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3
4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 JOSEPH M ROBINSON,
8 Plaintiff,

9 v.

10 JORDAN BAILEY, et al.,
11 Defendants.

CASE NO. 3:19-cv-05551-BAT

**ORDER GRANTING DEFENDANT
JOSEPH GIBSON'S MOTION TO
DISMISS**

12 Defendant Joseph Gibson moves for an order dismissing Plaintiff Joseph M. Robinson's
13 42 U.S.C. § 1983 and state law claims (Counts Three, Four, Six, Seven and Eight), pursuant to
14 Fed. R. Civ. P. 12(b)(6) and 12(c). Mr. Gibson further moves for dismissal of Count Six, the
15 state law claim for malicious prosecution, under RCW 4.24.510, and requests that the Court
16 award Mr. Gibson attorney's fees, costs, and statutory damages of \$10,000. Dkt. 22.

17 On April 20, 2021, Lawrence Hildes filed a motion to withdraw as attorney for Plaintiff.
18 Dkt. 23. Mr. Hildes requested a stay of all pending motions, including the instant motion filed by
19 Defendant Joey Gibson. *Id.* The Court denied the motion without prejudice; ordered Plaintiff
20 Joseph Robinson and Attorney Lawrence A. Hildes to advise the Court by May 3, 2021 if
21 Plaintiff intends to prosecute this action; denied the motion to stay, and re-noted Defendant
22 Gibson's motion for May 7, 2021. Dkt. 24. The Court noted that Defendant Gibson's motion to
23 dismiss, which is based on the sufficiency of the complaint filed on Plaintiff's behalf by Attorney
Hildes, does not require Plaintiff's active participation. *Id.*, p. 2. Copies of the Court's Order were

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1 sent to counsel and to Plaintiff by email and regular mail. *Id.* The regular mail addressed to
2 Plaintiff was returned to the Court as “undeliverable” on April 29, 2021. Dkt. 25.

3 Attorney Hildes did not respond to the Court’s Order and has filed no response to the
4 motion to dismiss. Pursuant to LCR 7(b)(2), if a party fails to file papers in opposition to a
5 motion, such failure may be considered by the court as an admission that the motion has merit.

6 Based on a careful review of the motion, the Court grants the motion to dismiss all claims
7 against Defendant Gibson. The dismissal shall be with prejudice as Plaintiff was given ample
8 opportunity and additional time to respond but failed to do so. Defendant Gibson’s motion for
9 fees and damages pursuant to RCW 4.24.510 is denied.

10 STATEMENT OF FACTS

11 A. Procedural History

12 Plaintiff filed a Complaint for Damages on June 17, 2019. Dkt. 1. Defendant Joseph
13 Gibson filed an Answer and Affirmative Defenses on December 2, 2019. Dkt. 6.

14 B. Factual Allegations Made in Plaintiff’s Complaint

15 In May of 2017, a controversy over racism and appropriate responses to it developed at
16 Evergreen State College in Olympia. Dkt. 1, ¶ 2 3.1-3. Later when a professor took to the
17 airways of Fox News, a heated National debate developed as to whether “it was appropriate for
18 students and faculty of color to be allowed to take over the campus...” *Id.*

19 Plaintiff alleges that Defendant Gibson is the founder of “Patriot Prayer” and a leader of
20 the “Proud Boys”. Dkt. 1, ¶ 2.6. He alleges that Defendant Gibson and Patriot Prayer, a far-right
21 group with close connections to neo-Nazi, White Supremacist, and other extremist groups,
22 “inserted themselves” into this conflict. *Id.*, ¶ 3.4. After Defendant Gibson and Patriot Prayer
23 announced their intention to stage a rally in the middle of Red Square on June 15, 2017 (*id.*, ¶

1 3.10), a counter demonstration “was organized.” *Id.*, ¶ 3.13.

2 According to Plaintiff, “these efforts [of Patriot Prayer and the Proud Boys] have been
3 aided by sympathy and cooperation from law enforcement personnel and agencies” “particularly
4 prevalent with personnel, supervisors and commanders of the Washington State Patrol” and that
5 unidentified “commanders and supervisors” “authorized ‘Patriot Prayer’ to make arrests.” Dkt. 1,
6 ¶ 3.8; 3.11. Plaintiff alleges that he was on his way to the counter demonstration when Defendant
7 Knox ordered him to stop and Defendant Gibson told him he could not go through the area to the
8 public plaza. *Id.*, ¶ 3.15. When he tried to do so, Defendant Grzozwski grabbed him by the throat
9 and Defendants Toese, Knox, Todd, Gibson and others tackled him to the ground and pinned him
10 there. *Id.*, ¶ 3.16. Plaintiff further alleges that Defendant Toese searched him, found his knife and
11 then Defendants Toese and Todd “dragged/marched” him to the Washington State Patrol, where
12 he was taken into custody. *Id.*, ¶ 3.18-3.20.

13 Plaintiff alleges that the actions taken by all of the members of Patriot Prayer were under
14 “the specific direction and control of Gibson.” Dkt. 1, ¶ 3.14. Plaintiff also alleges that the
15 Washington State Patrol did their “best to give Patriot Prayer an unobstructed opportunity to say
16 and do anything they wanted in front of a circus media without any dissent.” *Id.*, ¶ 3.10.

17 Plaintiff was charged with disorderly conduct and was released hours later. Dkt. 1, ¶
18 3.22-3.23. The charge was dismissed approximately eleven months later. *Id.*, ¶ 3.28. Plaintiff
19 claims he missed classes for court hearings. *Id.*, ¶ 3.28-3.29.

20 Plaintiff sues multiple law enforcement officers, civilians, and “DOES 1-11 1000” and
21 seeks general damages for pain and suffering, special damages for his legal and medical
22 expenses; punitive damages, attorney’s fees and litigation costs, and for a declaratory judgment
23 requiring court supervised training for involved agencies and officers. Dkt. 1, ¶ VII.

1 **C. Counts Against Gibson**

2 Plaintiff asserts the following claims against Defendant Gibson: (1) 42 U.S.C. § 1983
3 claim against “All Individual Defendants 14 and DOES 1-100” (Count One); (2) state law claim
4 for a general violation of civil rights under the Washington State Constitution (Count Three); (3)
5 wrongful arrest (Count Four); (4) malicious prosecution (Count Six); (5) negligence (Count
6 Seven); and (6) intentional infliction of emotional distress (Count Eight). Dkt. 1, ¶ 5, 5.12, 5.29-
7 32, 5.33-35, 5.36-39.

8 **DISCUSSION**

9 **A. Legal Standard**

10 Under Fed. R. Civ. P. 12(b)(6), a court may dismiss a complaint for failure to state a
11 claim. The court must assume the truth of the complaint’s factual allegations and credit all
12 reasonable inferences arising from those allegations. *Sanders v. Brown*, 504 F.3d 903, 910 (9th
13 Cir. 2007). The court “need not accept as true conclusory allegations that are contradicted by
14 documents referred to in the complaint.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d
15 1025, 1031 (9th Cir. 2008). Instead, the plaintiff must point to factual allegations that “state a
16 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568
17 (2007). If the plaintiff succeeds, the complaint avoids dismissal if there is “any set of facts
18 consistent with the allegations in the complaint” that would entitle the plaintiff to relief. *Id.* at
19 563; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

20 On a motion to dismiss, a court typically considers only the contents of the complaint.
21 However, a court is permitted to take judicial notice of facts that are incorporated by reference in
22 the complaint. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“A court may ...
23 consider certain materials documents attached to the complaint, documents incorporated by

1 reference in the complaint.”); *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988)
2 (“[I]t is proper for the district court to ‘take judicial notice of matters of public record outside the
3 pleadings’ and consider them for purposes of the motion to dismiss.”) (quoting *MGIC Indem.*
4 *Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986)).

5 Judgment on the pleadings under Federal Rule of Civil Procedure 12(c) “is proper when
6 the moving party clearly establishes on the face of the pleadings that no material issue of fact
7 remains to be resolved and that it is entitled to judgment as a matter of law.” *Hal Roach Studios,*
8 *Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989). A motion for judgment on
9 the pleadings will be denied unless it appears “beyond doubt” that the non-moving party cannot
10 prove any facts in support of the claim that would entitle the non-moving party to relief. *RLI Ins.*
11 *Co. v. City of Visalia*, 297 F. Supp. 3d 1038, 1047 (E.D. Cal. 2018), *aff’d*, 770 F. App’x 377 (9th
12 Cir. 2019) (internal quotation and citation omitted).

13 **B. Count One – 42 U.S.C. § 1983**

14 To prevail in a claim under 42 U.S.C. § 1983, a plaintiff must establish two essential
15 elements: (1) that the defendant acted under color of state law; and (2) that the defendant caused
16 Plaintiff to be deprived of a right secured by the Constitution and laws of the United States.”
17 *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir., 1997). Vague and conclusory allegations of
18 official participation in civil rights violations are insufficient. *Pena v. Gardner*, 976 F.2d 469,
19 471 (9th Cir. 1992).

20 A plaintiff trying to show that a private party acted under color of state law must show
21 that the defendants “conspired or acted jointly with state actors.” *Radcliffe v. Rainbow Const.*
22 *Co.*, 254 F.3d 772, 783 (9th Cir.2001) (citing *United Steelworkers v. Phelps Dodge Corp.*, 865
23 F.2d 1539, 1540 (9th Cir.1989)). The plaintiffs must therefore provide evidence of “an

1 agreement or meeting of the minds to violate constitutional rights.” *Id.* (quoting *Phelps Dodge*,
2 865 F.2d at 1540–41). But the mere furnishing of information to police officers does not
3 constitute joint action under color of state law which renders a private citizen liable under §
4 1983. *See Benavidez v. Gunnell*, 722 F.2d 615, 618 (10th Cir.1983); *Butler v. Goldblatt Bros.,*
5 *Inc.*, 589 F.2d 323, 327 (7th Cir.1978). “A relationship of cause and effect between the
6 complaint and the prosecution is not sufficient, or every citizen who complained to a prosecutor
7 would find himself in a conspiracy.” *Radcliffe*, 254 F.3d at 783.

8 Plaintiff alleges that Defendants Toese and Todd presented Plaintiff to the Washington
9 State Patrol and that the Washington State Patrol arrested him and took him into custody. Dkt. 1,
10 ¶ 5.19. Plaintiff does not allege that Defendant Gibson is, was, or claimed to be a law
11 enforcement officer or that Defendant Gibson arrested him. In short, Plaintiff has alleged no facts
12 to show an agreement or meeting of the minds to show that Defendant Gibson “conspired or
13 acted jointly with state actors.” Plaintiff’s allegations that the “personnel, supervisors and
14 commanders of the Washington State Patrol” are sympathetic to Patriot Prayer and Proud Boys,
15 and that unidentified “commanders and supervisors” “authorized ‘Patriot Prayer’ to make arrests,
16 are vague conclusory allegations devoid of factual support and as such, are not entitled to the
17 assumption of truth.

18 Plaintiff has provided no facts, accepted as true, that would establish Defendant Gibson
19 acted under color of state law in causing a violation of Plaintiff’s rights and this claim will be
20 dismissed.

21 **C. Count Three – Washington Constitution Claim**

22 Plaintiff alleges that his detention, arrest, and malicious prosecution were unlawful, in
23 retaliation for his exercise of his First Amendment Rights, and that his “lawful refusal” to

1 provide identification to an officer was protected under Article 1 of the Washington State
2 Constitution, Section 5 and Section 7. Dkt. 1, ¶ 5.13.

3 Washington law contains no counterpart to 42 U.S.C. § 1983, which creates a civil cause
4 of action for violations of the United States Constitution by persons acting under color of state
5 law. *Sisley v. City of Seattle*, 179 Wn. App. 1021 (2014). Washington courts have consistently
6 rejected invitations to establish a cause of action for damages based upon constitutional
7 violations. *Blinka v. Wash. State Bar Ass'n*, 109 Wash. App. 575, 578 (2001). *See Peltier v.*
8 *Sacks*, 328 F. Supp.3d 1170, 1185 (W.D. Wash. 2018).

9 Thus, to the extent Plaintiff seeks damages for violations of the Washington state
10 constitution, the claim is not permitted and will be dismissed.

11 **D. Count Four –False Arrest Claim**

12 “False arrest occurs when a law enforcement officer, or one claiming to have the powers
13 of a police officer, unlawfully restrains or imprisons another by physical force, threat of force, or
14 conduct reasonably implying the use of force against the detainee should he resist.” *Demelash v.*
15 *Ross Stores, Inc.*, 105 Wash. App. 508, 529, 20 P.3d 447, 458 (2001). “The claim does not turn
16 on the misperceptions of the detainee, but on the intent of the person making the arrest.” *Id.*

17 Plaintiff alleges that Defendants Toese and Todd “dragged/marched” Plaintiff to the
18 Washington State Patrol, who took him into custody. Dkt. 1, ¶ 5.19. Plaintiff does not allege that
19 Defendant Gibson is, was, or claimed to be a law enforcement officer or that Defendant Gibson
20 arrested him.

21 Even assuming the truth of Plaintiff’s allegations and crediting all reasonable inferences
22 arising from those allegations, Plaintiff has failed to state a claim of false arrest against
23 Defendant Gibson and the claim will be dismissed.

1 **E. Count Six –Malicious Prosecution and RCW 4.24.510**

2 1. Malicious Prosecution

3 Malicious prosecution actions are not favored in law. *Hanson v. City of Snohomish*, 121
4 Wash.2d 552, 557, 852 P.2d 295 (1993) (citing *Bender v. Seattle*, 99 Wash.2d 582, 602–03, 664
5 P.2d 492 (1983)). This is because an individual, ““who acts in good faith shall not be subjected to
6 damages merely because the accused is not convicted.”” *Id.* (quoting *Peasley v. Puget Sound Tug
7 & Barge Co.*, 13 Wash.2d 485, 497, 125 P.2d 681 (1942)). To maintain an action for malicious
8 prosecution, a plaintiff must prove:

9 (1) that the prosecution claimed to have been malicious was instituted or
10 continued by the defendant; (2) that there was want of probable cause for the
11 institution or continuation of the prosecution; (3) that the proceedings were
12 instituted or continued through malice; (4) that the proceedings terminated on the
13 merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff
14 suffered injury or damage as a result of the prosecution.

15 *Clark v. Baines*, 150 Wash.2d 905, 911, 84 P.3d 245 (2004) (quoting *Hanson*, 121 Wn.2d at
16 558). “[M]alice and want of probable cause constitute the gist of a malicious prosecution action.”
17 *Hanson*, 121 Wash.2d at 558, 852 P.2d 295 (citing *Peasley*, 13 Wash.2d at 497, 125 P.2d 681).
18 Probable cause is a complete defense to malicious prosecution. *Hanson*, 121 Wash.2d at 563,
19 852 P.2d 295.

20 Plaintiff alleges that in “falsely arresting Plaintiff, in making numerous false statements
21 in their reports and written statements and in sworn testimony Defendants, and each of them,
22 intentionally caused Plaintiff to be prosecuted and imprisoned for []assault, maliciously
23 prosecuted, and to have the arrest and charge permanently on his record, despite its dismissal,
resulting in great harm to Plaintiff that continues to this day.” Dkt. 1, ¶ 5.30.

Plaintiff makes no allegation specific to what statements, reports, or testimony can be
fairly attributed to Defendant Gibson. As previously noted, Plaintiff claims that it was Defendant

1 Toese who searched him and found his knife and Defendants Toese and Todd who “dragged/
2 marched” him to the Washington State Patrol, where he was taken into custody. Dkt. 1, ¶ 3.18-
3 3.20. Plaintiff does not allege that Defendant Gibson instituted the prosecution or that there was
4 a want of probable cause for the institution of the prosecution. Plaintiff does not deny that he had
5 a knife in his possession and elsewhere in his Complaint, Plaintiff alleges that he “lawful[ly]
6 refus[ed] to provide identification to an officer.” Dkt. 1, ¶ 5.13.

7 Thus, Plaintiff’s malicious prosecution claim against Defendant Gibson shall be
8 dismissed.

9 2. RCW 4.24.510

10 Defendant Gibson argues that, to the extent that Count Six, or any other count, is based
11 on an allegation related to Defendant Gibson’s communications or “sworn statements” with law
12 enforcement about what he perceived to be dangerous or criminal acts by Plaintiff, such count is
13 barred by RCW 4.24.510 and therefore, Defendant Gibson is entitled to fees, costs, and statutory
14 damages of \$10,000.00.

15 The statutory provision to which Defendant Gibson refers provides that “[a] person who
16 communicates a complaint or information to any branch or agency of federal, state, or local
17 government ... is immune from civil liability for claims based upon the communication to the
18 agency ... regarding any matter reasonably of concern to that agency.” RCW 4.24.510. In
19 addition, “[a] person prevailing upon the defense provided for in [RCW 4.24.510] ... is entitled to
20 recover expenses and reasonable attorneys’ fees incurred in establishing the defense and in
21 addition shall receive statutory damages of ten thousand dollars.”¹

22 _____
23 ¹ An “anti-SLAPP” statute such as RCW 4.24.510, does not apply to federal law causes of action,
but only to special motions to strike in connection with state law claims. *Hilton v. Hallmark
Cards*, 599 F.3d 894, 901 (9th Cir. 2010).

1 Plaintiff very broadly and in conclusory fashion, alleges that he was wrongfully arrested
2 for the alleged assault of one or more of the Defendants based the numerous false statements
3 made by “all of the Defendants and each of them.” However, at this stage in the litigation, the
4 Court is permitted to consider only the contents of the complaint or to take judicial notice of
5 facts that are incorporated by reference in the complaint. The Court has determined that Plaintiff
6 has failed to state a claim of malicious prosecution against Defendant Gibson. Moreover, at this
7 stage of the litigation, Defendant Gibson cannot show that he in fact, made a complaint or
8 submitted a sworn statement to any governmental agency which led to Plaintiff’s arrest and
9 prosecution, and for which he is entitled to immunity under RCW 4.24.510.

10 Accordingly, the Court declines to entertain a claim for statutory fees under RCW
11 4.24.510.

12 **F. Count Seven – Negligence**

13 Plaintiff brings a state law claim of negligence against “Law Enforcement Defendants,
14 and those acting as law enforcement, and each of them,” for negligence in the investigation of
15 criminal and dangerous conduct by Plaintiff. Dkt. 1, ¶ 5.34.

16 In Washington, a claim for negligence requires a showing of “(1) the existence of a duty
17 to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the
18 proximate cause of the injury.” *Lowman v. Wilbur*, 178 Wash.2d 165, 309 P.3d 387 (2013)
19 (quoting *Crowe v. Gaston*, 134 Wash.2d 509, 514, 951 P.2d 1118 (1998)). Generally, a claim for
20 negligent investigation does not exist in Washington because there is no duty owed to a
21 particular class of persons. *M.W. v. Dep’t of Social & Health Serv.*, 149 Wash.2d 589, 601, 70
22 P.3d 954 (2003); *Donohoe v. State*, 135 Wash.App. 824, 142 P.3d 654 (2006); *Rodriguez v.*
23 *Perez*, 99 Wash.App. 439, 443, 994 P.2d 874 (2000). An exception, which is not applicable here,

1 is recognized in Washington for child abuse cases because of a duty found in a state statute.
2 *M.W.*, at 601, 70 P.3d 954.

3 Plaintiff does not allege that Defendant Gibson was involved in the investigation nor can
4 he establish an actionable duty owed to him by Defendant Gibson. Accordingly, this claim
5 against Defendant Gibson fails as a matter of law and will be dismissed.

6 **G. Count Eight – Intentional Infliction of Emotional Distress**

7 Plaintiff alleges “Intentional Infliction of Emotional Distress” against all defendants. Dkt.
8 1, ¶ 5.36-39. Intentional infliction of emotional distress is also known as the tort of outrage. 16
9 Wash. Prac., Tort Law And Practice § 14:11 (4th ed.). To establish a claim for the tort of
10 outrage, a plaintiff must show “(1) extreme and outrageous conduct, (2) intentional or reckless
11 infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff.”
12 *Reid v. Pierce County*, 136 Wash.2d 195, 961 P.2d 333, 337 (1998). Regarding the standard for
13 “extreme and outrageous conduct,” the Washington Supreme Court has held that “the conduct in
14 question must be ‘so outrageous in character, and so extreme in degree, as to go beyond all
15 possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized
16 community.’” *Dicomes v. Washington*, 113 Wash.2d 612, 782 P.2d 1002, 1012 (1989) (citing
17 *Grimsby v. Samson*, 85 Wash.2d 52, 530 P.2d 291, 295 (1975) (emphasis omitted)).

18 “While the question of outrageousness is normally one for the jury to decide, it is for the
19 court to make the initial determination of whether ‘reasonable minds could differ on whether the
20 conduct was sufficiently extreme to result in liability.’” *Bryant v. Country Life Ins. Co.*, 414
21 F.Supp.2d 981, 1004 (W.D.Wash.2006) (quoting *Grimsby*, 530 P.2d at 295). “Conduct which is
22 merely insulting or annoying, or even threatening will not trigger liability.” *Bryant*, 414
23 F.Supp.2d at 1004.

1 Even assuming the facts alleged in Plaintiff's complaint are true, the Court finds no
2 reasonable jury could find Defendant Gibson's conduct "so outrageous in character, and so
3 extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as
4 atrocious, and utterly intolerable in a civilized community." *Dicomes*, 113 Wash.2d 612, 782
5 P.2d 1002, 1012 (1989). Plaintiff does not allege that Defendant Gibson took any action that was
6 extreme and outrageous. While Plaintiff claims that he was assaulted and battered by "one or
7 more of the named Defendants," Defendants claim that it was Plaintiff who committed an assault
8 and battery upon one or more of them and this all apparently occurred during a demonstration
9 and counter demonstration. *See* Dkt. 19 (Joint Status Report, p. 2).

10 Plaintiff also makes no allegation of any actual "severe emotional distress." "Severe
11 emotional distress is emotional distress so extreme that no reasonable person could be expected
12 to endure it." 16 Wash. Prac., Tort Law And Practice at § 14:39; WPI 14.03.04. Plaintiff merely
13 alleges that being arrested on his birthday "soured the event" and that he had to miss several
14 classes to attend court. These allegations are insufficient, as a matter of law, to state a claim for
15 the intentional infliction of emotional distress against Defendant Gibson and therefore, the claim
16 will be dismissed.

17 Accordingly, Defendant Gibson's motion to dismiss (Dkt. 22) is **GRANTED** (except as
18 to a request for RCW 4.24.510 statutory fees and expenses which is **DENIED**). Plaintiff's claims
19 against Defendant Gibson are dismissed with prejudice.

20 DATED this 14th day of May, 2021.

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BRIAN A. TSUCHIDA
United States Magistrate Judge