this fact to raise an inference that the officers could not have reasonably suspected that the individuals who turned out to be Pond and Andrews were committing felonies of burglary or breaking and entering. The fatal flaw in Pond's position, however, is that he presents no evidence that Officers Rehfus and Hodson knew these facts on the night of May 22-23, 2002. Both officers testified that they did not know the house was unoccupied and was scheduled to be demolished. Rehfus Aff. ¶¶ 31-32; Hodson Aff. ¶ 39. Photographs taken by Sergeant De La Garza, taken a few hours after the incidents on the night of May 22-23, 2002, show that there were blinds in the windows. Supp. De la Garza Aff. Ex; Rehfus Aff. ¶ 9. There were no warning signs indicating that the building was to be demolished. Brown Aff., ¶ 13. The property owner testified that while the residence at 518 North Calvert might not have looked appealing, its outward

appearance was "not remarkably different from the other student rentals located in the immediate area." *Id.* ¶ 12.

In the case at hand, it is not disputed that the officers on the scene did not know the extent of crimes that Pond might have committed nor did they know whether he was armed. It is also undisputed that Officer Rehfus had legally sufficient grounds to stop Pond as he approached the rear door of the house and saw Pond inside, and that before the Officer could do so, Pond fled. In *Matthews v. Jones*, the Sixth Circuit noted that use of a K-9 can be reasonable under the circumstances, even if the officers "did not know the extent of crimes that [the Defendant] might have committed nor did they know whether he was armed." *Matthews v. Jones*, 35 F.3d 1046, 1050-51 (6th Cir. 1994). Furthermore, the court noted that attempts to evade the police "provided cause for the officers to believe that he was involved in activity considerably more nefarious" than the traffic violations which were the basis for the initial stop. *Id.* The surrounding facts, Officer Hodson's observations, and Pond's flight gave Officer Hodson a reasonable suspicion that Pond was engaged in criminal activity. When Pond defied Officer Hodson's orders to stop and continued to flee, Officer Hodson had probable cause to arrest Pond for resisting law enforcement. Put differently, Pond's continued flight from Hodson and Rehfus ripened Hodson's reasonable suspicion into probable cause. *See Tom v. Voida*, 963 F.2d 952, 959 (1992) (finding that continued flight ripens reasonable suspicion of criminal activity into probable cause for arrest).

b. Attempt to Evade Arrest by Active Resistance and Flight

As explained, Pond was attempting to evade arrest by flight as he ran from 518 North Calvert street and disobeyed Officers' orders to stop. K-9 Boyka caught up with Pond and bit Pond's right arm. Pond actively resisted by fighting off the dog, breaking free, and running again. Officer

Hodson again ordered Pond to stop running and the dog will be called off. Pond continued to run and Hodson again ordered K-9 Boyka to apprehend Pond. This time, K-9 Boyka engaged Pond on his left arm. Hodson Aff. ¶¶ 24-28; Rehfus Aff. ¶¶ 16-17. Pond then began actively resisting arrest by striking K-9 Boyka's head with his right fist and grabbing the dog around his neck. Officers Hodson and Rehfus repeatedly told Pond that K-9 Boyka would be called off if Pond quit resisting. Hodson Aff. ¶¶ 29-30; Rehfus Aff ¶¶ 18-20; De La Garza Aff. ¶¶ 6-9.

c. Threat to Safety of Officers or Others

Again, as Officer Hodson was standing in Calvert Street with K-9 Boyka, he heard Officer Rehfus command someone to show his hands. Officer Hodson heard Officer Rehfus' radio transmission that the fleeing subject was running out of the house. It occurred to Officer Hodson that they might have been burglarizing the house and that 83% of burglars are armed. Hodson Aff. ¶¶ 17-18, 37-38. When K-9 Boyka engaged Pond the second time, Pond struggled so fiercely against K-9 Boyka that Officer Rehfus thought they better be certain Pond was calmed before calling the dog off. Officer Hodson was also concerned with the officers' safety due to Pond's extremely combative behavior. Rehfus Aff. ¶ 21; Hodson Aff. ¶ 36. These concerns were not unfounded. Mr. Pond continued to yell at the officers and had to be restrained by Officer Rehfus even after being handcuffed. Rehfus Aff. ¶¶ 27-28; Hodson Aff. ¶¶ 32. The record is clear and unrebutted that K-9 Boyka initially seized Pond by the right arm. Only after actively resisting arrest and fleeing a second time did K-9 Boyka engage Pond's left arm. After he continued to actively resist after the second capture did Pond incurred his most severe injuries, to his left arm and face. Rehfus Aff. ¶¶ 17-18, 22; Hodson Aff. ¶¶ 25-31.

Additionally, Pond alleges that Officer Rehfus is liable for failing to intervene and stop

Officer Hodson's continued use of K-9 Boyka. But to establish a failure to act or intervene claim in a § 1983 excessive force action, a plaintiff must show that the officer had reason to know that another officer was using excessive force and the officer also had a realistic opportunity to intervene and prevent harm to the plaintiff. *See Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994). Here, because the use of the K-9 was objectively reasonable under the circumstances, that claim is rejected.

When material facts are in dispute, then the case must go to a jury, whether the argument is that the police acted unreasonably because they lacked probable cause, or that they acted unreasonably because they responded overzealously and with too little concern for safety. *See Bell v. Irwin*, 321 F.3d 637, 640 (7th Cir. 2003). But when material facts (or enough of them to justify the conduct objectively) are undisputed, then there would be nothing for a jury to do *except* second-guess the officers, which *Graham* held must be prevented. *Id*.

2. <u>Claims against Chief Burton and the Trustees</u>

Pond contends that Chief Burton, *in his individual capacity*, was negligent in supervising and training Officers Rehfus and Hodson and by making policy for the use of police dogs to apprehend suspects. Pond also contends the Trustees, *in their individual capacities*, were negligent in allowing the creation and execution of such policies. Comp. ¶¶ 65-72 (emphasis added). However, the Seventh Circuit assumes the action is an official capacity suit where the "indicia of an official policy or custom are present in the complaint." *Hill v. Shelander*, 924 F.2d 1370, 1373 (7th Cir. 1991). Where the "allegations [in the complaint] clearly establish that it is the defendant's actions in his official capacity that form the basis for the constitutional depravation which is alleged in that complaint," the complaint will be construed to allege an official capacity claim. *Id*. In other words,

the Court will ordinarily assume that an official acting under color of state law giving rise to liability under § 1983 has been sued in his official capacity and only in that capacity. *See id; Holly v. City of Naperville*, 571 F.Supp. 668, 673 (N.D. Ill. 1983) (assuming that defendants were sued in their official capacities where the unconstitutional conduct alleged was taken "pursuant to official City law, practices, policies and customs"). Here, the crux of Pond's claim against the Trustees is they did not fulfill their statutory duty under Indiana Code § 20-12-3.5-1. It is also eminently clear that the conduct described in the complaint with regard to Chief Burton relates solely to the Chief's authority or duty to supervise and train officers as well as enact departmental policy. Pond has named Chief Burton and the Trustees in their individual capacities without alleging or offering any facts to support individual capacity claims. Rather, Pond merely asserts that "[t]here are three distinct groups of defendants: *Individuals* who are members of the board of trustees . . . and the *individual* who is the police chief for the university . . . They are named *individually*, they were each served *individually*, and the complaint asserts *individual* liability." Pl.'s Rep. Br. in Opp'n at 8. Despite a plaintiff's best efforts to point out to the Court that a person, by nature, is also an individual, an "individual capacity" claim does not inevitably follow.

The uncontroverted facts indicate that all actions and inactions alleged in his complaint were taken in Chief Burton and the Trustees' official capacities, and these causes of action are barred as a matter of law. A lawsuit against an official of the state, or of an agency of the state, in his "official capacity" is a suit against the state entity itself. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Williams v. Wisconsin*, 336 F.3d 576, 580 (7th Cir. 2003). Ball State is an agency of the State of Indiana and Chief Burton and the Trustees are officials of that state agency. *See Williamson v. Ind. Univ.*, 345 F.3d 459, 463 (7th Cir. 2003) ("state universities are entities that are considered part of the state for § 1983 analysis"). A state is not a "person" subject to a damages action under § 1983.

See Lapides v. Bd. of Regents, 535 U.S. 613, 617 (2002).[5]

Despite the Court's belief that Pond's claims are "official capacity" claims masquerading as "individual capacity" claims, the Court will entertain Pond's "individual capacity" claims, reaching the same result. Pond failed to bring forth admissible evidence to support his "individual capacity" claims and Defendants' properly invoked qualified immunity.

To avoid summary judgment on a § 1983 claim against individuals, Pond must come forward with evidence that Chief Burton and the Trustees each personally participated in the alleged constitutional deprivation. *See Jones v. City of Chicago*, 856 F.2d 985, 992-93 (7th Cir. 1998); *Wolfe-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983) (a government official may not be liable in his individual capacity unless he caused or participated in the alleged wrongdoing). Personal responsibility exists if the conduct causing a constitutional deprivation occurred at the defendant's direction or with his knowledge and consent. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). Thus, "some causal connection or affirmative link between the action complained about and the official sued is necessary for § 1983 recovery." *Gentry*, 65 F.3d at 561.

With regard to the Trustees, who, pursuant to Indiana Code § 20-12-3.5-1, are authorized to (1) appoint police officers for the institution for which it is responsible; and (2) prescribe their duties and direct their conduct, Pond has not presented any evidence of knowledge, consent, or an affirmative link between the alleged constitutional depravation and the Trustees beyond their statutory authority to create a University police department. Pond extends considerable effort arguing that the Trustees are bound to take hands-on, personal responsibility for the minutiae of

[5] The defendants assert that the Eleventh Amendment bars any damages claims. Def.'s Mot. at 12. But any constitutional problem that may exist is subordinate to a statutory deficiency. Suits against states for damages should be resolved on the ground that they do not come within § 1983, not because states are protected by the Eleventh Amendment. *Vt. Agency of Nat'l Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000); *Power v. Summers*, 226 F.3d 815, 818 (7th Cir. 2000).

University life. However, as provided by Indiana statute, individual governing boards may delegate to such persons and to others such authority as it may possess. Indiana Code § 20-12-1-4. When asked if the individual trustees weren't controlling events as things unfolded between he and the University police officers, Pond responded that what made them liable as individuals was "allowing the attacks against me to happen by involving themselves with the police" and "by employing them." Pond Dep. at 71-73. By Pond's own admission, the individual trustees did not personally participate in his alleged constitutional depravation.

Furthermore, Pond cites *Farmer v. Brennan*, 511 U.S. 825 (1994), for the proposition that "failure to act to control the use of K-9 units was an act of deliberate indifference on the part of the Trustees which could support a finding of liability against . . . the individual trustees." Pl.'s Rep. Br. in Opp'n at 22-23. However, *Farmer* explicitly requires a showing that the official was subjectively aware of a risk. *Farmer*, 511 U.S. at 828. Pond has made no such showing, and Pond has not offered any evidence that use of excessive force is common on the Ball State campus, let alone by the use of a K-9 to assist in apprehending a suspect, and indeed has not produced evidence of even one prior incident. For want of admissible evidence, his claim against the Trustees must fail.

With regard to Chief Burton, it is not sufficient for a § 1983 plaintiff to show that a supervisory official was remiss in supervising the implementation of policy in force in an institution. *See Rascon v. Hardiman*, 803 F.2d 269, 273-74 (7th Cir. 1986). Further, "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police came into contact. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Pond had to show that Chief Burton had actual or constructive knowledge that such a failure to train would likely result in constitutional deprivations. *See Robles v. City of Fort Wayne*, 113 F.3d 732, 735 (7th Cir. 1997). Pond could have showed this

by presenting evidence of a pattern of constitutional violations, or where a clear constitutional duty is implicated in recurrent situations that a particular officer is likely to face. *Id.* Pond made no such showing. Pond's only support is speculation that "[a]s chief, Burton had to be aware of the high incident rate of apprehensions due to use of K-9 units, as reported by Hodson." Pl.'s Rep. Br. in Opp'n at 26. In fact, the "report" to which Pond refers is Officer Hodson's testimony that he has made over thirty apprehensions with K-9 Boyka without needing to let the dog loose. Hodson Aff. ¶ 40. If anything, this flies in the face of Pond's assertion that Chief Burton had constructive knowledge of a pattern of constitutional violations resulting from the use of K-9s in apprehending suspects.

Failure to train may be used as evidence of intent, when intent is an issue in a constitutional tort, but intent is not a factor in an excessive force case, where the standard of care is objective reasonableness. *See Dye v. Wargo*, 253 F.3d 296, 299 (7th Cir. 2001), *citing Collins v. Harker Heights*, 503 U.S. 115, 122-24 (1992) (additional citations omitted). Stated another way,

> [p]roof of failure to train officers could be used to demonstrate that the municipality approves (hence has a policy of) improper conduct that training could extirpate. Such a claim . . . would depend on establishing that the [University] policymakers knew that the police were using objectively unreasonable force in apprehending suspects, yet did nothing to solve the problem.

Dye, 253 F.3d at 299.

Pond's complaint plainly alleges *negligence* on the part of Chief Burton and the Trustees, yet in an "individual capacity" claim, "a showing of mere negligence on the part of state officials is insufficient" to establish a constitutional claim under § 1983." *Rascon*, 803 F.2d at 273-74. As previously stated, to establish a claim against a supervisory official, there must be a showing that the official knowingly, willfully, or at least recklessly caused the alleged deprivation by his action or failure to act." *Id.* At 274. Pond has not offered any material facts that support a finding of

negligence, let alone knowing, willful, or reckless conduct on the part of Chief Burton or the Trustees. Instead, Pond substitutes pages of speculation and conjecture unsupported by case law.

Pond fails to bring forth admissible evidence that establishes that Chief Burton knowingly, willfully, or at least recklessly caused the alleged deprivation by failing to properly train Officers Rehfus and Hodson "in the proper use of releasing a police dog to subdue a suspect who was suspected of having committed a misdemeanor" and "failing to approve proper policy and/or enforce proper policy in the use of police dogs." Comp. ¶¶ 65, 67. Pond did not establish that Chief Burton, as a policymaker, knew the police were using objectively unreasonable force in apprehending suspects, yet did nothing to solve the problem. *See e.g., Lanigan v. East Hazel Crest*, 110 F.3d 467, 478-79 (7th Cir. 1997). Pond has not offered any evidence that use of excessive force is common on the Ball State campus, and indeed has not produced evidence of even one prior incident. For want of admissible evidence, these claims, too, must fail.

Even if Pond had adequately supported his "individual capacity" claims, Chief Burton and the Trustees successfully invoked the defense of qualified immunity, that protects an individual defendant from liability under § 1983 unless his conduct violated clearly established constitutional rights of which a reasonable government official in his position would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Gomez v. Toledo*, 446 U.S. 635, 640-41 (1980).

A two-part test determines whether a government official is entitled to qualified immunity in a civil suit under § 1983. *See Saucier v. Katz*, 533 U.S. 194, 200-01 (2001); *McNair v. Coffey*, 279 F.3d 463, 465 (7th Cir. 2002). First, the Court asks whether the facts alleged demonstrate a constitutional violation when examined in the light most favorable to the plaintiff. *See Saucier*, 533 U.S. at 201. If the facts as alleged reveal no constitutional violation, the inquiry ends and the officer prevails on the merits of the case. *See Los Angeles v. Heller*, 475 U.S. 796 (1986); *Estate of Phillips*

v. Milwaukee, 123 F.3d 586, 596-97 (7th Cir. 1997). If the facts alleged would amount to a constitutional violation, the court next examines whether the law was "clearly established" at the relevant time. *Saucier*, 533 U.S. at 201. To adequately plead a violation of a constitutional right, a plaintiff must "offer either a closely analogous case or evidence that the defendant's conduct is patently violative of the constitutional right that reasonable officials would know without guidance from the courts." *Hope v. Pelzer*, 536 U.S. 730, 739-740 (2002). Pond has not met this burden. As indicated in the Court's discussion of Pond's excessive force claim, no constitutional depravation took place, thus ending the inquiry.

B. POND'S STATE LAW CLAIMS

Finally, this Court must consider the appropriateness of retaining jurisdiction over Plaintiffs' remaining state claims. 28 U.S.C. § 1367. "The general rule is that when as here the federal claim drops out before trial . . . the federal district court should relinquish jurisdiction over the supplemental claim[s]." *Van Harken v. City of Chicago*, 103 F.3d 1346, 1354 (7th Cir. 1997). If, however, an interpretation of state law that knocks out the plaintiff's state claim is obviously correct, the federal judge should put plaintiff out of his misery then and there, rather than burdening the state courts with a frivolous case. *Id*. at 1354. The remaining state law claims share a common nucleus of fact with the federal claims and, therefore, the Court will retain jurisdiction as a decision in the claim will serve the interests of judicial economy, convenience, and fairness to the parties. *U. Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725-26 (1966).

Claims Against Officers Hodson and Rehfus

Pond's common law tort claims against Officers Hodson and Rehfus are barred by the

Indiana Tort Claims Act ("ITCA"), IND. CODE §§ 34-14-4-1 to 25, which provides immunity to governmental entities in certain cases where a common law duty of care might otherwise exist. The ITCA provides that a "governmental entity or employee acting within the scope of the employee's employment is not liable if a loss results from: . . . the adoption and enforcement of . . . a law . . . unless the enforcement constitutes false arrest or false imprisonment." IND. CODE § 34-13-3-3(7); *City of Anderson v. Davis*, 743 N.E.2d 359, 364 (Ind. Ct. App. 2001). The Indiana Supreme Court explained the meaning of "scope of employment" in the context of governmental immunity in the case of *Celebration Fireworks, Inc. v. Smith*, 727 N.E.2d 450 (Ind. 2000), as "conduct . . . of the same general nature as that authorized, or incidental to the conduct authorized." *Id.* At 453 (quoting Restatement (Second) Agency § 229 cmt. B (1958)). An act is incidental to authorized conduct when it is subordinate to or pertinent to an act that the servant is employed to perform. *Id.* at 453. The scope of the term "enforcement" is limited to those activities in which a government entity or its employees compel or attempt to compel the obedience of another to laws, rules, or regulations, or sanction or attempt to sanction a violation thereof. *Mullin v. Mun. City of South Bend*, 639 N.E.2d 278, 283 (1994). Further, "an officer engaged in effecting an arrest is . . . enforcing a law." *Bank v. State*, 422 N.E.2d 1223, 1226 (Ind. 1981).

Pond incorrectly contends that Officers Hodson and Rehfus were acting outside the scope of their employment in effecting his arrest because the officers utilized excessive force, and "the facts of this case can be found to establish false arrest or false imprisonment," thereby removing Officers Hodson and Rehfus from immunity under the ITCA. Pl.'s Rep. Br. in Opp'n at 34.

First, it has been established, based on the evidence in contemplation of Pond's federal claims, that no excessive force was used by Officers Hodson and Rehfus in effecting Pond's arrest. Officers Hodson and Rehfus' activities pertinent to Pond's arrest and the deployment of K-9 Boyka

plainly constitute "an activity in which a government entity or its employees compel or attempt to compel the obedience of another to laws" and therefore amount to "enforcement of a law" within the meaning of the ITCA. *City of Anderson*, 743 N.E.2d at 365 (finding the same when a K-9 was utilized to effectuate the apprehension of an escapee from a juvenile detention facility). Officers Hodson and Rehfus investigated breaking glass in a residence and pursued and apprehended a fleeing individual suspected of felonies using reasonable force, which are activities within the scope of employment for a law enforcement officer. *See id*.

Second, Pond did not, even under the most liberal interpretation of notice pleading, assert that Pond's arrest constituted false imprisonment or unlawful arrest in his complaint. "It is well settled that a plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." *Speer v. Rand McNally & Co*., 123 F.3d 658, 665 (7th Cir. 1997).

V. CONCLUSION

For the reasons stated herein, the Court **GRANTS** Defendants' Motion to strike and **GRANTS** Defendants' Motion for Summary Judgment in its entirety.

IT IS SO ORDERED this 9th day of September, 2004.

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

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