UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LEROY BERRY,

Plaintiff,

v. **Case No: 6:15-cv-145-Orl-41GJK**

JAMIE MCGOWAN and WAYNE IVEY,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on Defendants' Motion for Summary Judgment (Doc. 30), and Plaintiff's response in opposition, (Pl.'s Resp., Doc. 48). Also before the Court is Plaintiff's Motion for Summary Judgment (Doc. 44), and Defendants' response thereto, (Defs.' Resp., Doc. 50). For the reasons set forth herein, Defendants' motion will be granted in part and Plaintiff's motion will be denied.

I. BACKGROUND

On December 22, 2010, Plaintiff was driving home from work when he saw a large group blocking the road. (Berry Dep., Doc. 33, at 9:5–8; Berry Test., Doc. 32, at 5:5–7, 6:2–8). He noticed two of his young cousins, Melvena Espanosa and Alantra McDaniel, were in the group, so he stopped to find out what was happening. (Berry Dep. at 30:25–31:11, 32:13–16). Plaintiff learned that Ms. McDaniel had been in a fight with two older females, and Ms. Espanosa had called the police to seek assistance in breaking up the fight. (Berry Test. at 6:10–13, 7:9–10; Espanosa Test., Doc. 38, at 5:3–16). Deputy McGowan was the first officer to respond to the call, which he was informed was for a fight in progress. (McGowan Test., Doc. 34, 5:2–3, 32:16). When

he arrived, a large crowd was still in the area.[1] (*Id.* at 5:6–11; McGowan Aff., Doc. 31, ¶ 3). He parked his police vehicle and walked toward the group. (McGowan Test. at 6:21–22, 7:16–18).

Although the other females involved in the fight had already begun to retreat from the area, they were still within a few blocks of Ms. McDaniel, who remained visibly upset. (Berry Dep. at 46:13–21; McDaniel Dep., Doc. 37, at 14:14–15; McGowan Test. at 33:4–12). Plaintiff was standing with Ms. McDaniel and attempting to calm her down. (Berry Dep. at 46:23–47:4; Espanosa Test. at 9:2–4). Nevertheless, Ms. McDaniel began to make an effort to run toward the retreating females. (McDaniel Test., Doc. 36, 17:25–18:5). Plaintiff wrapped his arms around her to prevent her from leaving the area to reinitiate the fight.[2] (Berry Test. at 13:4–16). Deputy McGowan approached Ms. McDaniel and grabbed her arm to escort her away from the situation. (*Id.* at 13:22–2, 14:14–17).

According to Plaintiff and several witnesses, Plaintiff immediately released Ms. McDaniel to Deputy McGowan's custody when Deputy McGowan grabbed her arm, and he did not touch Deputy McGowan. (McDaniel Dep. at 16:19–17:2; Berry Test. at 14:18–15:8; Berry Dep. at 56:1–9, 63:8–13; Espanosa Test. at 10:8–11, 10:16–23; Brown Test., Doc. 40, at 12:3–12). Deputy McGowan and Deputy DeWind, who arrived at or near the time that Plaintiff and Deputy McGowan were standing with Ms. McDaniel, claim that Plaintiff was not holding Ms. McDaniel when Deputy McGowan approached. (McGowan Aff. ¶ 5; McGowan Test. at 7:18–8:1; DeWind Test., Doc. 35, at 8:1–9). Rather, they contend that Deputy McGowan chased Ms. McDaniel down

[1] The witnesses' testimony varies with regard to the number of individuals present, ranging from six adults to thirty people total, with most people remembering it to be roughly fifteen to twenty people. For the purposes of this Order, it is sufficient to say that there was a large gathering of people in the area.

[2] Deputy McGowan maintains that he saw Ms. McDaniel run toward the other women, but that Plaintiff was not holding her when he commanded her to calm down and stand by his patrol car. (McGowan Aff. ¶ 5).

and took her by the arm to lead her away from possible further involvement in the fight and that Plaintiff grabbed Deputy McGowan's arm in an attempt to force him to let go of Ms. McDaniel. (McGowan Aff. ¶¶ 5–6; McGowan Test. at 9:12–10:7, 13:8–20, 15:14–15; DeWind Test. at 10:19–11:4). Deputy McGowan claims that as a result, he received a minor scratch to his forearm. (McGowan Aff. ¶ 5; McGowan Test. at 15:17–18). Finally, at least one witness describes the encounter as a two to three second "tug of war" between Plaintiff and Deputy McGowan but maintains that Plaintiff did not touch the Deputy. (Marshall Test., Doc. 42, at 11:17–25). It is undisputed, however, that Deputy McGowan ultimately got control of Ms. McDaniel and walked her away from Plaintiff. (McGowan Test. at 17:23–24).

Deputy DeWind escorted Plaintiff to his patrol car, and Deputy McGowan informed Plaintiff that he was under arrest for battery on a law enforcement officer for allegedly grabbing the Deputy's arm. (McGowan Aff. ¶¶ 7, 10). Deputy McGowan placed Plaintiff in handcuffs and put him in the back of the police cruiser to be transported to the jail. (*Id.* ¶¶ 7, 9). Deputy McGowan claims that Plaintiff refused verbal commands and attempted to pull his arms apart in an effort to avoid being handcuffed. (*Id.* ¶ 7; McGowan Test. at 18:14–17, 19:1–7). Plaintiff was subsequently transferred to the Brevard County jail, where he remained for several hours until he was able to post bail. (McGowan Aff. ¶ 9; Brevard Cty. Detention Info., Doc. 50-1, at 1).

In March 2011, Plaintiff was tried before a jury for the crime of battery on a law enforcement officer. (Mar. 30, 2011 Court Min., Doc. 44-11, at 1). The jury returned a verdict of not guilty and a judgment of acquittal on those charges was entered in favor of Plaintiff. (*Id.*; J. of Acquittal, Doc. 44-12, at 1).

II. LEGAL STANDARD

Summary judgment is appropriate when the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if 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). A fact is material if it may "affect the outcome of the suit under the governing law." *Id.* "The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1313–14 (11th Cir. 2007). Stated differently, the moving party discharges its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

However, once the moving party has discharged its burden, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quotation omitted). The nonmoving party may not rely solely on "conclusory allegations without specific supporting facts." *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985). Nevertheless, "[i]f there is a conflict between the parties' allegations or evidence, the [nonmoving] party's evidence is presumed to be true and all reasonable inferences must be drawn in the [nonmoving] party's favor." *Allen*, 495 F.3d at 1314.

III. ANALYSIS

In his Second Amended Complaint (Doc. 26), Plaintiff asserts claims against Deputy McGowan for violations of his Fourth Amendment rights against false arrest and excessive force and state law claims for false arrest and battery. Plaintiff also asserts a claim against Sherriff Ivey

that alleges both respondeat superior liability for the conduct of Deputy McGowan and municipal liability for the failure to train officers to properly recognize the existence of probable cause.[3]

A. Deputy McGowan

Deputy McGowan argues that he is entitled to qualified immunity for all claims asserted against him. "In order to receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (quotation omitted). "The question is 'whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties.'" *Hargis v. City of Orlando*, No. 6:12-cv-723-ORL-37KRS, 2012 WL 6089715, at *3 (M.D. Fla. Dec. 7, 2012) (quoting *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1303 (11th Cir. 2006)). The parties agree that at the time of the complained of conduct, Deputy McGowan was effectuating an arrest. The Eleventh Circuit has noted that "making an arrest is within the official responsibilities of a sheriff's deputy"; thus an officer making an arrest is acting within his discretionary duty. *Crosby v. Monroe Cty.*, 394 F.3d 1328, 1332 (11th Cir. 2004); *see also Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (holding that it was "clear" that a law enforcement officer "was acting within the course and scope of his discretionary authority" when making an arrest). Accordingly, Deputy McGowan has sufficiently demonstrated that he was acting within the scope of his discretionary duties.

[3] The Second Amended Complaint—despite clear instructions from the Court—still lumps several causes of action together, includes irrelevant factual allegations, and is less than a model of clarity. Although the claims asserted are actually labeled as claims against only Deputy McGowan for "assault," "battery," "false arrest," and "violation of [Plaintiff's] constitutional rights," the Court has construed the substance of Plaintiff's Second Amended Complaint as asserting the claims addressed herein against Deputy McGowan and Sheriff Ivey. To the extent Plaintiff attempts to argue any other claims, the Second Amended Complaint is not sufficient to have placed Defendants on notice of those claims or to have put those claims at issue in this case.

The remaining burden is on Plaintiff to satisfy the "two-part inquiry"; at the summary judgment stage, that inquiry requires consideration of: (1) whether, under the plaintiff's version of the facts, the defendant's conduct violated a constitutional right and (2) whether the right was "clearly established." *Perez v. Suszczynski*, 809 F.3d 1213, 1218 (11th Cir. 2016) (quotation omitted). "A qualified-immunity inquiry can begin with either prong; neither is antecedent to the other." *Morris v. Town of Lexington*, 748 F.3d 1316, 1322 (11th Cir. 2014) (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

1. False Arrest

"In Fourth Amendment terminology, an arrest is a seizure of the person, and the 'reasonableness' of an arrest is, in turn, determined by the presence or absence of probable cause for the arrest." *Bates v. Harvey*, 518 F.3d 1233, 1239 (11th Cir. 2008) (quoting *Skop v. City of Atlanta*, 485 F.3d 1130, 1137 (11th Cir. 2007)).[4] A law enforcement officer has probable cause to arrest when the facts and circumstances of which he is aware are "sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime." *Skop*, 485 F.3d at 1137 (quoting *United States v. Floyd*, 281 F.3d 1346, 1348 (11th Cir. 2002) (per curiam)). Probable cause is assessed based on the totality of the circumstances. *See id.* "Whether an arresting officer possesses probable cause or arguable probable cause naturally depends on the elements of the alleged crime." *Id.* (citing *Crosby*, 394 F.3d at 1333).

Plaintiff was arrested, charged, and tried for battery on a law enforcement officer in violation of section 784.07 of the Florida Statutes. "[T]he elements of the offense of battery on a

[4] Plaintiff alleges claims for false arrest under both federal and Florida law. However, in the Eleventh Circuit the standard for determining the existence of probable cause is essentially the same for both claims. *See Valderrama v. Rousseau*, 780 F.3d 1108, 1115 n.6 (11th Cir. 2015) (citing *Miami-Dade Cty. v. Asad*, 787 So. 3d 660, 669–70 (Fla. 3d DCA 2012)). Accordingly, these claims will be considered together.

law enforcement officer are that: (1) the defendant intentionally touched or struck the victim or intentionally caused bodily harm to the victim; (2) the victim was a law enforcement officer; (3) the defendant knew that the victim was a law enforcement officer; and (4) the law enforcement officer was engaged in the lawful performance of his or her duties when the battery was committed." *State v. Granner*, 661 So. 2d 89, 90 (Fla. 5th DCA 1995). The facts make it clear that probable cause existed with respect to the second, third, and fourth elements. Specifically, Deputy McGowan is undisputedly a law enforcement officer who was engaged in the lawful performance of his duties. Furthermore, Plaintiff testified that he was aware Deputy McGowan was a law enforcement officer because Deputy McGowan was driving a marked police vehicle and wearing a police uniform. (Berry Dep. at 54:23–55:9). Thus, the question is whether there was probable cause or arguable probable cause for Deputy McGowan to believe that Plaintiff intentionally touched him.

There is a factual issue as to whether or not probable cause or arguable probable cause existed to arrest Plaintiff for battery on a law enforcement officer. Although Deputy McGowan and Deputy DeWind claim that Plaintiff grabbed Deputy McGowan's wrist, Plaintiff and several other witnesses to the event claim that Plaintiff did not touch the officer. Crediting Plaintiff's version of the facts as true, as we must at this stage in the proceedings, Plaintiff did not touch Deputy McGowan, and thus, there could not have been arguable probable cause to arrest him for battery on a law enforcement officer.

Deputy McGowan has presented evidence that at some point during the events on December 22, 2010, he sustained a scratch to his forearm. He claims that this is proof that Plaintiff grabbed his arm. However, aside from Deputy McGowan's conclusory and self-serving statements, there is no evidence to prove that the scratch was inflicted by Plaintiff. Additionally,

Deputy McGowan also submitted evidence that he sustained injuries to his hand during the event but has testified that he is unsure of how he received those injuries. (*See* McGowan Test. at 37:8–17). The photographs might be sufficient to show that *someone* battered Deputy McGowan but not to show arguable probable cause that *Plaintiff* did so. Certainly, in light of the conflicting testimony, the photographs are not enough to overcome the factual dispute.

Deputy McGowan also argues that even if he lacked arguable probable cause to arrest Plaintiff for battery on a law enforcement officer, he had probable cause to arrest him for resisting an officer without violence in violation of section 843.02 of the Florida Statutes. To establish a violation of that section, it must be shown that: "(1) the officer [was] engaged in the lawful execution of a legal duty and (2) the [suspect's] action constitute[d] obstruction or resistance of that lawful duty." *Crapps v. Florida*, 155 So. 3d 1242, 1246–47 (Fla. 4th DCA 2015) (quotation omitted). There is no dispute that Deputy McGowan was engaged in the lawful execution of a legal duty at the time of his encounter with Plaintiff. Thus, only the second element is at issue.[5]

Deputy McGowan argues that probable cause, or at least arguable probable cause, existed to arrest Plaintiff for resisting without violence because he did not immediately release his cousin when Deputy McGowan attempted to gain control of her. Plaintiff maintains that he released his cousin as soon as he became aware that Deputy McGowan was attempting to gain control of her. Several witnesses support Plaintiff's contention, while others support Deputy McGowan's claim

[5] To the extent Plaintiff argues that he was not charged with the crime of resisting without violence, and therefore, the Court should not consider probable cause with respect thereto, Plaintiff's position is contrary to well-settled law. *See Elmore v. Fulton Cty. Sch. Dist.*, 605 F. App'x 906, 914 (11th Cir. 2015) (per curiam) ("So long as the circumstances known to the officers, viewed objectively, give probable cause to arrest for any crime, the arrest is constitutionally valid even if probable cause was lacking as to some offenses, or even all announced charges."). Thus, the Court will consider Deputy McGowan's arguments.

that Plaintiff resisted his attempts for a few seconds. Again, taking the facts in the light most favorable to Plaintiff, there is not sufficient evidence to establish arguable probable cause.

"Where an officer arrests without even arguable probable cause, he violates the arrestee's clearly established Fourth Amendment right to be free from unreasonable seizures." *Carter v. Butts Cty.*, 821 F.3d 1310, 1320 (11th Cir. 2016). Construing the facts in the light most favorable to Plaintiff, Deputy McGowan is not entitled to qualified immunity on Plaintiff's false arrest claims at this time, and he will be denied summary judgment on these claims. However, material issues of disputed fact remain with respect to the issue of probable cause. Therefore, Plaintiff's motion for summary judgment will also be denied.

2. Fourth Amendment Excessive Force

Assuming probable cause existed to arrest him,[6] Plaintiff argues that Deputy McGowan used excessive force in pushing him up against the police cruiser and handcuffing him while effectuating the arrest and in placing him in the backseat while transporting him to the jail. "Fourth Amendment jurisprudence has staked no bright line for identifying force as excessive." *Jackson v. Sauls*, 206 F.3d 1156, 1170 (11th Cir. 2000) (quotation omitted). "The hazy border between permissible and forbidden force is marked by a multifactored, case-by-case balancing test, and the test requires weighing of all the circumstances." *Id.*; *see also Scott v. Harris*, 550 U.S. 372, 383 (2007) (noting that in order to determine whether excessive force was used "we must . . . slosh our way through the factbound morass of 'reasonableness.'"). Nevertheless, the Eleventh Circuit has

[6] To the extent it is determined that Deputy McGowan lacked probable cause or arguable probable cause to arrest Plaintiff, Plaintiff's claim that the force used to effectuate his arrest was excessive as unjustified by probable cause "is subsumed into and included within [his] unlawful arrest claim." *Williams v. Sirmons*, 307 F. App'x 354, 360 (11th Cir. 2009) (per curiam). Here, the Court is only addressing the viability of a distinct excessive force or battery claim that is independent of Plaintiff's false arrest claim. *See id.* at 360 n.3.

distilled three guiding factors from *Graham* to assist in balancing the analysis: "(i) the severity of the crime at issue, (ii) whether the suspect poses an immediate threat to the safety of the officers or others, and (iii) whether he is actively resisting arrest or attempting to evade arrest by flight." *Steen v. City of Pensacola*, 809 F. Supp. 2d 1342, 1349–50 (N.D. Fla. 2011) (citing *Brown v. City of Huntsville*, 608 F.3d 724, 738 (11th Cir. 2010)).

"Painful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal." *Rodriguez v. Farrell*, 280 F.3d 1341, 1351 (11th Cir. 2002). Furthermore, "[w]hat would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time." *Id.* at 1353. Plaintiff was being arrested for a serious crime, and the complained of actions were normal handcuffing and transport techniques. Additionally, the complained of conduct occurred prior to or contemporaneous with Plaintiff being placed in handcuffs, not subsequent to Plaintiff being fully under the control of the officers. Finally, the only injury Plaintiff claims to have suffered is an aggravation of his back condition. There is no evidence that Deputy McGowan was aware that Plaintiff suffered from a back condition or that Plaintiff was in pain at the time of his arrest. Accordingly, the facts, taken in the light most favorable to Plaintiff, establish that Deputy McGowan did not use unconstitutional force in effectuating Plaintiff's arrest to the extent it was a lawful arrest. *Compare Williams v. Sirmons*, 307 F. App'x 354, 361–62 (11th Cir. 2009) (per curiam) (finding that pulling a seven month pregnant woman to the ground and placing a knee on her back in order to handcuff her was not excessive force where the individual was charged with a serious crime, no additional force was used after the individual was restrained, and there were no injuries as a result of the force), *and Nolin v. Isbell*, 207 F.3d 1253, 1258 & n.4 (11th Cir. 2000) (holding that shoving the suspect a

few feet up against a van, placing the officer's knee into the suspect's back, pushing the suspect's head against the van, searching his groin area, and handcuffing the suspect was not excessive force where there were minimal injuries), *with Davis v. Williams*, 451 F.3d 759, 767–68 (11th Cir. 2006) (finding there was evidence of an excessive use of force where the suspect was not suspected of committing a serious crime, told the officer he had a sore shoulder, was already in handcuffs and not resisting, and the officer intentionally applied additional stress to the suspect's shoulder after being informed it was injured), *and Lee*, 284 F.3d at 1198–99 (holding that slamming the suspect's head against the trunk of the car was plainly excessive where the crime was not serious, the suspect was not resisting or posing a danger, and the suspect had already been arrested and handcuffed when she was slammed into the trunk). Deputy McGowan will be granted summary judgment on Plaintiff's excessive force claim.

3. State Law Battery

Under Florida law, "[i]f excessive force is used in an arrest, the ordinarily protected use of force by a police officer is transformed into a battery." *City of Miami v. Sanders*, 672 So. 2d 46, 47 (Fla. 3d DCA 1996). However, "a presumption of good faith attaches to an officer's use of force in making a lawful arrest and an officer is liable for damages only where the force used is clearly excessive." *Id.* "A battery claim for excessive force is analyzed by focusing upon whether the amount of force used was reasonable under the circumstances." *Id.* This is a "similar standard" to that employed under the Fourth Amendment. *Sullivan v. City of Pembroke Pines*, 161 F. App'x 906, 911 (11th Cir. 2006) (per curiam). Accordingly, for the reasons already stated, Deputy McGowan is entitled to summary judgment on Plaintiff's state law battery claim as well.

B. Sheriff Ivey

Plaintiff alleges both constitutional and state law claims against Sheriff Ivey. Plaintiff only seeks summary judgment on his vicarious liability claims, but Sheriff Ivey seeks summary judgment on all the claims against him.

1. Section 1983

At the outset, to the extent Plaintiff is attempting to hold Sheriff Ivey responsible for excessive force or unlawful arrest in violation of the Fourth Amendment based on the conduct of Deputy McGowan, it is well-established law that "[a] county's liability under § 1983 may not be based on the doctrine of respondeat superior." *Grech v. Clayton Cty.*, 335 F.3d 1326, 1329 (11th Cir. 2003). "[A] county is liable only when the county's 'official policy' causes a constitutional violation." *Id.* Therefore, Plaintiff may only seek to hold Sheriff Ivey liable for constitutional violations that are a result of a specific policy or custom of Brevard County.

To the extent Plaintiff asserts § 1983 municipal liability for Sheriff Ivey's alleged failure to properly train his officers to assess probable cause prior to effectuating an arrest, which allegedly resulted in a violation of Plaintiff's rights against unlawful arrest, "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for [municipal] liability under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). The Eleventh Circuit has held that such limited circumstances exist only "where a plaintiff can show that: (1) the municipality inadequately trained or supervised its officers; (2) the failure to train or supervise is a city policy; and (3) the city's policy caused the officer to violate the plaintiff's constitutional rights." *Williams v. City of Homestead*, 206 F. App'x 886, 890 (11th Cir. 2006) (citing *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998)). "[A] plaintiff may prove a city policy by showing that the municipality's failure to train evidenced a 'deliberate indifference' to the rights of its inhabitants." *Gold*, 151 F.3d at 1350 (citing *City of Canton*, 489 U.S. at 388–89). "To establish . . . 'deliberate indifference,' a

plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Id.*

Defendant argues that the record is devoid of evidence of a pattern sufficient to put Sheriff Ivey on notice of the need to train deputies on probable cause. Plaintiff has failed to respond to this argument and has pointed this Court to no evidence that Sheriff Ivey was aware of a pattern of unlawful arrests made without probable cause or of the need for additional training. There is no record evidence, or even allegations, to support this claim. Accordingly, Sheriff Ivey is entitled to summary judgment on all constitutional claims asserted against him.

2. State Law Claims

Although Sheriff Ivey may not be held vicariously liable for constitutional violations brought pursuant to § 1983, he may be held vicariously liable for the negligent actions of his deputies under Florida law. *See Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty.*, 402 F.3d 1092, 1119 n.12 (11th Cir. 2005). Specifically, pursuant to section 768.28 of the Florida Statutes, Sheriff Ivey, in his official capacity as the Sheriff of Brevard County, may be held vicariously liable for the torts of his deputies. *See Mbano v. City of St. Petersburg*, No. 8:14-cv-1923-T-30TBM, 2016 WL 777815, at *3 (M.D. Fla. Feb. 29, 2016) ("Florida law permits a plaintiff to recover against a municipality on a theory of vicarious liability[,] [a]nd Florida law recognizes liability for false arrest by a law enforcement officer." (internal citations omitted)). However, he may not be held liable for the "acts or omissions of [his deputy] committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." Fla. Stat. § 768.28(9)(a).

There is no dispute that Deputy McGowan was acting within the scope of his employment when he arrested Plaintiff. Accordingly, absent evidence that Deputy McGowan acted in bad faith, maliciously, or with wanton and willful disregard for Plaintiff's rights, Sheriff Ivey could be held liable for false arrest in his official capacity if it is determined that Deputy McGowan falsely arrested Plaintiff.[7] Typically, whether or not a deputy acted in bad faith, maliciously, or with wanton and willful disregard for the rights of an arrestee is a question of fact for the jury. *See McGhee v. Volusia Cty.*, 679 So. 2d 729, 733 (Fla. 1996); *see also Doe v. Sch. Bd. of Highlands Cty.*, No. 12-14151-CIV-MARTINEZ-LYNCH, 2015 WL 8731566, at *5 (S.D. Fla. July 23, 2015). Here, the evidence raises an issue of fact with respect to Deputy McGowan's motivation for arresting Plaintiff. Therefore, Plaintiff's claims for vicarious liability for false arrest against Sheriff Ivey in his official capacity present an issue of fact for trial and both sides will be denied summary judgment on that claim.

IV. CONCLUSION

As set forth more fully above, Deputy McGowan is entitled to summary judgment with respect to Plaintiff's claims for excessive force in violation of the Fourth Amendment and for state law battery. Additionally, Sheriff Ivey is entitled to summary judgment with respect to all federal constitutional claims against him, and with respect to Plaintiff's claim for vicarious liability for battery. However, issues of fact remain with respect to Plaintiff's claims against Deputy McGowan

[7] Sheriff Ivey cannot be held vicariously liable for battery because that claim is dependant upon Plaintiff's battery claim against Deputy McGowan. "[O]nce an independent claim fails, the dependent claim must also fail." *Hernandez v. Sosa*, No. 11-21479-CIV, 2012 WL 4148890, at *7 (S.D. Fla. July 9, 2012). "Courts within the Eleventh Circuit have held that a claim under the theory of *respondeat superior* is, in fact, a dependent claim." *Id.* As noted herein, Deputy McGowan is entitled to summary judgment on Plaintiff's state law battery claim, and therefore, Sheriff Ivey is also entitled to summary judgment on Plaintiff's claim for vicarious liability arising out of that claim.

for false arrest in violation of the Fourth Amendment and state law, and Plaintiff's claim against Sheriff Ivey for vicarious liability for the Florida tort of false arrest.

Therefore, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Defendants' Motion for Summary Judgment (Doc. 30) is **GRANTED in part**.
2. Plaintiff's Motion for Summary Judgment (Doc. 44) is **DENIED**.
3. Defendants' Motion to Dismiss (Doc. 27) is **DENIED as moot**.

DONE and **ORDERED** in Orlando, Florida on August 10, 2016.

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record