Case No. 21-2820

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United States Court of Appeals for the Sixth Circuit

**CORY JARVELA,**

*Plaintiff-Appellee*,

v.

**WASHTENAW COUNTY, MI, ET AL.,**

*Defendants,*

**and**

**RICHARD HOUK,**

*Defendant-Appellant*

On Appeal from the United States District Court
for the Eastern District of Michigan

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# PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

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Dated: February 25, 2022

## CORPORATE DISCLOSURE

Pursuant to FRAP 26.1 and 6th Cir. R. 26.1 of the United States Court of Appeals for the Sixth Circuit, Plaintiff-Appellee, Cory Jarvela, makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

**No.**

2. Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome?

**No.**

Dated: February 25, 2022

**/s/ Shawn C. Cabot**
Shawn C. Cabot

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## STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellee believes that oral argument is necessary as it will afford counsel for the parties an opportunity to address any questions that this Honorable Court may have concerning the lower court record, the lower court's Opinion and Order, and the specifics of the parties' respective positions on appeal. Furthermore, oral argument will afford counsel for the parties the opportunity to clarify and/or expand upon any arguments set forth in their respective Briefs. Therefore, pursuant to Sixth Circuit Rule 34(a), Plaintiff-Appellee respectfully requests that this Honorable Court docket this appeal for oral argument.

## STATEMENT OF JURISDICTION

Plaintiff-Appellee filed his 42 U.S.C. §1983 police misconduct action in the District Court for the Eastern District of Michigan based upon violations of the Fourth Amendment to the United States Constitution. **(Complaint and Jury Demand, R. 1, Page ID ## 1-15; First Amended Complaint and Jury Demand as of Right, R. 4, Page ID ## 31-45; Second Amended Complaint and Jury Demand, R. 37, Page ID ## 233-247).**

At the conclusion of discovery, Defendants Trevino and Village of Clinton filed a Motion and Brief in support of Summary Judgment. **(Trevino and Village of Clinton Motion for Summary Judgment, R. 76, Page ID ## 754-880).** Plaintiff-Appellee filed a timely Response and Brief. **(Plaintiff's Response to Defendant Clinton and Trevino's Motion for Summary Judgment, R. 104, Page ID ## 2837-3008).** Defendant Andrew Hayes filed a Motion for Summary Judgment and Brief in support of same. **(Hayes' Motion for Summary Judgment, R. 78, Page ID ## 884-1015).** Plaintiff-Appellee timely responded. **(Plaintiff's Response and Brief to Hayes' Motion for Summary Judgment, R. 102, Page ID ## 2667-2834).** Finally, also on October 22, 2020, Defendant-Appellee Houk and Defendant Washtenaw County filed a Motion and Brief in support of Summary Judgment. **(Houk and Washtenaw's Motion for Summary Judgment, R. 81, Page ID ## 1228-2123).** Plaintiff subsequently filed a Response and Brief in opposition.

**(Plaintiff-Appellee's Response to Houk and Washtenaw's Motion for Summary Judgment, R. 100, Page ID ## 2283-2493).** The parties then each filed Replies to Plaintiff-Appellee's Responses to their Motions for Summary Judgment. **(Hayes' Reply, R. 111, Page ID ## 3054-3062; Trevino and Clinton Township's Reply, R. 109, Page ID ## 3026-3033; Houk and Washtenaw's Reply, R. 110, Page ID ## 3043-3053).**

On March 15, 2021, the District Court entered an Order stating that the various Motions for Summary Judgment would be determined on the parties' briefing. **(Order Regarding Hearing, R. 114, Page ID # 3081).** On August 2, 2021, the District Court entered its *Opinion & Order* regarding the parties respective Motions for Summary Judgment. **(Opinion & Order, R. 116, Page ID ## 3084-3131).** The Motions for Summary Judgment were granted, except as to Defendant-Appellant Houk and the excessive force claims. ***Id*.** Defendant-Appellant Houk then timely filed his Notice of Appeal on August 10, 2021. **(Notice of Appeal, R. 118, Page ID ## 3133-3135).**

The denial of summary judgment is ordinarily not a final decision within the meaning of 28 U.S.C. § 1291, and accordingly, is generally not immediately appealable. *McMullen v. Meijer, Inc*., 355 F.3d 485, 489 (6th Cir. 2004). However, the "denial of a claim of qualified immunity, to the extent it turns on an issue of law, is an appealable 'final decision' within the meaning of [] § 1291 notwithstanding the

absence of a final judgment." *Heykoop v. Mich. State Police*, 838 Fed. Appx. 137, 140 (6th Cir. 2020) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). Additionally, however, the appellate court will "lack jurisdiction to consider a 'district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.'" *Sabo v. City of Mentor*, 657 F.3d 332, 336 (6th Cir. 2011) (citing *Johnson v. Jones*, 515 U.S. 304, 313, 319 (1995)).

## COUNTER-STATEMENT OF THE ISSUES

I. Was the District Court correct when it denied Defendant-Appellant Houk qualified immunity where he failed to issue a warning before using his police dog to seize Plaintiff-Appellee Jarvela?

II. Was the District Court correct in denying qualified immunity where there exists questions of fact as to whether Plaintiff-Appellee was resisting the police canine's dog to attempt to seize him?

## STATEMENT OF THE CASE

### I. Statement of the Facts

Prior to the subject August 19, 2017 encounter, Defendant Trevino had approximately three to four encounters (traffic stops) with Plaintiff-Appellee. **(Robert Trevino's Deposition Transcript, R. 104-9, Page ID ## 2988-2989).** At the time of the incident complained of, Plaintiff-Appellee was driving a 2015 Chevy Silverado and was by himself. **(Plaintiff's Deposition Transcript, R. 100-3, Page ID # 2329, 2331).** Plaintiff-Appellee had left his home to go approximately 3.3 miles to the local Shell gas station to purchase some cigarettes; and after his purchase he headed back home. ***Id*.** While on his way home, Defendant Trevino got behind Plaintiff-Appellee and activated his lights and sirens. ***Id*.** Trevino's initial contact with Plaintiff-Appellee was at approximately 1:35 a.m. **(Robert Trevino's Deposition Transcript, R. 104-9, Page ID ## 2992).**

Trevino pursued Plaintiff-Appellee for approximately four to five minutes. **(Robert Trevino's Deposition Transcript, R. 104-9, Page ID ## 2991-2992).** Plaintiff-Appellee crashed into a tree, and because he was afraid he would be assaulted by the police, he exited the passenger's side of the truck and went into the woods. **(Plaintiff's Deposition Transcript, R. 100-3, Page ID ## 2330, 2331-2332).** At the time, Plaintiff was wearing a white tank top, checkered shorts, and white tennis shoes. ***Id*. at 2331.** After exiting his vehicle, Plaintiff-Appellee

removed his t-shirt and shoes and laid down and passed out in the weeds. ***Id*. at 2332.** Notably, once Plaintiff-Appellee exited his vehicle and went into the woods, Trevino did not immediately follow him, nor did he say anything; but instead, he went to Plaintiff's Appellee's vehicle to clear it. **(Robert Trevino's Deposition Transcript, R. 104-9, Page ID ## 2992-2993).** Once Trevino cleared Plaintiff-Appellee's truck, he got back into his patrol vehicle and re-positioned it; and still did not follow after Plaintiff-Appellee. **(Robert Trevino's Deposition Transcript, R. 104-9, Page ID # 2994).**

Eventually, Defendant-Appellant Houk arrived and Trevino advised him of what had occurred. **(Robert Trevino's Deposition Transcript, R. 104-9, Page ID # 2995).** Defendant-Appellant Houk then let the police canine (Argo) out of eh police vehicle to go to Plaintiff-Appellee's truck in order to get the initial scent of Plaintiff-Appellee. **(Robert Trevino's Deposition Transcript, R. 104-9, Page ID # 2995).** After this was accomplished, Trevino, Argo, and Defendant-Appellant Houk proceeded into the wooded area where Plaintiff-Appellee had entered into. **(Robert Trevino's Deposition Transcript, R. 104-9, Page ID # 2995).** The area that the three of them entered into was described as being flat, and for much of it, the grass had been mowed, but then in some areas, there was brush and trees. **(Robert Trevino's Deposition Transcript, R. 104-9, Page ID # 2995).** Defendant-Appellant Houk and Argo led the way, while Trevino was only probably fifteen to

twenty feet behind them. **(Robert Trevino's Deposition Transcript, R. 104-9, Page ID # 2996).** Defendant-Appellant Houk was wearing a Body Worn Camera ("BWC") which captured much of the following sequence of events. **(Houk BWC, R. 104-2).**

As Houk harnessed Argo, he advised Trevino that Argo was not a "petting dog," and could not confirm that Argo would not bite him. ***Id*. at 0:00-0:55).** Defendant-Appellant Houk then attached a lead to Argo and went towards Plaintiff-Appellee's vehicle. ***Id*. at 1:00-1:20**. After spending some time around Plaintiff-Appellee's vehicle, Defendant Houk and Argo proceeded to walk down what appears to be a driveway towards the area of a home with a light on. ***Id*. at 2:45-3:01.** At 3:16, Defendant Houk activated his flashlight and proceeded to scan the area. ***Id*. at 3:16**. Argo led Defendant-Appellant Houk in a circle. ***Id*. at 3:45-4:15.**

Defendant-Appellant Houk and Argo then began to backtrack, again walking on what appears to be cut grass. ***Id*. at 5:18-5:30.** While walking in the cut grass area with Argo who is approximately 5-7 feet in front of him, Defendant Houk spotted a shoe and a shirt; and the white shirt is highly visible. **(Richard Houk's Deposition Testimony, R. 100-6, Page ID # 2405; Houk BWC, R. 104-2, 5:30-6:05).** In fact, Houk acknowledged same by making radio communication and saying words to the effect of "We got his shoes and his shirt back here; so he's shredded his clothes." **(Houk BWC, R. 104-2, 6:00-6:06).** While not following

closely behind where Argo was walking, Defendant-Appellant Houk appeared to stay quite a distance behind, letting Argo go towards Plaintiff-Appellant. ***Id*. at 6:00-6:10.** At 6:10, Argo's excitability can be heard. ***Id*. at 6:10.** Notably, not at this point, or any other point in the video, is any warning or instruction given to Plaintiff-Appellee. Then, at 6:12, Houk gave the German command "packen" or "kampfen" which means to fight or apprehend multiple times; and Argo did just that. ***Id*. at 6:10-6:20; (Richard Houk's Deposition Testimony, R. 100-6, Page ID # 2405; Opinion & Order, R. 116, Page ID ## 3088-3089). This bite command was given despite the fact that Plaintiff-Appellee was not resisting, was not fleeing or attempting to flee, nor was he a threat.**

Plaintiff-Appellee (who was laying on his back) testified that he finally came to when Argo was already biting his arm (bicep) and there was a flashlight in his face. **(Plaintiff's Deposition Transcript, R. 100-3, Page ID ## 2332-2333, 2342).** Defendant-Appellant Houk then gave Argo multiple orders to hold Plaintiff-Appellee; and despite those commands to Argo, then immediately ordered a shirtless Jarvela to get on his stomach. **(Houk BWC, R. 104-2, 6:20-6:30).** Plaintiff-Appellee testified that while Argo was biting his right bicep and a flashlight was in his eyes, he heard a bunch of commands being given for him to get on his stomach, and he obeyed those commands. **(Plaintiff's Deposition Transcript, R. 100-3, Page ID ## 2332-2333, 2342-2343).** Interestingly enough, even at this point, no one

identified themselves as law enforcement. Plaintiff-Appellee then testified what he did after he was commanded to get on his stomach:

> I was ordered to get on my stomach, to stop resisting. I was laying on my back. Argo was on my right bicep. So, I'm either going to take this 90-pound dog and throw him over the top of my body to get on my stomach, or I'm going to roll over to the easiest path, which would've been for me to roll over to my right, where I'm still fighting a 90-pound dog on my arm and trying to get his mouth out of my bicep. So, I rolled over on top of Argo . . . .

**(Plaintiff's Deposition Transcript, R. 100-3, Page ID # 2333).**

Plaintiff-Appellee testified that he tried to take his left hand across his body to get the dog off of his arm. **(Plaintiff's Deposition Transcript, R. 100-3, Page ID # 2333).** Plaintiff-Appellee then turned to the right, which meant that he rolled on the top of Argo's head; but yet, Argo's mouth was still clamped down on Plaintiff-Appellee's arm. **(Plaintiff's Deposition Transcript, R. 100-3, Page ID ## 2333-2334).** This put Argo's head under the body of Plaintiff-Appellee; but only because Defendant-Appellant Houk had ordered Plaintiff-Appellee to get on his stomach. **(Plaintiff's Deposition Transcript, R. 100-3, Page ID # 2334).** Then, despite being on his stomach as ordered by Defendant-Appellant Houk, Defendant-Appellant Houk ordered Argo to hold him and then proceeded to senselessly strike Plaintiff-Appellee in the back of the head while at the same time telling Jarvela to "let go of the f****** dog." **(*Id.* at 2334; Houk BWC, R. 104-2, 6:19-6:44).** Plaintiff-Appellee then rolled on to his back at which time he was tased. **(Plaintiff's**

**Deposition Transcript, R. 100-3, Page ID ## 2334-2335).** Then, despite being handcuffed and not moving, Houk allowed Argo to go after Plaintiff-Appellee again. **(Houk BWC, R. 104-2, 7:55-8:04).**

An ambulance was called wherein Plaintiff-Appellee was initially transported to Herrick Hospital. **(Plaintiff's Deposition Transcript, R. 100-3, Page ID # 2335).** However, due to the severity of Plaintiff-Appellee's injuries, he had to be transported to the University of Michigan Hospital. ***Id*.** The University of Michigan medical records indicate "Extensive soft tissue tissue defect with soft tissue swelling and innumerable foci of air tracking throughout the soft tissue planes, within the posterolateral aspect of the right arm extending to the elbow." **(U-M Medical Records, R. 100-13, Page ID # 2486).** The laceration to Plaintiff-Appellee's right upper extremity measured approximately 18 cm and required 25 sutures to repair. **(U-M Medical Records, R. 100-13, Page ID # 2489-2490).**

## II. Statement of Corroborating Facts

### A. <u>Houk's Body Worn Camera Video Footage (Houk BWC, R. 104-2):</u>

- Defendant-Appellant Houk yelled "Suchen [seek/find], Packen [bite], Packen [bite], Packen [bite], Packen [bite], 'attaboy, get that guy, hold 'em, hold 'em, hold 'em." **(6:10-6:24).**

- For the first time, Defendant-Appellant Houk addressed Jarvela and told him to get on his stomach. **(6:24-6:29).**

- Beginning at approximately 6:37, Houk struck Jarvela approximately 7 times in the back of the head while yelling, "let go of the fucking dog now. Let go of the fucking dog."

**B. <u>Plaintiff's Deposition Transcript (Plaintiff's Deposition, R. 100-3, Page ID ## 2323-2354:</u>**

- Jarvela was awakened by a flashlight being shined in his face and Argo biting his right bicep; while also hearing "[a] bunch of yelling and commands for me to get on my stomach." **(Page ID ## 2332-2333).**

- Initially, Jarvela was on his back, Argo was biting his right bicep, and he heard commands to get on his stomach, which he obeyed; and which caused him to roll on Argo. **(Page ID ## 2333-2334).**

- Once Jarvela got on his stomach, Houk struck him with felt like his fist in the back of the head multiple times (roughly 7 times in the back of his head). **(Page ID ## 2334, 2350).**

- Jarvela did not punch Argo or otherwise fight with Argo. **(Page ID # 2350).**

- When Houk said, "Let go of the f****** dog," Jarvela did not have the dog; but in fact, the dog had him. Also, Houk was striking him at the same time. **(Page ID # 2334).**

- Jarvela followed every command he was asked to. If he was told to get on his stomach, he got on his stomach to the best of his ability. If he was asked to roll onto his back, he did so to the best of his ability. **(Page ID # 2343-2344, 2349).**

- Jarvela gave up when he went into the weeds. **(Page ID # 2343).**

- Plaintiff-Appellee did not spring up from the weeds and strike Argo, he did not strangle Argo, and he did not punch Argo. **(Page ID # 2351).**

**C. <u>Houk's Deposition Testimony (R. 100-6, Page ID ## 2371-2411):</u>**

- They are supposed to provide warnings for uses of force in general. **(Page ID ## 2379-2380).**

- When asked if an officer must warn a suspect of the officer's intent to release a dog, he answered, "I would say yes, with explanation." **(Page ID # 2379).**

- When asked if he agreed that a dog is not supposed to be deployed if the suspect can be apprehended safely without deploying a dog, he said "I would say again yes, with explanation." **(Page ID ## 2379-2380).**

- He did not receive any radio traffic concerning the speeds of the pursuit or that the suspect was armed or that shots were fired. **(Page ID ## 2382-2383).**

- Argo was on a 15-foot lead; and the purpose of the lead is to control the dog. **(Page ID # 2384).**

- At no time prior to seeing Plaintiff-Appellee's tennis shoe and shirt, did he announce police presence, did he order the suspect to show himself, nor give a warning that a dog would be released. **(Page ID # 2386).**

- At the moment he saw Plaintiff-Appellee, he did not say anything to Jarvela nor did he give him any orders. **(Page ID # 2387).**

- Instead, almost immediately after seeing Jarvela, he gave Argo the command to bite. **(Page ID # 2388).**

- He claims that after Jarvela sat up, he could see his hands, and at that point, he claims that Argo was not biting Jarvela. **(Page ID # 2388).**

- Contrary to the deposition testimony of Jarvela, he claimed to have struck Jarvela 7 times in the suprascapular area; but admittedly did not tell Jarvela to release the dog before doing so. In fact, the only time he told Jarvela to release the dog was while he was hitting Jarvela. **(Page ID # 2394).**

- He agreed it would not have been appropriate to hit Jarvela in the head 7 times. **(Page ID ## 2394-2395).**

**D. <u>Robert Trevino's Deposition Testimony (R. 100-12, Page ID ##2457-2484):</u>**

- The pursuit of Jarvela lasted 4-5 minutes. **(Page ID # 2470).**

- As he exited his patrol vehicle, he saw Jarvela exit his vehicle, but did not say anything to Jarvela. **(Page ID ## 2470-2471).**

- Up to the point he saw Jarvela, no one had announced police presence. **(Page ID # 2475).**

- As an officer on the scene, he did not see any reason for an officer to strike Jarvela in the head. **(Page ID # 2477).**

## SUMMARY OF THE ARGUMENT

On the date of the incident complained of (August 19, 2017), it was clearly established that a citizen had a constitutional right under the Fourth Amendment, to be offered an opportunity to surrender without being attacked by a police dog. Based upon the law in existence at the time, before Defendant-Appellant Houk allowed Argo to maul Plaintiff-Appellee, a warning should have been given; thereby allowing Plaintiff-Appellee the opportunity to avoid being attacked by Argo. Furthermore, despite Plaintiff-Appellee not resisting, Defendant-Appellant Houk needlessly and senselessly delivered multiple blows to the back of Plaintiff-Appellee's head for no other reason than to punish Plaintiff-Appellee for injuring his dog.

The District Court was correct when it denied qualified immunity to Defendant-Appellant Houk. As such, the Court's decision, with respect to the instant appeal, must be affirmed.

## STANDARD OF REVIEW

This Honorable Court reviews a district court's grant or denial of summary judgment *de novo*. *Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 301 (6th Cir. 2005). Summary Judgment pursuant to Federal Rule of Civil Procedure 56 is proper only when there is no genuine issue as to any material fact. "In reviewing a motion for summary judgment, we review the evidence, all facts, and any inferences that may be properly drawn from the facts in the light most favorable to the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). Furthermore, if the evidence is such that a reasonable jury could return a verdict for a nonmoving party, then summary judgment will not lie. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

Under Federal Rule of Civil Procedure 56, the key inquiry is "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." *Painter v. Robertson*, 185 F.3d 557, 566 (6th Cir. 1999). Based upon the body of case law within this Circuit, in conjunction with the overwhelming evidence presented by Plaintiff-Appellee, the District Court was correct in denying Summary Judgment as to Defendant-Appellant Houk.

Furthermore, this Court has held that "[o]n interlocutory appeal of the denial of summary judgment based on qualified immunity in a case where all of the relevant

events were captured on video, we accept the district court's view of the facts unless it is blatantly contradicted by the video evidence. *Evans v. Plummer*, 687 Fed. Appx. 434, 439 (6th Cir. 2017) (citing *Jones v. City of Cincinnati*, 736 F.3d 688, 692-693 (6th Cir. 2012)). Furthermore, as to those facts not caught on video, the Court must adopt Plaintiff-Appellee's version. *See Scott v. Harris*, 550 U.S. 372, 378-380 (2007).

As such the appellate court has jurisdiction only to the extent that the Defendant-Appellant limits his arguments to questions of law premised on facts taken in the light most favorable to Plaintiff-Appellee. *Plummer, supra* at 440 (citing *Phillips v. Roane County,* 534 F.3d 531, 538 (6th Cir. 2008). Additionally, even where a video captures an incident, if reasonable jurors could interpret the video evidence differently, then qualified immunity must be denied. *Green v. Throckmorton*, 681 F.3d 853, 865-866 (6th Cir. 2012). Ultimately review of the denial of qualified immunity is de novo. *Id*.

## ARGUMENTS

### I. Defendant-Appellant Houk is NOT Entitled to Qualified Immunity Because of His Failure to Give a Verbal Warning Before Allowing a Police Canine to Attack, Bite, and Hold Plaintiff-Appellee.

Qualified immunity is a privilege granting immunity to government officials performing discretionary functions 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, 818 (1982). To determine whether a defendant is entitled to qualified immunity at the summary judgment stage, courts are required to engage in a two-pronged inquiry. *Tolan v. Cotton*, 572 U.S. 650, 655 (2014). The first inquiry asks whether the facts, "[t]aken in the light most favorable to the party asserting the injury . . . show the officer's conduct violated a [federal right[.]" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The second prong of the qualified immunity analysis asks whether the right in question was "clearly established" at the time of the violation. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). "[T]he salient question . . . is whether the state of law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional." *Id*. at 741. The precise factual scenario need not have been found unconstitutional for it to be sufficiently clear to a reasonable official that his actions violate a constitutional right. *Id*. at 739, 741. While the contours of a right must be sufficiently clear such that a reasonable officer would understand that what he/she

did violated that right, "there need not be a case with the exact same fact pattern, or even fundamentally or similar or materially similar facts; rather the question is whether the defendants had fair warning that their actions were unconstitutional." *Norton v. Stille*, 526 Fed. Appx. 509, 513 (6th Cir. 2013) (citing *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cr. 2005)). Additionally, when considering whether a constitutional violation occurred, if the defendant challenges the plaintiff's version of the facts, an issue of fact is created, and qualified immunity must be denied. *Johnson v. Jones*, 515 U.S. 304 (1995).

Courts have discretion to decide the order in which to evaluate the two qualified immunity prongs. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). However, under either prong, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan*, 572 U.S. at 656.

**A. There was a Constitutional Violation Committed by Houk**

**1. An Officer's Use of a Police Canine is not Unfettered**

The *Fourth* Amendment's prohibition of unreasonable seizures strictly limits the amount of force a police officer may use. Specifically, a police officer may only use that degree of force necessary to complete the arrest. *Monday v. Oullette,* 118 F.3d 1099, 1102 (6th Cir. 1997). Reviewing courts "apply an objective reasonableness test, looking to the reasonableness of the force in light of the totality of the circumstances confronting the defendants, and not to the underlying intent or

motivation of the defendants." *Dunigan v. Noble*, 390 F.3d 486, 493 (6th Cir. 2004); *see also Graham v. Connor*, 490 U.S. 386, 396-397 (1989). The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . . and the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure." *Id*. There are three factors which should be considered under the excessive force analysis: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham,* 490 U.S. at 396. When these factors are weighed in this case, they weigh in the favor of Plaintiff-Appellee; as will be shown later.

While Courts have not carte blanche opposed a police officer's use of a canine, an officer's use of a police canine must still be guided by Fourth Amendment principles of reasonableness; and this includes not using force on an individual who is not resisting or is otherwise not a threat; and warning of such use if possible. Since at least 2006, the Sixth Circuit has held that "[c]ases in this circuit clearly establish the right of people who pose no safety risk to the police to be free from gratuitous violence during an arrest. *Shreve v. Jessamine County Fiscal Court*, 453 F.3d 681, 688 (6th Cir. 2006). Then, specifically addressing the situation involving police canines and dog bites, the Court in *Drew v. Milka*, 555 Fed. Appx. 574 (6th Cir. 2014) affirmed that "there is a clearly established constitutional right to be free from

dog bites when one is neither resisting arrest nor trying to flee." (citing *Wysong v. City of Heath*, 260 Fed. Appx. 848 (6th Cir. 2008); *Smoak v. Hall*, 460 F.3d 768, 784 (6th Cir. 2006); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004)). Furthermore, when the video of the incident is viewed, Defendant-Appellant Houk ordered Argo to attack Plaintiff-Appellee Jarvela despite the fact he was not resisting, fleeing, or otherwise a threat; thereby violating Plaintiff-Appellee's constitutional rights.

"An excessive-force claim turns on whether an officer's actions were 'objectively reasonable' given the circumstances he confronted." *Shanaberg v. Licking Cty.*, 936 F.3d 453, 455-456 (6th Cir. 2019). This principle has been in place since at least 1988, which is when the Court decided *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988).

*Robinette, supra* involved a man who was suspected of being involved in a burglary, and was hiding inside of a darkened commercial building shortly after midnight. *Id.* at 910-911. Officers testified that while they were outside of the building, they saw a white male inside; and once the officers entered the building, one of the officers "shouted a warning that he had a police dog and that anyone inside the building should come out or he would turn the dog loose. Approximately thirty seconds later, Barnes repeated the warning." *Id.* at 911. The dog was released and yet another warning was issued. *Id.* The dog ultimately found the perpetrator whose

body was half under a car, and the police canine had grabbed the man's neck, ultimately killing him. *Id*. While the Court ultimately concluded that the use of a police canine does not per se constitute deadly force, the force used still had to be reasonable under the circumstances. *Id*. at 913. However, in the instant case, unlike *Robinette,* no warnings were ever given and the use of force was not reasonable.

Since at least 2012, it has been well established that an attack by an unreasonably deployed police dog during the course of an arrest is a Fourth Amendment excessive force violation. *Campbell v. City of Springboro, Ohio*, 700 F.3d 779, 787-789 (6th Cir. 2012). While Defendant-Appellant muddies the waters by emphasizing that Argo was properly trained, such emphasis is really nothing more than a red herring and is not dispositive. In *Campbell, supra* at 787-789, the Sixth Circuit held that it was well established that an attack by an unreasonably deployed police dog in the course of an arrest is a Fourth Amendment excessive force violation. Specifically, the Court stated:

> When the officers found Campbell, he was lying face down with his arms at his side. According to Campbell, he and Clark made eye contact prior to Spike engaging him. At no point was Campbell actively resisting arrest. Thus, Campbell has made out a colorable argument for excessive force based upon improper handling by Clark. . . . Viewing the facts in a light most favorable to the Plaintiff, the district court did not err in finding that a reasonable jury could find that Officer Clark's actions were unreasonable.

*Id*. at 787. The Court also concluded that the officer acted contrary to established law when he released a canine to apprehend the suspects without warning. *Id.* at 789.

The principles set forth in *Campbell* were followed in *Rainey v. Patton*, 534 Fed. Appx. 391 (6th Cir. 2013). *Rainey* involved a traffic stop where the suspect was ordered out of her vehicle and the officer eventually brought a police dog over to where the suspect was lying on the ground and the canine bit her. *Id*. at 392-393. Notably, the Court's decision did not rest on the training or lack thereof as to the police dog; but instead considered whether the decision to employ the canine was even reasonable in the first place. Viewing the facts in the light most favorable to the plaintiff, the Court concluded that the officer's decision to employ his canine during the course of the traffic stop was unreasonable. *Id*. at 395.

Moving on to the next question of whether the protections against excessive force as it related to the use of police dogs was clearly established at the time, the Court stated as follows:

> **The cases granting qualified immunity to the officer highlight the importance of facts establishing that a suspect has failed to surrender or has yet to be apprehended and has been given the opportunity to avoid an encounter with a dog before its deployment.** When such facts have not been present, use of a police canine has been deemed unreasonable. . . .Based on the principles articulated in these cases, it would be clear to a reasonable officer that deploying a police dog against an unarmed suspect detained on the basis of a traffic offense, who was on the

> ground and not attempting to flee, would constitute excessive force.

*Id*. at 397. (Emphasis added).

Therefore, prior to the incident complained of, it was clear that before an officer deployed a police dog, an opportunity to avoid the encounter must be given, and that such facts are requisite to the granting of qualified immunity.

### 2. The Cases in this Circuit Establish that a Warning be Given Before a Canine Seizes a Citizen

Once again, Defendant-Appellant misses the point, because it is not being argued that an officer is absolutely prohibited from using a canine in police work. The touchstone of Fourth Amendment excessive force cases which would involve the use of canines, however, is reasonableness. *Brown v. Battle Creek Police Dep't*., 844 F.3d 556, 567 (6th Cir. 2016). It has long been established that an officer's actions in using force, whether by use of their hands, tasers, other weapons, or a police dog, must be reasonable. The reasonableness of a use of force "involves a fact-specific inquiry based on the totality of the circumstances." *Morrison v. Bd. of Trs. of Green Township*, 583 F.3d 394, 401 (6th Cir. 2009). Therefore, the question to be answered is whether Houk acted reasonably when he failed to give a warning that he was going to release Argo. The caselaw supports a finding that he indeed acted unreasonably; and as such, the District Court's decision in this regard was correct.

Cases within the Sixth Circuit, both Circuit and district court cases, have understood that it has been clearly established that unreasonably deploying a police dog in the course of an arrest is excessive force and violates the Fourth Amendment, especially when no warning or an opportunity to surrender is given.

Citing *Campbell, supra*, the district court in *Ziolkowski v. City of Taylor*, 2013 U.S. Dist. LEXIS 107355, *27 (E.D. Mich. 2013) recognized that "[i]t 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." In the district court case of *Drew v. Milka*, 2013 U.S. Dist. LEXIS 110970, *15-16 (E.D. Mich. 2013), a case involving a police officer who ordered his police dog to bite the plaintiff without warning and despite the plaintiff's compliance, the Court stated that "[i]t is clear that ordering a dog bite on a compliant arrestee violates a clearly established constitutional right."

In *Baker v. Snyder*, 2004 U.S. Dist. LEXIS 30056 (E.D. Tenn. 2004), the police went to the house of the plaintiff who was on a wanted list and had multiple warrants for his arrest. *Id.* at *4. Information was given that the plaintiff had run into a closet or a crawl space in the basement. *Id.* at *6. Officers gathered in the basement where they claimed that they called out to the plaintiff and asked him to come out multiple times and warned that a canine would be used. *Id.* at *6. The canine and its police handler entered the basement and approached the entrance of

the crawlspace and the officer stated that if the plaintiff did not come out of his hiding place, he would send in the dog to bite him. *Id*. at *6-7. After the warning was repeated three times with no response being received, the canine was put in the crawlspace and told to search. *Id*. The police dog grabbed hold of the plaintiff's leg. *Id*. at *7-8. **The court acknowledged that "the presence or absence of a warning is generally a critical fact in determining whether the deployment of a police dog amounts to excessive force in a given case."** *Id*. at *23. And furthermore, "requiring loud verbal warnings before releasing a trained police dog will, in most cases, not subject officers to any increased danger and will likely diminish the risk of confrontation by increasing the likelihood a suspect will surrender and enable innocent persons to exit the area." *Id*.

Looking at Sixth Circuit decisions, in *Campbell, supra*, one of the factors that was important in deciding that the officer in that case unreasonably deployed a police dog was the fact that no warnings were given prior to the dog biting the suspects. *Id*. at 789.

In *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), which was discussed earlier, multiple warnings were given about the possible release of a police dog before it was actually released. *Id*. at 911. The police dog was ultimately released and found the suspect and bit the partially hidden suspect in the neck, killing him. *Id*. at 911. Although the Sixth Circuit ultimately determined that the force was

reasonable under the circumstances, the Court emphasized that the reasonableness of the force was because the suspect was hidden inside of a darkened building and refused to surrender despite having been given multiple warnings that the dog would be released. *Id*. at 913-914. The decision in *Robinette* was based upon the critical fact that the suspect had been warned that a dog would be released yet still refused to surrender, thereby declaring the suspect's unwillingness to obey. *Id*. at 913. In the instant case, Plaintiff-Appellee was never even warned that a dog would be released and was never given any orders general or specific before Argo bit him.

In *Matthews v. Jones*, 35 F.3d 1046, 1048 (6th Cir. 1994), in the wee hours of the morning, the plaintiff (who had been drinking and was driving on a suspended license) was speeding and driving recklessly. The plaintiff pulled his car off the road and ran into a nearby woods with heavy trees and undergrowth. *Id*. When the officers were unable to locate the plaintiff, they called out orders for him to surrender, but the plaintiff did not respond. *Id*. One of the officers had a leashed police dog that stopped at the edge of a swampy, heavily wooded area. The officer again ordered the plaintiff to surrender and gave multiple warnings that the dog would be released if he did not surrender; however, again, the plaintiff did not respond. *Id*. The officer released the dog who then ran into the woods, stopped, and alerted. The plaintiff was found lying on his stomach in the weeds with his hands underneath his body. *Id*. The officer ordered the plaintiff not to move and informed

him that if he remained still, the dog would be recalled; but instead of complying with the officer's orders, the plaintiff rose to his knees and the dog bit the plaintiff in the arm and held him. *Id*. Although the Court determined that the police dog was not used in an inappropriate manner, that decision was based on the fact that the officer warned the plaintiff several times before releasing the police dog; and the plaintiff deliberately chose to move despite being told that if he remained still, the dog would be recalled. *Id*. at 1051.

Therefore, when the cases are considered, it becomes clear that the District Court was not "divining" some type of a new rule that purportedly required officers always to provide a warning, but was instead applying clearly established law that it is reasonable to give a warning before deploying a dog; and that is what the cases stand for.

Other sister circuits have also found that it is reasonable for a police officer to give a warning before deploying a police dog. In *Vathekan v. Prince George's County*, 154 F.3d 173, 179 (4th Cir. 1998), the Fourth Circuit stated that "precedent existing in 1995 clearly established that failure to give a warning before releasing a police dog is objectively unreasonable in an excessive force context." In *Kuha v. City of Minnetonka*, 365 F.3d 590, 598 (8th Cir. 2003), the Eighth Circuit concluded "that a jury could properly find it objectively unreasonable to use a police dog trained

in the bite and hold method without first giving the suspect a warning and opportunity for peaceful surrender."

Finally, as the Court said in *Greco v. Livingston County*, 774 F.3d 1061, 1064 (6th Cir. 2014), "[a]n apprehension by a police dog or a delay in calling off the dog may rise to the level of an unreasonable seizure." (citing *Campbell, supra* at 787). Therefore, the presence or absence of warnings is crucial and is vitally important in the Fourth Amendment reasonableness analysis.

### 3. Under the Circumstances of the Case, It was Reasonable Under to the Fourth Amendment to Give a Warning.

Contrary to Defendant-Appellant's assertion that the District Court imposed a de facto requirement to warn before releasing a canine, the failure of Defendant-Appellant Houk to do so was unreasonable given the facts of this particular case.

#### a. The Facts of the Instant Case are More Analogous to *Campbell* than *Robinette*.

First, it is necessary to consider the factual background of *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), which was decided before *Graham v. Connor*. The case has been discussed previously herein, but the critical facts of the case are that prior to the attack by the police dog, warnings were given. *Robinette, supra* at 911. The warning was repeated multiple times before the dog was released. *Id*. Notably, unlike the instant case, *Robinette* involved a situation where the officer gave

repeated warnings for the suspect to reveal himself or that a police dog would be loosed.

The analysis used to decide *Robinette* should be considered with caution when applying it to the case at bar; and quite simply, it does not control. First of all, the decision predates *Graham* and appears to have been decided under the assumption that anything short of deadly force may constitutionally be used to apprehend a felon. *Robinette, supra* at 911-913. Such an assumption conflicts with the reasoning set forth in *Graham.* Secondly, the Court's discussion of the force used considered the intent of the police officer. *Id*. at 912-913. However, *Graham* made it clear that "[a]s in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham, supra* at 397. Finally, the Court's reference to the fact that the police dog was properly trained was not a focal point of the decision, but was mentioned in the context of the Court's discussion of the intent of the officer in using deadly force and that "the use of a properly trained police dog to apprehend a felony suspect does not carry with it a 'substantial risk of causing death or serious bodily harm.'"

In contrast, *Campbell v. City of Springboro, Ohio*, 700 F.3d 779 (6th Cir. 2012) is more instructive and analogous to the instant case. That case involved two

separate plaintiffs who were bitten by the same police dog, albeit approximately one year apart.

**The Campbell Incident.** Campbell, his girlfriend, and another couple had spent the evening at a nightclub. Shortly after midnight, Campbell's girlfriend left the nightclub and walked home because she was too drunk to drive. *Id.* at 784. Campbell went to his girlfriend's house to return her car keys. *Id.* Through the window in the front door, Campbell saw his girlfriend lying on the couch, so he loudly pounded on the front door for 10-15 minutes in an attempt to arouse her; but his efforts failed. *Id.* Campbell went around to the back door and proceeded to pound on it for another 2-3 minutes; again with no success in arousing his girlfriend. A neighbor in the other half of duplex called the police because of the noise. *Id.* By the time officers arrived, Campbell had already started to head to his house on foot through the backyard of his girlfriend's duplex. *Id.* Hearing the approaching police sirens, Campbell decided to lie on the ground near an outbuilding so as to avoid any sort of confrontation with the police. *Id.*

The officer outfitted the police canine in a harness and a 20 foot tracking line. The officer claimed that he did not know he was even close to Campbell and did not see Campbell until the dog bit him. *Id.* at 785. The remaining important facts are set forth below:

> **Both parties agree that neither Campbell nor Clark said anything prior to Spike biting Campbell. Clark issued no**

> **warnings to Campbell**, and Campbell said nothing to the officers. Campbell contends and Anderkin's incident report reflects that when Spike engaged Campbell, Campbell was lying face down on the ground with his hands out to his side. Spike bit Campbell on the left leg and continued to bite Campbell at different places on his leg for some period of time, possible thirty to forty-five seconds.

*Id*. at 785.

The Court began its analysis of the Campbell encounter by acknowledging that "[i]n applying the objective reasonableness test, the court is required to pay 'careful attention to the facts and circumstances of each particular case.'" *Id*. at 787. The Court then acknowledged that the officers did not know the extent of the crime, if any, that the suspect had committed or if he was actually armed. *Id*. When Campbell was found, he was lying face down with his arms at his side and did not actively resist arrest. *Id*. Therefore, and without regard or consideration of the canine's inadequate training, the Court determined that "Campbell has made out a colorable argument for excessive force based upon improper handling by Clark." *Id*.

**The Gemperline Incident.** At approximately 1:30 a.m., officer Clark and other law enforcement were dispatched to a residence that was the sight of a loud party where under aged teenagers were believed to have been drinking. *Id*. at 785. Gemperline was eventually arrested, put in handcuffs, and placed in the rear of a patrol vehicle. *Id*. Gemperline became belligerent and eventually slid her right hand out of the handcuffs, lowered the police car window, and escaped; ultimately hiding

in a children's plastic playhouse in the backyard of a house six to seven houses away. *Id*. Upon being notified of the escape, officer Clark referred to Gemperline as a "b****" and said, "[s]he's gonna get a nice rude awakening here in one second or two . . . it's not gonna feel very good." *Id*. Officer Clark then harnessed his canine and attached a 20 foot tracking line. *Id*. at 785-786. The dog then leapt head-first through the window of the child's playhouse and nipped Gemperline's chin and bit her upper thigh. *Id*. at 786. Gemperline screamed and grabbed the dog's jaws and tried to pry the dog off of her leg, and after a brief release, the dog clamped down again. *Id*. Gemperline continued to struggle with the dog until she either passed out or went into shock. *Id*. Finally, the Court's factual recitation ended by stating, "Officer Clark testified that he could have, but did not shout any warnings when he entered the backyard with Spike." *Id*.

As to that situation, the Court began its analysis by stating that although Gemperline had committed a felony by escaping from police custody, "the crime was not violent, no weapons were found on her person, and she had not done anything to put anyone in harm's way." *Id*. at 787. The Court also noted that the parties disputed whether or not the officer gave Gemperline a warning and that the officer did not otherwise make himself known prior to the dog biting Gemperline. *Id*. As such, viewing the facts in the light most favorable to Gemperline, the Court

affirmed the district court's conclusion that a reasonable jury could find the officer's actions to be unreasonable. *Id*. at 789.

**Clearly Established Right Analysis as to Both Gemperline and Campbell.**

The question before the Court regarding both of the encounters was "whether or not Plaintiff's Fourth Amendment protections against excessive force, as it relates to the use of police dogs, was clearly established at the time the incidents occurred." *Id*. at 788. The incidents took place in 2007 and 2008. *Id*. at 784-785. In contrasting the facts of *Robinette, supra* and *Matthews v. Jones*, 35 F.3d 1046 (6th Cir. 1994), the Court emphasized that in both of the incidents in *Campbell*, the officer failed to give warnings to either of the suspects prior to the police dog biting them. *Id*. at 789. The Court said, "[i]n both instances, Spike attacked the suspects without warning or a command form Clark." *Id*. Likewise, in the instant case, a jury must likewise determine whether Houk's actions and/or inactions were unreasonable.

**b. The District Court's Reliance on *Rainey v. Patton* was Reasonable and Warranted.**

*Rainey v. Patton*, 534 Fed. Appx. 391 (6th Cir. 2013) was decided almost nine months after *Campbell*. The District Court's decision referenced and discussed *Rainey* on pages 15 and 20 of its Opinion and Order. **(Opinion and Order, R. 116, Page ID ## 3098, 3103).** While Defendant-Appellant argues that the facts of the instant matter and *Rainey* are too far apart, such is not the case; and even if they were, the principles to be gleaned from *Rainey* are dispositive.

Just prior to the September 23, 2010 traffic stop of the plaintiff, police officers had responded to her apartment because of a domestic call where the plaintiff requested her boyfriend be escorted from the apartment because of their continuous arguing. *Id*. at 392. The plaintiff left the apartment in her automobile and was pulled over later for failing to yield to oncoming traffic. *Id*. at 392. Admittedly, the plaintiff did not immediately pull over when the officer activated his cruiser emergency lights, did not immediately comply with the officer's commands to lie on the ground and put her cell phone down, and attempted to use her phone during the stop; all of which were evasive behaviors and actions that posed a threat to the safety of the officer. *Id*. at 393.

What is important in the Court's decision in *Rainey*, and its application to the present matter is its discussion of the application of qualified immunity as to the officer's actions and "whether or not [Rainey's] Fourth Amendment protections against excessive force, as it relates to the use of police dogs, was clearly established at the time the incident[] occurred." *Id*. at 395-396. To the "clearly established" question, the Court stated "However, 'there need not be a case with the exact same fact pattern, or even fundamentally similar or materially similar facts; rather, the question is whether the defendants had fair warning that their actions were unconstitutional.'" *Id*. at 396. Citing to *Campbell*, *Matthews*, and *Robinette* and gleaning insight from their decisions, the Court stated as follows:

> **The cases granting qualified immunity to the officer highlight the importance of facts establishing that a suspect has failed to surrender or has yet to be apprehended and has been given the opportunity to avoid an encounter with a dog before its deployment. When such facts have not been present, use of a police canine has been deemed unreasonable. . . .**
>
> Based on the principles articulated in these cases, it would be clear to a reasonable officer that employing a police dog against an unarmed suspect detained on the basis of a traffic offense, who was on the ground and not attempting to flee, would constitute excessive force.

*Id*. at 397 (internal citations omitted) (emphasis added).

Contrary to the assertions of Defendant-Appellant, the District Court correctly articulated *Rainey's* assessment of the caselaw up to that point in time, which was that a person had a right to be given an opportunity to avoid an encounter with a police dog before being seized by same. That is a correct reading, assessment, and application of *Rainey* to the instant matter. Furthermore, the Court's decision in *Rainey* was not limited to the facts of the case; but the decision was an analysis of the state of the law up to that point. As such, the District Court properly applied and invoked *Rainey.*

*Rainey* is a Sixth Circuit unpublished decision, and yet in his briefing Defendant-Appellant attempts to convince this Court to rely on the district court case of *Miller v. Rybicki*, 259 F.Supp.3d 688 (E.D. Mich. 2017), which he also relied on in his briefing before the lower court. The District Court's opinion was interesting in that that it agreed with the *Miller* Court's conclusion about the lack of a bright

line rule requiring an officer to warn a suspect before allowing a dog to bite, but continued with an analysis of Miller that actually supports Jarvela. See what the District Court stated in its Opinion and Order:

> By contrast, Houk cites Miller v. Rybicki, 259 F. Supp. 3d 688, 699 (E.D. Mich. 2017), for its conclusion that no Supreme Court or Sixth Circuit cases have adopted a bright-line rule that an officer must warn a suspect before allowing a dog to bite. That is a fair reading of Miller, with which this Court has no quibble. **But Jarvela does not need such a bright line rule to succeed.** Rainey acknowledges a baseline rule that the use of a canine is unreasonable when the suspect has not been afforded an opportunity to avoid the encounter. Miller recognizes commonsense deviations from that norm. The officer in Miller "reasonably believed that he was tracking a suspect who had threatened to kill other individuals and who could be armed with a deadly weapon. . . . And the track was occurring in a dark and heavily wooded area." Miller, 259 F. Supp. 3d at 698. . . .
>
> The circumstances of Miller demonstrate the wisdom of avoiding bright line rules such as a per se duty to warn. As Miller stated, "there is a reasonable argument" that such a rule "could create real danger for officers in circumstances like those confronted by Jacobson." Id. T 695 n.5. **But this does not mean that officers are free, in all circumstances, to track suspects with dogs in such a way that is intended to, or will likely, result in the dog detaining the suspect with the dog's teeth before the suspect is provided an opportunity to avoid contact with the dog.**
>
> Miller ultimately stands for the proposition that in some cases, it is unreasonable to require officers to announce their presence before deploying a canine, and that in those cases, a suspect's right to receive such a warning I qualified or lost entirely. **However, this is a fact bound question. As shown below, the facts, viewed in the light most favorable to Jarvela, do not show the kind of exceptional circumstances present in Miller were similarly present in Houk's pursuit of Jarvela.**

**(Opinion and Order, R. 116, Page ID. ## 3098-3099).**

The District Court correctly read and interpreted *Miller, supra*, which again, was a district court decision, in that whether a violation occurred was dependent on the specific and particular facts of the case. In *Miller*, the district court put the case "much closer to the end of the spectrum at which the Sixth Circuit has granted summary judgment to police officers in excessive force cases involving dog bites" because of the various facts. For one thing, the officer "reasonably believed that he was tracking a suspect who had threatened to kill other individuals and who could be armed with a deadly weapon," which is why the officer was working in "stealth" mode, which meant "that they did not announce their presence or give any advance warning or notice to Miller that they were approaching." *Miller, supra* at 693, 698). Additionally, the track was occurring in a dark and heavily wooded area. *Id*. at 698.

Those facts are indeed at the other end of the spectrum when compared with the facts of the instant case, which the District Court aptly noted. In the instant case, Houk was certainly not operating in any type of "stealth" mode. This is obvious from the video where Houk not only shined his flashlight but was talking. Also, there was no indication that Jarvela had been engaged in any sort of physical brawl that evening, nor was there evidence that he was armed with a weapon. Finally, the area being searched was not heavily wooded, but mowed and there was a nearby home with lights on. Therefore, factually, the two cases are not factually similar;

and as such, the District Court in this matter was correct that the ultimate decision would have to be made by a finder of fact, in this case, a jury.

**c. The District Court's Reasoning was Well Founded**

Contrary to the negative inference made by Defendant-Appellant Houk, while the District Court admittedly did not agree with his explanations for not issuing a warning during the track, the Court only rejected such explanations after a thorough discussion and consideration of the circumstances surrounding the incident. The Court's analysis is set forth below:

> The second explanation, concerning officer safety, is not much more persuasive. As discussed below in the context of the Graham factors, Jarvela did not present known risks that made him seem particularly dangerous. The circumstances were a far cry from Miller, which involved a suspect the officers had reason to believe had threatened to kill people and may have had a weapon. Furthermore, the officers' behavior, as captured in the video, contradicts the notion that the officers were engaged in anything like the "stealth mode" described in Miller. Houk communicated with Argo and Trevino throughout the track, and neither Houk nor Trevino seem to be whispering nor limiting their conversation to mission-critical exchanges. See Houk Video at 3:00-6:00. Houk conversed with Trevino, apparently answering questions about how Argo was tracking. Houk Video at 4:31. One of the officers can be heard on the recording saying he would be off for the next three days. Id. at 5:08-5:12. Houk ordered Argo to stop eating grass. Id. at 5:36. The officers' radios were on throughout the track and can be heard in the video. Furthermore, when Houk was asked why he did not issue a command to Jarvela once he saw his shirt and shoes, he did not say anything about needing to maintain stealth. Houk Dep. at 58. Instead, he said that the presence of clothing did not necessarily indicate the proximity of the suspect. Id.

> A jury could reasonably conclude that the officers were not going to significant lengths to conceal their presence, belying a claim that they failed to provide Jarvela an opportunity to avoid the encounter with Argo, which the Constitution requires in most cases.
>
> In sum, a genuine dispute of material facts precludes summary judgment on the question of whether Houk violated Jarvela's right to be given an opportunity to surrender without being attacked by a dog.

**(Opinion and Order, R. 116, Page ID # 3101).** The Court correctly noted, based on the plethora of facts presented, that Defendant-Appellant Houk was not particularly apprehensive during the search; which is also a reasonable conclusion that a reasonable juror could also reach.

Bolstering his argument and further attempting to discount the District Court's Opinion, Defendant-Appellant penned that an officer's subjective intent is irrelevant to the Fourth Amendment inquiry. However, this principle was not disputed by the District Court. Citing to *Graham, supra* at 397, the District Court stated, "[s]ubjective intent is irrelevant in excessive force cases. 'An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.' What matters are the 'facts and circumstances' confronting the officers.'" **(Opinion and Order, R. 116. Page ID. # 3100)** (internal citation omitted).

Finally, Defendant-Appellant continues with his campaign of erroneously accusing the District Court of conjuring up a "mandatory-warning requirement." The District Court did not compel such a requirement in every case involving a police dog. In fact, the District Court agreed that a fair reading of *Miller v. Rybicki*, 259 F. Supp. 3d 688 (E.D. Mich. 2017) was that a bright-line rule requiring an officer warning before a dog bite had not been adopted. **(Opinion and Order, R. 116. Page ID. # 3098).** However, the District Court then did go on to acknowledge that *Rainey, supra* recognized a baseline rule that "the use of a canine is unreasonable when the suspect has not been afforded an opportunity to avoid the encounter. *Id.* While Defendant-Appellant argues that the District Court "fails to identify precisely when Deputy Houk was required to give a verbal warning to Jarvela" such an argument illustrates the erroneous understanding of what the District Court was saying. The premise of the District Court's decision was whether the actions and/or inactions of Defendant Houk were reasonable or not. All of the arguments Defendant-Appellant makes about why warnings at certain points were not reasonable may be appropriate for a jury, but are not dispositive in terms of the Fourth Amendment reasonableness analysis at this stage of the case.

**B. Deputy Houk's Conduct DID Violate Clearly Established Law.**

As far back as 1989, the United States Supreme Court made it explicitly clear that an officer's use of force during the course of an arrest is to be analyzed under

the Fourth Amendment and its reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989). *Graham* went on to hold that:

> Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

*Id*. at 395. Thus, whether an officer's use of force "was excessive, and thus violative of 'clearly established law,' turns upon whether their actions were objectively reasonable under the circumstances." *Jackson v. Hoylman*, 933 F.2d 401, 402 (6th Cir. 1991) (citing *Graham, supra*). Specifically, officers may use only the degree of force necessary to effect an arrest. *Monday v. Oullette*, 118 F.3d 1099, 1104 (6th Cir. 1997). Additionally, cases in this Circuit have long established the right of people who pose no safety risk to the police to be free from gratuitous violence during an arrest. *Shreve v. Jessamine Cnty. Fiscal Court*, 453 F.3d 681, 688 (6th Cir. 2006).

The exact factual circumstances alleged in a given case do not have to be found to be a constitutional violation before a right can be "clearly established" for purposes of a qualified immunity analysis. The United States Supreme Court has recognized that "officials can still be on notice that their conduct violates established law even in novel circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

"When a general constitutional principle 'is not tied to particularized facts,' the principle 'can clearly establish law applicable in the future to different sets of detailed facts.'" *Sample v. Bailey*, 409 F.3d 689, 699 (6th Cir. 2005). The determinative concern is whether the officer had "fair warning that his conduct deprived [the plaintiff] of a constitutional right." *Hope, supra* at 740 (internal quotation omitted). See also *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 993 (6th Cir. 2017) ("The 'dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). And as previously stated, "[i]n order for a constitutional right to be clearly established, there need not be a case with the exact same fact pattern, or even 'fundamentally similar' or 'materially similar facts; rather, the question is whether the defendants had 'fair warning' that their actions were unconstitutional." *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005). Finally, in the recent decision of *Rhodes v. Michigan*, 10 F.4th 665, 679 (6th Cir. 2021), the Court stated:

> Rather, 'the clearly established law must be 'particularized' to the facts of the case. This does not mean, however, that Rhodes must point to a case 'on all fours' with the instant fact patter to form the basis of a clearly established right. All that is required is a sufficiently analogous case (or cases) from which a 'reasonable official would understand that what he is doing violates that right.'

(internal citations omitted).

The District Court did, in contrast to the argument by Defendant-Appellant, identify casleaw that gave Defendant Houk more than sufficient warning that his

actions/inactions were unconstitutional. As discussed previously, for example, the District Court opined that "[n]o later than Rainey, issued in 2013, a suspect's right to be given the opportunity to avoid an encounter with a dog before its deployment was clearly established." **(Opinion and Order, R. 116, Page ID # 3098).** And again, *Rainey* clearly established that a suspect who has failed to surrender or has yet to be apprehended be given the opportunity to avoid an encounter with a dog before its deployment. *Rainey, supra* at 397.

Defendant-Appellant makes much of the fact that *Rainey* is unpublished. Although a Sixth Circuit case may be unpublished, that does not mean that it should be ignored. As the Sixth Circuit has explained, "[u]npublished decisions of this court are not precedentially binding under the doctrine of stare decisis but may be considered for their persuasive value." *United States v. Mellies*, 329 Fed. Appx. 592, n.9 (6th Cir. 2009) (citing *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007)). *See also Hood v. Keller*, 229 Fed. Appx. 393, n.5 (6th Cir. 2007).

Furthermore, and more importantly, however, is that although the *Rainey* decision itself might be an unpublished Sixth Circuit decision, the decision was nonetheless premised upon three then-existing and published Sixth Circuit dog-bite decisions: *Campbell v. City of Springboro*, 700 F.3d 779 (6th Cir. 2012); *Matthews v. Jones*, 35 F.3d 1046, 1048 (6th Cir. 1994); and *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988). In *Rainey*, the published cases of *Campbell*, *Matthews*, and

*Robinette* were all part of the Court's qualified immunity and "clearly established" analysis. *Rainey, supra* at 396-397. In fact, it was those principles, which were articulated in the aforementioned published cases, that allowed the *Rainey* Court to state the following:

> Based upon the principles articulated in these cases, it would be clear to a reasonable officer that employing a police dog against an unarmed suspect detained on the basis of a traffic offense, who was on the ground and not attempting to flee, would constitute excessive force. Thus, in the case brought by Rainey, the magistrate judge's grant of summary judgment on qualified immunity grounds was inappropriate.

*Rainey, supra* at 397. Therefore, *Rainey*, although unpublished, is very instructive because its decision was based upon published Sixth Circuit caselaw. *Rainey* **acknowledges** the existing baseline rule that the use of a canine is unreasonable when the suspect has not been afforded an opportunity to avoid the encounter. The acknowledgment of that baseline rule came from prior published cases. As such, the law was clearly established at the time of the incident complained of.

## II. Defendant-Appellant Houk is NOT Entitled to Qualified Immunity for His Actions Taken Against Jarvela.

Defendant-Appellant argues that because the Court granted qualified immunity to Trevino, it should have granted the same to him; however, the argument is without merit. The Sixth Circuit requires a court to analyze each defendant's actions separately, rather than collectively. *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010). This is precisely what the District Court did, and that is how it came

to its decision. The District Court meticulously analyzed the actions of Defendant-Appellant separate from the actions of Officer Trevino and made its decision based upon their separate and not their collective actions.

In addition, when the factors set forth in *Graham* are considered, Defendant Houk's actions and/or inactions clearly establish a violation of Plaintiff-Appellant's constitutional rights. Although reasonableness is determined based on the totality of the circumstances, *Graham, supra* highlighted three factors that must guide the analysis, and those factors will now be discussed in turn.

**i. The Severity of the Crime at Issue**

In his briefing before the District Court, Defendant-Appellant Houk categorized the severity of the crime involved (fleeing and eluding while impaired) as being a crime of only moderate severity. **(Houk's Motion for Summary Judgment, R. 81, Page ID # 1249).** The Court in *Gaddis v. Redford Township*, 364 F.3d 763, 774 (6th Cir. 2004) described the crimes of driving while intoxicated and fleeing an officer as being a crime of only moderate severity. As to this factor, the District Court correctly determined that "[a] jury could reasonably conclude that the crimes of which Jarvela was suspected (and later convicted) did not, on their own, justify Houk's use of force." **(Opinion and Order, R. 116, Page ID # 3102).**

**ii. Whether Jarvela Posed an Immediate Threat to the Safety of the Officers or Others**

The language in *Graham* is important and must be considered when discussing this factor against the factual circumstances in this case. *Graham* instructs us to look at "whether the suspect poses an **immediate threat** to the safety of the officers or others." *Graham, supra* at 396. (Emphasis added). To the contrary, Defendant-Appellant argues that the second *Graham* factor weighs in his favor because Plaintiff-Appellee posed a "potential safety threat." However, that is not what *Graham* said; but rather it required an immediate threat. Why is that? Because arguably every single encounter between a citizen and law enforcement could pose a "potential" safety threat; whether the officer is dealing with the theft of a candy bar from a corner store or an armed robbery, there exists the potential for a safety threat. However, in looking at whether there was an "immediate threat" to the safety of the officers or others in this case, this factor weighs in favor of Plaintiff-Appellee. Again, when the video of the incident is viewed, when Defendant-Appellant Houk and Argo came upon Plaintiff-Appellee, he was visible, he was shirtless, had been lying clearly unarmed and did not pose an immediate threat (or any threat for that matter) whatsoever to anyone. This factor weighs in favor of Plaintiff-Appellee, and the District Court correctly determined same as well.

### 3. Whether Plaintiff-Appellee was Actively Resisting Arrest or Attempting to Evade Arrest by Flight

This third *Graham* factor, as correctly determined by the District Court, also weighs in favor of Plaintiff-Appellee. Clearly, when the evidence is considered,

especially the video evidence, there is no dispute that Plaintiff-Appellee did not attempt to evade arrest by flight once he was in the woods. However, Defendant-Appellant argues that Plaintiff-Appellee resisted arrest and "fought Argo," thereby permitting his use of force. While Defendant-Appellant Houk argues that Plaintiff-Appellee admitted that he was "fighting" Argo, when the cited portion of the deposition testimony is considered in its entirety, it is clear that although Plaintiff-Appellee used the word "fighting" it was not meant to be considered in its normal meaning of some sort of combat or violent engagement:

> I was ordered to get on my stomach, to stop resisting. I was laying on my back. Argo was on my right bicep. So, I'm either going to take this 90-pound dog and throw him over the top of my body to get on my stomach, or I'm going to roll over to the easiest path, which would've been for me to roll over to my right, where I'm still fighting a 90-pound dog on my arm and trying to get is mouth out of my bicep. So, I rolled over on top of Argo, to try to get his arm off – try to get his mouth off of my arm.
> . . . .
> Yea, trying to pull his mouth off my arm.
> . . . .
> I was right here, right on top of his snout, trying to lift his snout off of my bicep.

**(Plaintiff's Deposition, R. 100-3, Page ID # 2333).**

Given the video and the testimony, Defendant-Appellant Houk's use of force was not reasonable, and the District Court correctly determined (after a complete and thorough analysis) that a jury would have to make the ultimate determination. **(Opinion and Order, R. 116, Page ID # 3105).**

As the District Court correctly noted, prior to the contact between Plaintiff-Appellee and Argo, there was no evidence that Plaintiff-Appellee actively resisted arrest. While Plaintiff-Appellee did in fact flee from Officer Trevino initially in his vehicle and then left his vehicle on foot, at the time of the encounter with Argo, Plaintiff-Appellee did not try to flee. Caselaw from the Sixth Circuit has also held that a prior attempt to evade arrest or flee does not preclude a claim of excessive force. *Baker v. City of Hamilton*, 471 F.3d 601, 607-608 (6th Cir. 2006); *Shreve v. Jessamine County Fiscal Court*, 453 F.3d 681, 687 (6th Cir. 2006) (holding that strikes to plaintiff's back and knee are unreasonable where plaintiff was already incapacitated, despite plaintiff's prior attempt to avoid detection by the police).

However, the District Court then stated that "[o]nce the encounter began, Jarvela engaged in some resistance against Argo. The degree of the resistance is impossible to establish from the video alone, requiring a jury to weigh the parties' and witnesses' testimony in light of the video and other evidence available." **(Opinion and Order, R. 116, Page ID # 3104).** And while Defendant-Appellant Houk disagrees with the District Court's ruling, the Court did exactly what it was required to do at the summary judgment stage, which is send the matter to the jury for ultimate determination.

In *Eggleston v. Short*, 560 Fed. Appx. 561, 562 (6th Cir. 2014), the appellate court looked at the district court's order which stated, "[g]iven the varying

interpretations of the video . . . where [there is] an issue of material fact as to whether the force applied was objectively reasonable . . . [an award of] summary judgment is inappropriate." The appellate court ruled that because the district court determined that the video at issue was not clear as to the amount of force used and therefor did indeed raise issues of fact; and as such, lacked jurisdiction to consider the appeal. *Id.*

Defendant-Appellant Houk's blows to Plaintiff-Appellee's head were unreasonable, and a jury could easily conclude that they were made as retribution for harming Argo, which the Court aptly noted in its decision. **(Opinion and Order, R. 116, Page ID # 3109).**

### C. Defendant-Appellant's Actions After Argo Bit Jarvela Violated Clearly Established Law.

Houk attempts to argue that his seven (7) blows to the back of Jarvela's head were reasonable and otherwise did not violate Jarvela's constitutional s however, testimony in the case holds otherwise.

Plaintiff-Appellee testified that Houk struck him in the back of the head seven (7) times in the back of the head, with what felt like his fist. **(Plaintiff's Deposition, R. 100-3, Page ID ## 2334, 2350; Houk BWC, R. 104-2, 6:30-6:44).** Houk denies striking Jarvela in the back of the head seven times, but did admit that it would not have been appropriate to hit Jarvela in the back of the head seven times. **(Houk Deposition Testimony, R. 100-6, Page ID # 2394).** Furthermore, when officer

Trevino was asked during his deposition whether he, as an officer on the scene, saw a reason to strike Jarvela in the head, he unequivocally responded in the negative. **(Trevino Deposition, R. 100-12, Page ID # 2477).**

The analysis with respect to the multiple blows to Jarvela's head is really quite simple. "The circumstances, and their totality, are considered as they would have appeared to 'a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Stewart v. City of Euclid*, 970 F.3d 667, 672 (6th Cir. 2020). In the 2004 decision of *Burden v. Carroll*, 108 Fed. Appx. 291, 294 (6th Cir. 2004), the Court stated, "[t]t is well established that a police officer cannot continue to use force once a reasonable officer would conclude that force is no longer justified by the circumstances." (citing *Phelps v. Coy*, 286 F.3d 295, 301 (6th Cir. 2002)). Logically, therefore, it was well established that a police officer cannot use force when a reasonable officer would conclude that no force was justified.

Finally, Houk's description of Jarvela "fighting" with Argo takes his testimony out of context (as discussed previously herein) and is not supported by the video. **(Plaintiff's Deposition, R. 100-3, Page ID # 2330). In fact, later on during his deposition, Jarvela clearly and unequivocally denied fighting with Argo. (Plaintiff's Deposition, R. 100-3, Page ID # 2350).**

Therefore, in light of the video, Houk's testimony, Jarvela's testimony, and Trevino's testimony there was no reasonable reason to strike Jarvela seven times in

the head. Clearly, Houk's striking of Jarvela in the head seven times was unreasonable.

## CONCLUSION & RELIEF REQUESTED

In light of the evidence set forth in the lower court record, and the arguments, caselaw, and evidence set forth herein, the decision of the District Court must be AFFIRMED.

Respectfully Submitted,

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Dated: February 25, 2022
SCC/

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this 12,411-word Brief complies with the Court's type-volume restrictions.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 25, 2022, the foregoing document was served on all counsel of record through the CM/ECF system.

Respectfully Submitted,

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# ADDENDUM

## DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

| DESCRIPTION | RE # | Page ID Range |
|---|---|---|
| Complaint and Jury Demand | 1 | 1-15 |
| First Amended Complaint and Jury Demand as of Right | 4 | 31-45 |
| Second Amended Complaint and Jury Demand | 37 | 233-247 |
| Plaintiff's Motion and Brief in Support to Strike Expert and Expert Report of Matthew K. Simpson | 74 | 629-651 |
| Exhibit G: Photos of Plaintiff's Injury (Plaintiff's Motion and Brief in Support to Strike Expert and Expert Report of Matthew K. Simpson) | 74-8 | 708-710 |
| Defendants Trevino and Village of Clinton's Motion and Brief in Support of Summary Judgment | 76 | 754-780 |
| Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment | 81 | 1228-2123 |
| Defendant Hayes' Motion and Brief in Support of Summary Judgment | 78 | 884-911 |
| Plaintiff's Response to Defendants Trevino and Village of Clinton's Motion and Brief in Support of Summary Judgment | 104 | 2837-3008 |
| Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment | 100 | 2283-2493 |
| Plaintiff's Response to Defendant Hayes' Motion and Brief in Support of Summary Judgment | 102 | 2667-2834 |
| Exhibit A: Houk's Body Worn Camera (Plaintiff's Response to Defendants Trevino and Village of Clinton's Motion and Brief in Support of Summary Judgment) | 104-2 | 2865-2866 |
| Exhibit B: Plaintiff's Deposition (Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment) | 100-3 | 2323-2354 |

| | | |
|---|---|---|
| Exhibit C: Plaintiff's Criminal Trial Testimony (Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment) | 100-4 | 2355-2358 |
| Exhibit D: Houk's Criminal Trial Testimony (Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment) | 100-5 | 2359-2370 |
| Exhibit E: Houk's Deposition (Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment) | 100-6 | 2371-2411 |
| Exhibit F: Trooper Hayes' Deposition (Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment) | 100-7 | 2412-2432 |
| Exhibit G: Dr. Benjamin Colmery, III's Deposition (Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment) | 100-8 | 2433-2446 |
| Exhibit H: Order of Acquittal (Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment) | 100-9 | 2447-2448 |
| Exhibit I: Video of Plaintiff's Injury (Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment) | 100-10 | 2449-2450 |
| Exhibit J: Dr. Colmery Vet Records for Argo (Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment) | 100-11 | 2451-2456 |
| Exhibit K: Officer Trevino's Deposition (Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment) | 100-12 | 2457-2484 |
| Exhibit L: University of Michigan Medical Records (Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment) | 100-13 | 2485-2491 |
| Exhibit M: Google Photo/Map of Subject Location (Plaintiff's Response to Defendants Washtenaw and Houk's Motion and Brief in Support for Summary Judgment) | 100-14 | 2492-2493 |

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|---|---|---|
| Exhibit H: Robert Trevino's Deposition Testimony (Plaintiff's Response to Defendants Trevino and Village of Clinton's Motion and Brief in Support of Summary Judgment) | 104-9 | 2979-3006 |
| Defendants Trevino and Village of Clinton's Reply | 109 | 3026-3033 |
| Defendants Houk and County of Washtenaw's Reply | 110 | 3043-3053 |
| Defendant Hayes' Reply | 111 | 3054-3062 |
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