FILED
LORAIN COUNTY
2023 MAY 10 P 3: 09
COURT OF COMMON PLEAS
TOM ORLANDO

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date May 10, 2023 Case No. 22CV205300

CHANEL GRIFFIN, *et al.*
Plaintiffs

Anthony Baker
Plaintiffs' Attorney

VS

CITY OF LORAIN, *et al.*
Defendants

Patrick Riley & Joseph LaVeck
Defendants' Attorneys

This matter is before the Court on Defendants' [Joint] Motion for Summary Judgment, filed December 15, 2022; Plaintiffs' [Brief] in Opposition, filed January 17, 2023; and, Defendants' [Joint] Reply Brief, filed January 18, 2023.

Oral hearing had May 8, 2023.

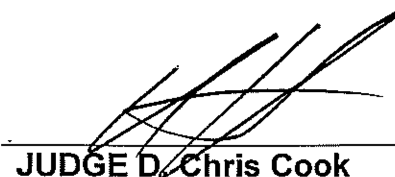
THE COURT RULES AS FOLLOWS:

Defendants' Motion for Summary Judgment is well-taken and hereby GRANTED.

Case Dismissed; Costs to Plaintiff.

See Judgment Entry.

IT IS SO ORDERED.



JUDGE D. Chris Cook

cc: Baker, Esq.
Riley, Esq.
LaVeck, Esq.

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I. INTRODUCTION

This matter is before the Court on Defendants' [Joint] Motion for Summary Judgment, filed December 15, 2022; Plaintiffs' [Brief] in Opposition, filed January 17, 2023; and, Defendants' [Joint] Reply Brief, filed January 18, 2023.

Oral hearing had on May 8, 2023.

II. STATEMENT OF PERTINENT FACTS

The facts of this case that give rise to the claims are not in material dispute.

On or about February 25, 2020, separate Plaintiff, JRC, a minor and student at General Johnnie Walker Middle School ("The School") was bitten by Titan, a K9 police dog[1] under the custody and control of Lorain Police Department Officer, separate Defendant, Officer Jamie Ball ("Officer Ball"). According to the record, JRC was bitten while using a restroom and was not seriously injured. Apparently, he suffered from a superficial abrasion that required an antibiotic topical ointment and a band-aid.[2]

Shortly before The Incident occurred, members of The School's staff, including Jeff Hawks ("Hawks"), Executive Director of Operations for the Lorain City School District ("The District"), and Reuben Figueroa ("Figueroa"), Safety Coordinator for The District, contacted the Lorain Police Department ("LPD"), to request a narcotics search at The School.

[1] Hereinafter referred to as "The Incident."
[2] See unauthenticated Exhibit "L," attached to Defendants' MSJ. And, at the oral hearing, Plaintiff confirmed the minor nature of the injury.

Such searches are regulated by The District's policy and occur three times per year. These searches are conducted during a "Lockdown Drill" ostensibly to minimize risk to students and are coordinated with an "Active Shooter" drill.

On the days that these operations are conducted, including the day when The Incident occurred, the students are all to be in the building by 8:50 a.m., at which time an announcement is made over The School's PA system advising the students and staff that a "Level 2 Lockdown" is in effect.

The narcotics search is conducted by members of LPD in conjunction with one or more K9 officers who engage in "Drug Sniffs" in order to determine the presence of drugs.

After the Level 2 Lockdown announcement and prior to members of LPD and the K9 officers entering The School, there is a waiting period in which The School staff ensures that the hallways are clear, that everyone is aware of the drill, and that The School is ready for the drug sniff to commence.

The District's policy regarding drug sniffs place the onus of ensuring that students are cleared of the hallways and bathrooms prior to commencement of the exercise and LPD officers and K9's do not enter The School until authorized by The School's staff[3] to do so.

On the morning of The Incident, Officer Ball was outside of The School with Titan when Figueroa informed him that The School was on lockdown and that the students were secure in their classrooms. Officer Ball prepared Titan by placing a patrol harness on him and affixing a six-foot lead. Officer Ball and Titan were cleared to enter The School at approximately 9:15 a.m., about 20 minutes after the lockdown was announced.

Officer Ball and Titan, accompanied by Hawks, entered The School to begin the drug sniffs. While inside The School, Titan was restrained and with Officer Ball at all times. Meanwhile, while The School was in lockdown and shortly after Officer Ball and Titan had begun the drug sniffs, JRC, who had missed his bus and was running late, entered the building.

JRC, who was in sixth grade, was granted access into The School through two security doors, and was permitted to perambulate unattended to his classroom. Apparently, JRC was not advised when he entered The School that it was on lockdown but he

[3] In this case, Hawks and/or Figueroa.

testified at his deposition that he heard the announcement that there was a level 2 lockdown.[4]

Regardless, it is undisputed that on the way to his classroom, JRC stopped at a restroom and entered a restroom stall. Right about this time, at 9:45 a.m., Officer Ball and Titan had completed the sniffs of the hallways and lockers and entered the restroom that JRC was using. Hawks did not accompany them.

Once in the restroom, Officer Ball announced his presence[5] and did not receive any response. He conducted a visual inspection under the stalls and did not observe any persons. He then directed Titan to search the restroom by searching the stalls. While Titan was searching the second stall, unprompted, he darted under the stall into the adjoining stall at which time Officer Ball heard JRC yell out. Officer Ball immediately pulled Titan out of the stall, left the restroom, and notified Hawks that there was a child in the restroom who may have been bitten by Titan.[6]

Hawks then entered the restroom and tended to JRC by taking him to the school nurse. As noted, JRC suffered superficial scratches on his right lower leg/ankle.

III. LAW AND ANALYSIS

STANDARD OF REVIEW – SUMMARY JUDGMENT

The standard of review for summary judgment in Ohio is well-settled. The Ninth District Court of Appeals has recently stated the standard of review for summary judgment.

> This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court uses the same standard that the trial court applies under Civ.R. 56(C), viewing the evidence in the light most favorable to the nonmoving party and resolving any doubt in favor of the non-moving party. See *Viock v. StoweWoodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).
>
> Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to

[4] Somewhat confusingly, JRC noted on a "School Incident Report Form" that he missed the announcements.
[5] In his deposition, Officer Ball affirmed that he announced his presence in the bathroom. In JRC's deposition, he testified that "nobody said anything," while he was using the facility. (Citations omitted.)
[6] At no time did Officer Ball command Titan to apprehend or bite JRC.

> judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Citing, *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977).

Petroskey v. Martin, 9th Dist. Lorain No. 17CA011098, 2018-Ohio-445, at ¶ 15.

> The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Specifically, the moving party must support the motion by pointing to some evidence of the type listed in Civ.R. 56(C). *Id.* at 292-293. If the moving party satisfies this burden, then the non-moving party has the reciprocal burden to demonstrate a genuine issue for trial remains. *Id.* at 293. The non-moving party may not rest upon the mere allegations or denials in their pleadings, but must point to or submit evidence of the type specified in Civ.R. 56(C). Id. at 293; Civ.R. 56(E).

Petroskey at ¶ 16.

> Once the moving party satisfies this burden, the non-moving party has a reciprocal burden to "set forth specific facts showing that there is a genuine issue for trial. * * * The non-moving party may not rest upon the mere allegations or denials in his pleadings, but instead must submit evidence as outlined in Civ.R. 56(C)." *Id.* at 293; Civ.R. 56(E). Additionally, expressions of speculation or assumptions in deposition testimony and affidavits are insufficient to sustain the non-movant's burden. *Dailey v. Mayo Family Ltd. Partnership*, 115 Ohio App.3d 112, 117 (7th Dist.1996).

Messer v. Summa Health System, 9th Dist. Summit No. 28470, 2018-Ohio-372, at ¶ 31.

COUNT ONE – 42 U.S.C. §1983 EXCESSIVE FORCE IN VIOLATION OF THE FOURTEENTH AMENDMENT

In Count One of the complaint, Plaintiffs allege a Federal § 1983 Fourteenth Amendment violation as a result of the dog bite injury JRC suffered while at The School.

This claim fails as a matter of law.

Section 1983 of Title 42 of the U.S. Code, enacted by Congress pursuant to § 5 of the Fourteenth Amendment, creates an action for damages and injunctive relief against

individuals and local governmental bodies who deprive a plaintiff of rights, privileges, or immunities "secured by the Constitution and laws."

In order to establish a prima facie § 1983 cause of action based on a constitutional violation, the plaintiff must prove that the defendant's conduct was a cause in fact of plaintiff's constitutional deprivation. Nahmod, Civil Rights & Civil Liberties Litigation: The Law of Section 1983 § 2:1.

Such constitutional deprivations may include violations of Fourteenth Amendment guarantees standing alone, as, for example, procedural due process and equal protection; violations of those provisions of the Bill of Rights which are incorporated by the due process clause of the Fourteenth Amendment and made applicable to the states; violations of constitutional rights, based on the due process clause, which are not explicitly mentioned in the Constitution, such as the rights of access to the courts and of privacy; violations of the right to travel interstate which is protected by the privileges or immunities clause of the Fourteenth Amendment; *Lane v. Wilson,* 307 U.S. 268 (1939); and certain violations of the Commerce Clause.

In order to establish a prima facie § 1983 cause of action in connection with federal statutory rights or "laws," the plaintiff must similarly prove that defendant's conduct was a cause in fact of plaintiff's own statutory deprivation. The United States Supreme Court has decided several important "laws" cases which take an intermediate position on the potential use of federal statutory violations as a basis for § 1983 actions. *Gonzaga University v. Doe,* 536 U.S. 273 (2002).

Whether a Fourteenth Amendment violation or a federal statutory violation is alleged, § 1983 requires that the challenged conduct be "under color of law." This means that color of law is a condition precedent to stating a § 1983 claim. The color of law inquiry is so closely related to the Fourteenth Amendment's state action requirement that when state action is present, the color of law requirement is also met. State action is obviously present where the individual official clearly acted in an official capacity in a manner authorized by state law.

THE OHIO SUPREME COURT

The Ohio Supreme Court has addressed the issue of § 1983 actions thus,

> Section 1983 provides a remedy to persons whose federal rights have been violated by governmental officials. *Monroe v. Pape* (1961), 365 U.S. 167, overruled on other grounds in *Monnell v. Dept. of Social Services of City of New York* (1978), 436 U.S. 658. However, "Section 1983 does not itself create any

constitutional rights; it creates a right of action for the vindication of constitutional guarantees found elsewhere." *Braley v. City of Pontiac* (C.A.6, 1990), 906 F. 2d 220, 223. Moreover, Section 1983 does not cover official conduct that violates only state law. Rather, the statute is limited to deprivations of federal statutory and constitutional rights. *Huron Valley Hosp., Inc. v. City of Pontiac* (C.A.6, 1989), 887 F.2d 710, 714; *Baker v. McCollan* (1979), 443 U.S. 137.

1946 St. Clair Corp. v. Cleveland (1990), 49 Ohio St. 3d 33, 34.

This case set forth the requisite elements of a Section 1983 claim, as follows:

> " * * * To establish such a claim, two elements are required:
>
> > "(1) the conduct in controversy must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. * * * " See, also, *Parratt v. Taylor* (1981), 451 U.S. 527.

1946 St. Clair Corp., supra.

THE NINTH DISTRICT

The Ninth District Court of Appeals has also opined on this issue,

> Section 1983, Title 42, U.S. Code provides a remedy to those persons whose federal rights have been violated by government officials. *Shirokey v. Marth* (1992), 63 Ohio St.3d 113, 116; *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 92.

Gubanc v. Warren et al., 130 Ohio App. 3d 714, 718 (9th Dist. 1998).

> A suit against a state employee in his individual capacity is a suit against that individual defendant, rather than against the entity that employed him. See *Kentucky v. Graham* (1985), 473 U.S. 159, 167–168.
>
> * * *
>
> There is no *respondeat superior* liability in a Section 1983 claim. *Shockey v. Fouty* (1995), 106 Ohio App.3d 420, 426, citing *Polk Cty. v. Dodson* (1981), 454 U.S. 312, 325; see, also, *Monell v. New York City Dept. of Social Serv.* (1978), 436 U.S. 658, 694, fn. 58. Instead, a plaintiff must show that an individual

> defendant committed the act that caused the constitutional deprivation. *Kinney v. Ohio Dept. of Adm. Serv.* (1986), 30 Ohio App.3d 121, 122.

Gubanc, at pg. 719.

The Ninth District further stated,

> To maintain a Section 1983 action, a plaintiff must show (1) that the defendants acted under color of state law and (2) that the defendants acted in a manner that caused the plaintiff to be deprived of a right, privilege, or immunity secured by federal law. *Gumpl v. Wilkinson* (Aug. 31, 1994), Lorain App. No. 94CA005858, unreported, 1994 WL 466728.

Gubanc, at pg. 720.

ANALYSIS

The gravamen of Plaintiff's § 1983 action in Count One is that Officer Ball, in conjunction with his K9 Titan, while acting under color of law, used unnecessary, unreasonable, outrageous, and excessive force on JRC in violation of his Federal constitutional rights.

Plaintiffs further allege that Officer Ball's conduct was wanton, willful, reckless, unjustifiable, and malicious, such that qualified immunity or statutory governmental immunity pursuant to R.C. 2744.03[7] are unavailable and/or inapplicable.

Specifically, Plaintiffs ground their claim in a violation of JRC's constitutional rights, based on the due process clause, not explicitly mentioned in the Constitution, to wit: to be free from being bitten by a police dog while using the restroom at a middle school.

There is no question that Officer Ball was acting under color of law when The Incident occurred. But this undisputed fact is the only element that Plaintiffs can establish in order to maintain a colorable § 1983 action.

As argued by Defendants, Officer Ball did not violate any of JRC's constitutional rights because he did not act knowingly or intentionally to cause any harm to JRC nor was Officer Ball negligent or even reckless when The Incident occurred. Accordingly, he is entitled to qualified immunity.

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[7] There is some confusion here as "qualified immunity" is a United States Supreme Court judicially created defense to ¶ 1983 federal claims and R.C. 2744, *et seq.*, is statutorily created political subdivision immunity from state tort claims.

In a case almost on point, the Sixth Circuit Court of Appeals stated,

> Qualified immunity shields an officer from § 1983 liability unless "the facts alleged show the officer's conduct violated a constitutional right," and "the right was clearly established" such that "**it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.**" *Saucier v. Katz,* 533 U.S. 194, 201–02, (2001), *abrogated in part by Pearson v. Callahan,* 555 U.S. 223, 236, (2009). In order to prevail, a plaintiff "must establish that the defendant **acted knowingly or intentionally** to violate his or her constitutional rights, such that **mere negligence or recklessness** is insufficient." *Ahlers v. Schebil,* 188 F.3d 365, 373 (6th Cir.1999).

Rainey v. Patton, 6th Cir., United States Court of Appeals, No. 12-3796, unrpt., (2013), at pgs. 393-394, emphasis added.

The Sixth Circuit continued,

> A seizure must occur before an excessive force claim is cognizable under the Fourth Amendment." *Dunigan v. Noble,* 390 F.3d 486, 492 (6th Cir. 2004) (citing *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, (1998)). * * * "A seizure within the meaning of the Fourth Amendment ... 'requires an **intentional acquisition of physical control**.' " *Id.* (quoting *Brower v. Inyo Cnty.,* 489 U.S. 593, 596, (1989)). In other words, the Fourth Amendment is implicated "only when there is a governmental termination of freedom of movement ***through means intentionally applied.***" *Brower,* 489 U.S. at 597. This court has applied the Fourth Amendment intent requirement to excessive force claims involving police dogs. *See Neal v. Melton,* 453 Fed.Appx. 572, 577 (6th Cir. 2011); *Dunigan,* 390 F.3d at 492.

Rainey, at pg. 394, emphasis added.

In the case at bar, it is undisputed that Officer Ball did not act knowingly or intentionally in causing the harm to JRC. In fact, Officer Ball was not even aware that JRC was in the restroom when Officer Ball and Titan entered it. Recall that negligent or even reckless conduct is insufficient to establish a § 1983 violation under these circumstances. Thus, even if Officer Ball was reckless (which he was not), such conduct is insufficient to overcome his qualified immunity.

Moreover, there must have been some *intentional* seizure of JRC that implicated his Fourth Amendment rights in order to advance his § 1983 claim. Again, Officer Ball was not aware of JRC's presence in the restroom and never ordered Titan to seize, restrain, arrest, or attack JRC.

The undisputed facts demonstrate that Officer Ball was advised by The School's safety personnel, Hawks and/or Figueroa, that all of the students were accounted for in their classrooms and that it was safe for Officer Ball and Titan to begin the dog sniff. Officer Ball and Titan completed the exercise in the hallways without incident and entered a restroom with no knowledge or expectation that there was a child using the facility.

Bolstering this conclusion is the fact that Officer Ball announced himself when entering the restroom and received no reply[8] and he visually inspected the restroom and did not see anyone in the stalls. These acts, taken together with his belief that the restroom was vacant, dispel any argument that Officer Ball was negligent, let alone reckless.

As such, based upon these facts, even when viewed in light most favorable to Plaintiffs, it was completely reasonable for Officer Ball and Titan to continue their exercise in the restroom as there was no way for Officer Ball to know that a child was in one of the stalls. See: *Graham v. Connor,* 490 U.S. 386, 397, (1989).

Finally, it is important to note the facts leading up to The Incident and how JRC found himself in the restroom to begin with. Recall that JRC was late for school and entered the building during the lockdown. Despite the fact that The School was in lockdown in order to conduct serious safety drills and provide for the intrusion into The School of police officers and K9's in order to search for drugs, JRC was admitted into the building *unattended* as if nothing was amiss.

Amazingly, JRC was allowed to wander about the halls unaccompanied, presumably on his way to his classroom, during a lockdown drill with police and dogs afoot. It is almost no surprise that an incident occurred and, as traumatic as The Incident no doubt was to JRC, it could have been much worse.

Regardless, the Plaintiffs' constitutional rights were not violated because Officer Ball did not in any way, shape, or form, knowingly or intentionally act to cause injury or harm to JRC. Moreover, at no time did Officer Ball act to seize JRC nor did Officer Ball affirmatively or intentionally apply any force, let alone excessive force, to JRC. As such, JRC's Fourth Amendment rights were never implicated, no § 1983 violation occurred, and Officer Ball is entitled to qualified immunity.

COUNT TWO – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS[9]

In Count Two, Plaintiffs allege that Officer Ball intentionally inflicted emotional distress upon JRC.

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[8] According to his testimony.

[9] Appropriately, and to their credit, Plaintiff's abandoned this claim at the oral hearing. Nevertheless, this Court will address it *seriatim*.

Similarly, this claim fails as a matter of law.

The elements of an intentional infliction of emotional distress claim are well-settled.

THE OHIO SUPREME COURT

As early as 1983, Ohio has recognized as a viable tortious cause of action, claims of intentional infliction of emotional distress.

> As a preliminary matter, it must be observed that this court has recognized intentional infliction of emotional distress to be an independent tort. *Reamsnyder v. Jaskolski* (1984), 10 Ohio St.3d 150, 152; *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 374. Thus, its character as a legally actionable injury is not dependent upon the existence of a contractual relationship between the litigants. Rather, recovery is predicated upon satisfaction of a standard applicable to a distinct type of tortious conduct. This standard, as set forth in the syllabus to *Yeager v. Local Union 20, supra,* provides as follows:
>
> > "One who by extreme and outrageous conduct **intentionally** or **recklessly** causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

Russ v. TRW, Inc., 59 Ohio St. 3d 42, 47, (1991), emphasis added.

THE NINTH DISTRICT COURT OF APPEALS

And, the Ninth District Court of Appeals recently stated,

> To establish their claims for intentional infliction of emotional distress, David and Grandpa Gibson were required to prove that: the defendants **intended to cause**, or knew or should have known, that their actions would result in serious emotional distress; their conduct was extreme and outrageous, going beyond all bounds of decency and considered intolerable in a civilized society; their actions proximately caused psychic injury to the plaintiffs; and the plaintiffs suffered mental anguish beyond what a reasonable person would be expected to endure. *Shetterly v. WHR Health Sys.*, 9th Dist. Medina No. 08CA0026-M, 2009-Ohio-673, ¶ 15.

Gibson Bros. v. Oberlin College, 9th Dist. Lorain Nos. 19CA011563, 20CA011632, 2022-Ohio-1079, at ¶ 70. See also: *Teodecki v. Litchfield Twnsp.,* 9th Dist. Medina No. 14CA0035-M, 2015-Ohio-2309, at ¶ 28, emphasis added.

ANALYSIS

In this cause of action, Plaintiffs cannot establish a single element prerequisite to maintaining this claim.

First, Officer Ball's search of The School with Titan, at the request of The District, was hardly extreme or outrageous. The evidence in the record demonstrates that The District conducts these searches three times per year. They are done according to a complex, thorough policy that endeavors to keep the children safe while seeking to discover the presence of drugs or narcotics in the building.[10]

Moreover, Officer Ball took measured, reasonable steps to carry out his role as safely as possible, to wit: he did not enter The School until told by school officials that it was safe to do so; he encountered no issues while searching the hallways and lockers with Titan; he announced his presence once he entered the restroom that JRC was using and received no reply;[11] and he visibly inspected the stalls and found them to be unoccupied.

As he had no reason to suspect that JRC was in one of the stalls, Officer Ball acted properly by conducting the search of the restroom.

Second, there is absolutely no evidence in the record that JRC suffered "serious emotional distress," "psychic injury," or "mental anguish." In fact, it does not appear that Plaintiffs even argue in their brief in opposition that this claim should remain viable and they fail to cite anywhere in the record to support any emotional damages or injury.

Instead, the only evidence that JRC suffered any injury at all is Defendants' unauthenticated Exhibit "L," that appears to be a one-page medical record from Mercy Hospital Lorain that describes superficial abrasions treated with ointment and a bandage and JRC's deposition testimony that discusses the minimal physical injury to his leg. Regardless, there is no testimony from JRC in his deposition that he suffered any mental anguish or psychic injury at all.

Third, the cause of action at issue, *intentional* infliction of emotional distress, is, obviously, an intentional tort. As such, it requires knowledge, intent, and/or purposeful conduct. The tort requires that,

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[10] As The District is not a party to this action, the fact that it failed miserably to protect JRC by allowing him to enter into The School unattended or warned of the lockdown is of no accord.

[11] While I acknowledge that this fact may be in dispute, it is more likely than not that a trained police officer did announce his presence in the restroom and that JRC simply did not hear the officer's announcement.

> *** * * the defendants intended to cause, or knew or should have known,** that their actions would result in serious emotional distress * * *

Gibson Bros., supra, emphasis added.

As discussed in detail above, Officer Ball was not aware of JRC's presence in the restroom; had no reason to suspect his presence in the restroom; and, never directed Titan to take any action towards JRC.

In essence, Officer Ball did not act "intentionally" at all, let alone engage in "extreme or outrageous" conduct "intolerable in a civilized society." And most importantly, even if he had done so, there is no evidence in the record that JRC suffered any mental anguish or psychic harm as a result.

COUNT THREE – 42 U.S.C. §1983 FOR CUSTOMS, POLICIES & TRAINING CAUSING CONSTITUTIONAL VIOLATIONS

In this cause of action, Plaintiffs seek to hold the City of Lorain, the Lorain Police Department, and Chief McCann liable as a result of unconstitutional customs, policies, and training of K9 Officer Ball.

This claim also lacks merit.

FEDERAL LAW

A municipality can be found liable under 42 U.S.C.A. § 1983 when the municipality's policy or custom inflicts the injury. *Perez v. County of Monroe,* 766 F. Supp. 2d 499 (W.D. N.Y. 2011). A municipal entity may not, however, be held liable under a theory of respondeat superior. *Alman v. Reed,* 703 F. 3d 887 (6th Cir. 2013). See also: *Monell v. Dept. of Social Services of City of New York,* 436 U.S. 658, 691 (1978).

To demonstrate municipal liability under 42 U.S.C.A. § 1983, the plaintiff must: (1) identify the municipal policy or custom; (2) connect the policy to the municipality; and (3) show that his or her particular injury was incurred due to execution of that policy. *Alkire v. Irving,* 330 F. 3d 802 (6th Cir. 2003).

The requirement that, in order for civil rights plaintiffs to successfully sue a municipal entity under § 1983, they must show that their injury was caused by a municipal policy, custom, usage, or practice is equally applicable, irrespective of whether the remedy sought is money damages or prospective relief such as an

injunction or a declaratory judgment. *Los Angeles County v. Humphries,* 562 U.S. 29 (2010).

An official municipal policy, such as may provide the basis for holding a municipality liable for civil rights violations committed pursuant thereto, includes decisions of the government's lawmakers, acts of its policymaking officials, and practices which are so persistent and widespread as to practically have the force of law; these are actions for which the municipality is actually responsible. *Connick v. Thompson,* 563 U.S. 51 (2011).

A "policy" is made, for purposes of a municipal liability claim under § 1983, when a decision maker possessing final authority to establish a municipal policy with respect to the action issues an official proclamation, policy, or edict. In the context of municipal liability under § 1983, a custom is a course of conduct, though not authorized by law, that is so permanent and well-settled as to virtually constitute law and may be established by evidence of knowledge and acquiescence. A municipal "custom," for purposes of subjecting it to § 1983 liability, must be so permanent and well settled as to constitute a custom or usage with the force of law. *Vereecke v. Huron Valley School Dist.,* 609 F. 3d 392, (6th Cir. 2010).

For purposes of establishing municipal liability under § 1983, actual or constructive knowledge of a custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority.
A policy, custom, or practice may be inferred in a § 1983 claim against a municipality where the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction. Failure to adequately train or supervise officers can rise to the level of a *de facto* unconstitutional policy or custom if a plaintiff can show in § 1983 proceedings: (1) the training or supervision was inadequate to the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury. *Sears v. Bradley County Gov.,* 821 F. Supp. 2d 987 (E.D. Tenn. 2011).

The plaintiff must also show that inadequate training actually caused the deprivation of constitutional rights. To demonstrate "deliberate indifference," as an element of a § 1983 municipal liability claim based on inadequate training or supervision, a plaintiff must establish three facts: (1) that the policymaker knows to "moral certainty" that the municipality's employees will confront a certain situation, (2) either that the situation presents the municipal employee with a difficult choice of the type that training or supervision will make less difficult, or that there is a history of municipal employees improperly handling the situation, and (3) that the wrong choice by a municipal

demonstrate deliberate indifference on the part of municipal decision makers for purpose of a failure-to-train claim against the municipality under § 1983.

In a 42 U.S.C.A. § 1983 action alleging that a municipality's facially valid actions violated the plaintiff's constitutional rights, the plaintiff must demonstrate that the municipality's lawful action was taken with deliberate indifference as to its known or obvious consequences. *McDowell v. Brown,* 392 F. 3d 1283 (11th Cir. 2004).

STATE LAW

The Ohio Supreme Court has addressed the constitutional issues relative to this claim thus,

> [P]ursuant to Section 1983, Title 42, U.S. Code . . . for violating their constitutional right . . . Such liability will attach to a municipality only if the municipality itself has inflicted a constitutionally significant injury by executing a policy or custom. *Monell v. New York City Dept. of Social Serv.* (1978), 436 U.S. 658, 694. Because a violation of a constitutional right is prerequisite to a Section 1983 violation, our threshold inquiry is whether Cleveland violated appellees' constitutional right to free speech. See *Flagg Bros., Inc. v. Brooks* (1978), 436 U.S. 149. If so, we would then proceed to resolve whether a Cleveland policy or custom was the " 'moving force [behind] the constitutional violation.' " *Canton v. Harris* (1989), 489 U.S. 378, quoting *Monell,* 436 U.S. at 694.

Bellecourt v. Cleveland, 104 Ohio St. 3d 439, 2004-Ohio-6551, at ¶ 4.

While this Court was unable to find a Ninth District Court of Appeals case on point, a case from the Eighth District is instructive,

> Public officials, including police officers and deputy sheriffs, who perform discretionary functions, are shielded from liability for civil damages in a Section 1983 action by qualified immunity if 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 (1982). The test is one of "objective reasonableness" that requires a "reasonably competent public official [to] know the law governing his conduct." *Id.*

Morrison v. Horseshoe Casino, 8th Dist. Cuyahoga No. 108644, 2020-Ohio-4131, at ¶ 26.

The court continued,

> The plaintiff bears the burden of showing that government officials are not entitled to qualified immunity. *Untalan v. Lorain,* 430 F. 3d 312, 314 (6th Cir. 2005). If the plaintiff fails to demonstrate that a constitutional right was violated or that the right was clearly established, he or she will have failed to carry her burden. *Summerville v. Forest Park*, 195 Ohio App.3d 13, 2011-Ohio-3457, ¶ 18 (1st Dist.), citing *Chappell v. Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009).

The Eighth District Court of appeals has also addressed this issue in numerous other cases,

> To assert this claim against a governmental entity, the complaint must also show that "an established practice, policy or custom of the governmental entity" deprived him of his rights. *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 652; see also *Canton v. Harris* (1989), 489 U.S. 378. "A plaintiff must * * * set forth facts showing the existence of an offending custom or policy and mere conclusory allegations are insufficient." *Davisson* at 652. There must be a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation" for the municipality to be subject to a Section 1983 action. *Harris,* 489 U.S. at 385.

Harris v. Sutton, et al., 8th Dist. Cuyahoga No. 91879, 2009-Ohio-4033, at ¶ 19.

The Eighth continued,

> A plaintiff may prove the existence of a governmental entity's illegal policy or custom by looking at (1) enactments or official agency policies, (2) actions taken by officials with final decision-making authority, (3) a policy of inadequate training or supervision, or (4) a custom of tolerance or acquiescence of federal-rights violations. *Pembaur v. Cincinnati* (1986), 475 U.S. 469; *Thomas v. Chattanooga* (2005), 398 F.3d 426, 429.

Harris, at ¶ 20.

ANALYSIS

Plaintiffs allege, "upon information and belief" that the City of Lorain, Chief McCann, and Officer Ball, with final decision-making authority, violated JRC's constitutional rights by, ". . . using excessive force, making warrantless searches, entries, and arrests without

probable cause, and arresting and charging citizens with criminal offenses which are not supported by probable cause."[12]

Plaintiffs further allege that these same three defendants, ". . . failed to adequately and properly supervise and train its Officers."[13] And, ". . . ratified the conduct of Officer Ball & K9 Titan . . ."[14]

The sole evidentiary support and argument in favor of this claim advanced by Plaintiffs is that ". . . there are no policies, customs or training offered by the City or LPD that addresses narcotics searches/sniffs in local schools."[15] Plaintiffs also discuss in passing the type of dogs selected by LPD to use for these operations and urge that, ". . . lack of training provides the requisite causal link between City/LPD and the injury Plaintiff incurred."

These allegations, however, are woefully lacking in evidentiary support to demonstrate a § 1983 violation as alleged in this claim. First, the plaintiff must: (1) identify the municipal policy or custom; (2) connect the policy to the municipality; and (3) show that his or her particular injury was incurred due to execution of that policy. *Alkire v. Irving, supra.*

Here, Plaintiffs identity *no customs, policies or procedures* at all, let alone any that related to JRC's injury.

Moreover, there are no "practices which are so persistent and widespread as to practically have the force of law" that Plaintiffs identify. *Connick v. Thompson, supra.* In fact, Plaintiffs concede in their complaint that their allegations are made "on information and belief" and in their reply brief they identify no evidence and advance no cogent argument to support this claim. And, at oral argument, Plaintiffs concede that there are no governmental or municipal policies at issue are applicable.

This is insufficient as a matter of law to sustain a § 1983 claim under these circumstances, particularly where the governmental actor was not even aware of the presence of JRC in the restroom when Titan snipped him.

In addition, liability will attach to a municipality only if the municipality itself has inflicted a constitutionally significant injury by executing a policy or custom. *Monell v. New York City Dept. of Social Serv., supra.* In the case at bar, there is no "constitutionally significant injury" (JRC suffered a minor abrasion treated with ointment and a band aid).

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[12] See Plaintiffs' Complaint, Count Three, para 27.
[13] See Plaintiffs' Complaint, Count Three, para 28.
[14] See Plaintiffs' Complaint, Count Three, para 29.
[15] See Section "E," of Plaintiffs' opposition brief.

Moreover, Officer Ball did not execute any "policy or custom" of the City of Lorain as no such policy or custom has been identified.

Finally, public officials, including police officers and deputy sheriffs who perform discretionary functions, are shielded from liability for civil damages in a Section 1983 action by qualified immunity if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, supra.*

Once again, when Officer Ball entered the restroom with Titan, he was completely unaware of JRC's presence. After being advised by The School's employees that it was safe to proceed with the drug sniff, he announced his presence in the restroom, received no reply, and then visually inspected the stalls. Given these facts and circumstances, he would have had no reason to think or believe that a student was using the facility.

Put another way, it was impossible for Officer Ball to violate any of JRC's constitutional rights when Officer Ball was not even aware of JRC's presence and Officer Ball took absolutely no affirmative action against JRC.

THE LORAIN POLICE DEPARTMENT IS *SUI JURIS*

While Defendants do address this issue in their motion for summary judgment, they do so in a most cursory fashion in a one sentence blurb improperly citing one sad case.[15] Regardless, Defendants are correct that LPD is not an entity capable of suing or being sued.

A municipal corporation as an incident to its corporate existence is capable of suing and being sued in its corporate capacity. By statute in Ohio a municipal corporation is declared to be a body politic and corporate and as such may sue and be sued. *Mollette v. Portsmouth City Council,* 169 Ohio App. 3d 557, 2006-Ohio-6289, (4th Dist. Scioto).

There is a substantial body of law that holds that a city police department is not a real party in interest and cannot be sued. *Parmelee v. Schnader*, 2018-Ohio-707, (Ohio Ct. App. 7th Dist. Mahoning County 2018); *McConnell v. Dudley*, 2018-Ohio-341, (Ohio Ct. App. 7th Dist. Mahoning County 2018), reversed on other grounds, 2019-Ohio-4740, (Ohio 2019); *Cooper v. Youngstown*, 2016-Ohio-7184, (Ohio Ct. App. 7th Dist. Mahoning County 2016); *Rieger v. Marsh*, 2011-Ohio-6808, (Ohio Ct. App. 2d Dist. Montgomery County 2011).

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[15] "*Larson v. Canton City Utils.*, 2019-Ohio-5400." The proper citation to this case is: *Larson v. City of Canton Utilities,* 5th Dist. Stark No. 2019CA00041, 2019-Ohio-5400, at ¶ 19.

And,

> The broader issue is whether a municipal police department is *sui juris*—that is, whether it is capable of bringing suit or being sued. The narrower issue is whether a municipal police department, assuming it is *sui juris*, is a proper party petitioner to a forfeiture proceeding under R.C. Chapter 2981. Because we conclude that a municipal police department is not a proper party petitioner to a Chapter 2981 forfeiture proceeding, we find it unnecessary to decide the broader issue.

In re Forfeiture of Property of Louis, et al., 187 Ohio App. 3d 504, 2010-Ohio-1792, at ¶ 22.

And finally,

> We first consider the defendants' contention that the police department cannot be sued. The defendants cite three cases in support of their position: *Friga v. E. Cleveland,* 8th Dist. No. 88262, 2007–Ohio–1716; *Richardson v. Grady,* 8th Dist. Nos. 77381 and 77403, 2000 WL 1847588 (Dec. 18, 2000); and *Ragan v. Akron Police Dept.,*9th Dist. Summit No. 16200, 1994 WL 18641.

McDade v. City of Cleveland, et al., 8th Dist. Cuyahoga No. 98415, 2012-Ohio-5515, at ¶ 9.

Each of these cases hold that a municipal police department is not *sui juris* and cannot be sued as a separate entity. As such, LPD is entitled to summary judgment for this reason alone.

COUNT FOUR – GROSS NEGLIGENCE

The Ohio Supreme Court has discussed the concept of gross negligence,

> An early Ohio Supreme Court case defined "gross negligence" as the "failure to exercise any or very slight care." *Johnson v. State* (1902), 66 Ohio St. 59, 67. See, also, *Cleveland, C., C. & I. Ry. Co. v. Elliott* (1876), 28 Ohio St. 340, 356–357; *Payne v. Vance* (1921), 103 Ohio St. 59. Prosser states that gross negligence "has been described as a failure to exercise even that care which a careless person would use." Prosser & Keeton, Law of Torts (5 Ed.1984) 212, Section 34.

Thompson Elec. v. Bank One, 37 Ohio St. 3d 259, 265, (1988).

Ohio Appellate District Courts have opined,

> Upon our review of the authorities within the State of Ohio (*Johnson v. State of Ohio*, 66 Ohio App. 59, 67, and *Payne v. Vance* (1921), 103 Ohio St. 59), it is our conclusion that the court was correct in his definition of gross negligence. **It is our conclusion that gross negligence is something less than wanton or willful negligence and yet something more than ordinary negligence.** We find no quarrel with the definition that gross negligence is the want or absence of slight care and diligence.

Childres v. Central Belmont Const., 7th Dist. Belmont No. 85-B-42, 1986 WL 11330, (1986), emphasis added.

And a Ninth District Court of Appeals case also touched on the issue,

> In 98 A.L.R. 267, there is found an annotation on the subject of our present question, wherein the general rule is stated that exemplary damages are not recoverable for mere negligence. An early case in this state, *Kuchenmeister v. O'Connor*, 9 Ohio Dec. Repr. 159 at 160, says that gross negligence **which shows a reckless indifference to the rights and safety of other persons** will warrant a jury in giving exemplary damages. See, also: 22 American Jurisprudence 2d 344, Damages, Section 252; 25 C.J.S. Damages s 123(8), p. 1147.

Gearhart v. Angeloff, et al., 17 Ohio App. 2d 143, (9th Dist. Summit 1969), emphasis added.

Simple negligence has recently been defined by the Ohio Supreme Court,

> In order to establish an actionable claim of negligence, a plaintiff must show the existence of a duty, a breach of that duty, and an injury that was proximately caused by the breach. *Strother* at 286-287. The failure to prove any one of these elements is fatal to a claim of negligence. We consider the sufficiency of the evidence for the element of causation. That is, we must determine whether there was any evidence that Rieger would not have been injured had Giant Eagle provided Kurka with training or instruction for purposes of operating the motorized cart.

Rieger v. Giant Eagle, 157 Ohio St. 3d 512, 2019-Ohio-3745, at ¶ 10.

Next, recklessness is defined by the Ohio Revised Code,

> A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

R.C. 2901.22(C).

And finally, foreseeability.

It is axiomatic that before any duty arises to prevent harm to another, one must foresee or anticipate that harm could result from the act, or failure to act, a certain way. The Ohio Supreme Court clarified the standard almost 40 years ago,

> It is rudimentary that in order to establish actionable negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom. *Di Gildo v. Caponi* (1969), 18 Ohio St.2d 125; *Feldman v. Howard* (1967), 10 Ohio St.2d 189. The existence of a duty depends on the foreseeability of the injury. *Ford Motor Co. v. Tomlinson* (C.A. 6, 1956), 229 F.2d 873 [59 O.O. 345]; *Gedeon v. East Ohio Gas Co.* (1934), 128 Ohio St. 335.
>
> The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. *Freeman v. United States* (C.A. 6, 1975), 509 F.2d 626; *Thompson v. Ohio Fuel Gas Co.* (1967), 9 Ohio St.2d 116; *Mudrich v. Standard Oil Co.* (1950), 153 Ohio St. 31. **The foreseeability of harm usually depends on the defendant's knowledge.** *Thompson, supra.*

Menifee v. Ohio Welding Prods., 15 Ohio St. 3d 75, 77, (1984), emphasis added.

The concept and explanation of the importance of foreseeability in a negligence case is manifest. *Menifee* and its progeny have repeatedly asserted this axiom,

> The concept of foreseeability is an important part of all negligence claims, because "[t]he existence of a duty depends on the foreseeability of the injury." *Menifee* at 77. As a society, we expect people to exercise reasonable precautions against the risks that a reasonably prudent person would anticipate. *Commerce & Industry Ins. Co. v. Toledo,* 45 Ohio St.3d 96, 98 (1989). **Conversely, we do not expect people to guard against risks that the**

> **reasonable person would not foresee.** *Menifee* at 77; Keeton, Dobbs, Keeton & Owen, *Prosser and Keeton on the Law of Torts,* Section 43, 280 (5th Ed.1984). The foreseeability of the risk of harm is not affected by the magnitude, severity, or exact probability of a particular harm, but instead by the question of whether *some* risk of harm would be foreseeable to the reasonably prudent person. *See Gedeon v. E. Ohio Gas Co.,* 128 Ohio St. 335, (1934). Accordingly, the existence and scope of a person's legal duty is determined by the reasonably foreseeable, general risk of harm that is involved.

Cromer, et al., v. Children's Hosp. Med. Center of Akron, 142 Ohio St. 3d 257, 2015-Ohio-229, at ¶ 24, emphasis added.

ANALYSIS

This cause of action is Plaintiffs' strongest, yet, as a matter of law, it still must fail.

At the outset, it is important to distinguish between the various culpable mental states at issue, particularly as gross negligence is a rather amorphous legal concept. For what it is worth, this Court finds that the degrees of mental culpability relative to these three concepts, in ascending order of legal responsibility, are negligence, followed by gross negligence, then at the further end of the civil liability spectrum, recklessness.[17]

Second, an interesting query arises in the context of foreseeability. Obviously it is a necessary element to consider in a negligence claim – but is it applicable in a *gross* negligence claim?

I believe that it is. After all, the elements of a negligence claim and gross negligence claim are identical in that there first must be a duty; there must be a breach of that duty; and there must be an injury proximately caused by the breach. The sole difference between the two causes of action is at the breach element. Negligence requires "ordinary care" or "reasonable precautions," *Cromer, et al., supra,* where gross negligence is the failure to exercise "any" or "very slight" care. *Thompson Elec., supra.*

So, the analysis of this cause of action really becomes quite simple; did Officer Ball owe JRC a duty of care when Officer Ball and Titan entered the restroom JRC was using?

OFFICER BALL OWED JRC NO DUTY OF CARE BECAUSE JRC'S INJURY WAS NOT FORESEEABLE

In order to address this question, this Court acknowledges the obvious. Of course a police officer has a duty of care when conducting drug sniffs/investigations in a middle

[17] Obviously, purposeful/intentional conduct (R.C. 2901.22(A)) and knowing conduct (R.C. 2901.22(B)) are even greater culpable mental states.

school with a police dog. But that does not end the inquiry. The question that matters is this: Did Officer Ball have a duty of care *to JRC* when The Incident occurred? Put another way, was JRC's injury foreseeable?

Recall the almost undisputed facts: The School contacts LPD to conduct a drug sniff of its building; Officers and their K9's, including Officer Ball and Titan, wait outside until they are given the green light to enter The School; The School gives an announcement on its PA system that a drill is underway and that The School will be placed in lockdown; the students are all accounted for; the officers are then allowed into the building.

At this point, Officer Ball and Titan conduct their drug sniffs throughout the hallways and lockers without incident, at all times reasonably believing that the students are safe and accounted for. Officer Ball and Titan enter a restroom to continue the drug sniffs; Officer Ball announces himself and gets no reply; Officer Ball visually inspects under the stalls and does not see anyone; Officer Ball deploys Titan to sniff the stalls at which time he encounters JRC in a stall and takes a snip at him.

At no time during his search of the restroom would any reasonable person, given these facts, have reason to believe that a child was using the facility. Recall further that the only reason JRC was able to avail himself of the restroom in the first place is because he was late for school and inexplicably allowed unaccompanied access into the building. Again, no reasonably prudent person in Officer Ball's position would ever think that The School would allow a child into the building, unattended, during a lockdown drill.

Clearly, it was unforeseeable that JRC would be in a restroom stall using the facilities without any advance warning or notice to Officer Ball or the other members of LPD conducting the drug sniff operation.

Because it was not foreseeable under these conditions that JRC would be in a restroom stall during a school-wide lockdown drill and drug sniff, Officer Ball owed him no duty of care and was not negligent, let alone grossly negligent, in conducting the drug sniff of the restroom.

In the immortal words of the great Justice Cardozo,

> Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do" * * * "Negligence is the absence of care, according to the circumstances."

Palsgraf v. Long Is. R.R. Co., 248 NY 339 (1928).

A recent Ninth District Court of Appeals case is almost on point. In *Callaway v. Akron Police Department,* 9th Dist. Summit No. 29852, 2021-Ohio-4412, a woman was bitten by a police dog while she was in her apartment when an Akron Police Officer, who believed a suspect had fled into her apartment, released his K9, Thunder, into Callaway's residence.

The *Callaway* court determined that the Akron Police Department was *sui juris* and that the City of Akron was statutorily immune and not liable to her pursuant to Ohio's general liability statute that attaches liability to the "owner, keeper, or harborer," of a dog. R.C. 2744.02(B)(5).

The *Callaway* court did find, however, that a genuine issue of material fact existed as to whether the officer acted in a wanton or reckless manner. Essentially, the court determined that there were multiple factual disputes in the record about what occurred and how Callaway was bitten that foreclosed summary judgment.

Such is not the case herein. The facts in the case at bar are almost entirely undisputed, with one exception – JRC testified that he did not hear Officer Ball announce himself when he entered the restroom. Even viewing this fact in favor of Plaintiffs, that Officer Ball did not announce his presence, does not change the outcome given all of the other facts at hand.

Finally, in their complaint and cause of action for gross negligence, Plaintiffs conflate the elements of gross negligence with "willful, wanton, and reckless" conduct.[17]

This Court has already defined reckless conduct and under no set of circumstances, even in a light most favorable to Plaintiffs, was Officer Ball's conduct willful. So was it wanton?

Callaway provides the answer,

> Wanton misconduct is **the failure to exercise any care** toward those to whom a duty of care is owed in circumstances in which **there is great probability that harm will result**. *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, paragraph three of the syllabus. Meanwhile, "[r]eckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Id.* at paragraph four of the syllabus. " 'The **actor must be conscious** that his conduct will in all probability

[17] See Count Four, para. 35, of Plaintiffs' complaint.

> result in injury.' There must be a 'perverse disregard of a known risk.' " (Internal citation omitted.) *Chunyo v. Gauntner*, 9th Dist. Summit No. 28346, 2017-Ohio-5555, ¶ 9, quoting *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, paragraph three of the syllabus.

Callaway, at ¶ 24, emphasis added.

In the case at bar, given Officer's Ball's knowledge of the facts and circumstances at hand when he entered the restroom, he had no reason to believe that there would be a child using the facilities. As such, it is legally inapposite to conclude that his conduct was wanton – that is, that he failed to exercise any duty of care.[18]

Similarly, it cannot be said that he disregarded or was indifferent to a *known or obvious* risk of harm to another or that he *was conscious* that his conduct would in all probability result in injury.

COUNT FIVE – ASSAULT AND BATTERY

Plaintiffs final cause of action is civil assault and battery. Like their first four claims, this claims also fails.

The elements of civil assault and battery are well-established,

> A person is subject to liability for battery when he acts **intending to cause** a harmful or offensive contact, and when a harmful contact results.

Love v. City of Port Clinton, 37 Ohio St. 3d 98, 99, (1988), emphasis added.

And the Ninth District, citing *Love, supra,*

> An assault in tort is "the **willful** threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact." *Smith v. John Deere Co.* (1993), 83 Ohio App.3d 398, 406. A person may be liable for battery when he acts **intending** to cause a harmful or offensive contact and, in fact, a harmful contact results. *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99.

Vandiver v. Morgan Adhesive Co., 126 Ohio App. 3d 634, 638, (1998), emphasis added.

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[18] As determined, *infra,* he did not even have a duty of care to JRC to begin with.

Battery has been defined as,

> a harmful or offensive touching of another person; **an intentional**, unconsented-to contact with another; **an intentional** uninvited contact with another; **an intentional**, nonconsensual touching; and an **intentional** harmful or offensive touching without the consent of the one being touched. A battery occurs when a person acts **intending** to cause a harmful or offensive contact and when a harmful contact results.

Love v. City of Port Clinton, 37 Ohio St. 3d 98, (1988); *McKee v. McCann*, 2017-Ohio-4072, (Ohio Ct. App. 8th Dist. Cuyahoga County 2017); *Brooks v. Lady Foot Locker*, 2005-Ohio-2394, (Ohio Ct. App. 9th Dist. Summit County 2005); *Shadler v. Double D. Ventures, Inc.*, 2004-Ohio-4802, (Ohio Ct. App. 6th Dist. Lucas County 2004); *Vandiver v. Morgan Adhesive Co.*, 126 Ohio App. 3d 634, (9th Dist. Summit County 1998).

ANALYSIS

In reviewing the foregoing four causes of action, this Court has evaluated the conduct of Officer Ball (and Titan) from the moment they entered The School to the second Officer Ball pulled Titan out from under the stall that JRC was using.

A review of Officer Ball's conduct, as has been extensively described and deconstructed, demonstrates that *at no time* did he act knowingly, purposely, *or intentionally*. In fact, the evidence is clear that he had no idea that JRC was even in the restroom, let alone that he intended to cause JRC harm or willfully or intentionally wanted to injure him.

Because civil assault and battery, like infliction of emotional distress, are intentional torts, and Officer Ball did not act with any intent to cause JRC harm, this claim is also without merit.

IV. CONCLUSION

To be fair, the competing societal interests in cases of this nature are manifest.

On the one hand, we task police officers with the duty to serve and protect us and to keep our schools and communities safe. This responsibility is rife with opportunities for tragic results. Despite their ongoing training, ever-improving equipment, and best intentions, police officers are still human beings charged with making life and death decisions, often in seconds.

We expect that those decisions be made based upon all of the training, factors, and information currently available to the officers and we are understandably reluctant to second-guess their judgment with the benefit of hindsight.

Nevertheless, police officers, like all members of society, must be held to certain standards and accountable when they fall short of them.

Police officers wield tremendous power and authority in our communities. They carry weapons, can arrest and restrain an individual's liberty, and they can cause serious injury or death by the decisions they make. These risks are amplified by the use of K9 police dogs, no matter how well trained they may be, particularly when placed in close proximity to school children.

Recognizing this paradox, the United States Supreme Court and Ohio General Assembly have crafted a judicial (qualified immunity) and statutory (R.C. 2744.03) calculus to take into account these competing interests and the courts have applied these standards accordingly.

In general, municipalities and individual police officers are cloaked in immunity for their on-the-job activities, while at the same time being liable and losing that immunity for conduct that rises to the level of malicious, bad faith, willful, wanton, or reckless misconduct.

Similarly, liability for gross negligence requires a failure to provide any or even slight care when a duty is owed and the intentional torts of infliction of emotion distress and civil assault and battery require affirmative, intentional acts directed at another person.

The upshot of this trade-off is that we give officers wide latitude in order to carry out their duties, to protect us, and to apprehend criminals, conduct searches and seizures, and to inspect schools, even in difficult or compromising situations and even where that latitude results in injustice or injury to innocent citizens.

Such is the situation here.

JRC was injured, albeit not seriously, when he was snipped by a police dog during a drug sniff exercise being conducted at his school. Despite the unfortunate and unfathomable fact that JRC was admitted to The School unattended during a lockdown and allowed to randomly stroll about the halls, the facts are clear that the law enforcement officer involved, Officer Ball, had no way to know that JRC was in a restroom stall.

Moreover, Officer Ball took reasonable precautions before conducting the search of the restroom with Titan by (according to his testimony) announcing his presence (he got no reply) and inspecting under the stalls (he did not see any persons). But most significantly, Officer Ball never took any action of any nature to seize, arrest, or constrain JRC nor at any time did Officer Ball command Titan to act against JRC. And, most certainly, Officer Ball never intended any harm to come to JRC.

That said, even if Officer Ball was minimally negligent by failing to more carefully constrain Titan while on The School grounds, the officer's conduct must be viewed in the greater context of creating a safe environment for school children by searching for narcotics that might be present. The flexibility embodied in the law for police officers to do their jobs, particularly in this context, demand nothing less. This is even more apparent when it was The School and The District that sought out law enforcement to conduct the drug sniffs and gave Officer Ball and Titan the "green light" to enter the building. It goes without saying that when Officer Ball began the drug sniffs with Titan, he had every reason to rely upon The School officials that the children were safe and accounted for.

Finally, while not emphasized by the parties but previously recognized by this Court, the imposition of a bright-line rule that regulates all aspects of law enforcement and citizen interaction is untenable.[20] Instead, each case must be considered through its own, individual lens and evaluated based upon the facts and circumstances attendant thereto.

Accordingly, after review of the pleadings and extensive briefing, the Affidavits and other Civ. R. 56(E) materials, including the deposition testimony, perusal of Civ. R 56(C) as well as the relevant case law supplied by the parties and the Court, and the arguments made at the oral hearing, the Court finds the following:

Defendants' Motion for Summary Judgment is hereby well-taken and GRANTED.

JUDGE D. Chris Cook

THIS IS A FINAL APPEALABLE ORDER

[20] See: *Anderson, et al. v. City of Westlake*, Lorain County Court of Common Pleas, Case No. 18CV194655, affd., 9th Dist. Lorain No. 21CA011512, 2021-Ohio-4582, *cert.* denied, 166 Ohio St. 3d 1479, 2022-Ohio-1332.