UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

ROY L. DENTON	)	
	)	
Plaintiff	)	**Case No. 1:07-cv-211**
	)	
v.	)	**JURY DEMAND**
	)	
STEVE RIEVLEY	)	**Collier/Carter**
	)	
Defendant	)	

DEFENDANT STEVE RIEVLEY'S MOTION FOR SUMMARY JUDGMENT
F.R.C.P. 56

Comes the Defendant, Steve Rievley, in his individual capacity, (herein "Officer Rievley") pursuant to Rule 56 of the *Federal Rules of Civil Procedure*, through counsel, and hereby moves this Honorable Court for summary judgment against the Plaintiff upon the grounds that there is no genuine issue as to any material fact and that the applicable law, when applied to those facts, entitles Officer Rievley to a judgment as a matter of law. In support hereof, Officer Rievley relies upon the pleadings in this matter; Exhibit A, the Affidavit of Office Steve Rievley, attached to Court Document # 29; and Exhibit B, the Affidavit of Complaint attached to Court Document # 20.

I. STATEMENT OF THE CASE

The Plaintiff, Roy Denton, and his son, Dustin B. Denton filed their Complaint on September 6, 2007. In the original Complaint, the Plaintiff and his son alleged 42 U.S.C § 1983 violations, excessive force, false arrest, and common law assault. *See* Complaint. On March 28, 2008, the Plaintiff filed an Amended Complaint alleging the same causes of actions, but in this Amended

Complaint, Dustin B. Denton was terminated from the lawsuit.[1] On May 12, 2008, the Plaintiff filed a Motion for Partial Summary Judgment as to his claims for unlawful arrest and that Officer Rievley was not entitled to rely upon the doctrine of qualified immunity. Officer Rievley filed a Motion for Extension of Time to Respond to the Plaintiff's Motion for Partial Summary Judgment on June 2, 2008. This Motion was granted, and Officer Rievely was given until June 21, 2008 to respond to the Plaintiff's Motion for Partial Summary Judgment. This Court denied the Plaintiff's Motion for Partial Summary Judgment by order dated July 21, 2008. The Plaintiff has filed a Motion to Alter or Amend the July 21, 2008 order. By the terms of the Scheduling Order, all dispositive motions must be filed on or before September 5, 2008; therefore, this Motion is timely.

II. STATEMENT OF FACTS

Officer Rievely, along with other members of the City of Dayton Police Department, was dispatched to the jail at approximately 1:39 a.m. on September 9, 2006 to respond to an assault that occurred at the home of the Plaintiff. Exhibit B. Upon arrival at the jail, Officer Rievely spoke with Brandon Denton, the Plaintiff's son, who stated that he had been attacked just minutes earlier by the Plaintiff and Dustin Denton, the Plaintiff's son (and Brandon's brother). *Id.* Brandon explained that earlier in the evening while at work, his brother, Dustin, called him to speak with one of Brandon's co-workers. Because Dustin sounded intoxicated, Brandon did not allow Dustin to speak the young lady, and Dustin became upset. *Id.* At the end of his shift, Brandon asked another co-worker, Jessica Carbajal, to take him home. *Id.* When Brandon arrived home, Dustin began arguing with him and eventually began hitting him. *Id.* The Plaintiff, also intoxicated, became involved in the

[1]Dustin B. Denton was terminated as a party to this lawsuit by order dated March 14, 2008.

fray, grabbing Brandon around the neck and strangling him. *Id.* During the attack, Brandon's eyeglass were broken. *Id.*

Officer Rievely observed that Brandon had numerous abrasions on his forehead and both arms and appeared to have been strangled which was consistent with his story. *Id.* Next, Officer Rievely telephoned Ms. Carbajal who confirmed that Brandon did not have any of these injuries when she dropped him off at his house shortly after midnight. Exhibit A, ¶ 13. Brandon informed Officer Rievely that both his father and brother remained at their home at 120 6th Avenue Dayton, Tennessee. *Id.* at 12. Brandon also told Officer Rievely that he wanted to retrieve some of his belongings from the home but was afraid to do so by himself after the attack. *Id.*

Officer Rievely, along with several other officers, went to the Denton residence, arriving at approximately 2:13 a.m. Exhibit B. The Plaintiff came to the door, and Officer Rievley asked him what happened to his son, Brandon. *Id.* The Plaintiff would not answer him. *Id.* Officer Rievley noted that on the front porch, Brandon's eyeglasses lay broken, further confirming his story of assault. *Id.* He then advised the Plaintiff that he was under arrest for domestic assault. *Id.* When Officer Rievley advised the Plaintiff that he would need to speak with Dustin as well, the Plaintiff turned away to go back inside the house. *Id.* Officer Rievley handcuffed the Plaintiff's right arm as the Plaintiff attempted to close and lock the door. *Id.* He then advised the Plaintiff that he needed to find Dustin and that he needed to give Officer Rievley his left hand. *Id.* Officer Rievley was able to handcuff both the Plaintiff's hands without further incident, and he was placed in a patrol car and taken to the jail at approximately 2:18 a.m. *Id.* Officer Rievley then entered the Denton residence to locate Dustin. *Id.* He was located in a bedroom and was also arrested for domestic assault. *Id.* He was transported to the jail at approximately 2:28 a.m. *Id.*

Throughout his career as a police officer, Officer Rievley has received extensive training in the area of domestic abuse. Exhibit A, ¶ 20. Officer Rievley has been instructed as to the provisions of the *Tennessee Domestic Abuse* statutes, codified at *Tennessee Code Annotated* §§ 36-3-601, et seq. In his training, Officer Rievley was taught that an arrest of an individual whom the officer has probable cause to believe has committed the crime of domestic abuse is "the preferred response" of the officer as explicitly stated in section 36-3-619. *Id.* Furthermore, Officer Rievley was taught that the Tennessee Attorney General has issued several opinions that construe this statute to allow for the warrantless arrest of an individual whom the officer has probable cause to believe committed domestic abuse. *Id.* Officer Rievley had probable cause to believe that the Plaintiff committed the crime of domestic abuse when he arrested him. *Id.*

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) provides that summary judgment will be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to show conclusively that no genuine issue of material fact exists, and the Court must view the facts and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 475, 587 (1986); *Morris v. Crete Carrier Corp.*, 105 F.3d 279, 281-81 (6th Cir. 1997); *White v. Turfway Park Racing Ass'n., Inc.*, 909 F.2d 941, 943 (6th Cir. 1990); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987).

Once the moving party presents evidence sufficient to support a motion under Rule 56, the non-moving party is not entitled to a trial merely on the basis of allegations. *See* FED. R. CIV. P. 56 (e)(2). The non-moving party is required to come forward with some significant probative evidence

which makes it necessary to resolve the factual dispute at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *White*, 909 F.2d at 943-44; *60 Ivy Street*, 822 F.2d at 1435. The moving party is entitled to summary judgment if the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. *Celotex*, 477 U.S. at 323; *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996).

The standard for summary judgment mirrors the standard for directed verdict. The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52; *see also Lapeer County, Mich. v. Montgomery County, Ohio*, 108 F.3d 74, 78 (6th Cir. 1997). There must be some probative evidence from which the jury could reasonably find for the non-moving party. *Anderson*, 477 U.S. at 252; *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 140 (6th Cir. 1997). If the Court concludes that a fair-minded jury could not return a verdict in favor of the non-moving party based on the evidence presented, it may enter a summary judgment. *Anderson*, 477 U.S. at 251-52; *University of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1280; *LaPointe v. UAW*, Local 600, 8 F.3d 376, 378 (6th Cir. 1993).

IV. LAW AND ARGUMENT

1. The Plaintiff has not alleged, and cannot prove, a factual basis necessary to establish a claim of § 1983 violation of his civil rights by Officer Rievley.

Section 1983 states in pertinent part

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action

> at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. 1983. Section 1983 enables an individual to file suit against "those who, while acting under color of state law, deprive another of a right secured by the Constitution or federal law." *Romanski v. Detroit Entm't L.L.C.*, 428 F.3d 629, 636 (6th Cir. 2005).

To establish a claim pursuant to §1983,a plaintiff must demonstrate two elements: "(1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that he was subjected or caused to be subjected to this deprivation by a person acting under color of state law." *Gregory v. Shelby County*, 220 F.3d 433,441 (6th Cir. 2000). Section 1983 "creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere."*Gardenhire v. Schubert*, 205 F.3d 303, 310 (6th. Cir. 2000).

With respect to Plaintiff's § 1983 claims, Officer Rievley contends that such claims should be dismissed because there were no constitutional violations and he is entitled to qualified immunity. The doctrine of qualified immunity shields " 'government officials performing discretionary functions ... 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.'" *Ewolski v. City of Brunswick,* 287 F .3d 492, 501 (6th Cir.2002) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). The United States Supreme Court has articulated a two-part test for determining whether a law enforcement officer is entitled to qualified immunity. *See Brosseau v. Haugen,* 543 U.S. 194, 125 S.Ct. 596, 598 (2004); *Saucier v. Katz,* 533 U.S. 194, 201 (2001). Under this test, district courts must

> consider whether "the facts alleged show the officer's conduct violated a constitutional right." If the plaintiff can establish that a constitutional violation occurred, a court should ask "whether the right was clearly established ... in light of

the specific context of the case, not as a broad general proposition."

Lyons v. City of Xenia, 417 F.3d 565, 571 (6th Cir.2005) (quoting *Saucier,* 533 U.S. at 201).

Once a defendant claims the affirmative defense of qualified immunity, the burden shifts to the plaintiff to demonstrate that the defendant is not entitled to the defense of qualified immunity. *Myers v. Potter,* 422 F.3d 347, 352 (6th Cir.2005). When a defendant moves for summary judgment and asserts the defense of qualified immunity, the plaintiff must "1) identify a clearly established right alleged to have been violated; and 2) establish that a reasonable officer in the defendant's position should have known that the conduct at issue was undertaken in violation of that right." *Pray v. City of Sandusky,* 49 F.3d 1154, 1158 (6th Cir.1995).

Thus, the key inquiry in determining whether a right was clearly established is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202; *see also Ewolski,* 287 F.3d at 501 ("For a right to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'"(quoting *Russo v. City of Cincinnati,* 953 F.2d 1036 (6th Cir.1992))). Although the conduct in question need not have been previously held unlawful, the unlawfulness must be apparent in light of pre-existing law. *Id.* Officials are entitled to qualified immunity" 'when their decision was *reasonable,* even if mistaken.' " *Pray,* 49 F.3d at 1158 (quoting *Castro v. United States,* 34 F.3d 106, 112 (2d Cir.1994)). Further, "'if officers of reasonable competence could disagree on this issue, immunity should be recognized.'" *Id.* (quoting *Malley v. Briggs,* 475 U.S. 335, 349 (1986)).

With respect to his § 1983 claim based on the Fourth, Fifth and Fourteenth Amendments,

Plaintiff alleges that the actions of Officer Rievley constituted false arrest, unlawful entry, and excessive force. *See* Complaint, ¶¶ 36-46. Officer Rievley contends that his actions were lawful and that, in any case, such actions were objectively reasonable given the situation.

A. Officer Rievley had probable cause to arrest the Plaintiff on a charge of domestic assault.

With respect to Plaintiff's § 1983 false arrest claim, the threshold question is whether a constitutional violation occurred. The key inquiry in a false arrest claim is whether the arrest was based on probable cause. *See Anderson v. Creighton,* 483 U.S. 635, 663-64 (1987); *Pierson v. Ray,* 386 U.S. 547, 556 (1967); *Stemler,* 126 F.3d at 871. The United States Supreme Court has described "probable cause" as follows

> [p]robable cause exists where "the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States,* 267 U.S. 132, 162 (1925)); *see also Lyons,* 417 F.3d at 573. To establish probable cause, "only a probability or substantial chance of criminal activity, not an actual showing of such activity" is required. *United States v. Moncivais,* 401 F.3d 751, 756 (6th Cir.2005). The existence of probable cause in a § 1983 action ordinarily presents a jury question, "unless there is only one reasonable determination possible." *Gardenhire,* 205 F.3d at 315.

Officer Rievley does not dispute that the right at issue is clearly established: a reasonable officer would be aware that an arrest requires probable cause, as that principle is contained within the text of the Fourth Amendment. U.S. Const. amend. IV; *Lyons,* 417 F.3d at 573 ("It has long been

true that the Fourth Amendment requires probable cause for an arrest."); *Gardenhire,* 205 F.3d at 314-15; *Pray,* 49 F.3d at 1158. The Plaintiff, however, must present sufficient evidence to show that the actions of Officer Rievley were not objectively reasonable in light of clearly established constitutional rights. The question, then, is whether the belief of Officer Rievley that he had probable cause to arrest Plaintiff was objectively reasonable. *See Brinegar,* 338 U.S.at 175-76. As the Plaintiff was charged with domestic assault, if it was objectively reasonable for Officer Rievley to believe that he had probable cause to arrest Plaintiff for this crime, then he is entitled to qualified immunity.

Under Tennessee law, "[a] person commits domestic assault who commits an assault as defined in § 39-13-101 against a person who is that person's family or household member." *State v. Duncan,* 2005 WL 3504899, *4 (Tenn. Crim. App. Dec. 21, 2005) (quoting TENN. CODE ANN. § 39-13-111) (A copy is attached hereto for the Court's convenience). A person commits assault "who (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative. *Id.* (quoting TENN. CODE ANN. § 39-13-101(a)). Furthermore, the domestic assault statute, § 39-13-111, defines "family or household member" as a "spouse, former spouse, person related by blood or marriage, or person who currently resides or in the past has resided with that person as if a family, or a person who has a child or children in common with that person, regardless of whether they have been married or resided together at any time." TENN. CODE ANN. § 39-13-111(a). Domestic assault is either a class A or class B misdemeanor. TENN. CODE ANN. § § 39-13-111(c)(1), 39-13-101(b)(1). Tennessee has a general rule against warrantless

arrests for misdemeanor offenses. TENN. CODE ANN. § 36-3-619. If, however, " a law enforcement officer has probable cause to believe that a person has committed a crime involving domestic abuse, whether the crime is a misdemeanor or a felony ... the preferred response of the officer is arrest." TENN. CODE ANN. § 36-3-619.

Given these elements, it was objectively reasonable for Officer Rievley to believe that he had probable cause to arrest Plaintiff. He was dispatched to the Sheriff's Department to respond to a complaint of a domestic violence incident. Brandon Denton told the deputies that his father, the Plaintiff, had hit him and strangled him. *See* Exhibit B. Officer Rievley observed that Brandon had bruising on his face and arms as well as hand prints around his neck and he photographed these injuries as well. *Id.* Officer Rievley confirmed Brandon's story by calling Jessica Carbajal who took Brandon home from work on an hour or so earlier. Exhibit A, ¶ 13. Ms. Carbajal told Officer Rievley that she did not see any bruises or strangulation marks on Brandon when she dropped him off at the home he shared with the Plaintiff shortly after midnight. *Id.* Thus, it was reasonable for Officer Rievley to conclude that Plaintiff's actions had caused Brandon " bodily injury,"as required by the statute.

As the Sixth Circuit court stated in *United States v. Strickland,* 144 F.3d 412, 415 (6th Cir.1998), "the Fourth Amendment does not require that a police officer *know* a crime occurred at the time the officer arrests or searches a suspect ... The Fourth Amendment, after all, necessitates an inquiry into probabilities, not certainty." *Id.* Officer Rievley respectfully submits, therefore, that it is reasonable that an officer, confronted with the situation Officer Rievley faced, could have reasonably concluded that there was probable cause to arrest the Plaintiff for domestic assault. Accordingly, Officer Rievley is entitled to qualified immunity for his arrest of the Plaintiff.

B. Officer Rievley is entitled to qualified immunity for his warrantless arrest of the Plaintiff.

The Plaintiff also contends that Officer Rievley violated his Fourth and Fourteenth Amendment rights by arresting him inside his home without a warrant. Complaint, ¶4-6. Officer Rievley respectfully submits that his actions in arresting the Plaintiff did not violate his Fourth and Fourteenth Amendment rights.

1. Officer Rievley's arrest of the Plaintiff did not violate the Fourth Amendment because it occurred on the front porch of the Plaintiff's home.

The Fourth Amendment has been interpreted to "prohibit the police from making a warrant less and non-consensual entry into a suspect's home in order to make a routine felony arrest." *Payton V. New York*, 445 U.S. 573, 576 (1980). The rule in *Payton*, however, is not an absolute. Although homes are accorded sanctity under the Fourth Amendment due to the privacy interests of the occupants, those same occupants may be arrested in their home if they have given up their privacy interests by knowingly exposing themselves to the public. *See Segura v. United States,* 468 U.S. 796, 810 (1984); *United States v. Santana*, 427 U.S. 38, 42 (1976) (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)); *see also* Court File No. 32. The facts in *Santana* are similar to the facts in the case at bar. In *Santana*, the officers saw the suspect standing in the doorway of her house. *Santana,* 427 U.S. at 42. As the officers approached the suspect, she ran back into her house whereupon the police officers followed her, eventually arresting her inside her home. *Id.* In upholding the arrest, the Supreme Court stated that the suspect "was not merely visible to the police but was as exposed to public view, speech, hearing, touch as if she had been standing completely outside her house." *Id.*

In the present case, the Plaintiff opened the front door of his home before the Officers could knock on his door and stepped out onto the front porch. *See* Affidavit of Officer Rievley, ¶ 15-16.

From Officer Rievley's Affidavit, it is evident that the Plaintiff was standing on the front porch of his home when he was arrested. Officer Rievley testified in his Affidavit that "I informed Roy L. Denton that he was under arrest. After a short discussion, Roy L. Denton turned away from me toward the door of his house. As Roy L. Denton turned away, I grabbed his right arm. I handcuffed his right arm and then his left arm. After successfully arresting Roy L. Denton, I turned him over to Jason Woody for transportation to the local jail. Gerald Brewer, a Rhea County police officer, and I went into the Denton house in search of Dustin Denton." *See id.* at ¶¶ 17-19. Officer Rievley's testimony makes clear that he did not enter the Plaintiff's house until **after** the Plaintiff had been arrested. *Id.* Thus, there could be no Fourth Amendment violation because there was no warrantless arrest inside the house of the Plaintiff as Officer Rievley never entered the house until after the arrest had already occurred. If there is no constitutional violation, the Plaintiff cannot recover under § 1983. *Wittstock v. Mark A. Va Sile, Inc.*, 330 F.3d 899 (6th Cir. 2003). Accordingly, Officer Rievley respectfully submits that he is entitled to summary judgment on this issue.

2. Officer Rievley is entitled to qualified immunity for his warrantless arrest of the Plaintiff.

Whether the Plaintiff's Fourth Amendment rights were violated is a separate inquiry from whether Officer Rievley is entitled to qualified immunity. *O"Brien v. City of Gand Rapids*, 23 F.3d 990 (6th Cir. 1994). If this Court finds that there was a constitutional violation, the Plaintiff may still be unable to recover under §1983 as Officer Rievley contends that he is entitled to qualified immunity. See *O'Brien*, 23 F. 3d 1000. The Fourth Amendment to the United States Constitution provides

> [t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause,

> supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id. The Fourth Amendment has been interpreted to "prohibit the police from making a warrantless and non-consensual entry into a suspect's home in order to make a routine felony arrest." *Payton V. New York*, 445 U.S. 573, 576 (1980). The exception to this rule is whether exigent circumstances exists. The Sixth Circuit, however, has not "addressed what impact a domestic violence situation may have on the exigent circumstances justifying a warrant less entry to effectuate arrest." *Cannon v. Hamilton County*, 2007 WL 3238959 (E.D. Tenn. 2007) (A copy is attached hereto for the Court's convenience).

The United States Court of Appeals for the Sixth Circuit has held that the following situations may give rise to exigent circumstances: "(1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent a suspect's escape, and (4) a risk of danger to the police or others." *U.S. v. Johnson*, 22 F.3d 674,680 (6th Cir. 1994). In a suit for civil damages, whether exigent circumstances existed to excuse a warrant less entry is a question for the jury, unless the underlying facts are essentially undisputed so that a jury could reach but one conclusion. *Hancock v. Dodson*, 958 F.2d 1367,1375 (6th Cir. 1991). Although there may be some dispute as to whether exigent circumstances existed to justify Officer Rievley's warrantless arrest of the Plaintiff, the Plaintiff's claims must still fail because Officer Rievley is entitled to qualified immunity for his actions.

In *Russo v. City of Cincinnati,* 953 F.2d 1036, 1042 (6th Cir.1992), the Sixth Circuit, addressing the applicability of qualified immunity stated that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that

right." *Id.* (quoting *Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). As the *Russo* Court stated, "[a]lthough it need not be the case that 'the very action in question has been previously held unlawful, ... in light of pre-existing law, the unlawfulness must be apparent.'" *Id.* (quoting *Anderson,* 483 U.S. at 640). *See also Megenity v. Stenger,* 27 F.3d 1120, 1124 (6th Cir.1994) ("If we conclude that a reasonable public official would not have been aware that he was committing a [federal civil rights] violation, we then afford immunity.") As the Supreme Court stated in *Saucier v. Katz*, 533 U.S. 194 (2001), "if the law does not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* at 202.

In the present case, even if it is determined that the Plaintiff's arrest violated his Fourth Amendment rights, it is clear that Officer Rievley was **not** "on notice that his conduct would be clearly unlawful." *Id.* In fact, just the opposite is true - Officer Rievley was acting in accordance with a Tennessee statute that explicitly states "the preferred response of the officer is arrest" in cases where the officer has probable cause to believe that domestic abuse has occurred whether in his presence or not. TENN. CODE ANN. § 36-3-619. Moreover, questions concerning warrantless arrests pursuant to TENN. CODE ANN. § 36-3-619 have been submitted to the Tennessee Attorney General for opinions. According to the Tennessee Attorney General Opinions 98- 169, 00-218 and 02-116, an officer may make a warrantless arrest if the officer has probable cause to believe that a crime involving domestic abuse has occurred. *See* Tenn. Atty. Gen. Op. 98-169 (determining that "once a law enforcement officer forms probable cause to arrest a person for a crime involving domestic abuse, the probable cause will continue to support a warrantless arrest under § 36-3-619(a) for the indefinite future, unless the officer discovers facts that dispel it"); Tenn.. Atty. Gen. Op. 00-048

(determining that "an officer who has probable cause to believe a person has committed a crime involving domestic abuse ...may make a warrantless arrest of that individual, regardless of whether that individual has left the scene"); Tenn. Atty. Gen. Op. 02-116 (determining that an officer may make a warrantless arrest for domestic abuse when an offender maliciously damages property jointly owned by the offender and the abused party).

Furthermore, as this Court has previously noted, there is no Sixth Circuit case addressing "the impact that a domestic violence situation may have on the exigent circumstances justifying a warrantless entry to effectuate an arrest." *See Cannon v. Hamilton County*, 2007 WL 3238959, * 13 (E.D. Tenn. 2007). Thus, the "contours" of this right are not clearly established in domestic violence situations given an unchallenged statute allowing for the warrantless arrest of an individual in such a situation, as well as no Sixth Circuit caselaw addressing the issue. Moreover, a reasonable official in Officer Rievley's position would not have been aware that he was committing a federal civil rights violation. *See Megenity v. Stenger,* 27 F.3d 1120, 1124 (6th Cir.1994). As officer are not "held to the standards of a constitutional law a scholar concerning the vagaries of the exigent circumstances exception to the warrant requirement of Fourth Amendment law," Officer Rievley should be entitled to rely upon the doctrine of qualified immunity for his arrest of the Plaintiff. *See O'Brien*, 23 F.3d at 1000.

C. Officer Rievley did not use excessive force to effectuate the arrest of the Plaintiff.

1. The Plaintiff cannot prove a factual basis to support his claim that Officer Rievley used excessive force.

In the Complaint, the Plaintiffs assert that Officer Rievley used excessive force when arresting the Plaintiffs. *See* Complaint, ¶¶ 41-43. In cases such as this, it has been noted that

excessive force allegations arising out of the context of arrests must be analyzed under the "objective reasonableness" standard. *See Graham v. Conner*, 490 U.S. 386, 388 (1989).

According to *Graham*, the use of force in making an arrest must be reasonable under the circumstances. *Id.* at 395. Whether the force used was reasonable is a question of law requiring a balancing between the nature and quality of the intrusion on the individual's interest against the countervailing government interests. *See Gravely v. Madden*, 142 F.3d 345 (6th Cir. 1989); *Graham*, 490 U.S. at 396. In so doing, the court must look at the facts and circumstances of each particular use of force. *Graham,* 490 U.S. at 396. The factors include the severity of the crimes, whether the suspect poses an immediate threat to the safety of officers or others and whether the suspect is actively resisting arrest or attempting to evade arrest.. *Id.* A determination of reasonableness must take into consideration an allowance for the fact that police officers are often forced to make spilt section decisions about the amount of force that is necessary in a particular situation. As the *Graham* court noted

> [w]ith respect to a claim of excessive force, the same standard of reasonableness at the moment applies - not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to may split second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation.

Graham , 490 U.S. 396-97 (internal citations omitted).

In his Complaint, the Plaintiff only alleges that Officer Rievley "adopted 'personal' policies, procedures, practices or customs...that allowed to his own satisfaction, the use of excessive force when other more reasonable and less drastic methods were available." *See* Complaint, ¶ 42. The

Plaintiff does not allege any facts to support such a contention; he merely makes a conclusory statement. The only facts the Plaintiff alleges in the Complaint are that Officer Rievley "slapped a cigarette from [his] mouth and grabbed him by the arm as [he] tried to shut the door to his home." *See* Complaint, ¶ 25. He then claims that Officer Rievley placed him in handcuffs. *Id.* There is no allegation of any type of force used by Officer Rievley except to grab the Plaintiff's arm to place him handcuffs **after** Officer Rievley instructed him that he was under arrest for domestic assault and **after** the Plaintiff attempted to go inside his house. *See* Complaint, ¶¶ 22, 25. Although Officer Rievley denies that he "slapped" a cigarette from the Plaintiff's mouth, assuming *arguendo* that such an action did occur, the Plaintiff does not claim that Officer Rievley slapped him or made any contact with his face during this alleged action. *See* Complaint ¶ 25. As such, the grabbing of the Plaintiff's arm to place him handcuffs as he attempted to go back inside his home after being informed that he was under arrest is the only use of "force" by Officer Rievley. Such force is not excessive, and the Plaintiff's claims for the same should be dismissed.

Based on the law outlined above, Officer Rievley's decision to use force and the amount of force he used was objectively reasonable under the facts of the case. Officer Rievley was dispatched to a "domestic assault" call. *See* Exhibit 1, ¶5. Brandon Denton had been examined by Officer Rievley and found to have injuries on his arms and neck consistent with strangulation and assault. *Id.,* ¶ 9. Further, Brandon Denton informed Officer Rievley that the Plaintiff and Sgt. Denton had been drinking that evening and were intoxicated. *Id.,* ¶ 10. The Plaintiff failed to comply when Officer Rievley told him that he was under arrest. Based upon these facts, the amount of force used by Officer Rievley was clearly not excessive. Therefore, Officer Rievley is entitled to qualified immunity on the allegations of excessive force upon the first prong as no constitutional violation

occurred.

2. <u>The Plaintiff is not entitled to an award of attorneys fees and experts fees pursuant to 42 U.S.C. § 1988</u>

Section 1988 permits the Court, at its discretion, to award attorney and expert fees in conjunction with Section 1983. The Court can address 42 U.S.C. 1988 only if it finds that the Plaintiffs have a claim under Section 1983. Officer Rievley respectfully requests this Court to find that the Plaintiff does not have any claims under Section 1983; therefore, claims for attorneys fees and experts fees under Section 1988 are not appropriate.

3. <u>The Plaintiff cannot maintain a cause of action against Officer Rievley for assault and battery in his individual capacity.</u>

In his Complaint, the Plaintiff sues Officer Rievley in his individual capacity. *See generally* Complaint caption; Complaint, ¶ 47-51. A governmental entity is not immune for causes of actions resulting from assault and battery. *Limbaugh v. Coffee Medical Center*, 59 S.W.3d 73 (Tenn. 2001). Employees of the governmental entity, however, are immune from such suits. TENN. CODE ANN. § 29-20-310(b); *Limbaugh, supra*. Section 29-20-310(b) states "[n]o claim may be brought against an employee or judgment entered against an employee for damages for which the immunity of the governmental entity is removed by this chapter unless the claim is one for medical malpractice brought against a health care practitioner." As the Tennessee Supreme Court has held that governmental immunity is removed for causes of actions resulting from assault and battery, no claim for assault and battery can be brought against Officer Rievley as an employee of the city of Dayton. *See Limbaugh, supra;* TENN. CODE ANN. § 29-20-310(b). Accordingly, the Plaintiff's claims for assault and battery should be dismissed.

V. CONCLUSION

Defendant Officer Rievley respectfully submits that the entire Complaint filed by Plaintiff should be dismissed for the reasons set forth above. If the Court determines, however, that the Motion for Summary Judgment should not be granted in full, this Defendant respectfully submits to the Court that the Motion for Summary Judgment should be granted in part

ROBINSON, SMITH & WELLS
Suite 700, Republic Centre
633 Chestnut Street
Chattanooga, TN 37450
Telephone: (423) 756-5051
Facsimile: (423) 266-0474

By: *s /Ronald D. Wells*
Ronald D. Wells, BPR# 011185
Attorney for Defendant, Steve Rievley

CERTIFICATE OF SERVICE

I hereby certify that on the _29th___ day of____August_____, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

This the 29th day of August , 2008.

Robinson, Smith & Wells

By: s/Ronald D. Wells

cc: Roy L. Denton
120 6th Avenue
Dayton, TN 37321

dlw/012808/LEB/daytondenton.msjlastversion