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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Curtis Bohnert,

Plaintiff,

vs.

George A. Burke; Kevin Carr; Maricopa
County; Maricopa County Sheriff Joe
Arpaio,

Defendants.

No. CV-08-2303-PHX-LOA

ORDER

This matter is before the Court after review of the Joint Proposed Final Pretrial Order, doc. 137, following the December 14, 2010 final pretrial conference which the Court conducted on the record to address the issues remaining for resolution. The final pretrial conference was attended by Joseph Gmuca and Scott Halverson, counsel for Plaintiff; Karen Hartman-Tellez and Randall Garczynski, counsel for Defendants Maricopa County, Maricopa County Sheriff Deputies George Burke and Kevin Carr; and Maria Brandon and Richard Stewart, counsel for Sheriff Joe Arpaio.

As stated in the Joint Proposed Final Pretrial Order, and agreed to by the parties during the final pretrial conference, the only claims remaining in this case are: (1) whether Title II of the Americans With Disabilities Act (“ADA”) provides a cause of action against Defendants Arpaio, Burke, and Carr in their individual capacities [alleged in Count I of the Complaint]; (2) whether Defendants Arpaio and Maricopa County are

1 vicariously liable for violating Plaintiff's rights under Title II of the ADA [alleged in
2 Count II of the Complaint]; (3) whether Defendants Burke and Carr were negligent in
3 violation of Arizona law [Count III]; (4) whether the conduct of Defendants Burke and
4 Carr constituted extreme and outrageous conduct such that they inflicted emotional
5 distress on Plaintiff in violation of Arizona law [Count IV¹]; (5) whether the conduct of
6 Defendants Burke and Carr amounted to false arrest in violation of Arizona law [Count
7 V]; (6) whether Defendants Burke and Carr committed the tort of assault and battery in
8 violation of Arizona law [Count VI]; and (7) whether Defendants Maricopa County and
9 Arpaio are vicariously liable under the doctrine of *respondeat superior* for the state law
10 torts allegedly committed by Deputies Burke and Carr [Count VII]. (Docs. 137 at 6-8, 1)

11 The Court previously considered these same issues in conjunction with the
12 Motion for Summary Judgment filed by the State of Arizona, DPS Officer Mitchell, and
13 former DPS Director Roger Vanderpool (collectively referred to as the "State
14 Defendants").² (Doc. 81) Plaintiff filed a response and statement of facts to the Motion,
15 docs. 93, 96, to which the State Defendants timely replied, doc. 99. After consideration
16 of the briefing, on October 26, 2010, the Court granted summary judgment in favor of the
17 State Defendants on all non-§ 1983³ counts alleged against them. (Doc. 112) As

19 ¹ Count IV of the Complaint alleges that the three police officers (Mitchell, Burke and
20 Carr) intentionally or recklessly engaged in "extreme and outrageous conduct" that resulted
21 in severe emotional distress to Plaintiff. (Doc. 1 at 15) Count IV, however, is titled
22 "Negligent Infliction of Emotional Distress" but the allegations spell out the elements of the
23 intentional tort recognized in Arizona as Intentional Infliction of Emotional Distress. The
24 Court believes Plaintiff intended to allege a claim of Intentional Infliction of Emotional
25 Distress which is confirmed in the Final Pretrial Order by Defendants' citation to *Mintz v.*
Bell Atlantic Sys., 905 P.2d 559, 562-633 (Az.Ct.App. 1995), citing the elements of
Intentional Infliction of Emotional Distress. (Doc. 140 at 7)

26 ² The County Defendants did not file a summary judgment motion on the non-§ 1983
27 claims before the June 25, 2010 dispositive motion deadline expired. (Docs. 37 at 4, 122)

28 ³ Summary judgment on Plaintiff's § 1983 claims against all Defendants was granted
on September 21, 2010. (Doc. 107)

1 discussed in more detail below, the Court, relying on the reasoning in the October 26,
2 2010 Order and pursuant to Fed.R.Civ.P. 56(f)(1), will grant summary judgment in favor
3 of Defendants Arpaio, Maricopa County, Burke, and Carr on Plaintiff's remaining
4 claims. Fed.R.Civ.P. 56(f)(1) (effective December 1, 2010) (providing that "[a]fter giving
5 notice and a reasonable time to respond, the court may . . . grant summary judgment for a
6 nonmovant.").

7 Significantly, the parties agreed in the Joint Proposed Final Pretrial Order,
8 doc. 137 at 3, that the following material facts, although not admitted, will not be
9 contested at trial by evidence to the contrary:

10 a. On March 5, 2008, Plaintiff Curtis Bohnert drove westbound for
11 approximately five miles in the eastbound lanes of Interstate 8 outside Gila
Bend, Arizona.

12 b. Plaintiff, a Type-I diabetic, experienced a hypoglycemic incident at the
13 time he drove the wrong way on the freeway.

14 c. Before he was removed from his vehicle and placed in restraints,
15 Plaintiff did not tell Defendants George Burke and Kevin Carr that he was
16 diabetic or in need of medical attention.

17 d. Defendants Burke [and Carr⁴] did not know or suspect that Plaintiff was
18 diabetic and experiencing a hypoglycemic incident until after removing him
19 from his vehicle and restraining him.

20 e. Neither Burke nor Carr used a Taser on Plaintiff.

21 (Doc. 137 at 3)

22 **1. ADA Claims Asserted against Individuals**

23 In the remaining portion of Count I, Plaintiff asserts that Defendants
24 Arpaio, Burke, and Carr are liable, in their individual capacities, for violating Plaintiff's
25 rights under Title II of the Americans with Disabilities Act ("ADA").

26 ⁴ Deputy Carr's name was omitted in this paragraph in the parties' Joint Proposed
27 Final Pretrial Order. (Doc. 137 at 3) Because the Court believes this omission was an
28 inadvertent drafting error, the Court has included his name in this paragraph in this order and
the Final Pretrial Order.

1 The Court previously considered this same claim in conjunction with the
2 Motion for Summary Judgment filed by the State Defendants. (Doc. 81) Plaintiff filed a
3 response to the Motion, doc. 96, to which the State Defendants timely replied, doc. 99.
4 After considering the briefing including the statements of fact, on October 26, 2010, the
5 Court ruled that Defendants Mitchell and Vanderpool could not be held individually
6 liable under the ADA and were entitled to summary judgment in their individual
7 capacities. (Doc. 112 at 10)

8 During the December 14, 2010 final pretrial conference, the Court notified
9 the parties that, although no motion was pending before it, after review of the record and
10 the Joint Proposed Final Pretrial Order, the Court was inclined to grant summary
11 judgment in favor of Defendants Arpaio, Burke, and Carr on Plaintiff's ADA claim
12 asserted in Count I against those Defendants. The Court explained that the facts have
13 been fully developed and the legal issues had been fully briefed and considered in the
14 Court's October 26, 2010 Order, doc. 112, and that the legal issues are the same as to the
15 State and County Defendants. Plaintiff's counsel, Mr. Gmuca and Mr. Halverson, agreed
16 that the record currently before the Court is complete and fully developed on the ADA
17 claim asserted in Count I against Defendants Burke, Carr, and Arpaio that Plaintiff has
18 had a full and fair opportunity to present facts and legal arguments in support of that
19 claim. Plaintiff's counsel also agreed that the Court's reasoning in the October 26, 2010
20 Order applies equally to Plaintiff's claims against Defendants Arpaio, Burke and Carr.
21 Counsel for Defendants Burke, Carr and Arpaio also agreed that the record is fully
22 developed on the claim asserted in Count I.

23 Prior to the December 1, 2010 amendment to Rule 56(f), Fed.R.Civ.P., the
24 Ninth Circuit approved the procedure implemented by the parties and Court in this order.
25 In *Portsmouth Square, Inc. v. S'holders Protective Comm.*, 770 F.2d 866, 869 (9th Cir.
26 1985), the court stated:

27 [If] the pretrial conference discloses that no material facts are in dispute and
28 that the undisputed facts entitle one of the parties to judgment as a matter of
law, a summary disposition of the case conserves scarce judicial resources.

1 The court need not await a formal motion, or proceed to trial, under those
2 circumstances.

3 Where the district court grants summary judgment in the absence of a
4 formal motion, we review the record closely to ensure that the party against
5 whom judgment was entered had a full and fair opportunity to develop and
6 present facts and legal arguments in support of [his] position. (citation
7 omitted) A litigant is entitled to reasonable notice that the sufficiency of his
8 or her claim will be in issue. (citations omitted) Reasonable notice implies
9 adequate time to develop the facts on which the litigant will depend to
10 oppose summary judgment. (citation omitted) Having reviewed this record,
11 we conclude that [plaintiff] was afforded a full and fair opportunity to make
12 its case.

13 *Portsmouth Square*, 770 F.2d at 869.

14 In view of the agreement by Plaintiff’s counsel and counsel for the County
15 Defendants that the record is fully developed on the ADA claim asserted in Count I
16 against Defendants Burke, Carr and Arpaio, and that the reasoning applied in the October
17 26, 2010 Order granting summary judgment in favor of Defendants Mitchell and
18 Vanderpool applies equally to Defendants Burke, Carr and Arpaio, the Court finds that
19 Defendants Burke, Carr, and Arpaio cannot not be held individually liable under the
20 ADA and are entitled to summary judgment in their individual capacities.

21 **2. ADA Vicarious Liability Claim**

22 In the remaining portion of Count II, Plaintiff alleges that Defendants
23 Maricopa County and Arpaio are vicariously liable under Title II of the ADA.

24 The Court previously considered this same claim in conjunction with the
25 Motion for Summary Judgment filed by the State Defendants. (Doc. 81) Plaintiff filed a
26 response to the Motion, doc. 96, to which the State Defendants timely replied, doc. 99.
27 In its October 26, 2010 Order, the Court noted that Plaintiff’s response failed to address
28 Defendant Vanderpool’s and the State of Arizona’s arguments pertaining to Count II.
(Doc. 112 at 12) The Court further noted that, pursuant to LRCiv 7.2(c),(i) and
Plaintiff’s failure to respond to the arguments of Defendants Vanderpool and the State of
Arizona, they were entitled to summary judgment on Count II because there is no ADA
liability on the merits on this claim and the lack of a response “may be deemed
[Plaintiff’s] consent to the . . . granting of the [summary judgment] motion.” (Doc. 112

1 at 12-13)

2 Independent of the Plaintiff's failure to address this issue in his response,
3 the Court ruled that, assuming that the ADA applies to an arrest, a legal analysis of the
4 relevant ADA case law and the undisputed facts dictate that [Defendants Vanderpool's
5 and the State of Arizona's] summary judgment motion on the ADA claim must be
6 granted." (Doc. 112 at 12-13) Specifically, the October 26, 2010 Order provided in
7 relevant part:

8 "To recover monetary damages under Title II of the ADA . . . a plaintiff
9 must prove intentional discrimination on the part of the defendant." *Duvall*
10 at 1138. In *Duvall*, the Ninth Circuit held that intentional discrimination
11 can be shown by establishing "deliberate indifference" by the defendant. *Id.*
12 The *Duvall* court further explained that "[d]eliberate indifference requires
13 both knowledge that a harm to a federally protected right is substantially
14 likely, and a failure to act upon the likelihood." *Id.* As the Ninth Circuit
15 subsequently stated in *Lovell*, "[t]he first element is satisfied when the
16 public entity has notice that an accommodation is required." *Lovell*, 303
17 F.3d at 1057. In other words, to establish a *prima facie* case under Title II
18 of the ADA, the State Defendants' must have discriminated against
19 Plaintiff because of Plaintiff's disability. *Lovell*, 303 F.3d at 1052;
20 *Weinreich*, 114 at 978. *Thus, if the disabled person has a latent disability
21 like diabetes or any other non-obvious disability, there can be no liability
22 under the ADA without actual or constructive notice of such disability.*

23 (*Id.*) (emphasis added and footnotes omitted). In the Joint Proposed Final Pretrial Order,
24 Plaintiff's counsel does not dispute that "Defendants Burke [and Carr] did not know or
25 suspect that Plaintiff was diabetic and experiencing a hypoglycemic incident until after
26 removing him from his vehicle and restraining him." (Doc. 137 at 3) (footnote omitted).

27 During the December 14, 2010 final pretrial conference, the Court notified
28 the parties that, although no motion was pending before it, after review of the record and
the Joint Proposed Final Pretrial Order, the Court was inclined to grant summary
judgment in favor of Defendants Arpaio and Maricopa County on Plaintiff's ADA claim
asserted in Count II against those Defendants. The Court explained that the facts and
legal issues had been fully briefed in the State Defendants' Motion for Summary
Judgment, and that Plaintiff was afforded a fair opportunity to respond to the State
Defendants' arguments. The Court further stated that the legal issues were the same as

1 to the State and County Defendants. Plaintiff's counsel, Mr. Gmuca and Mr. Halverson,
2 agreed that Plaintiff had a full and fair opportunity to address and fully develop the facts
3 and legal arguments pertaining to the allegations in Count II and indicated that, if given
4 an additional opportunity, Plaintiff would not respond differently regarding the ADA
5 claim asserted in Count II against Defendants Arpaio and Maricopa County. Plaintiff's
6 counsel also agreed that the Court's reasoning in the October 26, 2010 Order regarding
7 the ADA claim asserted in Count II of the Complaint applies equally to Plaintiff's claims
8 against Defendants Arpaio and Maricopa County. Counsel for Defendants Burke, Carr
9 and Arpaio also agreed that the record is fully developed on the ADA claim asserted in
10 Count II against Defendants Arpaio and Maricopa County.

11 In view of the agreement by counsel for Plaintiff and counsel for the
12 remaining Defendants that the record before the Court is fully developed on the ADA
13 claim asserted in Count II against Defendants Arpaio and Maricopa County, and that the
14 reasoning applied in the October 26, 2010 Order granting summary judgment in favor of
15 the State Defendants on Count II applies equally to Defendants Arpaio and Maricopa
16 County, the Court finds that Defendants Arpaio and Maricopa County are entitled to
17 summary Judgment on Plaintiff's ADA claim asserted in Count II of the Complaint.

18 **3. State Law Negligence Claim**

19 Count III of the Complaint alleges that the police officers, like Defendants
20 Burke and Carr, "[a]re charged with a duty to exercise reasonable care in their conduct,
21 so as to avoid injury to members of the public," that Defendants Burke and Carr acted
22 "unreasonably in their dealings with plaintiff Curtis Bohnert," and "are liable to plaintiff
23 for those damages as described in this Count." (Doc.1 at 14-15)

24 The Court previously considered this same claim in conjunction with the
25 Motion for Summary Judgment filed by the State Defendants. (Doc. 81) Plaintiff filed a
26 response to the Motion, doc. 96, to which the State Defendants timely replied, doc. 99.
27 After consideration of the briefing, on October 26, 2010, the Court ruled that Defendant
28 Officer Mitchell was entitled to summary judgment on Plaintiff's negligence claim

1 because “Plaintiff totally failed to address his negligence claim in his response, and,
2 thereby, failed to ‘set forth specific facts showing that there is a genuine issue for trial.’”
3 (Doc. 112 at 16)

4 During the December 14, 2010 final pretrial conference, the Court notified
5 the parties that, although no motion was pending before it, after review of the record and
6 the Joint Proposed Final Pretrial Order, the Court was inclined to grant summary
7 judgment in favor of Defendants Burke and Carr on Plaintiff’s negligence claim asserted
8 in Count III against those Defendants. The Court explained that the facts and legal issues
9 had been fully briefed in the State Defendants’ motion for summary judgment, and that
10 Plaintiff had been given an opportunity to respond to the State Defendants’ arguments.
11 The Court further stated that the legal issues were the same as to State and County
12 Defendants. Plaintiff’s counsel, Mr. Gmuca and Mr. Halverson, agreed that Plaintiff had
13 a full and fair opportunity to address the facts and legal arguments pertaining to the
14 allegations in Count III and indicated that, if given an additional opportunity, Plaintiff
15 would not respond differently to a summary judgment motion regarding the negligence
16 claim asserted in Count III against Defendants Burke and Carr. Plaintiff’s counsel also
17 agreed that the Court’s reasoning in the October 26, 2010 Order regarding the negligence
18 claim asserted in Count III of the Complaint applies equally to Plaintiff’s negligence
19 claim against Defendants Burke and Carr. Counsel for Defendants Burke and Carr also
20 agreed that the record is fully developed on the negligence claim asserted in Count III
21 against Defendants Burke and Carr.

22 In view of the agreement by counsel for Plaintiff and counsel for the
23 remaining Defendants that the record before the Court is fully developed on the claim
24 asserted in Count III against Defendants Burke and Carr, and that the reasoning applied
25 in the October 26, 2010 Order granting summary judgment in favor of Officer Mitchell
26 on Count III applies equally to Deputies Burke and Carr, the Court finds that Defendants
27 Burke and Carr are entitled to summary Judgment on Plaintiff’s negligence claim
28 asserted in Count III of the Complaint.

1 **4. Negligent or Intentional Infliction of Emotional Distress**

2 The remaining portion of Count IV of the Complaint alleges that Deputies
3 Burke and Carr intentionally or recklessly engaged in “extreme and outrageous” conduct
4 that caused Plaintiff “severe emotional distress.” (Doc. 1 at 15)

5 The Court previously considered this same claim in conjunction with the
6 Motion for Summary Judgment filed by the State Defendants. (Doc. 81) Plaintiff filed a
7 response to the Motion, doc. 96, to which the State Defendants timely replied, doc. 99.
8 After consideration of the briefing on October 26, 2010, the Court ruled that Defendant
9 Officer Mitchell was entitled to summary judgment on Plaintiff’s claim asserted in Count
10 IV. The Court found that Officer Mitchell had satisfied his “burden of producing
11 evidence that negates an essential element of the claim” and was “entitled to summary
12 judgment unless Plaintiff demonstrated that a genuine issue of material fact exists on this
13 state law claim.” (Doc. 112 at 18) The Court further found that Plaintiff had failed to
14 respond to Defendant Mitchell’s arguments and, regardless of that failure, Defendant
15 Mitchell’s conduct was not “extreme and outrageous.” (Doc. 112 at 18) Specifically, the
16 October 26, 2010 order provided in relevant part:

17 [Independent of the absence of a Plaintiff’s response, the Court cannot
18 conclude that there is a question of fact on Plaintiff’s claim for intentional
19 infliction of emotional distress. The Court has previously found that Officer
20 Mitchell did not use unreasonable or excessive force in arresting Plaintiff
21 and the amount of force that was used was necessary as a result of
22 Plaintiff’s own conduct, beginning with his refusal to comply with Officer
23 Mitchell’s orders to exit the vehicle. *Bohnert*, 2010 WL 3767566. It is not,
most certainly, “extreme and outrageous” conduct for police officers to use
reasonable, but not more than necessary, physical force to arrest a person
who actively resists his arrest, *especially if the police officers have no
actual or constructive knowledge such person is having a medical
emergency.*

24 (*Id.*) (emphasis added). Accordingly, the Court granted summary judgment in favor of
25 Defendant Mitchell on Plaintiff’s state law claim of Intentional Infliction of Emotional
26 Distress raised in Count IV.

27 During the December 14, 2010 final pretrial conference, the Court notified
28 the parties that, although no motion was pending before it, after review of the record and

1 the Joint Proposed Final Pretrial Order, the Court was inclined to grant summary
2 judgment in favor of Deputies Burke and Carr on Plaintiff's state law claim of Intentional
3 Infliction of Emotional Distress raised in Count IV. The Court explained that the facts
4 and legal issues had been fully briefed in the State Defendants' Motion for Summary
5 Judgment, and that Plaintiff was afforded a fair opportunity to respond to the State
6 Defendants' arguments. The Court further stated that the legal issues were the same as to
7 the State and County Defendants. Plaintiff's counsel, Mr. Gmuca and Mr. Halverson,
8 agreed that Plaintiff had a full and fair opportunity to address the facts and legal
9 arguments pertaining to the allegations in Count IV and indicated that, if given an
10 additional opportunity, Plaintiff would not respond differently to a summary judgment
11 motion regarding the state law claim of Intentional Infliction of Emotional Distress raised
12 in Count IV. Plaintiff's counsel also agreed that the Court's reasoning in the October 26,
13 2010 Order regarding the claim asserted in Count IV of the Complaint against Defendant
14 Mitchell applies equally to Plaintiff's claim of Intentional Infliction of Emotional
15 Distress against Defendants Burke and Carr. Counsel for Defendants Burke and Carr
16 also agreed that the record is fully developed on the claim asserted in Count IV against
17 Defendants Burke and Carr.

18 In view of the agreement by counsel for Plaintiff and counsel for the
19 remaining Defendants that the record before the Court is fully developed on the claim
20 asserted in Count IV against Defendants Burke and Carr, and that the reasoning applied
21 in the October 26, 2010 Order granting summary judgment in favor of Defendant
22 Mitchell on Count IV applies equally to Deputies Burke and Carr, the Court finds that
23 Defendants Burke and Carr are entitled to summary judgment on Plaintiff's state law
24 claim of Intentional Infliction of Emotional Distress raised in Count IV.

25 **5. State Law Claim of False Arrest**

26 In the remaining portion of Count V, Plaintiff alleges that the conduct of
27 Defendants Burke and Carr amounts to false arrest in violation of Arizona law.

28 The Court previously considered this same claim in conjunction with the

1 Motion for Summary Judgment filed by the State Defendants. (Doc. 81) Plaintiff filed a
2 response to the Motion, doc. 96, to which the State Defendants timely replied, doc. 99.
3 After consideration of the briefing, on October 26, 2010, the Court ruled that, because
4 Defendant Officer Mitchell “had probable cause to arrest Plaintiff,” he was entitled to
5 summary judgment on Plaintiff’s state law false arrest claim. (Doc. 112 at 19) (citing
6 *Bohnert v. Mitchell*, No. CV-08-2303-PHX-LOA, 2010 WL 3767566, at * 15 (D.Ariz.,
7 Sept. 21, 2010)).

8 During the December 14, 2010 final pretrial conference, the Court notified
9 the parties that, although no motion was pending before it, after review of the record and
10 the Joint Proposed Final Pretrial Order, the Court was inclined to grant summary
11 judgment in favor of Deputies Burke and Carr on Plaintiff’s false arrest claim asserted in
12 Count V against those Defendants. The Court explained that the facts and legal issues
13 had been fully briefed and considered in the Court’s October 26, 2010 Order and that the
14 legal issues were the same as to the State and County Defendants. Plaintiff’s counsel, Mr.
15 Gmuca and Mr. Halverson, agreed that the record currently before the Court is complete
16 and fully developed on the false arrest claim asserted in Count V against Defendants
17 Burke and Carr, and that Plaintiff has had a full and fair opportunity to present facts and
18 legal arguments in support of that claim. Plaintiff’s counsel also agreed that the Court’s
19 reasoning in the October 26, 2010 Order applies equally to Plaintiff’s claims against
20 Defendants Burke and Carr asserted in Count V. Counsel for Defendants Burke and Carr
21 also agreed that the record is fully developed on the false arrest claim asserted in Count V
22 against Defendants Burke and Carr.

23 Specifically, the October 26, 2010 provided in relevant part:

24 To establish a claim of false arrest in Arizona, a plaintiff must show
25 that he was detained “without his consent and without lawful authority.”
26 *Slade v. City of Phoenix*, 112 Ariz. 298, 300, 541 P.2d 550, 552 (1975)
27 (citing *Swetnam v. F.W. Woolworth Co.*, 83 Ariz. 189, 318 P.2d 364
28 (1957); *Mohajerin v. Pinal County*, 2007 WL 4358254, * 4 (D.Ariz. 2007).
“The essential element necessary to constitute either false arrest or false
imprisonment is unlawful detention.” *Slade*, 112 Ariz. at 300, 541 P.2d at
552. “Under Arizona law, probable cause is an absolute defense to a claim
of false arrest and imprisonment.” *Gasho v. United States*, 39 F.3d 1420,

1 1428 (9th Cir. 1994) (citing *Hockett v. City of Tucson*, 139 Ariz. 317, 320,
2 678 P.2d 502, 505 (Az.Ct.App. 1983); *Joseph v. Dillard's, Inc.*, 2009
3 WL5185393, * 15 (D.Ariz. 2009)). “Under Arizona law, probable cause is
an absolute defense to a claim of false arrest and imprisonment.” *Hockett*,
139 Ariz. 317, 320, 678 P.2d 502, 505

4 Having previously found that Officer Mitchell had probable cause to
5 arrest Plaintiff, *Bohnert*, 2010 WL 3767566 at 7-10, the Court will grant the
6 State Defendants’ Motion for Summary Judgment on Plaintiff’s State law
false arrest claim.

7 (Doc. 112 at 18-19)

8 In view of the agreement by counsel for Plaintiff and counsel for the
9 remaining Defendants that the record before the Court is fully developed on the false
10 arrest claim asserted in Count V against Defendants Burke and Carr, and that the
11 reasoning applied in the October 26, 2010 Order granting summary judgment in favor of
12 Defendant Mitchell applies equally to Defendants Burke and Carr, the Court finds that
13 Defendants Burke and Carr are entitled to summary judgment on Plaintiff’s state law
14 false arrest claim asserted in Count V.

15 **6. State Law Assault and Battery Claim**

16 In the remaining portion of Count VI, Plaintiff alleges that Defendants
17 Burke and Carr committed the tort of assault and battery in violation of Arizona law.

18 The Court previously considered this same claim in conjunction with the
19 Motion for Summary Judgment filed by the State Defendants. (Doc. 81) Plaintiff filed a
20 response to the Motion, doc. 96, to which the State Defendants timely replied, doc. 99.
21 After consideration of the briefing, on October 26, 2010, the Court found that Plaintiff
22 had failed to produce evidence of Defendant “Mitchell’s intent to cause harm or
23 imminent apprehension thereof to Plaintiff.” (Doc. 112 at 20) The Court also noted that
24 “Plaintiff failed to respond to the State Defendants’ Motion” pertaining to the assault and
25 battery claim. (Doc. 112 at 20) In view of Plaintiff’s failure to respond and the lack of
26 evidence that Defendant Mitchell intended to use “more force than was reasonable and
27 necessary to overcome Plaintiff’s physical resistance to arrest,” the Court granted
28 summary judgment in favor of Defendant Mitchell on Plaintiff’s state law claim of

1 assault and battery raised in Count VI.

2 During the December 14, 2010 final pretrial conference, the Court notified
3 the parties that, although no motion was pending before it, after review of the record and
4 the Joint Proposed Final Pretrial Order, the Court was inclined to grant summary
5 judgment in favor of Defendants Burke and Carr on Plaintiff's state law claim of assault
6 and battery asserted in Count VI. The Court explained that the facts and legal issues had
7 been fully briefed in the State Defendants' Motion for Summary Judgment, and that
8 Plaintiff was afforded a fair opportunity to respond to the State Defendants' arguments.
9 The Court further stated that the legal issues were the same as to the State and County
10 Defendants. Plaintiff's counsel, Mr. Gmuca and Mr. Halverson, agreed that Plaintiff had
11 a full and fair opportunity to address the facts and legal arguments pertaining to the
12 allegations in Count VI and indicated that, if given an additional opportunity, Plaintiff
13 would not respond differently to a summary judgment motion regarding the state law
14 claim of assault and battery asserted against Defendants Burke and Carr in Count VI.
15 Plaintiff's counsel also agreed that the Court's reasoning in the October 26, 2010 Order
16 applied to the claim asserted in Count VI against Defendant Mitchell applies equally to
17 Plaintiff's claim of assault and battery against Defendants Burke and Carr. Counsel for
18 Defendants Burke and Carr also agreed that the record is fully developed on the claim
19 asserted in Count VI against Defendants Burke and Carr.

20 In view of the agreement by counsel for Plaintiff and counsel for the
21 remaining Defendants that the record before the Court is fully developed on the claim
22 asserted in Count VI against Defendants Burke and Carr, and that the reasoning applied
23 in the October 26, 2010 Order granting summary judgment in favor of Defendant
24 Mitchell on Count VI applies equally to Defendants Burke and Carr, the Court finds that
25 Defendants Burke and Carr are entitled to summary Judgment on Plaintiff's state law
26 claim of assault and battery raised in Count VI.

27 **7. *Respondent Superior Liability***

28 Finally, Plaintiff alleges in Count VII that Defendants Maricopa County

1 and Arpaio are liable, under a theory of *respondeat superior*, for the state law torts
2 committed by Defendants Burke and Carr. In view of the Court's ruling set forth above
3 that Defendants Burke and Carr are entitled to summary judgment on all of the state law
4 tort claims alleged in the Complaint, there is no tortious conduct for which Defendants
5 Arpaio and Maricopa County could be vicariously liable. Accordingly, Defendants
6 Maricopa County and Arpaio are entitled to summary judgment on Count VII.

7 Upon review of the record and the statements counsel made on the record
8 during the December 14, 2010 final pretrial conference, and based on the reasoning in the
9 Court's October 26, 2010 Order, pursuant to Fed.R.Civ.P. 56(f)(1),

10 **IT IS ORDERED** granting summary judgment in favor of Defendant
11 Maricopa County on Plaintiff's claims asserted in Counts II and VII.

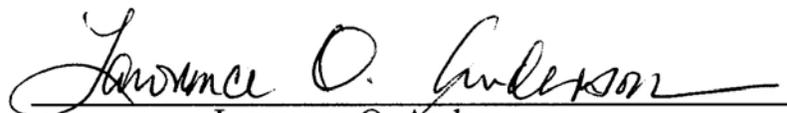
12 **IT IS FURTHER ORDERED** granting summary judgment in favor of
13 Defendant Arpaio on Plaintiff's claims asserted in Counts I, II, and VII.

14 **IT IS FURTHER ORDERED** granting summary judgment in favor of
15 Defendants Burke and Carr on Plaintiff claims asserted in Counts I, III, IV, V and VI.

16 **IT IS FURTHER ORDERED** that the bench trial set for January 31, 2011
17 and order that counsel must file proposed findings of fact and conclusions of law on or
18 before Friday, January 14, 2011 are **VACATED**.

19 The Clerk of Court is directed to enter judgment in favor of Defendants and
20 against Plaintiff and terminate this case.

21 Dated this 20th day of December, 2010.

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24 Lawrence O. Anderson
25 United States Magistrate Judge
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