UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS D'ANGELO,

Plaintiff,

vs.

Case No. 2:10-c-12195
Hon. Lawrence P. Zatkoff

Magistrate Judge Mona Majzoub

PAUL PARENT, CLINTON TOWNSHIP, a municipal entity, NICHOLAS DYKAS, JASON FIGURSKI and KEITH WATSON, in their official and individual capacities, jointly and severally,

Defendants.

/

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DEFENDANTS TOWNSHIP OF CLINTON, NICHOLAS DYKAS, JASON FIGURSKI, AND KEITH WATSON'S MOTION FOR SUMMARY JUDGMENT

NOW COME Defendants, TOWNSHIP OF CLINTON, NICHOLAS DYKAS, JASON FIGURSKI, AND KEITH WATSON, by and through their attorneys, PLUNKETT COONEY, and move for an order granting summary judgment pursuant to Rule 56(c) as there is no genuine issue of material fact and the Defendants are entitled to judgment as a matter of law. This Motion is based upon the legal authorities and arguments set forth in the Brief in Support of Motion for Summary Judgment, and the facts contained in the exhibits attached to the Brief.

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Dated: March 18, 2011

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BRIEF IN SUPPORT OF DEFENDANTS TOWNSHIP OF CLINTON, NICHOLAS DYKAS, JASON FIGURSKI, AND KEITH WATSON'S MOTION FOR SUMMARY JUDGMENT

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Defendants' answer: Yes.

II.

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Defendants' answer: Yes.

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Defendants' answer: Yes.

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Defendants' answer: Yes.

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Defendants answer: Yes.

Introduction

Plaintiff Thomas D'Angelo was arrested for indecent exposure on April 12, 2008, after a patron of the Macomb-Clinton Library complained to library staff and the Clinton Township Police Department that he observed Plaintiff rubbing his genitals and moaning and groaning while in the Library's computer lab. Plaintiff was found not guilty of the misdemeanor by a jury. He subsequently filed a lawsuit in the Macomb County Circuit Court, alleging that Clinton Township, Nicholas Dykas, Jason Figurski, and Keith Watson, violated his constitutional rights and committed a variety of state torts. (Docket Entry No. 1, Complaint, 6/3/10). Plaintiff also named as a defendant Paul Parent, the individual who witnessed the incident and requested the police be called. However, Parent has not been served.

Defendants removed the case to this Court on the basis of federal question jurisdiction. (Docket Entry No. 1, Notice of Removal, 6/3/10). On June 28, 2010, this Court issued an order remanding Plaintiff's state law claims of False Arrest and False Imprisonment, Malicious Prosecution, and Intentional Infliction of Emotional Distress to the Macomb County Circuit Court. (Docket Entry No. 3, Order, 6/28/10). Accordingly, this Motion for Summary Judgment addresses Plaintiff's 42 U.S.C § 1983 claim only.[1]

Statement of Facts

A. Library staff at the Macomb-Clinton Library called the Clinton Township Police Department after a library patron reported that another patron was masturbating in the adult computer lab.

On April 12, 2008, Paul Parent ("Parent") was a patron of the Macomb-Clinton Library. (Complaint, ¶¶ 8-9; Janine Taylor Dep, p. 6). Parent was seated at a computer (No. 23) in the adult

[1] Defendants will be filing a Motion for Summary Disposition in Macomb County Circuit Court, seeking dismissal of Plaintiff's state law claims.

computer lab (an enclosed room). (Complaint, ¶ 9). Plaintiff was seated at the computer immediately next to Parent (No. 24). (*Id.*; Taylor Dep, p. 6). After a period of time, Parent went out to speak to a librarian, Janine Taylor, and informed Taylor that Plaintiff was rubbing himself in the genital area and making noises. (Taylor Dep, p. 6). Parent advised Taylor that this had been going on for 45 minutes. (*Id.*).

Parent requested that Taylor call the police department. (*Id.*). Taylor advised Parent that if he wanted the police called, he would have to do so himself. (*Id.*, pp 6-7). Taylor, based on the complaint lodged by Parent, did send a message per library policy to Plaintiff's computer advising him, "There's been a complaint. Please stop whatever you might be doing." (Taylor Dep, pp. 7-8; Bodner Dep, p. 9).

Taylor also located the librarian in charge, Deborah Bodner, and advised her of the situation. (Taylor Dep, pp. 7-8; Bodner Dep, p. 6). Specifically, Taylor informed Bodner that Parent was insistent that the library call the police department. (Bodner Dep, pp. 6-7). The more the discussion continued with the library staff, the more irate Parent became. (Taylor Dep, p. 8; Bodner Dep, pp. 7-8). After another adult services librarian, Ellen McNally, stepped in and said that the Library would call the police (Taylor Dep, pp 8-9; Bodner Dep, pp 7-8), Taylor stated that she called the police department. (Taylor Dep, p 9). Ms. Taylor remembered telling the police:

> We have a customer here who claims that there is a gentleman playing with himself or whatever in our computer lab and he would like you to come out here so he can file a complaint. (Taylor Dep, p 9).

B. Based on the statements of the complaining witness that he personally observed Plaintiff masturbating in the computer lab, as well as the comments made by the library staff, the Clinton Township Police Officers arrested Plaintiff for indecent exposure.

When Officers Nicholas Dykas, Jason Figurski, and Keith Watson from the Clinton Township Police Department arrived at the Library, Bodner greeted them on the first floor and

then escorted them upstairs. (Bodner Dep, pp.12-13). Bodner advised Officer Dykas that she could see that Plaintiff had one hand on the desk and the other hand was probably in his lap. (Bodner Dep, p. 13). Officer Dykas testified that Bodner stated she could not visibly see Plaintiff's penis. (Dykas Dep, p. 12).

Officer Dykas then interviewed Parent. (Dykas Dep, p. 14). Parent advised Officer Dykas that Plaintiff had pulled his penis out, through his zipper, and began pumping his penis while moaning and groaning. (Dykas Dep, p. 14; Clinton Township Police General Incident Report). Officer Dykas observed Plaintiff while seated at the computer and did not see any porn and could not find any website history to show that he was looking at porn. (Clinton Township Police General Incident Report). Plaintiff's pants were zipped when Officer Dykas made contact with him. (*Id.*). Based on the comments made by Bodner and Taylor, along with Parent's eyewitness statement regarding what had occurred in the computer lab, Plaintiff was placed under arrest for indecent exposure.(Clinton Township Police General Incident Report).

Plaintiff testified that after he was led out of the library, an officer he believed to be Officer Figurski opened the back seat of the police car, and Plaintiff sat down with his feet hanging sideways out of the car. (Plaintiff Dep, pp. 66-67). Plaintiff then testified that as the officer turned him in the car so that he would face front, the officer grabbed his legs and "shoved both of them in real hard." (*Id.*, p. 67). Plaintiff testified that his knee hit the doorjamb of the car, causing him to say "ouch." (*Id.*, p. 68). Plaintiff has never seen a doctor or received medical treatment for his knee. (*Id.*, pp. 115-116). Nor has Plaintiff not received any kind of medical treatment and/or psychological treatment as a result of this arrest. (*Id*, p. 98). In fact, the only medical treatment Plaintiff has received was for his jock rash.

C. At his criminal trial for incident exposure, Plaintiff conceded that the jock rash from which he was suffering on the day of his arrest caused him to scratch his genital area.

The Macomb County Prosecutor's office prosecuted Plaintiff for incident exposure, MCL 750.335(A). The case went to a jury trial on September 11, 2008. Plaintiff testified that he had suffered from jock rash for a period of time up to and including the day he was arrested. (Tr 9/11/08, pp. 123-124). Plaintiff introduced pictures of his jock rash at the criminal trial, and conceded that he may have touched himself in the genital area a few times that day while at the Library in order to scratch himself. (*Id.*, pp. 125, 131-133). The jury ultimately returned a verdict of not guilty. (*Id.*, pp. 182-183).

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In *Copeland v. Machulis*, 57 F.3d 476, 478 – 479 (6th Cir. 1995), the court set forth the standard for deciding a motion for summary judgment:

> The moving party bears the initial burden of establishing an absence of evidence to support the nonmoving party's case. Once the moving party has met its burden of production, the nonmoving party cannot rest on its pleadings, but must present significant probative evidence in support of the complaint to defeat the motion for summary judgment. The mere existence of a scintilla of evidence to support plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

"In deciding a motion for summary judgment, the court views the factual evidence and draws all reasonable inferences in favor of the nonmoving party." *McLean v. 988011 Ontario Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000).

Argument

I. Plaintiff's claims for violation of the Fourth Amendment against Officers Dykas, Figurski, and Watson for alleged false arrest and false imprisonment are properly dismissed as there was no violation of Plaintiff's Fourth Amendment rights where the Officers had probable cause to arrest Plaintiff for indecent exposure, and alternatively, where the Officers are entitled to qualified immunity.

In order to state an actionable claim pursuant to 42 U.S.C. § 1983, a plaintiff must establish that (1) he was deprived of a right established by the constitution or a federal law and (2) the defendants, acting under color of law, caused the deprivation. *Flagg Brothers v. Brooks*, 436 U.S. 149, 155-57; 198 S.Ct. 1729; 56 L.Ed.2d 185 (1978); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1991). Plaintiff's claims under the Fourth Amendment of the U.S. Constitution for the alleged false arrest and false imprisonment against Defendants Dykas, Figurski, and Watson must be dismissed as there was no violation of Plaintiff's Fourth Amendment rights. In the alternative, Defendants are entitled to qualified immunity.

A. There was no Fourth Amendment violation because Parent's statements that he personally observed Plaintiff rubbing himself and moaning and groaning gave the Officers probable cause to arrest Plaintiff for indecent exposure.

Here, Plaintiff claims that the Defendant Officers deprived him of his Fourth Amendment rights to be free from unlawful arrest and false imprisonment by arresting and imprisoning him for indecent exposure without probable cause. (Complaint, ¶ 51). A plaintiff bringing a constitutional claim of false arrest and false imprisonment under the Fourth Amendment must show there was not probable cause for the arrest. *Stemler v. City of Florence*, 126 F.3d 856, 871 (6th Cir. 1997). The Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe the suspect has committed or is committing an offense. *Michigan v. DeFillippo*, 443 U.S. 31, 36; 99 S.Ct. 2627; 61 L.Ed.2d 343 (1979).

Probable cause to arrest "means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Crockett v. Cumberland Coll.,* 316 F.3d 571, 580 (6th Cir. 2003) citing *DeFillippo* at 37; 99 S.Ct. at 2627. "The Fourth Amendment does not require that an officer *know* a crime occurred at the time the officer arrests or searches a suspect . . . ." The Fourth Amendment, after all, necessitates an inquiry into probabilities, not certainty." *Thacker v. City of Columbus*, 328 F.3d 244, 256 (6th Cir. 2003). Thus, a police officer need not have proof of each element of the offense for which the suspect is arrested. *Id.* "'Due weight' should be accorded to the judgments of the law enforcement agents and other local law enforcement operatives that pre-arrest probable cause existed on a given set of facts." *Ross v. Duggan*, 402 F.3d 575, 585 (6th Cir. 2004).

> The Supreme Court has held that the test for whether an arrest is constitutionally valid is "whether, at the moment the arrest was made, the officers had probable cause to make it – whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

Donovan v. Thames, 105 F.3d 291, 298 (6th Cir. 1997) quoting *United States v. Dotson*, 49 F.3d 227, 229 (6th Cir. 1995) quoting *Beck v. Ohio,* 379 U.S. 89, 91; 85 S.Ct. 223, 225; 13 L.Ed.2d 142 (1964).

In the present case, Plaintiff was arrested for indecent exposure after Officers Dykas, Figurski, and Watson were called to the Macomb-Clinton Library based on a library patron's complaint that Plaintiff was rubbing himself in the genital area and making noises. (Taylor Dep, pp. 6, 9). The complaining witness, Paul Parent, insisted that library staff call the police to report Plaintiff's conduct. (Taylor Dep, pp. 6-9; Bodner Dep, pp. 6-8). When the Officers arrived at the Library, the librarian in charge, Deborah Bodner, greeted them on the first floor and then escorted

them upstairs to the adult computer lab. (Bodner Dep, pp. 12-13). Bodner advised Officer Dykas that she could see that Plaintiff had one hand on the desk and the other hand was probably in his lap. (Bodner Dep, p. 13). Officer Dykas then interviewed Parent. (Dykas Dep, p. 14). Parent advised Officer Dykas that Plaintiff had pulled his penis out, through his zipper, and began pumping his penis while moaning and groaning. (Dykas Dep, p. 14; Clinton Township Police General Incident Report). Parent also informed the Officer that Plaintiff was looking at pornography. (Clinton Township Police General Incident Report). Based on the account made by Parent regarding what had occurred in the computer lab, the Officers placed Plaintiff under arrest for indecent exposure, MCL 750.335(A). (Clinton Township Police General Incident Report).

Under these facts, Plaintiff cannot maintain a cognizable claim for lack of probable cause for Plaintiff's arrest and imprisonment. This is because Parent's statement, along with the comments made by library staff, was enough to establish probable cause to arrest Plaintiff for indecent exposure. Further, once Defendants had probable cause to arrest Plaintiff for indecent exposure, Defendants had no duty to continue their investigation to discover unidentified evidence to exculpate him. See *Ahlers v. Schebil*, 188 F.3d 365, 370 (6th Cir. 1999)("once Defendants established probable cause, this panel concludes that they were under no duty to continue their investigation and discover the information which Ahlers believes would have exculpated him."); *Criss v. City of Kent*, 867 F.2d 259, 263 (6th Cir. 2003) (law enforcement "is under no obligation to give any credence to a suspect's story nor should a plausible explanation in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause.").

Given the undisputed fact that at the time of Plaintiff's arrest, Defendants knew that Parent had identified Plaintiff as having engaged in indecent exposure by rubbing his penis in the adult

computer lab, probable cause existed to arrest Plaintiff. Thus, summary judgment of Plaintiff's federal false arrest and false imprisonment claims is proper.

B. Alternatively, Officers Dykas, Figurski, and Watson are entitled to qualified immunity.

Qualified immunity provides protection to government officials performing discretionary functions. Such officials are shielded from liability for civil damages in so far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818; 102 S.Ct. 2727; 73 L.Ed.2d 396 (1982). In the Sixth Circuit, a three-step inquiry is utilized in determining whether qualified immunity is appropriate. First, the court must determine whether, based upon applicable law, the facts viewed in a light most favorable to the plaintiff show that a constitutional violation has occurred. Second, the court must consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. Third, the court must determine whether the plaintiff has offered sufficient evidence to demonstrate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights of the plaintiff. *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 901 (6th Cir. 2004).

> Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officers from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is a "mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact."

Pearson v. Callahan, 555 U.S. 223; 129 S.Ct. 808, 815; 172 L.Ed.2d 565 (2009) quoting *Groh v. Ramirez*, 540 U.S. 551, 567; 124 S.Ct. 1284; 157 L.Ed.2d 1068 (2004) (Kennedy, J., dissenting).

In order to defeat a claim of qualified immunity, Plaintiff must establish that the contours of the right in question are sufficiently clear that a reasonable official would understand that what

he is doing violates that right. Although it is not necessary that the very action in question must previously have been held unlawful, it is necessary that in light of pre-existing law the unlawfulness must be apparent to the officer. *Anderson v. Creighton*, 43 U.S. 635, 640; 107 S.Ct. 3034; 97 L.Ed.2d 523 (1987). The right must be "clearly established" in a more "particularized" and hence more relevant sense. The relevant inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that the conduct was unlawful in the situation the officer confronted. *Saucier v. Katz*, 533 U.S. 194, 201-202; 121 S.Ct. 2151, 2156; 150 L.Ed.2d 272 (2001); *Brousseau v. Haugen*; 543 U.S. 194, 198-199; 125 S.Ct. 596, 599; 160 L.Ed.2d 583 (2004). Qualified immunity is a broad shield that protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 344-345; 106 S.Ct. 1092; 89 L.Ed.2d 271 (1986). Moreover, police officers are entitled to qualified immunity if a reasonable officer in their position could have believed that their actions were lawful in light of clearly established law. *Id.*

Here, Officers Dykas, Figurski, and Watson are protected with qualified immunity from Plaintiff's Fourth Amendment claim where a reasonable officer in their position could have believed that their conduct in relying on a complaining witness' statement that Plaintiff was masturbating in public to establish probable cause to arrest a suspect for indecent exposure, was lawful in light of clearly established law. This Court's decision in *Davey v. Tomlinson*, 627 F.Supp. 1458 (E.D. Mich. 1986), supports this conclusion. In *Davey*, the plaintiff was arrested and charged with indecent exposure after a citizen complained that she saw a man in a car, nude and masturbating, near her home. A neighbor got the man's license plate and called it in to police. The police located the plaintiff, who was wearing shorts and shoes, and arrested him for indecent exposure. After the plaintiff was acquitted by a jury, he filed a 42 U.S.C. § 1983 claim, arguing,

inter alia, that he was arrested without probable cause. *Id.* at 1461-1462. This Court granted the defendant officers' motion to dismiss and/or for summary judgment, finding that the officers were entitled to qualified immunity:

> In applying the *Harlow* test, the court must ask "whether another officer, standing in the officers' shoes and having the same information the officers had, would reasonably have come to the conclusion that he had probable cause to arrest" Davey for indecent exposure. The undisputed facts support defendants' position. There had been several sightings in the area of a man in a light blue Cutlass who had either exposed himself or was driving nude and masturbating. Police spoke with a witness, got a description of the suspect, his car, and the license plate number. An officer, armed with that information, was patrolling the area and stopped plaintiff who matched that description.
>
> Under the teachings of *Harlow*, the court cannot probe the subjective beliefs or reasons the officers may have entertained. Rather the court must make an objective analysis of the officers' actions in light of the facts known at the time. Thus, the evidence supports the conclusion that the officers acted in a reasonable manner and that their conduct was lawful.
>
> It appearing that the officers were reasonable in their belief that a crime had been committed, the officers are immune from present section 1983 action.

Id. at 1465.

Similarly, here the Officers acted in a reasonable manner in interviewing Parent regarding his complaint, and arresting Plaintiff thereafter Thus, Defendants Dykas, Figurski, and Watson, like the *Davey* defendants, are entitled to qualified immunity from Plaintiff's § 1983 claims.

II. Plaintiff's claim for violation of the Fourth Amendment against Officers Dykas, Figurski, and Watson for malicious prosecution is properly dismissed where (1) there was probable cause to arrest Plaintiff, and (2) where none of the Defendant officers made the decision to prosecute Plaintiff for indecent exposure.

Plaintiff also alleges in his Complaint that the Defendant Officers violated his Fourth Amendment rights by prosecuting him without probable cause. (Complaint, ¶ 51). To prevail on a federal malicious prosecution claim under § 1983, plaintiff must prove that the police lacked probable cause to make the arrest. *Painter v. Robertson,* 185 F.3d 557, 569 (6th Cir.1999); *Darrah v. City of Oak Park,* 255 F.3d 301(2001). As discussed in detail in Argument IA, *supra*, Officers

Dykas, Figurski, and Watson had probable cause to arrest Plaintiff for indecent exposure, after interviewing Parent and hearing his complaints that Plaintiff was masturbating in the adult computer lab of the Clinton-Macomb Library. (Clinton Township Police General Incident Report). Accordingly, summary judgment is proper.

Further, Defendants are also entitled to summary judgment of this claim because Sixth Circuit law is clear that a police officer cannot be liable for Fourth Amendment malicious prosecution when he did not make the decision to bring charges. *Skousen v. Brighton High School*, 305 F.3d 520 (6th Cir. 2002) (holding that a police officer "cannot be held liable for malicious prosecution when he did not make the decision to prosecute [the plaintiff]"). *See also McKinley v. City of Mansfield,* 404 F.3d 418, 444 (6th Cir. 2005) (holding that "*Skousen"* in which the plaintiff alleged that a police officer had falsely accused her, clearly forecloses a malicious prosecution claim based solely on officers' turning over evidence to the prosecuting authorities.").

In *Skousen,* the plaintiff was charged and acquitted of domestic assault, and she later filed a § 1983 claim alleging Fourth Amendment malicious prosecution against the investigating officer. The actions of the defendant police officer consisted of completing a police report detailing his investigation of the alleged assault involving the plaintiff, and then submitting the police report and a medical report to the prosecutor's office. 305 F.3d at 525. The court held that the plaintiff's malicious prosecution claim failed because she "offered no evidence ... supporting her claim that [the defendant] caused her to be prosecuted," and there was "no evidence that [the defendant] made or even was consulted with regard to the decision to prosecute [the plaintiff]." *Id.* at 529. As in *Skousen,* plaintiff in this case has no evidence that Officers Dykas, Figurski, and Watson made or were even consulted with regard to the decision to prosecution Plaintiff. Rather, it is the

Macomb County Prosecutor's Office that files the charges and prosecuted Plaintiff. Accordingly, Defendants are entitled to summary judgment of Plaintiff's malicious prosecution claim.

III. Plaintiff's claim for violation of the Fourth Amendment against Officers Dykas, Figurski, and Watson for excessive force is properly dismissed (1) where the force used to arrest Plaintiff was reasonable, and (2) alternatively, where the Officers are entitled to qualified immunity.

A. The minimal force used to position Plaintiff correctly in the police car was reasonable and not excessive.

Next, Plaintiff asserts a Fourth Amendment claim of excessive force against the Clinton Township Police Officers. (Complaint, ¶ 51). At the outset, it is important to note that while the excessive force claim is directed towards all Officers, in paragraph 26 of his Complaint Plaintiff states that "Defendant Figurski used excessive force after the Plaintiff was handcuffed when placing him in the scout car and injured his leg." (Complaint, ¶ 26). Accordingly, as Plaintiff has identified only Officer Figurski as the individual who allegedly used excessive force, Plaintiff's excessive claim against Officers Dykas and Watson must be dismissed for failure to state a claim. However, in an abundance of caution, the argument below applies equally to Officers Dykas and Watson, to the extent the excessive force claim is directed at all the Officers.

"*[A]ll* claims that law enforcement officers have used excessive force ... in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L.Ed.2d 43 (1989). (Emphasis in original). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396; *Slusher v. Carson*, 540 F.3d 449, 455

(6th Cir. 2008). In making this determination, the Court employs an "objective reasonableness" standard that does not include the underlying intent or motivation of the officer. *Slusher*, 540 F.3d at 455; *Dunigan v. Noble*, 390 F.3d 486, 493 (6th Cir. 2004).

Reasonableness must be judged from the perspective of a reasonable officer on the scene, not with the 20/20 vision of hindsight. *Id.* "This standard contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002).

The undisputed facts reflect that Plaintiff was sitting in the back seat of the police car with his feet hanging sideways out of the car. (Plaintiff Dep, pp. 66-67). Plaintiff describes the force used against him as Officer Figurski grabbing his legs and "shov[ing] both of them in real hard" so that he would be seated properly in the police car. (*Id.*, p. 67). Plaintiff testified that his knee hit the doorjamb of the car, causing him to say "ouch." (*Id.*, p. 68). Under these facts and circumstances, such a minimal use of force cannot be found to be excessive. This is the quintessential situation where "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Lyons v. City of Xenia, et. al.*, 417 F.3d 565, 575 (6th Cir. 2005). Summary judgment is therefore proper.

B. Alternatively, Plaintiff is entitled to qualified immunity because the law is not so clearly established as to put the Officers on notice that positioning a suspect's legs so that he is seated properly in the police car violates the Fourth Amendment.

Even assuming that Plaintiff's allegations rise to the level of a Fourth Amendment violation, Officers Dykas, Figurski, and Watson are nonetheless entitled to summary judgment on the basis of qualified immunity. Qualified immunity shields government officials from liability for civil damages if their actions did not violate clearly established statutory or constitutional rights of

which a reasonable person would have known. *Pearson v Callahan*, 129 S. Ct. 808, 815; 172 L.Ed.2d 565 (2009); *Chappell v. City of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009).[2]

In *Saucier v. Katz*, 533 U.S. 194; 121 S.Ct. 2151; 150 L.Ed.2d 272 (2001), the Supreme Court explained the proper application of qualified immunity in an excessive force case: "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Saucier*, 533 U.S. at 205.

Under this framework, Officers Dykas, Figurski, and Watson submit that they are entitled to summary judgment on the basis of qualified immunity at a minimum. Even if they misapprehended the amount of force called for under the circumstances (which they contest, See Argument IIIA, *supra*), that mistake was reasonable. Plaintiff can point to no binding precedent that existed in April 2008 which would have clearly alerted a police officer that moving a suspect so that he is properly positioned in the squad car, and bumping his knee in the process, violates the Fourth Amendment. Stated another way, no reasonable officer could have believed that the extremely minimal amount of force used was unreasonable and would be a violation of the Fourth Amendment. At a minimum, the Officers are entitled to qualified immunity.

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[2] Defendants incorporate into this Argument the legal recitation on qualified immunity as set forth in Argument I(B), *supra*.

IV. Plaintiff's Fourteenth Amendment suborning perjury claim is properly dismissed.

Plaintiff also claims that Defendants violated his Fourteenth Amendment rights by "manufacturing and suborning perjury." (Complaint, ¶ 51). Presumably, this claim is based on Plaintiff's allegation that Defendants enhanced Parent's complaints in order to manufacture probable cause to arrest Plaintiff for indecent exposure. (Complaint, ¶¶ 21-23). Specifically, Plaintiff complains that Officers Dykas, Figurski, and Watson manufactured in their police report that Plaintiff had his penis out. (*Id.*, ¶ 23).

"Police officers cannot, in good faith, rely on a judicial determination of probable cause [to absolve them of liability] where that determination was premised an on officer's own material misrepresentations to the court." *Sykes v. Anderson*, 625 F.3d 294 (6th Cir. 2010), quoting *Gregory v. City of Louisville*, 444 F.3d 725, 758 (6th Cir. 2006). Here, Defendants are entitled to summary judgment because the Officers' police report did not contain material misrepresentations. In fact, Parent's complaint (documented by police in the Clinton Township General Incident Report) that Plaintiff's zipper was down and that he was pumping his penis is consistent with Parent's testimony at Plaintiff's criminal trial:

> A: It was off and on for about forty-five minutes, but on three different occasions, I did notice that he was, he was, had his left hand on, you know, inside his, inside the, he had the zipper down on his pants, on his trousers.
>
> Q: You remember his zipper and trousers were down?
>
> A: Yeah.
>
> Q: And where was one hand?
>
> A: His right hand was on the computer terminal and when he would make that chirping sound, I noticed that his arm would go down gradually and he would open up the flap on his, he had a flannel, a checkered flannel shirt on, and he would reach inside his fly area and start massaging his genitals.
>
> ***

A: I saw his hand enter his opened, opened zipper, and massage his genitals.

Q: From your prospective, massing his genitals, correct?

A. Yes, sir, I believe he was stroking and he was also pumping with his hand. (9/11/08 Tr, p 39).

The consistency between Parent's complaints as documented in the police report, and Parent's testimony at trial, forecloses any argument that Defendant Officers enhanced Parent's complaints. Accordingly, Defendants are entitled to summary judgment.

V. Defendant Clinton Township is entitled to summary judgment on Plaintiff's municipal liability claim.

A plaintiff may only hold a local government entity liable under § 1983 for the entity's own wrongdoing. A local government entity can be held liable under § 1983 where its official policy or custom actually serves to deprive an individual of his or her constitutional rights. A city's custom or policy can be unconstitutional in two ways: 1) facially unconstitutional as written or articulated, or 2) facially constitutional but consistently implemented to result in constitutional violations with explicit or implicit ratification by city policymakers. Where the identified policy is itself facially lawful, the plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice." *Bd. Of County Commissioners v. Brown*, 520 U.S. 397, 407, 17 S.Ct. 1382, 137 L.Ed.2d 626 (1997); *Gregory v. City of Louisville, supra.*

"Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown*, 520 U.S. at 410. In other words, the risk of a constitutional violation arising as a result of the inadequacies in the municipal policy must be "plainly obvious." *Brown*, 520 U.S. at 412; *Stemler v. City of Florence*, 126 F.3d 856, 865 (6th Cir. 1997). Additionally, the courts recognize a systematic failure to train police

officers adequately as custom or policy which can lead to city liability. *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed2d 412 (1989). The Sixth Circuit has held that evidence pointing to a City's failure to provide *any* training on key duties with direct impact on the constitutional rights of citizens is sufficient to survive summary judgment with a *Monell* failure to train claim. *Gregory*, 444 F.3d at 754.

A prerequisite to any municipal liability claim is to tie the alleged policy or practice to the alleged constitutional violation. A municipality cannot be liable for the constitutional torts of its employees; that is, *respondeat superior* is not a viable theory of recovery. *Monell v. Dep't. of Social Services,* 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Rather, liability will attach only where the plaintiff establishes that the municipality engaged in a "policy or custom" that was the "moving force" behind the alleged deprivation of the plaintiff's rights. *Doe v. Claiborne County,* 103 F.3d 495, 507 (6th Cir. 1996).

A §1983 plaintiff may establish the existence of a custom by showing that policy making officials knew about and acquiesced in the practice at issue. *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis,* 361 F.3d 898, 902 (6th Cir. 2004). In order to prevail on such a theory, the plaintiff must prove (1) the existence of a clear and persistent pattern of violating federal rights (in this case unconstitutional arrest); (2) notice or constructive notice on the part of the defendants; (3) tacit approval of the unconstitutional conduct by the defendants; and (4) that the custom was the "moving force" or direct causal link for the constitutional deprivation. *Thomas v. City of Chattanooga,* 398 F.3d 426, 429 (6th Cir. 2005); *Doe,* 103 F.3d at 508.

Plaintiff cannot make such a showing in this case. There is no evidence of a clear and persistent pattern of unconstitutional conduct on the part of Clinton Township police officers. Plaintiff has not come forward with any affirmative evidence to prove such a pattern. Thus,

Plaintiff has failed to prove a municipal policy that will give rise to liability against Clinton Township. Further, even assuming that such a policy or practice existed, Plaintiff also cannot demonstrate that it was the "moving force" behind his constitutional claim in this case. Similarly, Plaintiff cannot establish that the Officers' alleged constitutional violation occurred as a result of any inadequate training by Clinton Township.

Additionally, municipal liability may not be premised upon a single instance of constitutional violation by a non-policy making official. *Oklahoma City v. Tuttle,* 471 U.S. 808, 818, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), *Brown v. Shaner,* 172 F.3d 927, 930 (6th Cir. 1999). There is simply no basis for Plaintiff to maintain a § 1983 claim against Clinton Township. As a result, this Court should grant summary judgment to Defendants on Plaintiff's § 1983 action against Clinton Township, as set forth in Count IV of Plaintiff's Complaint.

Conclusion

For these reasons, Defendants Township of Clinton, Nicholas Dykas, Jason Figurski, and Keith Watson, respectfully request that this Honorable Court grant defendants' motion for summary judgment, together with costs and attorneys' fees.

PLUNKETT COONEY

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CERTIFICATE OF SERVICE

Peter W. Peacock, attorney with the law firm of PLUNKETT COONEY, being first duly sworn, deposes and says that on the 18th day of March, 2011, he caused a copy of this document to be served upon all parties of record, and that such service was made electronically upon each counsel of record so registered with the United States District Court and via U.S. Mail to any counsel not registered to receive electronic copies from the court, by enclosing same in a sealed envelope with first class postage fully prepaid, addressed to the above, and depositing said envelope and its contents in a receptacle for the US Mail.

By: s/Peter W. Peacock

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