UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:21-CV-00050-GNS

Electronically Filed

ESTATE OF JEREMY MARR,
by and through its Administrator,
JOANNA MARR, *et al.* PLAINTIFFS

v.

CITY OF GLASGOW, *et al.* DEFENDANTS

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants, the City of Glasgow, the City of Glasgow Police Department, Guy Joseph Turcotte, Hayden Phillips, and Cameron Murrell, by counsel, for their memorandum in support of their motion to dismiss the Complaint filed by Plaintiffs, the Estate of Jeremy Marr, by and through its Administrator, Joanna Marr, and Joanna Marr, Individually and on behalf of E.J.M, a minor, state as follows:

Introduction

On April 14, 2020, an elderly woman called the Glasgow Police Department to report an unknown man was inside her home. When officers arrived, they found Jeremy Marr inside the house, behaving erratically. Marr told officers he was armed with a knife in his pocket. As three officers attempted to secure Marr, search his person, and secure the knife, Marr became increasingly combative, refusing to allow himself to be handcuffed and physically striking the officers. One officer attempted to deploy his Taser but was initially unsuccessful because Marr was continually flailing about on the ground. Eventually, the officers were able to handcuff and subdue Marr. After securing Marr, the officers noticed his breathing was shallow, and they immediately began administering first aid. EMS soon arrived and transported Marr to the hospital,

where he unfortunately passed away. The officers involved were cleared of wrongdoing following a Kentucky State Police investigation.

Marr's surviving spouse, on behalf of herself, her minor daughter, and Marr's estate, now brings a number of claims arising from the above-described incident. As explained in greater detail below, Plaintiffs' Complaint fails to establish any constitutional violation or make out any viable common law claims. Accordingly, Defendants respectfully ask this Court to dismiss Plaintiffs' Complaint with prejudice.

Factual Background

As a threshold matter, Defendants deny Plaintiffs' allegations in this case. If any of Plaintiffs' claims persist beyond the pleading stage, Defendants reserve the right to contest any and all of Plaintiffs' factual allegations. However, for the purposes of this motion only, Plaintiffs' non-conclusory allegations are accepted as true.

According to Plaintiffs' Complaint, on April 14, 2020, Jeremy Marr was behaving erratically at a Glasgow residence, saying people were trying to murder him. [Complaint, DN 1 at 4 ¶11.] Someone at the residence called the Glasgow Police Department, and three officers responded: Sergeant Cameron Murrell, Officer Guy Turcotte, and Officer Hayden Phillips. [*Id.* at 5 ¶12.] Marr told the officers he believed someone was trying to harm him. [*Id.* at 5 ¶13.]

Plaintiffs admit Marr told the officers he had a knife on his person. [*Id.* at 5 ¶14.] When officers attempted to secure Marr in physical custody, a struggle ensued, and officers were forced to deploy a Taser. *See* [*id.* at 5 ¶18.] According to Plaintiffs, the Taser deployments occurred over a span of less than three minutes. [*Id.*] Once officers finally secured Marr, they rolled him onto his back and discovered he was unresponsive. [*Id.* at 6 ¶21.] Plaintiffs do not dispute the officers immediately begun attempting to resuscitate Marr and immediately called for him to be transported

to the emergency room. [*Id.* at 6 ¶¶22-23.] Unfortunately, Marr was pronounced deceased upon his arrival at the hospital. [*Id.* at 6 ¶24.] Plaintiffs state the total interaction time between Marr and the officers was no more than five minutes. [*Id.* at 6 ¶22.]

Plaintiffs filed this lawsuit on March 19, 2021, naming as defendants the City of Glasgow, the City of Glasgow Police Department, Officer Guy Turcotte, Officer Hayden Phillips, and Sergeant Cameron Murrell. [*Id.* at 1-2.] The individual Defendants are named in both their individual and official capacities. [*Id.*] Plaintiffs assert the following claims: (1) violation of 42 U.S.C. § 1983 and the Fourth and Eighth Amendments, against all Defendants in all capacities; (2) state-law battery, against all Defendants in all capacities; (3) state-law negligence and wrongful death, against all Defendants in all capacities; (4) loss of spousal consortium, against all defendants in all capacities; (5) loss of parental consortium, against all defendants in all capacities; and (6) negligent hiring, retention, supervision, and training, against the City of Glasgow and the Glasgow Police Department. Defendants now move to dismiss all of Plaintiffs' claims and their Complaint in its entirety.

Legal Standard

"To survive a motion to dismiss for failure to state a claim, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *South Side Quarry, LLC v. Metro. Sewer Dist.*, No. 3:18-cv-706-DJH-RSE, 2020 WL 3977659, at *3 (W.D. Ky. Jul. 14, 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). "A claim is plausible on its face when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation and internal quotation marks omitted).

Argument

I. The Glasgow Police Department is Not a Distinct Entity and Must Be Dismissed

As noted above, Plaintiffs named the Glasgow Police Department as a separate defendant. This was improper, as the Glasgow Police Department is merely a subdivision of the City of Glasgow and "is not an entity which may be sued." *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). This Court and its sister court have repeatedly held "county and city police departments are not suable entities under Kentucky law." *Pittman v. Rutherford*, No. 19-36-DLB-CJS, 2019 WL 5558572, at *4 (E.D. Ky. Oct. 28, 2019); *see also Longwood, LLC v. Voegele*, No. 3:17-CV-00676-TBR, 2018 WL 1660086, at *5 (W.D. Ky. Apr. 5, 2018) (listing cases). Because the Glasgow Police Department is merely an alter ego of the City of Glasgow, it must be dismissed as a named defendant to this action.

II. Plaintiffs' § 1983 Claims Must Be Dismissed

Plaintiffs' central claim in this action arises under 42 U.S.C. § 1983, for Defendants' alleged violations of Marr's constitutional rights under the Fourth and Eighth Amendments. [DN 1 at 8 ¶41.] Plaintiffs assert their § 1983 claim against all Defendants in all their capacities. [*Id.* at 8.] For a variety of reasons, Plaintiffs have failed to plausibly plead any constitutional claim.

A. Plaintiffs' § 1983 Claim Cannot Arise Under the Eighth Amendment

Plaintiffs' § 1983 claim explicitly references two constitutional provisions, the Fourth and Eighth Amendments. [*Id.* at 8 ¶41.] Only the Fourth Amendment, however, potentially applies to this situation. It is undisputed the officers' use of force occurred during their efforts to secure and restrain Marr following their initial contact with him at the scene. [*Id.* at 5-6.] "When a free citizen claims that a government actor used excessive force during the process of an arrest, seizure, or investigatory stop, [courts] perform a Fourth Amendment inquiry into what was objectively

reasonable under the circumstances." *Coley v. Lucas Cty., Ohio*, 799 F.3d 530, 537 (6th Cir. 2015) (citations and internal quotation marks omitted). The Eighth Amendment applies only to excessive force claims brought by convicted prisoners. *Id.* (Emphasis added). Because Plaintiffs' constitutional claims arise from the use of force during a seizure, and because Marr was not a convicted prisoner, the Fourth Amendment reasonableness standard applies here. To the extent Plaintiffs attempt to assert an Eight Amendment cruel and unusual punishment claim, such a claim must be dismissed.

B. Plaintiffs' Official Capacity Claims Against the Officers are Merely Duplicative of Their Claims Against the City

Plaintiffs named Officer Turcotte, Officer Phillips, and Sergeant Murrell as Defendants in both their individual and official capacities. [*Id.* at 1-2.] Further, Plaintiffs attempt to assert their § 1983 claim against all defendants in all capacities. [*Id.* at 8.] However, "[o]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent," and "is, in all respects other than name, to be treated as a suit against the entity." *Thorpe ex rel. D.T. v. Breathitt Cty. Bd. of Educ.*, 932 F. Supp.2d 799, 802 (E.D. Ky. 2013) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)) (cleaned up). Where, as here, "a § 1983 complaint asserts a claim against a municipal entity and a municipal official in his or her official capacity, federal courts will dismiss the official-capacity claim." *Id.* (citation omitted). Because Plaintiffs named the City of Glasgow as a Defendant, their § 1983 claims against Officer Turcotte, Officer Phillips, and Sergeant Murrell in their official capacities are duplicative and must be dismissed. *See Baar v. Jefferson Cty. Bd. of Educ.*, 686 F. Supp.2d 699, 704 (W.D. Ky. 2010) ("In the Eastern and Western Districts of Kentucky . . . the judges have adopted the practical approach of dismissing the official capacity claims.").

C. Plaintiffs' § 1983 Claim Based on an Alleged Fourth Amendment Violation Fails

Plaintiffs have also asserted a § 1983 claim against Officer Turcotte, Officer Phillips, and Sergeant Murrell in their individual capacities. As explained above, this claim must arise under the Fourth Amendment because the questioned use of force occurred during the officers' seizure of Marr. "To evaluate whether an officer has used excessive force in violation of the Fourth Amendment, [courts] employ an objective-reasonableness test, asking 'whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.'" *Estate of Hill v. Miracle*, 853 F.3d 306, 312 (6th Cir. 2017) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). The reasonableness of an officers' use of force is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citation omitted). Courts consider three factors when assessing objective reasonableness: "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 313 (citation and internal quotation marks omitted).

In addition to establishing the officers' use of force against Marr was objectively unreasonable, and therefore constituted a Fourth Amendment violation, Plaintiffs must also overcome the officers' qualified immunity defense by demonstrating the unreasonableness of their conduct was clearly established when the violation occurred. "Qualified immunity shields government officials 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." *Id.* at 312 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)) (internal quotation marks omitted). The plaintiff "bears the burden of showing that the defendant's conduct violated

a right so clearly established that a reasonable official in his position would have clearly understood that he or she was under an affirmative duty to refrain from such conduct." *Id.* (citation omitted). Courts "ask two questions in evaluating whether a law-enforcement officer is entitled to qualified immunity on an excessive-force claim: (1) whether the officer violated the plaintiff's constitutional rights under the Fourth Amendment; and (2) whether that constitutional right was clearly established at the time of the incident." *Id.* (citation and internal quotation marks omitted). These questions may be answered in any order. *Id.* "[A] qualified immunity defense can be raised at various stages of the litigation including at the pleading stage in a motion to dismiss". *English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir. 1994). "[A] plaintiff bringing an action against individual governmental officials under 42 U.S.C. § 1983 must satisfy a heightened standard of pleading when the [qualified immunity] defense is raised pursuant to a motion to dismiss." *Veney v. Hogan*, 70 F.3d 917, 919 (6th Cir. 1995).

Here, Plaintiffs cannot establish that the officers' use of force upon Marr was objectively unreasonable, nor was such unreasonableness clearly established on the date of this incident. To the contrary, the Sixth Circuit has held on numerous occasions "that it is *not* excessive force for the police to tase someone (even multiple times) when the person is actively resisting arrest." *Rudlaff v. Gillispie*, 791 F.3d 638, 641 (6th Cir. 2015) (listing cases). For example, in *Rudlaff*, the Court held police were entitled to tase and use knee strikes against a subject who refused to allow himself to be handcuffed. *Id.* at 642. In another case with facts remarkably similar to those at bar, officers used physical force and multiple taser strikes to subdue a suspect who was running around and yelling that people were after him. *Hagans v. Franklin Cty. Sheriff's Ofc.*, 695 F.3d 505, 507 (6th Cir. 2012). The suspect soon lost consciousness and stopped breathing, and died three days later. *Id.* The Sixth Circuit held the officer who attempted to subdue the suspect taser did not

violate clearly established law, even though "the taser shocks might have contributed to [the suspect's] death." *Id.* at 511. And likewise, in *Estate of Collins v. Wilburn*, 755 F. App'x 550, 555 (6th Cir. 2018), the Court found officers were entitled to qualified immunity after using a Taser and physical strikes against a resisting suspect who later passed away. *See also Roell v. Hamilton Cty., Ohio/Hamilton Co. Bd. of Cty. Comm'rs*, 870 F.3d 471 (6th Cir. 2017) (officers' force likely not excessive, and they were entitled to qualified immunity, when they physically restrained, wrestled with, attempted to tase, and shackled suspect); *Sheffey v. City of Covington*, 564 F. App'x 783 (6th Cir. 2014) (no constitutional violation where officers repeatedly tased suspect who possessed handgun near school, and suspect later died); *Estate of Hill*, 853 F.3d 306 (6th Cir. 2017) (officer entitled to tase individual who, while experiencing a medical emergency, was resisting and striking out at paramedics); *Caie v. West Bloomfield Twp.*, 485 F. App'x 92 (6th Cir. 2012) (officer rightfully used taser to subdue suicidal, erratic, and noncompliant subject).

In addition, Plaintiffs cannot overcome the "clearly established" prong of the qualified immunity analysis. This is a high hurdle; "[e]xisting caselaw . . . must put the precise question 'beyond debate.'" *Rudlaff*, 791 F.3d at 643 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Again, Plaintiffs admit Marr was at a Glasgow residence, making remarks that caused enough concern for someone to call the police. [DN 1 at 4 ¶11.] They admit Marr told officers he had a knife in his possession. [*Id.* at 5 ¶14.] And they admit some form of physical altercation ensured when the officers attempted to take Marr into custody. [*Id.* at 5 ¶¶15-17.] Defendants are unaware of any binding Supreme Court or Sixth Circuit authority directing that the use of force by Officer Turcotte, Officer Phillips, and Sergeant Murrell was plainly unlawful. If anything, the above-cited cases counsel in the opposite direction, suggesting the officers did not violate the Fourth Amendment. At the very least, these cases create ambiguity in the law such that Plaintiffs

cannot meet their burden to establish that reasonable officers in the individual Defendants' positions would have known their actions were unconstitutional. Officer Turcotte, Officer Phillips, and Sergeant Murrell are therefore entitled to qualified immunity, and Plaintiffs' § 1983 claim against them in their official capacities must be dismissed.

D. Plaintiffs' § 1983 claim Against the City of Glasgow Fails

Finally, Plaintiffs have asserted a § 1983 claim against the City of Glasgow. As a threshold matter, Plaintiffs' claims against the City must be dismissed because, for the reasons explained above, they have failed to plead an underlying constitutional violation against the individual officers. "There can be no *Monell* municipal liability under § 1983 unless there is an underlying constitutional act against the plaintiff." *Dibrell v. City of Knoxville, Tenn.*, 984 F.3d 1156, 1165 (6th Cir. 2021) (cleaned up).

However, even if the Court believes Plaintiffs' claims against the individual officers should move past the pleading stage, it must still dismiss Plaintiffs' § 1983 claim against the City. "Section 1983 does not permit a plaintiff to hold a municipality . . . automatically liable for the unconstitutional actions of its employees under a vicarious-liability theory." *Id.* (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Rather, a municipality may be held liable under § 1983 only if "the plaintiff establishes that the municipality's 'policy' or 'custom' is what led to a violation of the plaintiff's constitutional rights." *Id.* (citations omitted).

To survive the pleading stage on a municipal liability claim, a plaintiff must sufficiently allege: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013). Here,

Plaintiffs do not allege that the City of Glasgow's policies are themselves illegal, that any high-ranking official ratified illegal actions, or that the City has a custom of tolerating constitutional violations. Rather, Plaintiffs present this as a failure-to-train case, alleging as follows:

> 32. On information and belief, the GPD's training and policies fail to provide adequate training to officers in using a reasonable degree of force when a suspect is posing a threat to an officer, themselves, or someone else.
>
> 33. As a result of this failure, there is a pattern of GPD officers in exercising unreasonable force during the course of an arrest or inquiry.
>
> 34. The conduct of the GPD officers during the incident in question, as well as past cases worked by the GPD, have shown that the GPD routinely exercises excessive force during the exercise of official duties.
>
> 35. Upon information and belief, GPD has not adequately trained its officers despite its knowledge of its officers' use of excessive force. The GPD has acted with deliberate indifference in failing to properly train its agents and officers, impliedly approving of the use of excessive force during the commission of police duties.

[Complaint at 7.]

These threadbare allegations concerning the City's officer training program cannot survive the federal pleading standard. "A failure-to-train claim . . . requires a showing of prior instances of unconstitutional conduct demonstrating that the municipality had ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Id.* (cleaned up). More specifically, the plaintiff must allege "(1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury." *Ellis ex rel. Pendergrass v. Cleveland Mun. School Dist.*, 455 F.3d 690, 700 (6th Cir. 2006). As to the municipality's deliberate indifference, the plaintiff must further allege either (1) "prior instances of unconstitutional conduct demonstrating that the municipality has ignored a history of abuse and was clearly on notice that the training in this particular area was

deficient and likely to cause injury," or (2) "a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation." *Karsner v. Hardin Cty.*, No. 3:20-CV-125-RGJ, 2021 WL 886233, at *15 (W.D. Ky. Mar. 9, 2021) (cleaned up).

Here, Plaintiffs have failed to allege many of the necessary elements of a § 1983 failure-to-train claim, and the few elements they have alleged are unaccompanied by any facts to back up their legal conclusions. For instance, although Plaintiffs claim the City's "training and policies fail to provide adequate training," [*id.* at 7 ¶32], they plead no facts concerning what those policies actually are. Likewise, although Plaintiffs say the City's officers "routinely exercise[] excessive force during the exercise of official duties," [*id.* at 7 ¶34], they provide no examples of past unlawful actions they characterize as "routine[]." Further, several of Plaintiffs' allegations concerning a failure to train are made upon their information and belief. But in the post-*Twombly* and *Iqbal* era, this method of pleading is disfavored because "information and belief" allegations "are precisely the kinds of conclusory allegations that *Iqbal* and *Twombly* condemned and thus told [courts] to ignore when evaluating a complaint's sufficiency." *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 506 (6th Cir. 2013) (emphasis added).

This Court and others have often dismissed § 1983 municipal failure-to-train claims where the plaintiff's complaint consisted of mere legal conclusions unsupported by specific facts. As recently as last month, this Court dismissed a plaintiff's failure-to-train claim when she failed to "allege[] that Hardin County and the City of Radcliff had a pattern of committing similar unconstitutional violations." *Karsner*, 2021 WL 886233, at *15. The allegations made by the plaintiff in *Karsner* are strikingly similar to those made by Plaintiffs here—she recited the elements of a failure-to-train claim in conclusory fashion without stating any specific facts. *Id.* at

*12-13. This case is also similar to *Fuller v. Louisville Metro Government*, No. 3:17-cv-661-DJH, 2018 WL 3058883, at *4 (W.D. Ky. June 20, 2018), where the plaintiff's complaint merely referenced the existence of a municipal policy and said the defendants ignored it. This Court dismissed the municipal liability claim, holding the plaintiff's "conclusory allegation that [the decedent's] death resulted from a Louisville Metro custom or policy does not suffice to state a plausible claim for relief." *Id.* (citing cases). *See also Lewis v. Louisville/Jefferson Cty. Metro Gov't*, No. 3:18-CV-00071-GNS-CHL, 2020 WL 6386871, at *5 (W.D. Ky. Oct. 30, 2020) (holding plaintiff's "scant allegation" of deliberate indifference was insufficient to state a *Monell* claim where the plaintiff "has not provided any factual basis concerning any . . . custom or policy, that any applicable policy is illegal, or that there is a policy of inadequate training, supervision, etc."); *Taylor v. Brandon*, No. 3:14-cv-588-DJH-DW, 2016 WL 258644, at *3 (W.D. Ky. Jan. 20. 2016) ("Merely alleging that negligent training occurred and amounts to deliberate indifference" requires dismissal of *Monell* failure-to-train claim under the *Iqbal* pleading standard).

Whether or not Plaintiffs' § 1983 claims against the individual officers survive, their municipal liability claim against the City of Glasgow must be dismissed. Plaintiffs' minimal recitation of some (but not all) elements of a *Monell* failure-to-train claim, accompanied only by "information and belief" allegations and no well-pleaded facts, is simply insufficient to make out a plausible claim for relief against the City. This claim must be dismissed.

III. Dismissal of Plaintiffs' § 1983 Claim Requires Dismissal of Their Common-Law Battery Claims

Plaintiffs' § 1983 claim must be dismissed for the reasons set forth above—they have failed to plead an objectively unreasonable application of force or that Marr's death resulted from an unconstitutional municipal policy or custom. An ancillary consequence is that Plaintiffs' claim for common-law battery must also be dismissed. This Court and the Sixth Circuit have held that,

"[i]f police action is reasonable under Section 1983, a plaintiff cannot succeed on a common law battery claim." *Reich v. City of Elizabethtown*, No. 3:16-cv-00429-RGJ, 2018 WL 6028719, at *12 (W.D. Ky. Nov. 16, 2018) (citing *Atwell v. Hart Cty., Ky.*, 122 F. App'x 215, 219 (6th Cir. 2005)). It follows, then, that because Plaintiffs cannot overcome qualified immunity at the pleading stage as against the individual Defendants, they cannot make out a claim against them for battery under Kentucky law. And because the individual Defendants cannot be liable for battery, the City of Glasgow cannot be liable under a *respondeat superior* theory as pleaded by Plaintiffs. [*Id.* at 10 ¶52.] Thus, Plaintiffs' battery claim must be dismissed.

IV. Defendants are Entitled to Immunity on Plaintiffs' Negligence Claims

Plaintiffs' penultimate substantive claim is for ordinary negligence and wrongful death under state law. Plaintiffs allege Defendants had a duty not to exceed their police powers during the course of Marr's arrest, and breached that duty by using excessive force. [DN 1 at 10 ¶¶55-56.] They further allege the City is vicariously liable for its employees' negligence. [*Id.* at 10 ¶58.]

In Kentucky, public officials and employees enjoy qualified official immunity from damages liability arising from "the negligent performance . . . of (1) discretionary acts or functions . . . ; (2) in good faith; and (3) within the scope of the employee's authority." *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). A discretionary act is one "involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment." *Id.* Conversely, a ministerial act, for which there is no qualified immunity, is "one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Id.* (citation omitted).

Here, Plaintiffs allege the individual officers were acting within the course and scope of their employment by the City of Glasgow. [*Id.* at 4 ¶8.] The question, then, is whether an arrest, and specifically an officer's determination of the amount of force necessary to effect and arrest, is discretionary or ministerial. This question has been answered definitively by Kentucky's state and federal courts, holding that "the determination of the amount of force required to effect the investigatory stop or arrest is [] a discretionary act within the scope of a peace officer's authority." *Smith v. Norton Hosps., Inc.*, 488 S.W.3d 23, 31 (Ky. Ct. App. 2016); *see also Nichols v. Bourbon Cty. Sheriff's Dept.*, 26 F. Supp. 3d 634, 642 (E.D. Ky. 2014). And this Court must defer to the pronouncements of Kentucky's state appellate courts on this matter of state law. *See* Wright & Miller, 19 Fed. Prac. & Proc. Juris. § 4507 (3d ed. 2020).

As noted above, the qualified immunity afforded to public officials in carrying out discretionary acts may be overcome by a showing of bad faith. A showing of bad faith "can be predicated on a violation of a constitutional, statutory, or other clearly established right . . . or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive." *Yanero*, 65 S.W.3d at 523. Defendants previously explained that Plaintiffs have failed to adequately plead a clearly-established Fourth Amendment violation. Plaintiffs have also failed to plead any facts supporting an allegation of willful, malicious, or intentional conduct by the individual officers. Therefore, the bad faith exception to qualified official immunity does not apply, and the individual officers are immune from suit.

Because the individual officers cannot be held liable, the City is absolved from liability under Plaintiffs' *respondeat superior* theory. Further, the City is immune under Kentucky's Claims Against Local Governments Act ("CALGA"), KRS 65.200 *et seq.* CALGA applies to "[e]very action in tort against any local government" in Kentucky, KRS 65.2001, and grants local

governments immunity from "injuries or losses resulting from . . . [a]ny claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government," KRS 65.2003. As with the common-law immunity granted to officers under *Yanero* and its progeny, the statutory grant of immunity supplied by KRS 65.2003 does not apply to "liability for negligence arising out of acts or omissions of [] employees carrying out their ministerial duties." The Kentucky Court of Appeals has stated KRS 65.2003 "codified the judicially recognized exception to the rule of municipal tort liability based upon discretionary acts." *City of Hodgenville v. Sanders*, 2020 WL 5742831, at *4 (Ky. Ct. App. Sept. 25, 2020).

Here, because Plaintiffs have grouped together all Defendants in their negligence and wrongful death claims, it is somewhat difficult to discern whether Plaintiffs are alleging the City engaged in any negligent acts separate from those acts alleged against the officers. *See* [*id.* at 10-11.] Nevertheless, to the extent Plaintiffs believe the City itself behaved negligently in connection with Marr's arrest, it too is entitled to immunity. CALGA extends immunity to local governments for "tortious actions [] aris[ing] out of the exercise of discretionary duties," and as stated above, effecting an arrest is discretionary under Kentucky law. *Madden v. City of Louisville*, No. 2003-CA-001162-MR, 2004 WL 1588279, at *4 (Ky. Ct. App. July 16, 2004); *Smith*, 488 S.W.3d at 31. Because both the individual officers and the City of Glasgow are entitled to a form of discretionary function immunity under state law, Plaintiffs' ordinary negligence and wrongful death claim must be dismissed.

V. The City is Entitled to Immunity on Plaintiffs' Negligent Hiring Claim, Which is Inadequately Pleaded

Plaintiffs' last claim is against the City of Glasgow, for its alleged negligence in hiring, retaining, supervising, and training the individual officers. [DN 1 at 12.] In two paragraphs,

Plaintiffs allege the City "had a duty to properly hire, train, and supervise the activities of its employees, including the GPD policemen," and failed to do so, resulting in Marr's death. [*Id.* at 12 ¶¶70-71.]

As with the above-examined negligence claim, the City is entitled to discretionary function immunity on this claim through CALGA. Considering a similar negligent hiring, training, supervision, and retention claim, this Court recently held "the training, supervision, and management of employees is a discretionary function 'involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment.'" *McMillen v. Windham*, No. 3:16-cv-00558-RGJ-CHL, 2020 WL 3964781, at *15 (W.D. Ky. July 13, 2020) (quoting *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 477 (Ky. 2006)); *see also Doe v. Univ. of Ky.*, 361 F. Supp. 3d 687, 702 (E.D. Ky. 2019) ("[T]he hiring and supervision of employees is an inherently discretionary function.").

The negligent hiring, retention, supervision, and training claim must also be dismissed because Plaintiffs inadequately pleaded their claim. Defendants have already explained, in the context of Plaintiffs' § 1983 municipal liability claim, how it is not enough for Plaintiffs to merely recite the elements of an action and state they are entitled to relief. Plaintiffs have made this same mistake in the context of this negligence claim against the City. They allege no facts concerning how the City hires its officers, how it evaluates its officers and decides they will be retained, how it supervises its officers, or how it trains its officers. Once again, Plaintiffs have failed to plead sufficient factual content allowing this Court to reasonably infer that the City could be held liable for negligent hiring, retention, supervision, or training. *South Side Quarry*, 2020 WL 3977659, at *3 (citation omitted). The City is therefore entitled to dismissal of this claim as well.

VI. Plaintiffs' Loss of Consortium Claims Must Be Dismissed

Finally, Plaintiffs' loss of spousal and parental consortium claims must be dismissed. *See* [DN 1 at 11-12.] "Under Kentucky law, loss of consortium is a separate cause of action, but it is 'derivative' of the underlying claim[s]." *Burgett v. Troy-Build LLC*, 970 F. Supp. 2d 676, 685 (E.D. Ky. 2013) (citations omitted). Where, as here, all underlying substantive claims must be dismissed, so too must the loss of consortium claims. *Id.*

Conclusion

For the foregoing reasons, Defendants City of Glasgow, City of Glasgow Police Department, Guy Joseph Turcotte, Hayden Phillips, and Cameron Murrell respectfully ask this Court to dismiss Plaintiffs' Complaint against them with prejudice.

This 12th day of April, 2021.

KERRICK BACHERT PSC
1025 State Street
Bowling Green, KY 42101
Telephone: (270) 782-8160
tkerrick@kerricklaw.com
mcook@kerricklaw.com

/s/ Matthew P. Cook
Thomas N. Kerrick
Matthew P. Cook
Counsel for Defendants

CERTIFICATE OF SERVICE

This will certify that on this the 12th day of April, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record. I further certify that on the 12th day of April, 2021, I emailed a copy of the foregoing pleading to the following:

David F. Broderick
Broderick & Davenport, PLLC
921 College Street
P.O. Box 3100
Bowling Green, KY 42102-3100
dbroderick@broderickfirm.com

/s/ Matthew P. Cook
Thomas N. Kerrick
Matthew P. Cook
Counsel for Defendants