

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-23677-CIV-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSO,
et al.,

Defendants.

_____ /

**DEFENDANT BELFORT’S MOTION FOR PARTIAL SUMMARY JUDGMENT
ON COUNTS III AND VI OF THE AMENDED COMPLAINT**

Defendant DETECTIVE ODNEY BELFORT, by and through undersigned counsel, and pursuant to Rule 56(b) of the Federal Rules of Civil Procedure and Local Rule 7.5, hereby moves for partial summary judgment on counts III and VI of the amended complaint [ECF No. 75]¹. Count III purports to state a section 1983 claim for deliberate indifference to serious medical needs in violation of Plaintiff’s Eighth and Fourteenth Amendment rights. Count VI purports to state a negligence claim against Defendant for breaching his duty of care in “...using excessive force against Plaintiff and failing to provide Lelieve immediate medical care.” All claims arise from the Plaintiff’s October 11, 2006 arrest.

Defendant moves for partial summary judgment contending he is entitled to qualified immunity on Count III. As a preliminary matter, the Eighth Amendment does

¹ These claims were added when Plaintiff filed his amended complaint on November 4, 2011. Therefore, they were not addressed in Defendant’s initial motion for summary judgment filed December 8, 2010. [ECF No. 12].

not apply to pretrial detainees and Plaintiff fails to properly allege an Eighth Amendment violation. Additionally, Defendant is entitled to qualified immunity because the record evidence does not establish that Defendant was deliberately indifferent to Plaintiff's medical needs, and Plaintiff cannot show Defendant Belfort's actions violated clearly established law. Specifically, Plaintiff alleged that after his arrest a police officer transported him to Jackson Memorial Hospital, but medical staff failed to diagnose his injuries. Furthermore, Defendant submits he is entitled to summary judgment on Count VI because there is no legal cause of action for the negligent commission of an intentional tort and Count VI fails to state a claim upon which relief can be granted.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Defendant Belfort is a police officer employed by the City of Miami Police Department, and has been employed with the Miami Police Department for sixteen years. [ECF No. 12-1].
2. In October 2006 Defendant Belfort was assigned to the Crime Suppression Unit of the Miami Police Department. [ECF No. 12-1].
3. On October 11, 2006, Defendant Belfort was conducting surveillance of a duplex apartment located at 5929 N.E. 1st Avenue. [ECF No. 12-1].
4. At the time of the surveillance, Defendant Belfort was located in a van parked in front of the duplex to observe suspected narcotics sales. [ECF No. 12-1].
5. Defendant Belfort did not observe other police officers stop Plaintiff's vehicle. [ECF No. 12-1].
6. Defendant Belfort was not present when other police officers arrested Plaintiff. [ECF No. 12-1].

7. Defendant Belfort never came into physical contact with Plaintiff. [ECF No. 12-1].

8. Plaintiff previously filed a lawsuit against Defendant Belfort and other defendants arising from the same incident. [09-20574-CIV-Lenard/White²].

9. In his prior lawsuit, Plaintiff named Jackson Memorial Hospital as a defendant. [09-20574-CIV-Lenard/White, ECF No. 1].

10. Under penalty of perjury, Plaintiff acknowledged that the police transported him to Jackson Memorial Hospital (JMH) prior to being taken to jail, but he claimed that "...medical staff nurses and doctors that said Plaintiff (sic) in prisoner section of hospital stated nothing was medically wrong and could leave." [09-20574-CIV-Lenard/White, ECF No. 1, p. 8].

11. In his prior lawsuit, Plaintiff alleged he was released back to the police after being seen by JMH medical staff. [09-20574-CIV-Lenard/White, ECF No. 1, p. 8].

12. Plaintiff further alleged that he was later transported to the emergency room while he was being "...held in county Jail." [09-20574-CIV-Lenard/White, ECF No. 1, p. 8].

13. In that action, Plaintiff sought \$1.5 million in compensatory damages and 750,000 (sic) in punitive damages against Jackson Memorial Hospital "...nurses and doctors unknown for initial diagnosis." [09-20574-CIV-Lenard/White, ECF No. 1, p. 8].

14. In his amended complaint, Plaintiff alleged that Officer Kevin Knowles transported Plaintiff to Ward D "...because of Lelieve's injuries," but that Ward D failed to administer care and released Lelieve. [ECF No. 75, ¶ 30].

15. Plaintiff alleged he subsequently underwent surgery at Jackson Memorial Hospital for internal bleeding. [ECF No. 75, ¶ 19].

² The prior action was dismissed on *res judicata* grounds. [09-CV-20547-JAL, ECF No. 33].

MEMORANDUM OF LAW

I. Summary Judgment Standard

The court, in reviewing a motion for summary judgment, is guided by the standard set forth in Federal Rule of Civil Procedure 56(a), which states, in relevant part, as follows:

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. F. R. Civ. P. 56(a).

The moving party bears the burden of meeting this exacting standard. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 (1986). “The moving party may discharge this ‘initial responsibility’ by showing that there is an absence of evidence to support the nonmoving party’s case or by showing that the nonmoving party will be unable to prove its case at trial.” *Hickson Corp., v. Northern Crossarm Co., Inc.*, 357 F.3d 1256, 1260 (11th Cir. 2004). To survive summary judgment, the nonmoving party bearing the ultimate burden of proof at trial must come forward with evidence sufficient to withstand a directed verdict motion. *Id.* “At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a ‘genuine’ dispute as to those facts.” *Scott v. Harris*, 127 S.Ct. 1769, 1776 (2007). “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.*

II. Count III fails to state a claim upon which relief can be granted because the Eighth Amendment governs the treatment of convicted prisoners not pretrial detainees.

Plaintiff fails to state a claim for relief under 42 U.S.C. section 1983 for a violation of his Eighth Amendment rights because he fails to establish that the incident alleged in the amended complaint occurred while he was a convicted prisoner. An action under section 1983 requires the deprivation of a federal right, privilege or immunity by a person acting under color of state law. 42 U.S.C. § 1983. The Eighth Amendment provides, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. Const. amend. VIII. The Eighth Amendment applies only after a prisoner is convicted. *U.S. v. Myers*, 972 F.2d 1566 (11th Cir. 1992). *See also Farrow v. West*, 320 F.3d 1235, 1242 (11th Cir. 2003); (“the Eighth Amendment governs the treatment a prisoner receives in prison and the conditions under which he is confined.”) In Count III of his amended complaint, Plaintiff identifies his claim as one arising under the Eighth Amendment. However, Plaintiff’s amended complaint fails to set forth allegations that he was subjected to excessive force as a convicted prisoner. On the contrary, Plaintiff’s amended complaint merely sets forth allegations pertaining to his initial arrest and pretrial detention. Because the Plaintiff cannot establish a constitutional violation arising under the Eighth Amendment, Defendant Belfort is entitled to qualified immunity and summary judgment is appropriate on Count III.

III. Defendant is entitled to qualified immunity on count III.

“The doctrine of qualified immunity provides that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (internal citations omitted). Qualified immunity balances two important interests--the need to hold public officials

accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."

Townsend v. Jefferson County, 601 F.3d 1152, 1157 (11th Cir. 2010)

"To invoke qualified immunity, the official first must establish that he was acting within the scope of his discretionary authority" when the alleged violation occurred. (internal citations omitted). If, interpreting the evidence in the light most favorable to the plaintiff, the court concludes that the defendant was engaged in a discretionary function, then the burden shifts to the plaintiff to show that the defendant is not entitled to qualified immunity." *Id.*

At the outset, Defendant submits that the record evidence reflects he acted in his discretionary capacity when he investigated alleged narcotics sales as a police officer working for the City of Miami. *See Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990);(government official proves that he acted within the purview of his discretionary authority by showing objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority.) Accordingly, Plaintiff bears the burden of showing Defendant is not entitled to qualified immunity.

A. Qualified immunity standard

Unless a state actor's conduct violates a clearly established constitutional right, he is protected from suit based on federal claims by qualified immunity. *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982). Qualified immunity is not just a mere defense to liability but an entitlement not to stand trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815 (1985). Assuming that a plaintiff has alleged a constitutional

violation in fact-specific terms, and the right in question was clearly established at the time, a government official is still entitled to qualified immunity as long as he could have believed that his conduct was within constitutional limits. *Hunter v. Bryant*, 112 S.Ct. 534, 536 (1991). “The court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.” *Id.*

B. Deliberate indifference to medical needs

In the instant action, Defendant Belfort is entitled to qualified immunity because Plaintiff has failed to establish a constitutional violation of his right to medical treatment, and he has failed to show that Defendant was on notice that the treatment of Plaintiff violated clearly established law in October, 2006. In order to prove a Fourteenth Amendment claim for deliberate indifference to medical needs under Title 42 U.S.C. section 1983, four elements must be proven: an objectively serious medical need; an objectively insufficient response to that need; subjective awareness of facts signaling the need; and an actual inference of required action from those facts which would demonstrate deliberate indifference. *Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Cir. 2000). Here, the fatal flaw in Plaintiff’s medical indifference claim is that he did not present evidence of an objectively insufficient response to his medical needs. In addition, Defendant submits that the nature of Plaintiff’s alleged injuries, internal bleeding, is not objectively obvious to a layperson.

In the instant action and its predecessors, Plaintiff has conceded that the police took him to a hospital after he was arrested and complained of injuries. For example, in this action Plaintiff alleged that Officer Kevin Knowles transported him to Jackson

Memorial Hospital after Plaintiff complained of injuries. It is undisputed that Plaintiff was transported to assess his immediate medical needs. However, in one of his prior lawsuits Plaintiff alleged under penalty of perjury that hospital nurses and doctors failed to diagnose his injuries, and released him back to the police. It is significant to note that Plaintiff previously sued Jackson Memorial Hospital for this alleged conduct.

The instant case is factual similar to *Townsend v. Jefferson County*, 601 F.3d 1152 (11th Cir. 2010). In that case, the Plaintiff detainee suffered a miscarriage while in jail and alleged deputies violated her civil rights under the Fourteenth Amendment by acting with deliberate indifference to her serious medical needs. In *Townsend*, each defendant deputy knew that a nurse had seen and spoken with the detainee and that the nurse had determined that there was no medical emergency. Upon appeal, the Eleventh Circuit reversed the trial court's denial of qualified immunity for the deputies.

Chambers had been told by a medical professional that Townsend was not presenting an emergency, and although Daniels had not received the same report, Daniels knew that a medical professional had spoken with Townsend and determined that Townsend could wait several hours for further evaluation. (internal citations omitted). Townsend has not presented evidence that her situation was so obviously dire that two lay deputies must have known that a medical professional had grossly misjudged Townsend's condition. *Townsend v. Jefferson County*, 601 F.3d 1152, 1159 (11th Cir. 2010)

Here, Plaintiff concedes that he was seen by medical staff at Jackson Memorial Hospital and released back to the police. As in *Townsend*, Plaintiff has not presented record evidence that his condition was obviously dire to require immediate medical attention and that Defendant Belfort knew of his medical condition. As in *Townsend*, the Defendant is entitled to qualified immunity.

A plaintiff who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of the delay in medical treatment. *Williams v. South Fulton Regional Jail*, 152 Fed.Appx. 862 (11th Cir. 2005)(affirming District Court's finding of qualified immunity). Although Plaintiff alleged he underwent surgery for his injuries, there is nothing in the record reflecting the difference in treatment he would have received had Jackson Memorial Hospital admitted him upon his first presentation rather than his second. While a delay in medical treatment can prove establish deliberate indifference claim, the reason for the delay and the nature of the medical need is relevant in determining what type of delay is constitutionally intolerable. See *Harris v. Coweta County*, 21 F.3d 388, 393-94 (11th Cir. 1994); *Brown v. Hughes*, 894 F.2d 1533, 1537-39 (11th Cir.1990). In the instant case, the purported delay in treatment can reasonably be attributed to another police officer's reliance on Jackson Memorial Hospital's Ward D staff releasing Plaintiff back to the police. More importantly, there is no evidence in the record that Defendant Belfort knew Plaintiff was taken to Jackson Memorial Hospital on the first or second occasion. In addition, there is no record evidence indicating that Defendant Belfort knew Plaintiff suffered internal bleeding and failed to provide medical treatment.

C. Clearly established law

“For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Hope v. Pelzer*, 122 S.Ct. 2508, 2515 (2002). In other words, in the light of pre-existing law the unlawful nature of the official's conduct must be apparent. *Id.* Additionally, government officers sued in a civil rights action under section 1983 are

entitled to the same “fair warning” requirement as to those criminal defendants charged under 18 U.S.C. section 242. *Id.* Even if a constitutional violation based on deliberate indifference was shown, Defendant Belfort is entitled to qualified immunity because the law was not clearly established at the time of this incident.

“Questions of deliberate indifference to medical needs based on claims of delay are complicated questions because the answer is tied to the combination of many facts; a change in even one fact from a precedent may be significant enough to make it debatable among objectively reasonable officers whether the precedent might not control in the circumstances later facing an officer.” *Pourmoghani-Esfahani v. Gee*, 625 F.3d 1313, 1318 (11th Cir. 2010). Plaintiff has failed to show how Defendant violated clearly established law in October 2006, under the unique factual circumstances presented in this case where a pretrial detainee was transported to a hospital after complaining of injuries, the hospital staff assessed the detainee’s physical condition without diagnosing internal bleeding, the staff then released the detainee back to the police for transportation to jail, and the detainee was later treated for internal bleeding. Consequently, Plaintiff fails to meet his burden and Defendant Belfort is entitled to qualified immunity on Plaintiff’s claim of deliberate indifference to medical needs.

IV. Plaintiff fails to state a cause of action for the negligent use of excessive force and the record evidence does not otherwise support a negligence claim.

To the extent that Plaintiff seeks to impose liability for Defendant’s intentional acts, the complaint fails to state a cause of action in negligence because there is no such thing as the negligent commission of an intentional tort. Plaintiff alleged that Defendant had a duty to exercise care in its (sic) police duties, and breached his duty of care by

using excessive force against Plaintiff and failing to provide Lelieve immediate medical care. [ECF No. 75, ¶ 88].

At the outset, there is no such cause of action as negligent use of excessive force. *City of Miami v. Ross*, 695 So.2d 486, 487 (Fla. 3rd DCA 1997). “[I]t is not possible to have a cause of action for “negligent” use of excessive force because there is no such thing as the negligent commission of an intentional tort.” *City of Miami v. Sanders*, 672 So.2d 46, 48 (Fla. 3rd DCA 1996). Consequently, to the extent Plaintiff seeks to allege a negligence claim against Defendant for excessive force, that claim must fail. Additionally, for the reasons discussed above, Defendant submits that there is no record evidence to support Plaintiff’s claim that he failed to provide Plaintiff medical care. Defendant was not present for Plaintiff’s arrest and there is no record evidence to indicate knew that Plaintiff required medical care for an objectively obvious injury and failed to act.

WHEREFORE, Defendant Detective Odney Belfort requests that this Court enter an Order granting his motion for partial summary judgment on counts III and VI of the amended complaint.

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CAGreen@ci.miami.fl.us

By: s/ Christopher Green
Christopher A. Green
Florida Bar No. 957917

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on December 6, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: **s/ Christopher Green**
Christopher A. Green
Assistant City Attorney
Florida Bar No. 957917

SERVICE LIST

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09-20574-CIV-LENARD/WHITE

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

UNITED STATES DISTRICT COURT Southern District of Florida

2-20-09 Gh

Case Number: 08-CV-21664-JLK

Gerald Beliere #L11928
(Enter the full name of the plaintiff in this action)

AMENDMENT

v.

City of Miami Police, Lt. Pierre, Lt. Fernandez,
Lt. Gonzalez, Lt. DeLoach, and Lt. Galt, also
Jackson Memorial Hospital (Miami) ET AL

FILED by <u>JC</u> D.C. ELECTRONIC
MAR. 4, 2009
STEVEN M. LARIMORE CLERK U.S. DIST. CT. S.D. OF FLA. - MIAMI

(Above, enter the full name of the defendant(s) in this action)

A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

Instructions for Filing:

This packet includes four copies of the complaint form and two copies of the Application to Proceed without Prepayment of Fees and Affidavit. To start an action you must file an original and one copy of your complaint for the court and one copy for each defendant you name. For example, if you name two defendants, you must file the original and three copies of the complaint (a total of four) with the court. You should also keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original.

Your complaint must be legibly handwritten or typewritten. Please do not use pencil to complete these forms. The plaintiff must sign and swear to the complaint. If you need additional space to answer a question, use an additional blank page.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further, it is necessary for you to file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

cat/div Dade "1983"
Case # 09-20547-CIV-
Judge Lenard Mag White
Motn lfp yes Fee pd \$ ---
Receipt # ---

Page 1 of 5

*Please note
(page labeled pages incorrect)*

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

There is a filing fee of \$350.00 for this complaint to be filed. If you are unable to pay the filing fee and service costs for this action, you may petition the court to proceed in forma pauperis.

Two blank Applications to Proceed without Prepayment of Fees and Affidavit for this purpose are included in this packet. Both should be completed and filed with your complaint.

You will note that you are required to give facts. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

When these forms are completed, mail the original and the copies to the Clerk's Office of the United States District Court, Southern District of Florida, 400 North Miami Avenue, Room 8N09, Miami, Florida 33128-7788.

I. Parties

In Item A below, place your name in the first blank and place your present address in the third blank.

A. Name of plaintiff: GERALD LEBEVE #L11928
Inmate #: DC# L11928
Address: HAMILTON CORRECTIONAL INSTITUTION ANNEX - 11119
SUN. COUNTY RD. #249, JASPER, FLORIDA 32052-3785

In Item B below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use Item C for the names, positions, and places of employment for any additional defendants.

B. Defendant: MR. YERRE
is employed as MIAMI POLICE OFFICER
at 400 N.W. 2nd ave, MIAMI Florida. 33128

C. Additional Defendants: MR. FERNANDEZ
MIAMI POLICE OFFICER
400 N.W. 2nd ave, MIAMI Florida. 33128

E. Defendant: MR. Gonzalez
Mailing Address: 400 N.W. 2nd Ave
Miami Florida 33128
Position: Patrolman
Employed at: Miami City Police Department

F. Defendant: MR. Belfort
Mailing Address: 400 N.W. 2nd Ave
Miami Florida - 33128
Position: Patrolman
Employed at: Miami City Police Department

G. Defendant: MR. Gayle
Mailing Address: 400 N.W. 2nd Ave
Miami Florida 33128
Position: Patrolman
Employed at: Miami City Police Department

H. Defendant: City of Miami Police Department
Mailing Address: 400 N.W. 2nd Ave
Miami Florida 33128
Position: City of Miami Police Supervisors
Employed at: Miami City Police Department

I. Defendant: Unknown at moment without Medical Records
Mailing Address: Miami Florida
Position: Medical Staff, Doctor MD IMH
Employed at: City of Miami

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

Plaintiff was maliciously beaten by named
Defendant's in violation of his Constitutional rights under
8TH & 14TH U.S.C.A.

II. Statement of Claim

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places.

Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach an additional blank page if necessary.

ON OR ABOUT THE 11TH DAY OF OCTOBER 2006, PLAINTIFF WAS VIOLENTLY
BEATEN WITHOUT REGARDS, SUFFERED INTERNAL INJURIES AND ALMOST FATAL
DUE TO THE NAMED DEFENDANT'S AND OTHER RESPONSIBLE PERSON'S
FAILURE TO ASCERTAIN FACTS OF MEDICAL NEEDS. DEFENDANT'S
CARELESSLY DISREGARDED, AND NEGLECTED THE SAFETY AND WELFARE OF
~~THE~~ THE PLAINTIFF, COMMITTING MALFEASANCE, WHEREOF INJURIES
HE SUSTAINED CAUSED INTERNAL BLEEDING AND CAUSING AN
IMMEDIATE SURGERY DUE TO LIFE THREATENING REASONS AND
WITHOUT THE PROCEDURE WOULD HAVE DIED. THEY CAUSED
PERMANENT DISFIGUREMENT AND TRAUMA. ON THE 11TH DAY OF
OCTOBER 2006, PLAINTIFF AND ASSOCIATE FRIEND, KNOWN ONLY AS
WESLEY AT THIS TIME DID TRAVEL TOGETHER AND INDIVIDUALS THAT
ARE ALLEGED PASSENGER OF THE SERVICE DROVE FROM ORLANDO TO
MIAMI FLORIDA. THE ALLEGED REASONS BEING THAT WESLEY HAD A
TRANSPORT BUSINESS AND ^{Page 3 of 5} NEEDED ASSISTANCE AND COMPANY.

At approximately 7:00 p.m. on the 11th day of October, Wesley the driver, Plaintiff a social passenger, and three paying customers pulled up to the club and Wesley parked the van, stating to plaintiff that he was stopping to pick up another passenger that was to be returning to Orlando with Plaintiff and Wesley after dropping Orlando fares off. Wesley then exited the van leaving Plaintiff and the three paying customers to allegedly receive another five (5) minutes or more elapsed and Wesley returned to the parked van, but no one accompanied him as alleged. He stated (Wesley) that they were not there, he stated he was tired and would Plaintiff take over the drivers duties because he was very tired, so Plaintiff became the driver operator at that moment. Just as Plaintiff was pulling out of the parking space, it was agreed they would stop at the supermarket and then drop the passenger off and return to Orlando. This did not occur. Some moments elapsed while in route to the nearest supermarket and a police car pulled behind the van that Plaintiff was now driving in the owners place (Wesley), when police signaled to pull over.

Plaintiff then pulled to the side of the road at the police officer's requested signal. When stopped, Plaintiff then rolled the drivers side windows down, when Officers Gonzalez and Pierre ordered the driver out of the vehicle (Plaintiff) and upon exiting was told to place his hands up against and on the vehicle, for which he fully complied.

Officer Pierre conducted the pat frisk search of Plaintiff and found nothing. After questioning Plaintiff and a response given that he had nothing was placed in handcuffs. Plaintiff continued to question officer Pierre's reasoning for placing cuff's on him and why he was being arrested, when officer Pierre punched Plaintiff in his face several times while in restraints and he fell to the ground. Both officers, Pierre and Gonzalez then at once began to continually punch kick and stomped on Plaintiff's mid section, chest, back, legs, stomach repeatedly, during this time, detectives Belfort and Gayle arrived, then Plaintiff noticed Detective Belfort was kicking and stomping him as well.

Detective and Officers, Belfort, Pierre and Gonzalez continued to punch, kick, stomp, and assault Plaintiff in the street without regard to this being observed or reported and without concern for the rights or welfare of Plaintiff. After what seemed to feel like hours, (actually about ten (10) minutes) of this assault against Plaintiff. Plaintiff was then lifted and placed into the rear of the awaiting Patrol Car bleeding from his mouth, spitting blood.

All such was unprovoked. Plaintiff complied fully, had not resisted nor did he attempt to flee, and yet he was victimized and viciously beaten with cause or reason. Reports prepared by Officer Gonzalez states that Plaintiff sustained nor had any injuries, yet within the next two (2) hours or sometime thereafter was rushed into surgery for internal injury and bleeding which may have n=been fatal had he

not been.

Police Officers and Detectives named herein are the cause and of the injury and disfigurements sustained and must be held accountable .

Jackson Memorial Hospital, prisoner only detention medical staff nurses and doctors that said Plaintiff in prisoner section of hospital stated nothing was medically wrong and could leave.

Such diagnosis had almost caused Plaintiff's injuries to be fatal had he not been returned by E.M.S. when he notified by the County Jail medical administrators less than (2) hours later.

The same injury which he had been earlier seen for and told that nothing was wrong, just prior to E.M.S. pickup while being held in county Jail. The Plaintiff became extremely dizzy and passed out, upon E.M.S. returning Plaintiff to E.R. was in surgery immediately for abdominal internal bleeding for injuries Police Stated did not exist or occur and medical staff claimed did not exist and released patient back to police when first seen.

From healthy and nothing wrong, the fake arrest, beating and closely fatal account if surgery had not been procured when it was Plaintiff's claim seeks trial by jury and not judge. He seeks his claim against the named Defendant's and those not known currently, but shall be provided for the unprovoked violent beating, injuries and neglect care given as well the physical disfiguration he must live with

the rest of his life. The trauma and stress and the wrongful incarceration and time taken away from his life and liberty. All such violent claims are of the 8th and 14th Const. Amend protected by the United States and States laws accordingly

RELIEF SOUGHT

1. City of Miami Police Department in their official capacity as employer and the sum sought is 2.5 million in compensatory damages and 1.5 million for punitive damages.

2. Patrol-Man Pierre of the City of Miami Police force is being sued and in the sum of relief sought in his official and individual capacities, compensatory relief of 2.5 million is sought, 1.5 million in punitive damages.

3. Patrol-Man Fernandez of the City of Miami Police force is being sued and in the sum of relief sought in his official and individual capacities, compensatory relief of 2.5 million is sought, 1.5 million in punitive damages.

4. Patrol-Man Gonzalez of the City of Miami Police force is being sued and in the sum of relief sought in his official and individual capacities, compensatory relief of 2.5 million is sought, 1.5 million in punitive damages.

5. Detective Belfort Pierre of the City of Miami Police force is being sued and in the sum of relief sought in his official and individual capacities, compensatory relief of 2.5 million is sought, 1.5 million in punitive damages.

6. Detective Gayle of the City of Miami Police force is being sued and in

the sum of relief sought in his official and individual capacities, compensatory relief of 1.5 million is sought, 750,000 in punitive damages.

7. Jackson Memorial Medical Nurses and Doctors unknown for initial diagnosis are being sued in their capacity as medical care providers in official and individual capacities, compensatory relief of 1.5 million is sought, 750,000 in punitive damages.

CONSTITUTIONAL VIOLATIONS

For violations under 42 U.S.C.A. Section 1983, Protected under the Eighth and Fourteenth United States Constitutional Amendments which have been violated and that are protected rights.

Respectfully Submitted,


GERALD LELIEVE DC #L1928
Hamilton Correctional Inst. – Annex
11419 SW County Road # 249
Jasper, Florida 32052–3735

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

Wesley had to transport people from Orlando to Miami and is a fact that he requested Plaintiff's assistance and company for social and assistance and believe agreed. The two plus passengers left that day early. Plaintiff and Wesley were not close, knew one another only from the neighborhood. They departed early from Orlando on October 11th 2006 along with passengers and arrived about 6:00 - 6:30 P.M.

III. Relief

State briefly exactly what you want the court do to do for you. Make no legal arguments. Cite no cases or statutes.

Punitive and compensatory damages against each named defendant in the official and individual separate capacities as asserted and attach on page 13 lines 1-7 Relief Souleff.

IV. Jury Demand

Do you demand a jury trial? Yes No

(Rev. 09/2007) Complaint Under The Civil Rights Act, 42 U.S.C. § 1983

Signed this _____ day of 2-20-(FEBRUARY), 2009



(Signature of Plaintiff)

I declare under penalty of perjury that the foregoing is true and correct. *(optional)*

Executed on: 2-20-09



(Signature of Plaintiff)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 10-23677-Civ-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

vs.

CHIEF OF POLICE MANUEL OROSO, et al.,

Defendants.

**PLAINTIFF, GERALD LELIEVE'S RESPONSE IN OPPOSITION TO
DEFENDANT BELFORT'S MOTION FOR SUMMARY JUDGMENT
ON COUNTS III AND IV OF THE AMENDED COMPLAINT**

Plaintiff, Gerald Lelieve (the "Plaintiff" or "Lelieve"), responds to Defendant Detective Odney Belfort's (the "Defendant" or "Belfort") Motion for Summary Judgment on Counts III and IV of the Amended Complaint, and as good cause therefore states:

I. STATEMENT OF DISPUTED FACTS

Contrary to Defendant's motion for summary judgment, in its "Statement of Undisputed Material Facts," the facts stated are disputed on the record, as follows:

1. Detective Belfort arrived on the scene at the time of the arrest, kicking and stomping him. [ECF 81-1, p.7].
2. Belfort continued to punch, kick, stomp and assault Plaintiff without regard to this being observed or reported and without concern for the rights and welfare of Plaintiff. [ECF 81-1, p. 7].
3. Belfort did not report Plaintiff's injury or seek immediate medical attention for him. [ECF 75, p. 3, ¶ 18; ECF 81-1, p. 7].

4. Plaintiff had a seriously medical need which required immediate medical attention, which has been diagnosed by a physician, and/or is so obvious that even a lay person would easily recognize the necessity for prompt medical attention. [ECF 75, p. 9, ¶ 55].

5. Belfort was the lead arresting officer, who had actual knowledge of Plaintiff's injuries and impending harm because he witnessed the arrest and engaged in the use of excessive force. [ECF 75, p. 9, ¶ 56].

6. Plaintiff's impending harm was easily preventable; however, Belfort was deliberately indifferent to Plaintiff's serious medical needs, and failed to provide necessary immediate medical care or complete an incident report. [ECF 75, p. 10, ¶ 57; p. 13, ¶ 88].

7. Plaintiff was placed in the rear of the patrol car bleeding from his mouth and spitting blood, and not rushed into surgery until two (2) hours later, which internal injury and bleeding may have been fatal. [ECF 81-1, p. 7-8].

8. After sustaining injuries, the proper procedure was not to take Lelieve to Ward D. Rather, pursuant to the departmental orders, Officer Kevin Knowles testified that when a detainee or someone who has been arrested, the required procedure under the departmental orders is to "advise the supervisor or . . . call fire-rescue." (Ex. 1, Depo. K. Knowles, 5:13-7:11, 10/21/11).

9. The departmental orders in effect as of October 11, 2011, provide:

21.4.1.21 Medical Attention: In use of force incidents, both less than lethal and lethal, medical attention may be required. If a subject complains of pain or injury; is unconscious; or, in the opinion of the concerned officer or supervisor, has an apparent injury requiring medical attention, officers shall request a fire-rescue unit be dispatched to the scene. If a subject is injured or complains of pain or injury, a supervisor shall be requested and must respond to the scene. If there is an obvious injury, fire rescue must be called to the scene.

21.4.3 Situations Requiring A Response to Resistance Report: The Response to Resistance Report (R.F. #186) will be completed whether or not an arrest is made, under the following circumstances:

21.4.3.1 When striking, kicking, hitting a subject, using OC, Taser or K-9.

21.4.3.2 When an officer causes an injury or death by use of force other than with a firearm.

21.4.3.3 When there is a complaint of injury and the injury is visible.

10. Although Plaintiff maintains that he was transported to Ward D, Officer Knowles testified that he did not transport Plaintiff to Ward D, and would not have been able to transport him to Ward D without an arrest affidavit. (Ex. 1, Depo. K. Knowles, 4:8-5:5, 10/21/11).

II. STANDARD OF REVIEW

Summary judgment is only appropriate under Rule 56(c) of the Federal Rules of Civil Procedure, if the court determines that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548 (1986). A material fact is one which “might affect the outcome of the suit under the governing law,” and a genuine issue exists where the “evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, courts must construe the evidence in a “light most favorable to the non-moving party.” *Hilburn v. Murata Electronics N. Am., Inc.*, 181 F.3d 1220, 1225 (11th Cir. 1999). Summary judgment is a drastic remedy, and should not be granted unless the movant establishes “that the other party is not entitled to recover *under any discernible circumstances.*” *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 209 (8th Cir. 1976) (emphasis added).

III. ARGUMENT

Defendant Belfort is not entitled to summary judgment on Counts III or IV. Count III states a claim for relief for deliberate indifference to medical needs because the same standard applies equally to both pretrial detainees and convicted prisoners. Further, Defendant Belfort is not entitled to qualified immunity when, as here, Belfort's failure to immediately call fire rescue and inform the medical staff of Plaintiff's internal injuries could have resulted in Plaintiff's death. Moreover, Plaintiff is allowed to plead negligence in Count IV in the alternative as well as for separate acts, and it is for the factfinder to determine whether Belfort's acts rise to an intentional tort or negligence.

A. Count III states a claim upon which relief can be granted because the applicable standard for deliberate indifference to medical needs is the same for both pretrial detainees in custody and convicted prisoners.

The Eleventh Circuit has rejected the very argument raised by Defendants, and held:

Plaintiff argues that the Officers violated Haggard's Fourteenth Amendment rights by using excessive force while subduing Haggard in his cell causing him to suffocate. "Claims involving the mistreatment of ... pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause instead of the Eighth Amendment's Cruel and Unusual Punishment Clause, which applies to such claims by convicted prisoners." *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir.1996). **But it makes no difference whether Haggard was a pretrial detainee or a convicted prisoner because "the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving ... pretrial detainees."** *Id.* We thus apply the excessive force standard first enunciated in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.1973), adopted by this Circuit in *Williams v. Kelley*, 624 F.2d 695, 697-98 (5th Cir.1980),¹⁰ and applied in this Circuit thereafter in the Eighth Amendment context. See e.g., *Campbell v. Sikes*, 169 F.3d 1353, 1374-77 (11th Cir.1999). Under this standard, "whether or not a prison guard's application of force is actionable turns on whether that force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm." *Brown v. Smith*, 813 F.2d 1187, 1188 (11th Cir.1987) (internal quotation marks omitted); see also *Campbell*, 169 F.3d at 1374.

Bozeman v. Orum, 422 F.3d 1265, 1271 (11th Cir. 2005)(e.s.). See also, *McDaniels v. Lee*, 405 F. App'x 456, 458 (11th Cir. 2010) (“pretrial detainees are afforded the same protection as prisoners, and cases analyzing deliberate indifference claims of pretrial detainees and prisoners can be used interchangeably); *Keehner v. Dunn*, 409 F. Supp. 2d 1266, 1272 (D. Kan. 2005)(“Although the Eighth Amendment only applies to convicted inmates, the Fourteenth Amendment due process clause provides for the same degree of medical attention to pretrial detainees as the Eighth Amendment provides for inmates.”)

Lelieve has alleged deliberate indifference under both the Eighth and Fourteenth Amendments in Count III. However, pursuant to *Bozeman* and *McDaniels*, it makes no difference whether Lelieve’s claim is governed under the Fourteenth Amendment, as a pretrial detainee, or the Eighth Amendment, as a convicted prisoner, because the applicable legal standard is the same. Lelieve has alleged that he had a serious medical need which required immediate medical attention and that Belfort, as the lead arresting officer, had knowledge of the injuries and harm because he witnessed the arrest and engaged in the use of excessive force. [ECF 75, p. 9, ¶ 55-56]. Despite the seriousness of Lelieve’s injuries, which could have been fatal, Belfort did not report Plaintiff’s injury or seek immediate medical attention for him by calling fire rescue. [ECF 75, p. 3, ¶ 18, 57; ECF 81-1, p. 7]. Therefore, Lelieve has stated a claim for relief in Count III for deliberate indifference to serious medical needs against Belfort.

B. Belfort is not entitled to qualified immunity on Count III.

The Court has already considered and ruled that Belfort is not entitled to qualified immunity in this action because Lelieve demonstrated the two prong test by showing (1) violation of a constitutional right, and (2) the right that Belfort allegedly violated was clearly established. [ECF 23, 20-21].

As the Eleventh Circuit has held:

“[A]n official acts with deliberate indifference when he intentionally delays providing an inmate with access to medical treatment, knowing that the inmate has a life-threatening condition or an urgent medical condition that would be exacerbated by delay.” *Lancaster v. Monroe County, Ala.*, 116 F.3d 1419, 1425 (11th Cir.1997); accord *Hill v. Dekalb Regional *1274 Youth Detention Center*, 40 F.3d 1176, 1187 (11th Cir.1994); *Brown v. Hughes*, 894 F.2d 1533, 1538 (11th Cir.1990); *Thomas v. Town of Davie*, 847 F.2d 771, 772 (11th Cir.1988); *Aldridge v. Montgomery*, 753 F.2d 970, 972-73 (11th Cir.1985). This general statement of law ordinarily does not preclude qualified immunity in cases involving a delay in medical treatment for a serious injury. The cases are highly **fact-specific** and involve an array of circumstances pertinent to just what kind of notice is imputed to a government official and to the constitutional adequacy of what was done to help and when. Most cases in which deliberate indifference is asserted are far from obvious violations of the Constitution. But the assumed circumstances here are stark and simple, and the decisional language from cases such as *Lancaster* obviously and clearly applies to these extreme circumstances: the officers **knew** Haggard was unconscious and not breathing and-for fourteen minutes-**did nothing**. They did not check Haggard's breathing or pulse; they did not administer CPR; **they did not summon medical help**. Given these circumstances, we conclude that the Officers were **fairly warned by our case law** and that the **Officers' total failure to address Haggard's medical need during the fourteen-minute period violated Haggard's constitutional rights, which violation should have been obvious to any objectively reasonable correctional officer**.

Bozeman v. Orum, 422 F.3d 1265, 1273-74 (11th Cir. 2005)(e.s.).

There is no room for qualified immunity under the facts here. Lelieve demonstrated “an objectively insufficient response to his medical needs” by Belfort. Contrary to *Townsend*, Plaintiff's situation was so obviously dire that Belfort must have “known” that obtaining medical care for his injuries was an “emergency.” *Townsend v. Jefferson Cty.*, 601 F.3d 1152, 1159 (11th Cir. 2010). Belfort cannot assert that “Plaintiff's alleged injuries, internal bleeding, [are] not objectively obvious” when Belfort himself caused those injuries by use of excessive force. [ECF 81-1, p. 7]. As such, *it was Belfort who would have had the knowledge of Lelieve's dire*

situation, called fire rescue, and otherwise advised medical staff of the misdiagnosis. [ECF 75, p. 10, ¶ 57; Ex. 1, Depo. K. Knowles, 5:13-7:11, 10/21/11]. Belfort is not entitled rely on a medial staff's opinion releasing Lelieve from Ward D when Belfort knew that he caused critical life threatening internal injuries on Lelieve, and did nothing to obtain proper medical care for him.

In addition, Lelieve is alleging deliberate indifference for the delay caused by Belfort in failing to provide him immediate medical attention. The “clearly established law in October 2006,” as stated in the departmental orders, required Belfort to immediately summon fire rescue on the arrest scene, as follows:

21.4.1.21 Medical Attention: In use of force incidents, both less than lethal and lethal, medical attention may be required. If a subject complains of pain or injury; is unconscious; or, in the opinion of the concerned officer or supervisor, has an apparent injury requiring medical attention, officers shall request a fire-rescue unit be dispatched to the scene. If a subject is injured or complains of pain or injury, a supervisor shall be requested and must respond to the scene. If there is an obvious injury, fire rescue must be called to the scene.

(Ex. 1, Depo. K. Knowles, Ex. 3, 10/21/11). This Circuit has held that a fourteen minute delay and failure to address medical needs or to summon medical help will bar an officer's claim of qualified immunity. *Bozeman v. Orum*, 422 F.3d 1265, 1273-74 (11th Cir. 2005). Here, Lelieve could have died for failure to address his internal injuries. [ECF 81-1, p. 7]. This is not a “superficial, nonserious physical condition,” but rather a serious condition that was obvious and the delay caused Lelieve additional pain and suffering. *See Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir. 1976) (“[A] prisoner states a proper cause of action when he alleges that prison authorities have denied reasonable requests for medical treatment in the face of an obvious need for such attention where the inmate is thereby exposed to undue suffering or the threat of tangible residual injury.”) Thus, Lelieve has established the detrimental effect of the delay.

Alternatively, at the very least, there are sufficient disputed facts in the record, and this matter is not appropriate for summary judgment. Although Plaintiff maintains that he was transported to Ward D, Officer Knowles testified that he did not transport Plaintiff to Ward D, and would not have been able to transport him to Ward D without an arrest affidavit. (Ex. 1, Depo. K. Knowles, 4:8-5:5 10/21/11).

C. Clearly established law.

As indicated *supra*, the law governing Lelieve's constitutional rights were clearly established. The departmental orders in force in October 2006 required Belfort to immediately summon fire rescue on the arrest scene, as follows:

21.4.1.21 Medical Attention: In use of force incidents, both less than lethal and lethal, medical attention may be required. If a subject complains of pain or injury; is unconscious; or, in the opinion of the concerned officer or supervisor, has an apparent injury requiring medical attention, officers shall request a fire-rescue unit be dispatched to the scene. If a subject is injured or complains of pain or injury, a supervisor shall be requested and must respond to the scene. If there is an obvious injury, fire rescue must be called to the scene.

(Ex. 1, Depo. K. Knowles, Ex. 3, 10/21/11). It also required Belfort to report the injuries in a "control of persons" form, as follows:

21.4.3 Situations Requiring A Response to Resistance Report: The Response to Resistance Report (R.F. #186) will be completed whether or not an arrest is made, under the following circumstances:

21.4.3.1 When striking, kicking, hitting a subject, using OC, Taser or K-9.

21.4.3.2 When an officer causes an injury or death by use of force other than with a firearm.

21.4.3.3 When there is a complaint of injury and the injury is visible.

Belfort did neither, which would have alerted supervising officers and medical staff.

Further, at the time of the arrest, it was well-settled law in the Eleventh Circuit that a delay of a couple hours may constitute deliberate indifference. *Brown v. Hughes*, 894 F.2d 1533, 1538-39 (11th Cir. 1990) (finding deliberate indifference where inmate with a broken foot was

delayed treatment for a few hours); *Aldridge v. Montgomery*, 753 F.2d 970, 972-73 (11th Cir. 1985) (finding deliberate indifference where inmate had bleeding cut under his eye with treatment delayed for two and a half hours). *See also, Calhoun v. Thomas*, 360 F. Supp. 2d 1264, 1282 (M.D. Ala. 2005)(upholding claim for deliberate indifference for refusing medical care during six hour interrogation while detainee suffered from gunshot wound); *Bozeman v. Orum*, 422 F.3d 1265, 1273-74 (11th Cir. 2005)(a fourteen minute delay and failure to address medical needs or to summon medical help is not sufficient for a claim of qualified immunity).

Even if the law was not clearly established, Belfort is not entitled to qualified immunity. When the violation is so obvious that every objectively reasonable officer in Defendant's position would have known that what Defendant did following the struggle was not enough. *Pourmoghani-Esfahani v. Gee*, 625 F.3d 1313, 1319 (11th Cir. 2010) (citing *Lee v. Ferraro*, 284 F.3d 1188, 1198-99 (11th Cir.2002)) (sometimes constitutional violation is clear even without case law on point). Any officer who critically injures a detainee is aware of the injuries he caused, and it is obvious that he should have reported the incident, obtained immediate medical care, and informed medical staff of the injuries to allow them to properly diagnose Lelieve. However, Belfort admittedly did nothing. Had Lelieve not been rushed into the hospital after being imprisoned, Belfort's inactions may have caused his death.

D. Lelieve states a cause of action for negligence.

It is well-settled that a plaintiff may plead in the alternative. Here, plaintiff states a claim for negligence due to Belfort's actions. The issue of whether Belfort engaged in excessive force or negligence is a finding for the factfinder, and the trial court is permitted, even at trial, to allow a plaintiff to amend the complaint to conform with the evidence. *City of Miami v. Ross*, 695 So. 2d 486, 488 (Fla. 3d DCA 1997). As the Third district held, the use of excessive force does not

bar a claim for negligence, rather the relevant inquiry is whether “a separate negligence claim based upon a distinct act of negligence may be brought against a police officer in conjunction with a claim for excessive use of force.” *City of Miami v. Sanders*, 672 So. 2d 46, 48 (Fla. 3d DCA 1996). In addition to using excessive force, Lelieve indicated that Belfort’s failure to render medical care caused additional injuries. [ECF 75, p. 13, ¶ 88]. This is clearly a distinct act in addition to the actual use of excessive force.

WHEREFORE, Plaintiff requests this Court to deny Defendants’ Motion for Summary Judgment, and such other relief as the Court deems just and proper.

Respectfully submitted,

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*Counsel for Plaintiff, Gerald Lelieve
Volunteer Lawyers’ Project of the
Southern District of Florida*

/s/ Diane J. Zelmer

Diane J. Zelmer, P.A.
Florida Bar No. 27251

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I HEREBY CERTIFY that on December 23, 2011, I filed a true and correct copy of the foregoing document with the Clerk of Court using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other manner authorized for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filings.

/s/ Diane J. Zelmer

Diane J. Zelmer, P.A.
Florida Bar No. 27251

SERVICE LIST

I hereby certify that a true and correct copy of the attached has been furnished this 23rd day of December, 2011 as follows:

[VIA CM/ECF]

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***Attorneys for Defendants, City of
Miami Police, Chief Manuel Oroso, et. al.***

/s/ Diane J. Zelmer

Diane J. Zelmer, P.A.
Florida Bar No. 27251

EXHIBIT “1”

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 10-23677-CIV-ALTONAGA/SIMONTON

GERALD LELIEVE,

Plaintiff,

-vs-

CHIEF OF POLICE MANUEL OROSO,
et al.,

Defendants.

EXCERPT FROM
DEPOSITION OF OFFICER KEVIN EUGENE KNOWLES

Wednesday, December 21, 2011
2:30 p.m. - 3:09 p.m.

One Southeast Third Avenue, Suite 1250
Miami, Florida 33131

Reported By:
MARGARET PHILLIPS, Court Reporter
Notary Public, State of Florida
U.S. LEGAL SUPPORT, INC.
Miami Office
Phone - (305) 373.8404

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APPEARANCES:

On behalf of the Plaintiff:
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954-400-5055

On behalf of the Defendants:
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305-416-1800

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Deposition taken before MARGARET PHILLIPS,
Court Reporter and Notary Public in and for the State of
Florida at Large, in the above cause.

- - -

Thereupon,

OFFICER KEVIN EUGENE KNOWLES,
having been first duly sworn or affirmed, was examined
and testified as follows:

DIRECT EXAMINATION

BY MS. ZELMER:

* * * * *

**Q. In your career when you are acting as
transport, how many times have you had to transport a
detainee to Ward D?**

A. With that now, if you are the transporter
and you have more than one person that you are
transporting then you wouldn't be the one that transport
that individual to the Ward D, somebody else would,
because you have the remainder of the prisoners.

**Q. Okay, but that didn't answer my question.
In your career how many times have you transported a
detainee to Ward D?**

A. Well, you are asking me questions that I
really can't answer. I don't know. I would say numerous
times, but I couldn't give you an exact count of how many

1 times I have done it.

2 Q. Over ten times per year?

3 A. No, I wouldn't say that. I wouldn't say
4 that.

5 Q. Over five times?

6 A. It's a possibility. It's a possibility,
7 but it's not something I do often.

8 Q. And you don't have any recollection of
9 transporting Mr. Gerald Lelieve to Ward D?

10 A. No, because if I had transported him to
11 Ward D then I would remember this incident.

12 Q. Are you aware that Major Cunningham has
13 testified that you told him you had to transport
14 Mr. Gerald Lelieve to Ward D?

15 A. No, I am not aware of that, and if Major
16 Cunningham was here right now I would be asking him why
17 he told you that because he is probably assuming because
18 I was the transport that I did it.

19 You can go to Ward D and pull up files and
20 see who transported him there, but I know I don't have an
21 independent recollection of taking him there. If I had
22 more than one prisoners on that day I wouldn't have been
23 the one to take him.

24 Q. If you did transport him to the Ward D,
25 would you have completed any forms, use of force forms or

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Ward D forms?

A. No. Ward D fill out the form and they give you a copy to take back to the jail. That's the only way the jail would accept him and you would not be allowed to take a prisoner to Ward D without an arrest affidavit.

* * * * *

Q. You have reviewed records relating to this incident prior to your deposition today. Correct?

A. I just read the affidavit, picture and the tactic 301.

Q. Was there any control of persons?

A. That I reviewed, no.

Q. Right. Let me show you what's marked as Plaintiff's Exhibit No. 3. Do you recognize these departmental orders?

A. These are departmental orders procedures following the use of force.

Q. Is there a section relating to medical attention?

A. It says in -- yes. It is.

Q. So when there is an injury at the arrest scene, what are the required procedures?

A. Excuse me? I didn't understand the question.

Q. When there is an injury or complaint of

1 injury by a detainee or someone who has been arrested,
2 what are the required procedures?

3 A. Well, they have -- the arrest affidavit
4 itself has a yellow copy on the back for you to list the
5 injuries that he is claiming. I know with me, if someone
6 tells me they are complaining of an injury, I advise the
7 supervisor or I would call fire-rescue.

8 Q. So the fire-rescue would actually respond
9 on the scene. Correct?

10 MR. GREEN: Objection to form.

11 A. They would respond to the scene or wherever
12 he is.

13 Q. Those are the required procedures for the
14 department?

15 A. Yes. It is.

16 Q. In this Section 21.4.3, procedures
17 following the use of force -- and I just want you to
18 review 21.4.3.3 and 21.4.3.2 -- in the case where there
19 is a complaint of injury, is a control of persons form
20 required to be completed?

21 A. Yes, ma'am. It is.

22 Q. And in this case you did not review one?
23 You are not aware of any control of persons being
24 completed?

25 A. No.

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Q. Do you know why a control of persons would not have been completed in this case?

MR. GREEN: Objection to form.

A. Why would it be? I mean, did he complain of injury or something? Was he struck? That's the only time that you fill it out. I mean, no one complained to me.

Like I said, if somebody complained to me about an injury or something, I bring it to the supervisor's attention. If not, I call fire-rescue and I let them know I requested fire-rescue.

Q. Do you know anything about the allegations in this particular litigation?

A. I sure don't.

* * * * *