

# THE LOCAL GOVERNMENT LIABILITY BEAT



Presented by Local Government Risk Management Services, Inc.

*A Service Organization of the Association County Commissioners of Georgia and the Georgia Municipal Association Risk Management Programs*

## Fifth Circuit Holds K9 Bites were Reasonable on Dangerous Suspect Who Claims He Surrendered

*By Brian S. Batterton, J.D., Legal and Liability Risk Management Institute*

On July 11, 2018, the Fifth Circuit Court of Appeals decided *Escobar v. Montee*,<sup>1</sup> in which the court examined whether it was reasonable to allow a police K9 to bite a felony assault suspect who was within arm's reach of his knife for approximately a minute until he was safely handcuffed. The relevant facts of Escobar are as follows:

Escobar assaulted his wife in a restaurant parking lot, and then left her alone in a nearby retail lot. After noticing police vehicles at his house, he fled into the night. He ran through several neighbors' yards, finally hiding in the backyard of a house a few blocks from his own. He remained there, crouched under an awning near the back door, for about twenty minutes while the police searched for him, both on foot and in a helicopter. They eventually located Escobar, and the helicopter circled the house while the police decided on a course of action.

While the helicopter monitored Escobar, the police were informed that he had a knife. Furthermore, they were told that Escobar's mother had called and said the police would have to kill Escobar to catch him; he would not go without a fight. Based on those facts, Montee – the K-9 officer in charge of the police dog "Bullet" – decided not to give his usual warning to the suspect that he would deploy the canine. Instead, he threw Bullet over the fence surrounding the backyard and only then scaled the fence himself.

Montee followed Bullet alongside the house into the backyard, where he claims he saw Escobar standing with the knife. Escobar disagrees; according to him, once he heard the dog and officers approaching, he dropped his knife and lay flat on the ground "like a parachute man." Either way, Escobar was then bitten by Bullet and wound up lying flat on the ground. Montee agrees that Escobar then dropped the knife but



maintains that the knife remained within Escobar's reach – a fact Escobar never disputes.

Escobar claims he remained on the ground in an attempt to convey his surrender. But Montee, believing Escobar still posed a threat because of the knife and warnings by Escobar's mother, allowed Bullet to continue biting Escobar until Escobar was fully subdued and in handcuffs. All in all, Escobar was bitten for approximately one minute. Once he was cuffed, the officers removed Bullet and took Escobar away; he eventually pleaded guilty of third-degree family assault.”<sup>ii</sup>

Escobar sued Officer Montee in federal district court and claimed that he violated his right to be free from excessive force when he (1) allowed the dog to bite him without first giving a warning, and (2) for allowing the dog to repeatedly bite him for one minute after he surrendered and was not resisting. The district court granted summary judgment to the officer on the first claim and held it was reasonable to release the dog without a warning in that circumstance. However, the district court denied qualified immunity for the officer regarding the second claim of allowing the dog to bite him after he surrendered. The district court held that a reasonable officer would have recognized that Escobar was surrendering and not resisting. Officer Montee appealed the denial of qualified immunity to the Fifth Circuit Court of Appeals.

The court of appeals noted that an officer engaged in a discretionary function, such as the decision to use particular force against a suspect, is entitled to qualified immunity from suit. In order to overcome the officer's qualified immunity, the plaintiff must show (1) that the officer violated a constitutional right, and (2) that the right was clearly established at the time of the violation.<sup>iii</sup>

The issue in this case was whether the officer was entitled to qualified immunity for allowing the dog to bite Escobar repeatedly for approximately a minute even though the plaintiff alleges that he had surrendered and was not resisting arrest.

The court first set out to determine the first prong of the qualified immunity analysis above, particularly whether the officer violated Escobar's rights under the Fourth Amendment when he allowed the dog to bite Escobar repeatedly for approximately a minute even though Escobar alleged that he had surrendered and was not resisting arrest. It should be noted that at this stage of the litigation, the court must credit the plaintiff's version of events.

The court then examined the legal standards that apply when they determine if a particular use of force was reasonable under the Fourth Amendment. The court stated

[E]xcessive force claims “in the context of arrests” are analyzed under the Fourth Amendment's “objective reasonableness standard.” Because “police officers are often forced to make split-second judgments . . . in circumstances that are tense, uncertain, and

rapidly evolving,” we must not use “the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396-97. Instead, we look at the case from the perspective of a reasonable officer on the scene, paying “careful attention to the facts and circumstances of each particular case.” *Id.* at 396. When viewing “the totality of the circumstances,” we pay particular attention to the *Graham* factors, i.e. [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.” *Darden v. City of Fort Worth*, 880 F.3d 722, 728-29 (5th Cir. 2018) (second quoting *Graham*, 490 U.S. at 396).<sup>iv</sup> [emphasis added]

The court also listed the relevant facts of the case, accepting the plaintiff's version of events, as they are required to do at this stage of the litigation. The court stated

Because we construe any disputed facts in Escobar's favor, we begin by laying out the facts as properly viewed: Escobar had dropped the knife and lay flat on the ground “like a parachute man” just before being bitten; Escobar did not struggle and begged for the dog to be removed; and the bites lasted for about one minute. But the following facts are undisputed: The knife remained within Escobar's reach; Montee knew about the knife and saw that it was within Escobar's reach; Escobar's mother had called and told the police that Escobar would have to be killed; the police were rightly informed that Escobar had committed a felony assault; and Escobar had fled into the night through multiple backyards before hiding for approximately twenty minutes.

With these facts in mind, the court then examined the three factors from *Graham* listed above. First, the court examined the seriousness of the crime at issue. The court reasoned that the felony assault he had committed against his was a serious offense and this weighed in favor of the officers.

The second, factor, whether Escobar posed a threat to the officers is the main issue in this case. Escobar cited cases that were not similar to his case in support of his argument. Particularly, the cases that he cited involved incidents where officers used force against suspects that they had no reason to believe were armed and/or violent. The court then cited the facts of Escobar distinguish his case as different from the cases that he used to attempt to support his case. The court stated that relevant facts were that Escobar (1) committed a felony assault, (2) fled the police at night, (3) hid in a neighbors yard for 20 minutes, (4) his mother warned police that he would not be arrested without a fight, (5) and the knife remained with his reach during the arrest. The court then stated that these facts

[W]ould lead a reasonable officer to believe that, as he had apparently promised, Escobar would not go without a fight; and the knife remained within

Escobar’s reach, ready to be used. In the face of such facts, a reasonable officer could believe that Escobar’s “surrender” was a ploy and that he was ready to snatch the knife again once the dog was removed.<sup>v</sup>

In support of the above conclusion, the court cited the Eleventh Circuit case, *Crenshaw v. Lister*.<sup>vi</sup> In *Crenshaw*, officers responded to two armed robbery calls. They then engaged in a vehicle pursuit and subsequent foot chase where Crenshaw fled into the woods. Crenshaw yelled his location and his intent to surrender and the canine officer released his dog without warning. Crenshaw screamed in pain, but the officer did not remove the dog until Crenshaw was handcuffed. The court held that the officer’s use of force was not excessive under the Fourth Amendment. The court discussed the Eleventh Circuit’s opinion and stated

The officer [in *Crenshaw*] had reason to believe that the suspect of an armed robbery was armed and, given the nature of the flight and location in the woods, “it was objectively reasonable for [the officer] to question the sincerity” of the surrender. *Id.* at 1293. Moreover, although the suspect was not actively resisting while being handcuffed, the officer was not required to call off the dog until the suspect was secured because he “had no reason to trust that [the suspect] would not suddenly attempt to do him harm.” *Id.*<sup>vii</sup> [emphasis added]

The court then reasoned that this was similar to the situation the officer faced with Escobar. His mother said that he would fight, he had fled in the dark and hid in a neighbor’s yard, and he had a knife within arm’s reach during the arrest. The court stated

[Officer] Montee could reasonably believe that Escobar – if the dog was called off before handcuffing – would then try to harm someone. Accordingly, a reasonable officer could think Escobar posed a threat.<sup>viii</sup> [emphasis added]



The court also noted that the third factor from *Graham*, whether the suspect was actively resisting arrest or attempting to evade arrest by flight was intertwined with the second factor that was discussed above. The court reasoned that since Escobar may have posed a threat, he may have also fled if the officer removed the dog prior to handcuffing Escobar.

Therefore, the court held

[B]ased on all the circumstances, it was objectively reasonable to permit Bullet to continue biting Escobar until he was fully handcuffed and subdued. Montee did not violate Escobar’s Fourth Amendment rights.

Thus, the court reversed the order of the district court that denied qualified immunity.

---

### Citations

- |      |   |       |                                |
|------|---|-------|--------------------------------|
| i.   | No. 17-10467 (5th Cir. Decided July 11, 2018) | v.    | <i>Id.</i> at 9                |
| ii.  | <i>Id.</i> at 2-3                             | vi.   | 556 F.3d 1283 (11th Cir. 2009) |
| iii. | <i>Id.</i> at 7                               | vii.  | <i>Id.</i> at 11               |
| iv.  | <i>Id.</i> at 7-8                             | viii. | <i>Id.</i>                     |

## How Important is Work-Life Balance?

*By Chris Ryan, LRMS Loss Control Field Rep*

Maintaining a healthy work-life balance is not only important for health and relationships, but it can also improve your employee’s productivity, and ultimately performance. Put simply, if your people don’t view work as a chore, then they will work harder, make fewer mistakes and are more likely to become advocates for your brand.

Businesses that gain a reputation for encouraging work-life balance have become very attractive – especially when you consider how difficult it can be to attract and retain millennials. The Oxford Economic suggests, “Replacing an employee costs on average around \$30,000 and it takes up to 28 weeks to get them up to speed.” Bearing this in mind, it might be a good idea to keep your existing employees happy. Focusing on work-life balance will help you draw a valuable talent-pool for new recruits and boost retention rates. It will save time and money, whilst ensuring a high level of in-house talent.

Here are some more reasons why work-life balance is important for your people and your organization:

- Fewer health problems
- More engagement
- Fewer “burnouts”
- More mindfulness



**LGRMS**  
**RISK CONTROL**  
**ACCG | GMA**

Local Government  
Risk Management Services  
3500 Parkway Lane . Suite 110  
Norcross, Georgia 30092

A Service Organization of the Association County Commissioners of Georgia and the Georgia Municipal Association

---

*This Issue . . .*

# K-9 Bites After Surrender

## Work-Life Balance

