UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BIG STONE GAP DIVISION

Z.F., AN INFANT, BY HIS NEXT FRIEND, ALFRED FLEMING, *Plaintiff*, **v.** **RYAN ADKINS,** *Defendant*.	Case No. 2:18-CV-00042

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The basis for Defendant Ryan Adkins's motion for summary judgment remains a mystery. Rather than explaining why summary judgment should be granted in his favor, Adkins provided a miscellany of sworn and unsworn statements in a single 103-page document styled as a "motion." Adkins has failed to meet his burden under Rule 56 of the Federal Rules of Civil Procedure. And even if the Court were to consider the entirety of Adkins's unconventional filing, his motion hardly entitles him to summary judgment on Plaintiff Z.F.'s excessive-force claim. Adkins's motion should be denied.

ARGUMENT

When a party moves for summary judgment, that party carries the "burden of showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Estate of Kimmell ex rel. Kimmell v. Seven Up Bottling Co.*, 993 F.2d 410, 412 (4th Cir. 1993). Defendant Adkins has failed to carry this burden, as required by Rule 56(a).

I. Deputy Adkins's motion is devoid of substantive legal reasoning and argument.

Adkins's motion is rife with substantive and procedural deficiencies. Most glaringly, the motion contains no "statement of the facts," nor does it include any "supporting reasons." Local Civ. R. 11(c)(1); *see also* Local Civ. R. 56(b) (requiring that motions for summary judgment contain "a separately captioned section setting

forth . . . the material facts claimed to be undisputed together with specific record citations in support thereof."). Indeed, Adkins has made no effort to explain *why* he is entitled to summary judgment on any of Z.F.'s claims. The closest he comes is in declaring—in conclusory fashion—that "there is no genuine dispute as to any of the material facts and/or as to any necessary Qualified Immunity, for School Resource Officer, Adkins." Mot. 90. But that is simply a restatement of Rule 56(a)'s standard, not a "showing" that the standard has been met. This defect alone warrants the denial of Adkins's motion.

Although Adkins intersperses various affidavits throughout his motion, he provides the Court no basis for assessing their import.[1] The same is true of the lengthy deposition excerpts that were manually typed into Adkins's motion. Adkins has not identified which passages are most relevant to his motion (and why), nor has he provided any of the surrounding text to contextualize those fragments that do appear in his motion.[2] *See Williams v. Am. Family Mut. Ins. Co.*, No. 2:09-CV-00675, 2012 WL 1574825, at *4 n.2 (D. Nev. May 2, 2012) ("Plaintiffs have copied and

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1 In addition, one of the affidavits filed by Stacy Nichols indicates that it was notarized three days before the affidavit was actually signed by Ms. Nichols. Mot. 5. And the affidavits submitted by Captain Tim Wagner and Investigator Charles Curry appear to be identical, save for the substitution of their respective names. *See* Mot. 25-27, 31-33.

2 For example, the deposition excerpt spanning pages 53 and 54 of Adkins's motion refers to an earlier matter having nothing to do with Adkins's use of force against Z.F. *See* Deposition of Z.F., Second Declaration of Daniel B. Rice ("Second Rice Decl."), Ex. A, at 24:20-26:15.

pasted into the body of the brief 34 pages of disjointed deposition excerpts which have little context . . . and do not appear to have been selected with much care."); *Maag v. Silversea Cruises, Ltd.*, No. 18-21535-CV, 2019 WL 1724044, at *2 n.2 (S.D. Fla. Apr. 18, 2019) ("[R]ather than present arguments with relevant case law, Plaintiff decided to copy and paste large portions of her deposition transcript."). And Plaintiff has not independently verified the accuracy of all 37 pages of hand-typed deposition excerpts, which contain many obvious mistakes.[3]

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[3] *Compare* Mot. 55 ("is had to have a password"), *with* Z.F. Dep., Second Rice Decl., Ex. A, at 33:3-4 ("**it** had to have a password"); Mot. 56 ("the use the Internet"), *with* Z.F. Dep., Second Rice Decl., Ex. A, at 55:3 ("the use **of** the Internet"); Mot. 57 ("This is correct. Of the possibility of that/"), *with* Z.F. Dep., Second Rice Decl., Ex. A, at 62:17-18 ("**That** is correct. Of the possibility of **that.**"); Mot. 57 ("that's what he need to find out"), *with* Z.F. Dep., Second Rice Decl., Ex. A, at 64:5-6 ("that's what he **needed** to find out"); Mot. 58 ("who know what was going on"), *with* Z.F. Dep., Second Rice Decl., Ex. A, at 66:1-2 ("who **knew** what was going on"); Mot. 62 ("They have has some fights there"), *with* Adkins Dep., Second Rice Decl., Ex. B, at 17:7 ("They have **had** some fights there"); Mot. 63 ("breaking schools rules"), *with* Adkins Dep., Second Rice Decl., Ex. B, at 22:23-24 ("breaking **school** rules"); Mot. 66 ("We walked tight straight over to him"), *with* Adkins Dep., Rice Decl., Ex. A, at 34:12-13 ("We walked **right** straight over to him"); Mot. 70 ("walked around and hot in the main path"), *with* Adkins Dep., Second Rice Decl., Ex. B, at 47:13-14 ("walked around and **got** in the main path"); Mot. 81 ("what we have already mentioned here>"), *with* Adkins Dep., Rice Decl., Ex. A, at 91:7 ("what we have already mentioned **here?**"); Mot. 82 ("my immediate supervisor, brad Mullins"), *with* Adkins Dep., Rice Decl., Ex. A, at 95:6-7 ("my immediate supervisor, **Brad** Mullins"); Mot. 82 ("asked him to pit his phone"), *with* Adkins Dep., Rice Decl., Ex. A, at 95:16 ("asked him to **put** his phone"); Mot. 85 ("permitted to have cell phone"), *with* Adkins Dep., Second Rice Decl., Ex. B, at 128:6 ("permitted to have cell **phones**"); Mot. 87 ("for the Sheriff's Officer"), *with* Adkins Dep., Second Rice Decl., Ex. B, at 131:17 ("for the **sheriff's office**"); Mot. 88 ("concern if what might be happening"), *with* Adkins Dep., Second Rice Decl., Ex. B, at 132:7 ("concern **of** what might be happening"); Mot. 89 ("were you raking him out the door?"), *with* Adkins Dep.,

In addition, for the second time in this case, Adkins has filed a motion for summary judgment containing numerous unsworn assertions. *See* Mot. 6, 9, 14, 20, 29-30, 35-36, 93-102. As this Court has already explained, "[i]t is well established that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment." *Z.F. v. Adkins*, No. 2:18-CV-00042, 2019 WL 1559022, at *3 (W.D. Va. Apr. 10, 2019) (quoting *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993)).

Finally, although Adkins has identified (at 48-51) five judicial decisions that allegedly "appl[y] to this case," Mot. 48, he makes no effort to explain why any of those cases—none of which pertain to excessive force, and four of which are not binding on this Court—are relevant to his motion. Again, Adkins's motion contains no legal argument whatsoever. Adkins has not even attempted to "show[]" that he is "entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a), and it is not the Court's responsibility to remedy this defect. Adkins's motion should be denied.

II. Under any reading of his motion, Adkins cannot prevail on the present summary-judgment record.

Even if Adkins had filed a summary-judgment memorandum supported by argument and citations to the record, he still would be unable to demonstrate an entitlement to relief on Plaintiff's excessive-force claim.

Second Rice Decl., Ex. B, at 137:8 ("were you **taking** him out the door?"); and Mot. 89 ("he was pilling me with him"), *with* Adkins Dep., Second Rice Decl., Ex. B, at 137:10 ("he was **pulling** me with him").

A. Adkins used excessive force in tackling an unarmed child who posed no threat to anyone.

As explained in Plaintiff's summary-judgment memorandum (at 14-24), Adkins used excessive force when he tackled Z.F. in the hallway of L.F. Addington Middle School. By Adkins's own admission, Z.F. was unarmed and behaving in an entirely nonviolent and non-threatening manner. Adkins Dep., Rice Decl., Ex. A, at 50:11-21, 60:5-24, 61:1-6. Video footage clearly shows that Z.F. was not trying to flee the school building either before or after Adkins began restraining him. Hallway Video, Rice Decl., Ex. F, at 12:45:05 to 12:45:13. And even if he had been, slamming a child to the ground is a disproportionate response to the attempted violation of a school rule (which Adkins had no authority to enforce). *See* Mem. Supp. Pl.'s MSJ 14-15. Adkins, moreover, was not investigating a type of violent crime requiring immediate incapacitation, and his own subsequent actions belie any assertion that Adkins needed to take extraordinary measures to preserve evidence relevant to his investigation. *See id.* at 15, 19. The egregiousness of Adkins's actions is further underscored by Z.F.'s youth, the fact that Adkins subjected him to violent force in school, and the magnitude of Z.F.'s resulting injuries. *See id.* at 20-24.

Rather than contending that established excessive-force principles entitle him to relief, Adkins simply appends a series of affidavits, deposition excerpts, and other documents to his motion. But none of them calls into question what the video footage plainly shows: a violent attack that was wholly out of proportion to Z.F.'s

actions. In fact, Ms. Nichols's affidavit even confirms that Z.F. was walking "toward[] the main office" at the end of the hallway—and not toward the school's front exit—when Adkins began restraining him. Mot. 4.

Z.F. does not dispute that Adkins "had [p]robable [c]ause to take possession of Z.F.'s phone." Mot. 25. But that fact did not authorize Adkins to seize Z.F.'s person—or even Z.F.'s phone—using any amount of force that he wished. Adkins's motion does not cite a single case on the use of excessive force. He instead attaches statements indicating that various prosecutors, law-enforcement personnel, and school officials believe that Adkins did nothing wrong. *See* Mot. 8, 21-22, 26-27, 32-33. But these self-interested assessments carry no weight with this Court, which must independently review the fully developed factual record—including Adkins's deposition testimony and the extent of Z.F.'s injuries—alongside Fourth Circuit precedent on the use of force against children in schools.

It is irrelevant whether or not Z.F. told Adkins that he was "OK" following the attack. Mot. 41, 44-45. Nor does it matter whether Z.F. was visibly distressed when interacting with his friends the next morning. *Id.* at 27. As Z.F. explained at his deposition, "you know how it is. You don't want to show being hurt." Z.F. Dep., Second Rice Decl., Ex. A, at 21:18-19. But Z.F. was in fact experiencing severe trauma. That very morning, Z.F. "threw up," "was freaking shaking," and "ke[pt] having anxiety attacks." Fleming Decl., Ex. K, at 1. And he had to be taken to the emergency room on the evening of April 19. It is likewise irrelevant that Z.F. had

missed school on a number of occasions during the 2017-18 school year before the incident. *See* Mot. 90-91. There can be no dispute that Z.F.'s skyrocketing absence rate following April 18 was attributable to the very real injuries caused by Adkins. *See* Fleming Decl., Ex. G; Z.F. Decl. ¶¶ 19-20; Fleming Decl. ¶¶ 11-18.

Finally, it is true that the record contains factual disputes over (1) when Adkins told Z.F. that he needed his phone for an investigation and (2) whether Z.F. informed Adkins that he was going to call his dad. But these disputes are immaterial to the parties' present motions. Even accepting Adkins's account of the facts, his actions still violated settled Fourth Amendment principles. The undisputed facts and video evidence show that Adkins used excessive force in tackling an unarmed schoolchild who concededly posed no danger to anyone. *See* Pl.'s Mem. Supp. MSJ 14-20. At an absolute minimum, a reasonable jury could conclude as much from the existing record. Adkins's motion should therefore be denied.

B. Adkins is not entitled to qualified immunity.

To be entitled to qualified immunity in an excessive-force case, an officer must have acted "objectively reasonabl[y] in view of the clearly established law at the time of the alleged event." *Hill v. Crum*, 727 F.3d 312, 321 (4th Cir. 2013). For a plaintiff to prevail, however, it is "not required . . . that a court previously found the specific conduct at issue to have violated an individual's rights." *E.W. ex rel. T.W. v. Dolgos*, 884 F.3d 172, 185 (4th Cir. 2018). It is enough if "a general constitutional rule already identified in the decisional law applies with obvious clarity to the specific conduct in

question." *Id.* (quoting *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 543 (4th Cir. 2017)).

Although Adkins asserts (at 1, 90) that he is entitled to qualified immunity in this matter, he is mistaken. As the Fourth Circuit has explained, "[t]he burden of proof and persuasion with respect to [the] defense of qualified immunity rests on the official asserting that defense." *Meyers v. Baltimore Cty.*, 713 F.3d 723, 731 (4th Cir. 2013); *see also Betton v. Belue*, 942 F.3d 184, 190 (4th Cir. 2019). Adkins has entirely neglected this burden, failing to articulate a single reason why the Court should deem qualified immunity applicable here—just as he offered no argument defending his use of force against Z.F. as consistent with the Fourth Amendment.[4]

That omission is not surprising, given that bedrock excessive-force principles "appl[y] with obvious clarity" to Adkins's use of violent force against Z.F. *E.W.*, 884 F.3d at 185. As explained in Z.F.'s summary-judgment memorandum (at 13-17), all three factors that the Supreme Court has identified as particularly relevant in excessive-force cases, *see Graham v. Connor*, 490 U.S. 386, 396 (1989), cut uniformly in Z.F.'s favor. Z.F. was not suspected of committing a violent crime; he concededly posed no threat to anyone, including Officer Adkins; and he was not attempting to evade arrest when Adkins tackled him. As in prior cases, "the weakness of the

[4] The absence of any argument from Adkins on the issue of qualified immunity accords with his decision not to raise that affirmative defense until *after* the close of discovery. *See Ridpath v. Bd. of Governors of Marshall Univ.*, 447 F.3d 292, 305 (4th Cir. 2006) ("Generally, qualified immunity must be raised in an answer or a dismissal motion.").

Graham factors was so apparent that any reasonable officer would have realized that the force employed was excessive." *Smith v. Ray*, 781 F.3d 95, 106 (4th Cir. 2015).

This prohibition on using grossly disproportionate force was firmly established as of April 18, 2018, the date on which Adkins tackled Z.F. As if forecasting this case's very fact pattern, the Fourth Circuit had previously rejected an officer's effort to assert qualified immunity due to "the simple fact that the officer took a situation where there obviously was no need for the use of any significant force and yet took an unreasonably aggressive tack that quickly escalated into a violent exchange." *Smith*, 781 F.3d at 104; *see also Meyers*, 713 F.3d at 734 ("[O]fficers using unnecessary, gratuitous, and disproportionate force . . . are not entitled to qualified immunity" (quotation omitted)); *Jones v. Buchanan*, 325 F.3d 520, 530 (4th Cir. 2003) (clarifying that a use of force exceeds constitutional bounds when there is no "legitimate law enforcement need" for the amount of force used). As the video footage plainly shows, slamming Z.F. into the concrete floor was unnecessary to any legitimate law-enforcement need. And even if Adkins's version of events were not blatantly contradicted by the record, a student's attempted violation of a school rule—or suspected commission of a nonviolent crime—cannot justify the type of "violent exchange" Adkins initiated. *Smith*, 781 F.3d at 104; *see also* Mem. Supp. Pl.'s MSJ 14-15.

Z.F.'s youth and the school context further underscore the egregiousness of Adkins's actions. After explaining at length why "officers should use more restraint

when dealing with student misbehavior in the school context," the *E.W.* court clarified that this principle was "clearly established for any future qualified immunity cases" in the Fourth Circuit. 884 F.3d at 183, 187. To be sure, the officer in *E.W.* was accorded qualified immunity on two distinct grounds: (1) the Fourth Circuit had not yet directed police officers to use more restraint against schoolchildren, and (2) an earlier Fourth Circuit decision had specifically stated that "the use of handcuffs would 'rarely' be considered excessive force" when an officer has probable cause to arrest a suspect. *Id.* at 186. But no such impediments exist in this case. Unlike in *E.W.*, moreover, the alleged crime at issue here was not a violent one, *id.* at 180, and Z.F.'s injuries were far from "de minimis," *id.* at 185. Adkins's actions simply do "not qualify as the type of bad guesses in gray areas that qualified immunity is designed to protect." *Betton*, 942 F.3d at 194 (quotation omitted).

Nor would denying qualified immunity here be remotely unusual. A multitude of recent Fourth Circuit decisions have rejected officers' requests for qualified immunity in Fourth Amendment excessive-force cases. *See, e.g.*, *Betton*, 942 F.3d at 195; *Hupp v. Cook*, 931 F.3d 307, 323 (4th Cir. 2019); *Harris v. Pittman*, 927 F.3d 266, 281 (4th Cir. 2019); *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019); *Hensley ex rel. North Carolina v. Price*, 876 F.3d 573, 586 (4th Cir. 2017); *Hawkins v. McMillan*, 670 F. App'x 167, 168 (4th Cir. 2016) (per curiam); *Connor v. Thompson*, 647 F. App'x 231, 239 (4th Cir. 2016); *Yates v. Terry*, 817 F.3d 877, 888 (4th Cir. 2016); *Barfield v. Kershaw Cty. Sheriff's Office*, 638 F. App'x 196, 204 (4th Cir. 2016); *Smith*, 781 F.3d at 106; *Smith*

v. Murphy, 634 F. App'x 914, 916 (4th Cir. 2015); *Krein v. Price*, 596 F. App'x 184, 189 (4th Cir. 2014); *Streater v. Wilson*, 565 F. App'x 208, 212 (4th Cir. 2014); *Cooper v. Sheehan*, 735 F.3d 153, 160 (4th Cir. 2013); *Thomas v. Holly*, 533 F. App'x 208, 218 (4th Cir. 2013); *Jiggets ex rel. S.J. v. Long*, 510 F. App'x 278, 287 (4th Cir. 2013); *Meyers*, 713 F.3d at 735; *Henry v. Purnell*, 652 F.3d 524, 534 (4th Cir. 2011) (en banc). This Court would be on firm ground in adopting that same approach here.

In any event, according Adkins qualified immunity on Z.F.'s damages claim would not bring this case to a close, because neither party has moved for summary judgment on Z.F.'s claims for declaratory and injunctive relief.[5] Thus, if the Court were to grant Adkins's motion in full, Z.F. would still be entitled to a trial on his claims for prospective relief.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment should be granted. Although Plaintiff does not believe that a hearing is necessary to resolve either party's motion, if the Court has any questions or would be inclined to grant Adkins's motion, Plaintiff would appreciate the opportunity to present oral argument. Further, if the Court grants Plaintiff's motion, Plaintiff would request that the current February 2020 trial date be kept in place to determine an appropriate amount of damages.

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[5] Indeed, Adkins's 103-page motion does not use the words "declaratory" or "injunctive" a single time. And because Z.F. did not move for summary judgment on his claims for declaratory and injunctive relief, his summary-judgment memorandum omits record evidence that would support these claims.

Respectfully submitted,

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Dated: December 23, 2019

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2019, I electronically filed the foregoing brief with the U.S. District Court for the Western District of Virginia by using the Court's CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Daniel B. Rice
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