No. 18-5102

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALEXANDER L. BAXTER

Plaintiff-Appellee

v.

BRAD BRACEY; SPENCER R. HARRIS

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY BRIEF OF APPELLANTS OFFICER SPENCER HARRIS AND OFFICER BRAD BRACEY

DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER, DIRECTOR OF LAW

KELI J. OLIVER
MELISSA ROBERGE
Assistant Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6341

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

ARGUMENT

I. OFFICER SPENCER HARRIS AND OFFICER BRAD BRACEY ARE ENTITLED TO QUALIFIED IMMUNITY.

A. It is Not Clearly Established that Using a Well-Trained Canine to Subdue an Aggravated Burglary Suspect Who Acted Irrationally and Continually Refused to Surrender Violates the Fourth Amendment.

Baxter devotes his brief to the actions of Officer Harris, relying almost exclusively on *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Campbell v. City of Springboro, Ohio*, 700 F.3d 779 (6th Cir. 2012). *Garner* is the foundational case that requires the use of deadly force be objectively reasonable under the circumstances. *Garner*, 471 U.S. 1. But, "when a properly trained police dog is used in an appropriate manner to apprehend a felony suspect, the use of the dog does not constitute deadly force. *Robinette v. Barnes*, 854 F.2d 909, 913 (6th Cir. 1988). Here, the use of Iwo—who bit Baxter one time—is not deadly force.

Nothing in the record could support departing from the general rule in *Robinette* that the use of Iwo was not an instrument of deadly force. There is no evidence that Officer Harris intended to use Iwo in that manner or the Iwo severely lacked training. *Id*. at 913. *Garner*, adds little, if anything, to the determination of if Officer Harris is entitled to qualified immunity because it addresses the circumstances that justify deadly force, which Officer Harris did not use. And, it merely sets forth at the highest levels of generality the framework for evaluating

the use of force. To deny qualified immunity, Baxter must point to a case, or a robust line of precedent, that places the constitutional question beyond debate.

Similarly, *Campbell v. City of Springboro, Ohio,* 700 F.3d 779 (6th Cir. 2012) sets forth the broad parameters of determining if the use of a canine is reasonable. Central to this Court's determination that the officer in *Campbell* used excessive force was that the canine acted contrary to his training, that his training had not been maintained and that the canine had issues with excessive biting. *Id*. at 787. Additionally, in distinguishing *Robinette* and *Matthews v. Jones,* 35 F.3d 1048 (6th Cir. 1994), both of which approved of the use of a canine, this Court summarized the circumstances of those cases stating:

> [T]he suspects were potentially dangerous based upon the crimes they committed and their irrational behavior. Further, the spaces in which the suspects were located—an unlit building and a dark heavily wooded area—made police vulnerable to ambush. The court also found that the police dogs in these cases were properly trained and that the officers gave the suspects several warnings prior to allowing the dogs to engage the suspect.

Campbell, 700 F.3d at 789.

The underlying facts of this case align with the circumstances summarized above in *Robinette* and *Matthews*, not those present in *Campbell*. Baxter boldly committed aggravated burglary, fled the police and refused to surrender despite being given multiple opportunities to do so. Both Officer Harris and Officer Bracey warned Baxter that a canine would be used if he did not surrender his

defensive position in an un-lit basement. Finally, in direct contrast to the canine in *Campbell*, Officer Harris had conducted extensive training with Iwo, who received satisfactory marks, and there is no evidence that he had a history of excessive biting.

The general right established in *Campbell* to be free from the excessive use of force in the context of police canine units cannot clearly establish that Officer Harris's actions violated the Fourth Amendment when the underlying circumstances are readily distinguishable. The Supreme Court has warned the Federal Courts to avoid extrapolating broad constitutional rights from prior precedents particularly in the Fourth Amendment context because "use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific **facts** at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)(citations omitted)(emphasis added). This Court should reverse the District Court and grant Officer Harris qualified immunity because the existing precedent does not squarely govern the facts of this case.

B. By Failing to Address the Actions of Officer Bracey, Baxter Has Waived Any Arguments to the Contrary. As Set Forth in The Officers' Principal Brief, Officer Bracey is Entitled to Qualified Immunity.

Baxter has waived any opposition to Officer Bracey being granted qualified immunity. *See Thaddeus–X v. Blatter*, 175 F.3d 378, 403 n. 18 (6th Cir.1999);

Enertech Elec., Inc. v. Mahoning County Comm'rs, 85 F.3d 257, 259 (6th Cir.1996) (concerning waiver by failure to brief). While pro see briefs are construed liberally, a pro see party must still brief the issues advanced "with some effort at developed argumentation." *Wright v. Knox Cty. Bd. of Educ.,* 23 F. App'x 519, 520 (6th Cir. 2001) citing *United States v. Reed,* 167 F.3d 984, 993 (6th Cir. 1999).

Here, Baxter has made no effort to develop his arguments pertaining to Officer Bracey. Throughout his brief, Baxter concentrates on the actions of Officer Harris and focuses his argument there. Baxter does not make any argument about Officer Bracey's opportunity to intervene when Officer Harris released Iwo. He does not dispute the Officer Harris did not give any indication he was going to release Iwo, or that Officer Bracey lacked any knowledge that Iwo would be released. (Baxter Dep., PageID# 478-480, RE 99-1). Moreover, he presents no argument that the attack lasted for such a lengthy duration that Officer Bracey could have interceded. Indeed, the Nashville General Medical records prove there was a single dog bite. (Nashville General Records, PageID# 519–524, RE 99-3). Thus, once Iwo was released and bit Baxter there was no additional force that Officer Bracey could have prevented.

Moreover, Baxter offers no rebuttal to Officer Bracey's analysis that the law surrounding intervention in a canine apprehension was clearly established. As set

forth in the Officers' principal brief, Officer Bracey is entitled to qualified immunity because there are no cases from the Supreme Court, this Court, or the district courts that establish the parameters when an officer must intervene when a canine officer releases his canine that only responds to his commands. Accordingly, because Baxter has put forth no substantive arguments concerning Officer Bracey's conduct, he has waived any opportunity to do so. Officer Bracey is entitled to qualified immunity and the district court should be reversed.

II. THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA ARE NOT APPLICABLE BECAUSE THIS COURT'S DECISION ON THE MOTION TO DISMISS WAS NOT A FINAL JUDGMENT.

Baxter attempts to bind the Officers' to this Court's decision on the Motion to Dismiss by invoking the doctrines of collateral estoppel and res judicata. To establish collateral estoppel, it must be shown that: (1) the precise issue raised in the present case was raised and actually litigated in the prior proceeding; (2) the issue was necessary to the outcome of the prior proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought had a full and fair opportunity to litigate the issues in the prior proceeding. *See United States v. Cinemark USA, Inc.*, 348 F.3d 569, 582 (6th Cir. 2003); *Aircraft Braking Systems Corp. v. Local 856, UAW*, 97 F.3d 155, 161 (6th Cir. 1996).

Here, Baxter cannot satisfy the third element because this litigation is on-going. Accordingly, the prior proceeding has not resulted in a final judgment on the merits. With regard to Officer Harris, he did not have a full and fair opportunity to litigate his qualified immunity at the motion to dismiss stage because he did not challenge the sufficiency of the complaint. Simply put, the doctrine of collateral estoppel does not defeat the Officers' entitlement to summary judgment. Moreover, as this Court has previously recognized, the holding on a motion to dismiss does not establish the law of the case for purposes of summary judgment, when the complaint has been supplemented by discovery. *McKenzie v. BellSouth Telecommunications, Inc.*, 219 F.3d 508, 513 (6th Cir. 2000). The parties have supplemented the allegations in the complaint with discovery[1] and the Court's rulings on the Motion to Dismiss are not controlling. As set forth in the Officers principal brief and in Section I above, the Officers are entitled to qualified

[1] Baxter alludes to the idea that the Officers should be denied summary judgment to permit Baxter to engage in discovery. For support, he cites two out of circuit cases, *Ingle v. Yelton*, 439 F.3d 191, 196 (4th Cir.) and *Castlow v. U.S.*, 552 F.2d 560 (3d. Cir. 1977), both of which relied on Fed. R. Civ. P. 56(f) to argue summary judgment should be denied because the moving party—the Officers—have possession of pictures supposedly taken at the Davidson County Sheriff's Office of his wounds. The Officers work for MNPD, not the Davidson County Sheriff's Office and do not have possession of the pictures, to the extent they even exist. Moreover, Baxter seems to assume, without any foundation, that the Nashville General records that document a single dog bite will be contradicted by these pictures. There is no proof for such an assumption and Baxter's continued requests for discovery do not preclude this Court from reaching the merits of the Officers appeal.

immunity because the undisputed material facts do not establish that a violation of a clearly established right occurred.

III. THIS COURT HAS JURISDICTION OVER THE APPEAL.

This Court has jurisdiction to consider Officers Brad Bracey's and Spencer Harris's interlocutory appeal because it presents pure issues of law. Both Officer Harris and Officer Bracey assert that based on the undisputed facts their actions did not constitute a violation of clearly established law.

Nonetheless, Baxter attempts to prohibit Officers Harris and Officer Spencer from willingly conceding Baxter's version of the facts by pointing to Officer Bracey's declaration filed in support of his response to Baxter's Motion for Summary Judgment. (Baxter Appellee Brief, filing pg. 13) to create a genuine dispute of fact. *See Moldowan v. City of Warren*, 578 F.3d 351, 370 (6th Cir. 2009)(if the defendant disputes the plaintiff's version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal). In Officer Bracey's declaration he professes that he was not even in the basement when Iwo apprehended Baxter. (Brad Bracey Declaration, PageID# 316-317, RE 81-1).

Although they dispute Baxter's version of the story, for purposes of their summary judgment motion and this appeal, Officer Harris and Officer Bracey are entitled to willingly concede the facts as put forth by Baxter and request this Court

to find, as a matter of law based on the undisputed facts that they did not violate any clearly established rights of Baxter. Baxter cannot thwart this Court's jurisdiction and survive summary judgment by disavowing his own account of what happened.

Thus, to be clear, for purposes of this appeal, Officers Harris and Bracey concede[2]:

- Both Officers entered the basement prior to Baxter being apprehended by Iwo. (Baxter Dep., PageID# 473, RE 99-1)
- Both Officers came around the water heater with Officer Harris taking a position in front of Baxter and Officer Bracey behind Baxter. *Id*. at PageID# 474-476.
- Iwo came up to Officer Harris[3], who grabbed his chain while he reared up at Baxter. *Id*. at PageID# 477.

[2] Officers Bracey and Harris are only listing the facts that occurred in the basement. While Baxter's commission of aggravated burglary, continued irrational flight from an overwhelming show of force from MNPD, and the warnings given by Officer Bracey and Harris frame the decision to deploy Iwo once Officer Harris confronted Baxter, Baxter does not contest, or even mention, those circumstances. Similarly, Baxter does not dispute that Iwo was a well-trained police dog that will only respond to his handler.

[3] For the first time, Baxter asserts that 15-20 seconds elapsed between when Officer Harris confronted him and Iwo joined him. (Appellee Brief, filing pg. 21). In his response to the Motion for Summary Judgment Baxter never put forth this alleged fact. (Response to Summary Judgment, PageID# 574-596, RE 102). In his deposition, Baxter testified "it all happened so fast. The dog ran, came this way to this officer right here." (Baxter Depo, PageID# 477, RE 99-1). A party may not by-pass the fact-finding process of the lower court and introduce new facts in its brief on appeal. *Sovereign News Co*. *v*. *United States*, 690 F.2d 569, 571 (6th Cir. 1982).

- "It couldn't have been five or ten seconds" between when Officer Harris had Iwo by the collar and when Iwo was released. *Id*. at PageID# 479.

- In that five or ten second period, Officer Harris kept saying "show me your hands." *Id*. at PageID# 478.

- During that five or second period, Baxter was sitting on the basement floor. *Id*. at PageID# 478.

- Officer Harris did not give any warning that he was going to release Iwo. *Id*. at PageID# 478.

- Baxter's medical records reflect that he only received a single puncture wound. (Nashville General Records, PageID 519 – 524, RE 99-3).

Officer Bracey and Officer Harris have simply done what precedent permits them to do—willingly "concede an interpretation of the relevant facts in the light most favorable to the plaintiff's case, and…argue that, even on those facts, he or she is entitled to qualified immunity." *See Harrison v. Ash*, 539 F.3d 510, 517 (6th Cir. 2008) (quoting *Berryman v. Reiger*, 150 F.3d 561, 562 (6th Cir. 1998)).

Moreover, although the District Court referenced disputed facts, it is important to note that a lower court characterizing its denial of a defendant's dispositive motion as premised on the existence of disputed factual issues does not necessarily preclude this Court's jurisdiction over a defendant's appeal. *See Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 402-03 (6th Cir. 2007); *Estate of Carter v. City of Detroit*, 408 F.3d 305, 309 (6th Cir.2005). In other words, this

Court is not compelled to conclude that it lacks jurisdiction simply because the district court or the parties may say so.

As this Court has recognized, "regardless of the district court's reasons for denying qualified immunity, [this Court] may exercise jurisdiction over the [defendant's] appeal to the extent it raises questions of law." *Williams v. Mehra*, 186 F.3d 685, 689-90 (6th Cir. 1999) (*en banc*)(citations omitted); *see also Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997). And even if the defendant disputes a plaintiff's version of the facts, this Court will maintain jurisdiction over an appeal if the defendant nonetheless concedes to the most favorable view of the facts to the plaintiff for purposes of the appeal. *Moldowan*, 578 F.3d at 370.

For purposes of the appeal the Officers adopted Baxter's testimony about what occurred in the basement and rely on the unbiased medical records to establish both the number of bites and the severity of the injury. Baxter maintains Iwo bit him multiple times under his left arm pit with the teeth piercing the skin each time. (Baxter Depo., PageID# 479, 482, RE 99-1). In the summary judgment context, "appeals courts should not accept 'visible fiction' that is so utterly discredited by the record that no reasonable jury could have believed' it. *Coble v. City of White House, Tenn.*, 634 F.3d 865, 868 (6th Cir. 2011)(citations omitted).

The medical records blatantly contradict Baxter's account and only document one puncture wound. For purposes of determining this appeal, when

evaluating the force used the Court does not need to credit Baxter's "visible fiction" that Iwo bit him multiple times; rather, the Court should credit the independent medical records that reflect a single bite. *See, e.g., White v. Georgia,* 380 F. App'x 796, 798 (11th Cir.2010) (refusing to credit the plaintiff's testimony that she was shot where the medical records conclusively established that her injuries were not caused by a gunshot); *Cooper v. City of Rockford,* No. 06–C–50124, 2010 WL 3034181, at *2 n. 3 (N.D.Ill. Aug. 3, 2010) (refusing to credit a witness statement that the victim was running away when he was shot because the autopsy report was clear that the bullet entered the victim from the front).

The Officers have conceded to Baxter's versions of events, as they are permitted to do, and submit that based on the facts most favorable to Baxter they are entitled to qualified immunity. Baxter cannot defeat this Court's jurisdiction, or the qualified immunity defense by relying on statements in the record that contradict his own version of events, and by disputing unbiased independent medical records. This Court has jurisdiction over the appeal and the Officers are entitled to qualified immunity because there is no genuine dispute of fact, and under the facts as testified to by Baxter the Officers did not violate any clearly established right.

CONCLUSION

This Court should reverse the District Court's denial of Officer Harris and Officer Bracey's motion for summary judgment and should grant them qualified immunity. Based on the facts as alleged by Baxter, the use of Iwo did not constitute excessive force and there is no clearly established law that put Officer Harris on notice that his conduct violated the Fourth Amendment. With regard to Officer Bracey, Baxter did not develop any substantive argument that he is not entitled to qualified immunity and thus have waived the opportunity to do so. Accordingly, Officers Harris and Bracey request that this Court reverse the District Court and grant them qualified immunity. Alternatively, the Court should remand the case back to the District Court so that it may consider the clearly established prong of the qualified immunity analysis.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER
DIRECTOR OF LAW

/s/Melissa Roberge
Keli J. Oliver (#21023)
Melissa Roberge (#26230)
108 Metropolitan Courthouse
P.O. Box 196300
Nashville, Tennessee 37219
(615)862-6341

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation prescribed in F. R. App. P. 32(a)(7)(B). It was prepared using Times New Roman 14-point type, and it contains 2,947 words.

/s/Melissa Roberge
Melissa Roberge

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served via U.S. First Class Mail to the following:

Alexander L. Baxter
#145056
R.M.S.I.
7475 Cockrill Bend Industrial Blvd.
Nashville, TN 37209

Alexander L. Baxter
#145056
Trousdale Turner Correctional Complex
140 Macon Way
Hartsville, TN 37074

on this 30th day of April, 2018.

/s/Melissa Roberge
Melissa Roberge

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: November 08, 2018

Mr. Alexander L. Baxter
Safehouse
525 40th Avenue, N.
Nashville, TN 37209

Ms. Keli J. Oliver
Ms. Melissa Roberge
Metropolitan Department of Law
P.O. Box 196300
Nashville, TN 37219

Re: Case No. 18-5102*, Alexander Baxter v. Brad Bracey, et al*
Originating Case No. : 3:15-cv-00019

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. Keith Throckmorton

Enclosure

Mandate to issue

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 18a0566n.06

Case No. 18-5102

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 08, 2018
DEBORAH S. HUNT, Clerk

ALEXANDER L. BAXTER,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE MIDDLE DISTRICT OF
BRAD BRACEY; SPENCER R. HARRIS,	)	TENNESSEE
	)	
Defendants-Appellants.	)	**OPINION**

BEFORE: THAPAR, BUSH, and NALBANDIAN, Circuit Judges.

NALBANDIAN, Circuit Judge.

A neighbor caught Alexander Baxter burglarizing a house and called the police. Soon Baxter heard sirens and saw a helicopter looking for him, so he ran to another house (one he had broken into before) and hid in the basement. But the canine unit arrived and quickly sniffed him out. After giving several warnings, one of the officers released his dog, who apprehended Baxter with a bite to the arm. Baxter says he had already surrendered when the dog was released, and so the two officers violated his constitutional right to be free from excessive force. The case is before us now on an interlocutory appeal after the district court denied the officers' claims of qualified immunity. We reverse that decision because the officers' conduct, whether constitutional, did not violate any clearly established right.

I.

Officers Spencer Harris and Brad Bracey arrested Alexander Baxter on January 8, 2014 after he committed an aggravated burglary and fled the scene. A neighbor caught Baxter breaking into a home and called the police. He fled once he heard sirens and saw the helicopter—first hiding in a car, and then seeking refuge in the basement of a house he had previously broken into. There, Baxter hid between a chimney and a water heater while he watched and listened to the officers outside.

Harris and Bracey were part of Nashville's canine unit, which is deployed for serious crimes such as aggravated burglary. The two of them entered the house with their dog, Iwo. Bracey announced they would release the canine if Baxter did not surrender. Although Baxter heard the warnings, he stayed quiet. Harris—the dog's handler—repeated the warning. Again, Baxter remained quiet. So Harris released Iwo, who quickly found Baxter downstairs.

The two officers followed Iwo into the basement and—according to Baxter—surrounded him. Baxter claims that he raised his hands in the air when they came downstairs. But he never responded to the officers' warnings or communicated about where he was hiding. Within five to ten seconds of discovering Baxter, Harris again released Iwo—this time to apprehend him. Iwo restrained Baxter with a bite to the arm. The medical records reveal only one bite on Baxter's underarm, revealing that Iwo followed his training by apprehending Baxter with a single bite. Harris eventually commanded Iwo to release Baxter and placed him under arrest.

Baxter, proceeding pro se, sued Harris and Bracey under 42 U.S.C. § 1983. He asserts an excessive-force claim against Harris and a failure-to-intervene claim against Bracey. Originally, Bracey alone moved to dismiss the suit against him, arguing that qualified immunity shielded him from Baxter's somewhat amorphous claim that he failed to prevent the canine apprehension.

Baxter's complaint, we held, pleaded sufficient facts to withstand a motion to dismiss. But those facts must bear out during discovery for Baxter to defeat a motion for summary judgment. And that is where we are today.

After discovery, both officers moved for summary judgment, and the district court rejected both claims. The district court held that summary judgment was inappropriate because Baxter's testimony corroborated the factual assertions in the complaint that this court previously upheld against a motion to dismiss. If those facts were enough to defeat qualified immunity in a complaint, the court reasoned, Baxter's supporting testimony should do the same. Harris and Bracey then filed this interlocutory appeal. *See Plumhoff v. Rickard*, 572 U.S. 765, 771–72 (2014).

II.

Our inquiry here is guided by the interlocutory posture of the case. Because the district court denied summary judgment to the defendants, we must determine whether "the undisputed facts or the evidence viewed in the light most favorable to the plaintiff fail to establish a *prima facie* violation of clear constitutional law." *Berryman v. Rieger*, 150 F.3d 561, 563 (6th Cir. 1998). We will not weigh into credibility issues or try to resolve factual disputes. *See Estate of Carter v. City of Detroit*, 408 F.3d 305, 310 (6th Cir. 2005). Our task is much simpler. We must decide the "neat abstract issue[] of law" regarding whether Baxter's version of the facts amounts to a clear constitutional violation. *See Berryman*, 150 F.3d at 563 (quoting *Johnson v. Jones*, 515 U.S. 304, 317 (1995)).

The clarity of the constitutional violation is critical. An individual suing under § 1983 must demonstrate two things: First, that the officer violated his constitutional rights. And second, that the violation was "clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted). The "clearly established" prong sets up an exacting

standard in which the plaintiff must show that "every reasonable official would understand that what he is doing is unlawful." *Id.* (internal citations and quotations omitted). "It is not enough that the rule is *suggested* by then-existing precedent"—it must be "beyond debate" and "settled law." *Id.* at 589–90 (emphasis added) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)). The effect is that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Relevant here, courts can jump straight to the second question and dispose of a claim without deciding whether the officer's conduct violated the plaintiff's constitutional rights. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). So long as the alleged violation has not been clearly established, the officers receive qualified immunity and the suit can be dismissed. *See id.* Proceeding in this way is often appropriate in "cases in which the briefing of constitutional questions is woefully inadequate." *See Pearson v. Callahan*, 555 U.S. 223, 239 (2009). By resolving the issue on only the second prong, courts avoid "expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case." *Ashcroft*, 563 U.S. at 735 (internal quotations and citations omitted).

That is the case here. The officers are entitled to qualified immunity because Harris's use of the canine to apprehend Baxter did not violate clearly established law. And because this court does not have the benefit of sophisticated adversarial briefing from both parties, we decline to resolve the more complex constitutional question raised by Baxter's claim. *See Pearson*, 555 U.S. at 239.

The Fourth Amendment's prohibition against unreasonable seizures protects individuals from an officer's use of excessive force while making an arrest. *See Graham v. Connor*, 490 U.S.

386, 394–95 (1989). Whether the force was excessive turns on its objective reasonableness under the totality of the circumstances. *Id.* at 395–96; *Kostrzewa v. City of Troy*, 247 F.3d 633, 639 (6th Cir. 2001). And the reasonableness of the officer's force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

We have demarcated the outer bounds of excessive-force cases involving canine seizures with some degree of clarity. In this circuit, for example, we have held that officers cannot "use[] an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing." *Campbell v. City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2013). But just as clearly, we have upheld the use of a well-trained canine to apprehend a fleeing suspect in a dark and unfamiliar location. *See Robinette v. Barnes*, 854 F.2d 909, 913–14 (6th Cir. 1988). These cases and their progeny establish guidance on the ends of the spectrum, but the middle ground between the two proves much hazier.

Baxter's case looks closer to *Robinette* than *Campbell*—but the fit is not perfect. Like the suspect in *Robinette*, Baxter fled the police after committing a serious crime and hid in an unfamiliar location. He also ignored multiple warnings that a canine would be released, choosing to remain silent as he hid. And unlike *Campbell*, the canine here was properly trained with no apparent history of bad behavior. All of these facts would lead a reasonable officer to believe that the use of a canine to apprehend Baxter did not violate the Fourth Amendment. *See Graham*, 490 U.S. at 396; *Robinette*, 854 F.2d at 913–14.

Militating against those facts is Baxter's claim that he surrendered by raising his hands in the air before Harris released the dog. This conduct might show that he did not pose the kind of safety threat justifying a forceful arrest. *See, e.g., Ciminillo v. Streicher*, 434 F.3d 461, 467 (6th

Cir. 2006). But Baxter does not point us to any case law suggesting that raising his hands, on its own, is enough to put Harris on notice that a canine apprehension was unlawful in these circumstances. That's because even with Baxter's hands raised, Harris faced a suspect hiding in an unfamiliar location after fleeing from the police who posed an unknown safety risk—all factors the *Campbell* court identified as significant to determining whether the seizure was lawful. *See Campbell*, 700 F.3d at 788–89.

Given all of this, we cannot say that Harris violated any clearly established law in using Iwo to apprehend Baxter. Even if Baxter raised his hands, the other circumstances—undisputed in the record below—weigh against a finding that "every reasonable official would understand that what [Harris did] is unlawful." *Wesby*, 138 S. Ct. at 589 (internal quotations omitted). For that reason, Harris is entitled to qualified immunity.

We reach this decision mindful of the fact that, on appeal from the prior motion to dismiss, we held that Baxter's right to be free from excessive force was clearly established under *Campbell*. But there, we looked only at the facts as pleaded in the complaint. Baxter alleged that he surrendered before the arrest, and his complaint was understandably silent about whether Iwo had proper training or the time that elapsed before Harris released the dog. The facts revealed during discovery add much-needed color to this case—as they often do. We now know that Iwo was well-trained, that Harris released him within only a few seconds after entering the basement, and that Baxter fled the scene, hid in the basement, was warned twice, and still never communicated with the officers before being apprehended. All of these facts change the analysis and move the well-

pleaded claims to a place where we cannot say that "every reasonable official would understand that what he is doing is unlawful."[1] *Wesby*, 138 S. Ct. at 589 (internal quotation marks omitted).

Finally, it follows from there that Bracey receives the same protection of qualified immunity. Police officers "can be held liable for failure to protect a person from the use of excessive force." *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997). Such a claim requires proving that the officer "observed or had reason to know that excessive force would be or was being used" and "the officer had both the opportunity and the means to prevent the harm from occurring." *Id.* While there are numerous reasons to find that Baxter cannot prevail on this claim, the first is the most obvious: If it is not clearly established that Harris used excessive force in apprehending Baxter, it cannot be that Bracey observed or had reason to know that excessive force would be used.

III.

For the above-stated reasons, we **REVERSE** the district court's order denying summary judgment.

[1] It also bears mentioning that only Bracey filed the initial motion to dismiss. Harris, who is directly responsible for the canine apprehension, defends his conduct under qualified immunity for the first time.