[Cite as *Black v. Hicks*, 2020-Ohio-3976.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

ARNOLD BLACK, :

Plaintiff-Appellee, :

No. 108958

v. :

DETECTIVE RANDY HICKS, ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 6, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-14-826010

Appearances:

Willa Hemmons, Director of Law, City of East Cleveland, *for appellants.*

DiCello Levitt Gutzler, L.L.C., and Justin J. Hawal and Robert F. DiCello, *for appellee.*

Randy Hicks, *pro se, for cross-claim defendant-appellee.*

EILEEN T. GALLAGHER, A.J.:

{¶ 1} Defendants-appellants, city of East Cleveland and former East Cleveland Police Chief Ralph Spotts (collectively referred as "appellants") appeal a

judgment, rendered following a jury trial, in favor of plaintiff-appellee, Arnold Black.

Appellants claim the following eleven errors:

> 1. In that defendant Randy Hicks was acting as an arm of the state through his assignment to a joint task force whose sole mission was to interdict the violation of state drug laws, the trial court lacked jurisdiction to hear any of plaintiff's federal or state law claims.
>
> 2. The journal entry of 8/15/19 was inapposite of the 8/9/19 jury verdict inasmuch as it deviated from said verdict which awarded $15,000 in punitive damages only as to defendant Ralph Spotts with no award of compensatory damages.
>
> 3. Neither the city of East Cleveland nor Chief Ralph Spotts (the city Defendants) may held liable for the misconduct of defendant Randy Hicks, as defendant Hicks was not under the control and authority of these city defendants at the time of his alleged misconduct.
>
> 4. Defendant Randy Hicks's actions were outside any scope and authority he might have possessed as an East Cleveland police officer as he was acting as an individual, and the city should have been able to offer rebuttal evidence thereof.
>
> 5. The admission of Randy Hicks * * * [sic] admissions and jury instructions violated the previous court of appeals case no. 16-105248 with reference to maintenance of discovery as of 5/10/16.
>
> 6. There was insufficient evidence to support the jury's verdict and it was against the manifest weight of the evidence.
>
> 7. The trial court erred when it found a *Monell* claim against the city.
>
> 8. The trial court erred to the prejudice of defendant Ralph Spotts when it imputed supervisory liability to him for the malicious, wanton, reckless action of Randy Hicks.
>
> 9. The surprise showing of Arnold Black's head scar from a 2015 surgery irreparably injured the defense and should have resulted in a mistrial in that it was plain error.
>
> 10. The statute of limitations had run by 23:44 hours, April 28, 2014 time of the case refiling when, according to evidence, the alleged

precipitating incident occurred at 00:55 hours on April 28, 2012, which is plain error.

11. Denial of criminal court *State v. Black*, Cuyahoga C.P. No. CR-2-562242, finding that probable cause existed as a matter of judicial notice was due process violation.

{¶ 2} We find no merit to the appeal and affirm the trial court's judgment.

I. Facts and Procedural History

{¶ 3} On April 28, 2012, at approximately 10:00 p.m., Black was driving home from his mother's house when he was pulled over by East Cleveland Patrolman Jonathan O'Leary. (Trial tr. 166-167; 218; 227.) Sergeant Randy Hicks had ordered O'Leary to stop Black's green truck because it resembled a green truck belonging to a suspected drug dealer. Hicks was a narcotics detective in East Cleveland and was also a member of a joint narcotics task force with the Cuyahoga County Sheriff's Department. (O'Leary trial depo. tr. 54.)

{¶ 4} O'Leary told Black to get out of his vehicle, handcuffed him, and escorted him to the back of his truck. (O'Leary trial depo. tr. 8.) O'Leary's patrol car was parked behind Black's vehicle with the lights activated. Black was sitting on his back bumper in front of O'Leary's patrol car when Hicks arrived on the scene. Black testified that Hicks immediately began searching his car and removed the side panels from his truck. Hicks did not find any narcotics in the truck and, after brandishing his badge, began questioning Black about who sells drugs in East Cleveland. (Trial tr. 86.) Black replied that he did not know who sold drugs in the city. Thereafter, Hicks became violent and repeatedly struck Black's face and head without provocation or justification. (Trial tr. 93.) Hicks admitted at trial that he

struck Black several times until O'Leary came between them and stopped him. (Trial tr. 93-94.) Hicks described Black as appearing "dazed" after the beating. (Trial tr. 94; 232-234.) O'Leary testified that he believed his dash camera was operating throughout the duration of the incident and captured the incident on film. (O'Leary trial depo. 18.) Black and O'Leary both testified that Hicks may have been under the influence of alcohol at the time of the incident because he smelled of alcohol. (Trial tr. 291-292; O'Leary trial depo. 73-74.)

{¶ 5} Hicks admitted that he called another officer to transport Black to the East Cleveland jail even though he did not have probable cause to arrest him. (Trial tr. 98.) Upon arriving at the jail, Black was placed in a storage room that the police officers referred to as a "holding cell," even though there was no bed and no toilet in the room. (Trial tr. 238-239.) The room contained a wooden bench, some storage lockers, and cleaning supplies and was infested with cock roaches. (Trial tr. 240-241.)

{¶ 6} Black remained in the storage room for four days. At some point, an unknown officer entered the room, gave Black a carton of milk, and allowed him to use his cell phone to make a call. (Trial tr. 244-245.) Black called his former fiancée, Eryka Bey and told her, in a whisper, that he had been arrested and beaten and was being held in the East Cleveland jail. (Trial tr. 190.) Bey went immediately to the jail and asked to see Black. An officer told her she could not see him because he was "under investigation."

{¶ 7} Black testified that on the fourth day following his arrest, a councilwoman came to the jail to inquire about him because she had heard he had been beaten while he was handcuffed and was being detained without probable cause in the city jail. Chief Spotts accompanied the councilwoman during her visit with Black in the storage room. (Trial tr. 272.) In Black's presence, the councilwoman told the chief that she wanted to know what happened to Black and how "at this time and age * * * he got beat up and put in a closet." (Trial tr. 274.) Thereafter, Black was placed in a line of inmates, who were awaiting transport to the county jail. (Trial tr. 271-274.) Later that day, Bey picked Black up at the county jail and drove him home. (Trial tr. 196-197.) According to Bey, Black's head was swollen like a "helmet" and he was acting fearful. (Trial tr. 196-197.)

{¶ 8} In the weeks following the incident, Black complained of headaches and developed vision problems. His mother and Bey also observed changes in his personality. They described him as withdrawn and unwilling to leave the house due to fear of the police. (Trial tr. 199-200, 201, 209, 253-254.) Black eventually sought medical attention and required surgery to remove blood from his brain. (Trial tr. 204-206, 257-260.)

{¶ 9} Following the incident, O'Leary reported Hicks to his superiors, including Spotts. (Trial depo. tr. 29-30.) O'Leary told Spotts that the dash camera video would show Hicks beating Black while he was handcuffed. O'Leary also completed a "Form-M," a report in which O'Leary detailed Hicks's actions with respect to Black. (O'Leary trial depo. tr. 66.) Yet, nobody from the East Cleveland

Police Department ever followed up with O'Leary to investigate the incident, and the dash-camera video went missing. (Trial tr. 31; 33-34; 49.) O'Leary testified that the department's failure to take action in response to the incident suggested that the department intended to cover it up. (Trial tr. 33-34.) O'Leary stated:

> Q: Now, based on your experience, based on your reference to notify supervisors, based on the actual notifications that you gave to supervisors about what happened, does the missing video and the inaction by the city and chief --- * * * lead you to believe * * * that the chief ignored your information so they could put the matter to rest without prosecuting Detective Hicks?
>
> * * *
>
> A: I don't know what his intentions were, but the appearance to me was that he probably wanted to put [it] to rest.
>
> Q: So the missing video and inaction by the city and chief leads you to believe, and do you in fact, truly believe that the chief participated in a passive, do nothing cover up in this case?
>
> * * *
>
> A: So you're saying that because nothing was ultimately done and – by anybody, basically, that there was no prosecution, was that a covert way to basically, hide this? It has that appearance to me.

(O'Leary trial depo. tr. 33-34.)

{¶ 10} Hicks similarly testified that he propounded discovery to appellants, requesting any police reports, O'Leary's Form-M complaint, the dash-camera video, booking documents, jail records, and his own personnel file, and the city informed him that "[t]hey didn't have [them] anymore" and that "they were gone." (Trial tr. 102-103.)

{¶ 11} Hicks testified that there was a culture of violence in the East Cleveland Police Department. He explained that as part of his on-the-job training, he was taught to use violence against citizens in order to obtain information from them and to instill fear. (Trial tr. 83-84, 87.) Hicks explained that when he was a patrol officer, he and Spotts were part of group known as the "jump-out boys." (Trial tr. 90.) Whenever they encountered citizens gathered on a sidewalk, they would jump out of their cars, throw the citizens on the ground, and beat or "boot" them. (Trial tr. 90.) Hicks was also taught to "clear the corners" by slamming people against police cars, searching them for drugs without probable cause, and if they did not find any drugs, making it "inconvenient for them." (Trial tr. 91.) The officers "made it inconvenient" for citizens by "strip[ping] them down in the middle of winter" and making them stand naked in the cold. (Trial tr. 91.) They stripped people naked on a "daily" basis. (Trial tr. 91.) Hicks testified that he would not have been promoted if he had refused to engage in these violent tactics. (Trial tr. 95.)

{¶ 12} Spotts was the chief of police in the East Cleveland Police Department at the time of Black's arrest. (O'Leary trial depo. tr. 22; trial tr. 109.) Hicks testified that as the "top law enforcement officer" in East Cleveland, Spotts was responsible for establishing policies and procedures for the jail, criminal investigations, and "every aspect" of the police department. (Trial tr. 106, 110.) Under Spotts's supervision, it was well known that there was a "right way, a wrong way, and the East Cleveland way." (O'Leary trial depo tr. 34, Trial tr. 106.) The "East Cleveland way" included a lack of meaningful oversight by supervisors, routine failures to

report violations of police procedures, and the use of violence against citizens and other officers. (O'Leary trial depo tr. 36-39, Trial tr. 87-93.) As a result, violence was a custom and practice within the city when arresting people at traffic stops or when citizens were not compliant. (Trial tr. 103-104, 146-147.) According to Hicks, individuals, who posed a threat the city's civil liability, were also routinely treated with violence, arrested without probable cause, and placed in the jail. (Trial tr. 105.)

{¶ 13} As a result of his treatment by Hicks and other members of the East Cleveland Police Department, Black filed a complaint on April 28, 2014, asserting claims for malicious prosecution, abuse of process, spoliation, battery, false imprisonment, supervisory liability, reckless, wanton or willful conduct pursuant to R.C. 2921.52, civil conspiracy, and a claim for violations of Black's Fourth, Fifth, and Fourteenth Amendments of the United States Constitution under 42 U.S.C. 1983. The prayer for relief requested compensatory and punitive damages. Appellants filed an answer to Black's complaint and a cross-claim against Hicks, alleging that he acted outside the scope of his authority as an East Cleveland police officer. Hicks, acting pro se, filed an answer to Black's complaint and appellants' cross-claim.

{¶ 14} Black propounded discovery to appellants in August and September 2014. Appellants failed to respond to the discovery requests, and Black filed a motion in March 2016, to preclude appellants from offering evidence and witnesses not disclosed in discovery. The trial court issued an order, dated April 19, 2016, requiring appellants to respond to Black's discovery requests on or before May 2, 2016. The trial court warned that failure to respond to the discovery requests would

result in sanctions, including the exclusion of any evidence or witnesses not disclosed in discovery.

{¶ 15} The next day, on April 20, 2016, the trial court vacated its April 19, 2016 order and set a hearing to show cause to afford appellants the opportunity to explain why they failed to respond to Black's discovery requests. The court's order again warned, however, that failure to show cause would result in sanctions, including an order precluding appellants from offering evidence and witnesses at trial. Instead of appearing for the show cause hearing, appellants filed a notice of appeal, challenging the trial court's April 20, 2016 order. This court promptly dismissed the appeal for lack of a final, appealable order. *Black v. Hicks*, 8th Dist. Cuyahoga No. 104453 (May 10, 2016).

{¶ 16} Meanwhile, the trial court issued an order addressing appellants' failure to respond to Black's discovery requests. In a judgment entry, dated May 9, 2016, the trial court denied Black's motion for default judgment, but granted his motion to preclude appellants from offering evidence and witnesses at trial that were not disclosed during discovery. The trial court concluded that appellants failed to respond to Black's requests for discovery, failed to file a response to Black's motion to exclude evidence, and failed to provide a reason or excuse for their failure to respond to discovery. On that same day, the trial court issued another judgment entry granting Black's motions in limine to exclude character evidence, evidence regarding the East Cleveland defendants' inability to satisfy a judgment, and

evidence in support of affirmative defenses. The trial court also granted Black's request to have admissions deemed admitted against Hicks.

{¶ 17} Thereafter, appellants filed another notice of appeal, challenging the trial court's May 9, 2016 order, and this court again dismissed the appeal for lack of a final, appealable order. *See Black v. Hicks*, 8th Dist. Cuyahoga No. 104461 (May 24, 2016). Appellants filed a notice of appeal and a memorandum in support of jurisdiction in the Ohio Supreme Court, challenging this court's dismissal of their appeal in *Black II*. *See Black v. Hicks*, Ohio Supreme Court Case No. 2016-0805. The Ohio Supreme Court declined to accept jurisdiction, and the case was remanded to the trial court.

{¶ 18} While the case was pending in the Ohio Supreme Court, the trial court conducted an ex parte jury trial that began on May 25, 2016. The jury returned a verdict in favor Black and awarded Black $10,000,000 in compensatory damages and $12,000,000 in punitive damages; $1,000,000 against O'Leary for false arrest and violation of his civil rights under 42 U.S.C. 1983, and $11,000,000 against Spotts for spoliation and supervisory liability.

{¶ 19} Appellants appealed the judgment, and this court dismissed the appeal for lack of a final, appealable order because judgment was not entered on all claims. *Black v. Hicks*, 8th Dist. Cuyahoga No. 104613 (Nov. 8, 2016). Thereafter, Black voluntarily dismissed the wanton, reckless and willful conduct, and civil conspiracy claims with prejudice, and appellants appealed. This court sua sponte dismissed the appeal due to appellants' failure to file an appellate brief. *See Black*

v. Hicks, 8th Dist. Cuyahoga No. 105248 (Mar. 21, 2017). This court later granted a motion to reinstate the appeal, and ultimately reversed the trial court's judgment on grounds that the trial court lacked jurisdiction to proceed with a jury trial while the matter was pending on appeal. *Black*, 8th Dist. Cuyahoga No. 105248, 2018-Ohio-2289, at ¶ 51-52. This court remanded the case to the trial court to continue from "the state of the proceeding as it existed on May 10, 2016." *Id*. at ¶ 52.

{¶ 20} On remand, the trial court issued another ruling on appellants' failure to respond to Black's discovery requests. The court's order, dated April 5, 2019, precluded appellants from offering evidence and witnesses that were not disclosed during discovery. The ruling effectively precluded appellants from presenting a case-in-chief. The court also issued an order that Black's requests for admissions were deemed admitted. (See journal entry dated Apr. 5, 2019.)

{¶ 21} The trial court conducted a second jury trial in August 2019. Although appellants were precluded from presenting a case-in-chief, they were present to cross-examine Black's witnesses and participate in the trial. The jury returned a verdict in favor of Black and awarded compensatory damages against all defendants, jointly and severally, in the amount of $20,000,000, punitive damages against Hicks in the amount of $15,000,000, and punitive damages against Spotts in the amount of $15,000,000. Appellants now appeal the trial court's judgment.

II. Law and Analysis

A. Jurisdiction

{¶ 22} In the first assignment of error, appellants argue the trial court lacked jurisdiction to hear Black's complaint. They assert that, under R.C. Chapter 2743, the Ohio Court of Claims rather than the common pleas court had exclusive jurisdiction over Black's claims because his claims were made against the state. Appellants allege Hicks and the city of East Cleveland were acting as an "arm of the state" during the relevant time period.

{¶ 23} Appellants never raised this jurisdictional issue in the trial court. The failure to timely advise a trial court of a possible error, whether by objection or otherwise, generally results in a forfeiture of the issue for purposes of appeal. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). However, the question of a court's subject matter jurisdiction may be raised at any time — even after judgment or on appeal. *Vilk v. DiNardo*, 8th Dist. Cuyahoga No. 103755, 2016-Ohio-5245, ¶ 10, citing *Escada Internatl. v. Eurocargo Express*, 8th Dist. Cuyahoga No. 80761, 2002-Ohio-4035, ¶ 17. Therefore, appellants' failure to raise this jurisdictional question in the trial court does not prevent us from considering it on appeal.

{¶ 24} "The court of claims has exclusive, original jurisdiction over civil actions against the state for money damages that sound in law." *Young v. Ohio State Univ. Hosps.*, 2017-Ohio-2673, 90 N.E.3d 234, ¶ 13 (10th Dist.), citing R.C. 2743.03(A)(1); *see also Cleveland v. Ohio Bureau of Workers' Comp.*, Slip Opinion

No. 2020-Ohio-337. R.C. 2743.01(A) defines the term "state" for purposes of the Court of Claims' jurisdiction and states:

> "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state. "State" does not include political subdivisions.

{¶ 25} R.C. 2743.01(B) distinguishes political subdivisions from state entities and defines the term "political subdivisions" as "municipal corporations, townships, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches." *See also* R.C. 2744.01(F).

{¶ 26} East Cleveland is a municipal corporation, and appellants are responsible for governmental activities within the city. R.C. 2744.01(C)(2)(a) provides that a municipal corporation's "governmental functions" include, among other things, "[t]he provision or nonprovision of police * * * services or protection." Appellants are, therefore, members of a political subdivision and not agents of the state. Therefore, the Cuyahoga County Court of Common Pleas rather than the Ohio Court of Claims has subject matter jurisdiction over Black's claims against them.

{¶ 27} The first assignment of error is overruled.

B. Joint and Several Liability

{¶ 28} In the second assignment of error, appellants argue the trial court erred in imposing joint and several liability for compensatory damages against Spotts. They argue the imposition of joint and several liability against Spotts was

not consistent with the jury's verdict, which awarded punitive damages against Spotts individually but did not award compensatory damages individually against him.

{¶ 29} However, the jury determined that Black was entitled to compensatory damages in the amount of $20,000,000. In the general verdict form, the jury awarded Black a total of $50,000,000 in damages. The breakdown of the jury's calculation of total damages is set forth in interrogatory No. 10, wherein the jury determined that Black was entitled to a total of $20,000,000 in compensatory damages and awarded punitive damages in the amount of $15,000,000 against Hicks and $15,000,000 against Spotts for total of $50,000,000.

{¶ 30} The general verdict form does not specify how the jury determined that Black was entitled to $20,000,000 in compensatory damages. However, jury interrogatory No. 7 explains the jury's determination of the total amount of compensatory damages was composed of findings made in other jury interrogatories. Jury interrogatory No. 7 states, in relevant part:

> If you answered yes to any one or more of the sets of Interrogatories 1 and 1A; and/or 2 and 2A; and/or 3 and 3A; and/or 4 and 4A; and/or 5 and 5A; and/or 6 and 6A; state the total amount of compensatory damages you award Plaintiff Arnold Black:

{¶ 31} Interrogatory Nos. 5 and 6 specifically refer to Spotts's liability for compensatory damages. Jury interrogatory No. 5 states, in relevant part:

> Fifth Claim: Supervisory Liability – Chief Ralph Spotts
>
> Has Plaintiff Arnold Black proven by a preponderance of the evidence that the deprivation of his constitutional rights took place at the

> direction or with the knowledge, acquiescence, or consent of Defendant Chief Spotts?
>
> Circle your answer in ink: Yes or No

The jury circled the word "yes," indicating that Black's constitutional rights were violated either at Spotts's direction or with his knowledge, acquiescence, and consent. Jury interrogatory No. 5A makes an additional finding regarding Spotts's contribution to Black's injuries and states, in relevant part:

> Has Plaintiff Arnold Black proven by a preponderance of the evidence that the conduct of Chief Ralph Spotts was a proximate cause of Plaintiff Arnold Black's injuries?
>
> Circle your answer in ink: Yes or No

Again, the jury circled the word "yes," indicating that Spotts's conduct was a proximate cause of Black's injuries.

{¶ 32} Jury interrogatory No. 6 also charges Spotts with liability for Black's injuries and states, in relevant part:

> Has Plaintiff Arnold Black proven by a preponderance of the evidence that Defendant city of East Cleveland, through its policy makers, the chief of police and/or the mayor, established or promoted policy(s), practice(s), or custom(s) that deprive Plaintiff Arnold Black of his constitutional rights?
>
> Circle or your answer in ink: Yes or No

The jury circled the word "yes," indicating the evidence proved, by preponderance of the evidence, that his constitutional rights were violated as a result of policies, practices or customs promoted by Spotts, the chief of police, and/or the mayor of East Cleveland. Although it is theoretically possible the jury could have circled "yes" due to the mayor's activities and would not have circled "yes" due to Spotts's

activities, appellants did not object to the interrogatory. The failure to object to an interrogatory constitutes a waiver of the alleged error on appeal. *Druzin v. S.A. Comunale Co.*, 8th Dist. Cuyahoga No. 102674, 2015-Ohio-4699, ¶ 17, citing *Boewe v. Ford Motor Co.*, 94 Ohio App.3d 270, 279, 640 N.E.2d 850 (8th Dist.1992).

{¶ 33} In any case, the jury's response to jury interrogatory No. 6 is duplicative of their answers to jury interrogatory Nos. 5 and 5A, wherein the jury found Spotts liable for Black's injuries. Jury interrogatory No. 7 asked the jury to determine the amount of damages to which Black was entitled as compensation for those injuries, which the jury concluded were caused, at least in part, by Spotts's conduct. Thus, despite appellants' argument to the contrary, the jury awarded compensatory damages against Spotts.

{¶ 34} Moreover, Ohio law recognizes a modified form of joint and several liability that limits a plaintiff's ability to recover the full amount of compensatory damages for any one of multiple tortfeasors to the percentage of liability found against each defendant. *See* R.C. 2307.22. Despite the law allowing a modified form of joint and several liability based on each defendant's proportionate share of the liability, none of the jury interrogatories asked the jury to determine each defendant's proportionate share of the liability for compensatory damages in this case. Therefore, the defendants are jointly and severally liable for the full amount of the compensatory damages.

{¶ 35} Finally, appellants assert that Spotts cannot be held personally liable for compensatory damages because the city is required by R.C. 2744.07(B)(1) to

indemnify him and hold him harmless. However, there are exceptions to the indemnification provided in R.C. 2744.07(B)(1), and this issue was not litigated in the trial court to determine whether any of the exceptions apply. Having failed to raise this argument in the trial court, it is forfeited for purposes of appeal. *Goldfuss*, 79 Ohio St.3d 116, at 121, 679 N.E.2d 1099.

{¶ 36} The second assignment of error is overruled.

C. Vicarious Liability

{¶ 37} In the third assignment of error, appellants argue the trial court erred in finding them liable for Hicks's misconduct. In the seventh assignment of error, appellants again argue the trial court erred in finding them vicariously liable for Hicks's misconduct, in violation of the United States Supreme Court's decision in *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). We discuss these assigned errors together because they are interrelated.

{¶ 38} As previously stated, Black brought his complaint against Hicks and appellants pursuant to 42 U.S.C. 1983, which states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * .

{¶ 39} To prevail on a 1983 claim, a plaintiff must prove (1) that a right secured by the United States Constitution or laws of the United States was deprived,

and (2) that the defendant committed the violation while acting under color of state law. *Kalvitz v. Cleveland*, N.D. Ohio No. 1:16 CV 748, 2017 U.S. Dist. LEXIS 217570, (Oct. 16, 2017), citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 155, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978).

{¶ 40} Appellants contend that Hicks acted outside the scope of his authority as an East Cleveland police officer and was, therefore, not acting under color of state law at the time of the events giving rise to this case. They argue he was not acting under color of state law because he was off duty, wearing plain clothes, and was driving an unmarked car at the time of Black's arrest. However, "[i]t is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer acted under color of state law." *Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir.1975). In determining whether a police officer was acting under color of law, the court must consider the nature of the act performed by the officer as well as "whether he flashed his badge, announced himself as an officer, or arrested or tried to arrest anyone." *Kalvitz* at *15-16.

{¶ 41} Hicks testified that he brandished his badge when he arrested Black. (Trial tr. 86-87.) Hicks further stated that although he was not technically on duty, he acted according to his authority as a police officer. (Trial tr. 125.) He testified: "If I was going to look for something, I was on duty. Once I'm in the city, I'm on duty." (Trial tr. 125.) Moreover, Hicks used his authority as a supervisor to order O'Leary to stop Black's vehicle and place him under arrest. (Trial tr. 106, 108, 111; O'Leary trial depo. tr. 6-8.) Referring to Hicks, O'Leary testified, in relevant part:

> Q: * * * And his actions that night, when you say he was there for work, you mean his actions that night were interpreted by you as actions undertaken in an official police capacity.
>
> A: Yes. * * * he was acting as a policeman.

(O'Leary trial depo. tr. 7.) Therefore, the evidence established that Hicks was acting under color of state law when he arrested, assaulted, and detained Black.

{¶ 42} Appellants nevertheless assert that Hicks was acting under the authority and control of the Cuyahoga County Sheriff's Department rather than as an East Cleveland police officer when he committed the acts giving rise to this case. However, Hicks testified that he assisted the sheriff's department "when they called," but was paid by East Cleveland. (Trial tr. 126.) He explained: "[the] [s]heriff's department doesn't pay me. I work for the [c]ity of East Cleveland." (Trial tr. 126.) Although Hicks collaborated with Cuyahoga County Sheriff's Department at times, the evidence showed he was acting in his capacity as an East Cleveland police officer at the time he arrested and detained Black.

{¶ 43} Furthermore, the evidence showed that Hicks used his authority as a police officer to have Black arrested and taken into police custody without probable cause. (Trial tr. 98.) Hicks testified:

> Q: * * * On the night this occurred, you directed the men to drive Arnold [Black] to the station, correct?
>
> A: Correct.
>
> Q: And he had done nothing, by law, that required incarceration, isn't that right?
>
> A: Correct.

* * *

> Q: He had done nothing at the time that required being detained or held for investigative purposes, fair?
>
> A: Correct.

(Trial tr. 98-99.) The evidence established that Black was seized and his liberty was restrained in violation of the Fourth Amendment to the United States Constitution. *See State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 7 ("The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution guarantee the right to be free from unreasonable searches and seizures.").

{¶ 44} The Fourth Amendment also protects individuals from government actors who use excessive force in the course of an arrest or other seizure. *Jones v. Elyria*, 947 F.3d 905 (6th Cir.2020); G*raham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L.Ed.2d 243 (1989). In determining whether a police officer used excessive force, courts consider "'(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.'" *Id*. at 917, quoting *Estate of Hill v. Miracle*, 853 F.3d 306, 312-313 (6th Cir.2017.).

{¶ 45} As previously stated, Hicks testified that the East Cleveland police had no legitimate reason for stopping and detaining Black since Black had not committed a crime. (Tr. 91.) Yet, Hicks repeatedly struck Black's head while Black

was handcuffed simply because Black denied having knowledge of any drug dealing in East Cleveland. Hicks stated:

> Q: And he told you he didn't know, didn't he?
>
> A: Yes.
>
> Q: And when that didn't satisfy you, you struck him, isn't that right?
>
> A: Correct.
>
> Q: You struck him repeatedly, isn't that right?
>
> A: Correct.
>
> Q: And when you were done striking him, O'Leary got between the two of you, isn't that right?
>
> A: From what I remember, yes.

(Trial tr. 92-93.) When asked how Black appeared after being hit, Hicks described him as being "dazed." (Trial tr. 94.) Since Black was handcuffed, he did not pose a threat to any of the officers, and there is no evidence that he resisted arrest. Therefore, there was evidence that Hicks used excessive force when he arrested Black.

{¶ 46} Local governments are generally not liable under 42 U.S.C. 1983 for injuries caused by their employees or agents pursuant the theory of respondeat superior. *Miller v. Shaker Hts,* N.D. Ohio No. 1:19 CV 1080, 2020 U.S. Dist. LEXIS 19200 (Feb. 5, 2020), citing *Monell*, 36 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 at 691. However, in *Monell,* the United States Supreme Court held that a local government is liable for the acts of its employee or agent when the employee or agent causes an injury while acting pursuant to the "government's policy or custom,

whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy * * *." *Id*. at 694.

{¶ 47} To prevail on a *Monell* claim, the plaintiff must show (1) the existence of a clear and persistent pattern of illegal activity, (2) notice or constructive notice on the part of the defendant, (3) the defendant's tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction, and (4) that the defendant's custom was the "moving force" or direct causal link in the constitutional deprivation. *Kalvitz*, N.D. Ohio No. 1:16 CV 748, 2017 U.S. Dist. LEXIS 217570, at * 23, citing *Thomas v. Chattanooga*, 398 F.3d 426, 429 (6th Cir.2005).

{¶ 48} The evidence at trial demonstrated that the East Cleveland Police Department had an unwritten custom and practice of using violence and arrests to intimidate people. Hicks testified that "[v]iolence was a custom and practice * * * when arresting people at traffic stops." (Trial tr. 104.) He also stated that East Cleveland police officers routinely assaulted citizens in the city:

> A: I'm not going to sit here and say I didn't hit Arnold Black. But that's the way I was brought up working there, by not just Chief Spotts.
>
> There was other officers, too, that were older and senior to me, just like I was senior to O'Leary. This is nothing new. It's been going on before I was there, going on when Chief Spotts was a patrolman. This is nothing new in East Cleveland. This was just the way it was.

(Trial tr. 84.)

{¶ 49} Hicks later stated that he was a member of "the Street Crimes Unit" in East Cleveland, which was known as the "jump-out boys." (Trial tr. 90.) Hicks and

other "jump-out boys" would ride through the streets, chase drug dealers, "jump out at them," and "beat" and "boot" them. (Trial tr. 90.) According to Hicks, officers were instructed to "clear the corners," by holding citizens against police vehicles, searching them for drugs without probable cause, and if they did not find any drugs, to "make it inconvenient for them" by stripping them naked in both winter and summer. (Trial tr. 91.) They used these tactics "daily" to find drugs in the city. (Tr. 91.)

{¶ 50} Hicks further testified that people who posed a threat to the city's civil liability were routinely treated with violence, detained in the jail, and "made to wait." (Trial tr. 104-105.) Hicks testified that as the chief of police, Spotts was the "top law enforcement officer" in charge of establishing policies and procedures throughout the East Cleveland Police Department and within the jail.[1] (Trial tr. 106, 109-110.) As a supervisor, Hicks was responsible for ensuring that lower ranking police officers followed the policies and procedures. (Trial tr. 108.) Both Hicks and O'Leary acknowledged that East Cleveland had its own unique policies, stating there was a right way, a wrong way, and the "East Cleveland way." (O'Leary trial depo. tr. 34, trial tr. 106.) Indeed, officers were rewarded with promotions for following the "East Cleveland way," and Hicks testified that he probably would not have been promoted if he had not followed these policies. (Trial tr. 95.) The unrefuted

[1] Appellants observe in their appellants' brief that Hicks aligned himself with Black at trial in a joint "search" for "deeper pockets." (Appellants' brief at x.) However, O'Leary's testimony corroborated Hicks's testimony that he assaulted, arrested, and detained Black without probable cause pursuant to policies of the East Cleveland Police Department at that time.

evidence demonstrated that Black was assaulted and detained without probable cause pursuant to a longstanding policy within the East Cleveland Police Department. Therefore, there was competent, credible evidence to support Black's *Monell* claim.

{¶ 51} The third and seventh assignments of error are overruled.

D. Rebuttal Evidence

{¶ 52} In the fourth assignment of error, appellants argue the trial court erred in precluding them from introducing portions of O'Leary's trial deposition testimony as well as a police report written by O'Leary as "rebuttal" evidence at trial. Appellants argue the evidence would have shown that small amounts of cocaine and marijuana were found in Black's car, despite his claim that the police lacked probable cause to arrest him. The trial court excluded the evidence because it was not produced pursuant to Black's discovery requests.

{¶ 53} The admission of rebuttal evidence rests within the sound discretion of the trial court. *In re Sadiku*, 139 Ohio App.3d 263, 267, 743 N.E.2d 507 (9th Dist.2000). An abuse of discretion implies a decision that is unreasonable, arbitrary, or unconscionable. *State ex rel. DiFranco v. S. Euclid*, 144 Ohio St.3d 571, 2015-Ohio-4915, 45 N.E.3d 987, ¶ 13. And, even if a trial court abuses its discretion, the judgment will not be disturbed "unless the abuse affected the substantial rights of the adverse party or is inconsistent with substantial justice." *Beard v. Merida Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶ 20.

{¶ 54} Rebuttal evidence is evidence offered to "explain, refute, or disprove new facts introduced into evidence by the adverse party; it becomes relevant only to challenge the evidence offered by the opponent, and its scope is limited by such evidence." *State v. McNeill*, 83 Ohio St.3d 438, 446, 700 N.E.2d 596 (1998).

{¶ 55} However, the trial court also has discretion to exclude evidence that was not produced pursuant to a timely request for discovery. Civ.R. 37(B)(1) authorizes the court to impose sanctions for failure to comply with discovery requests, including, but not limited to, orders:

> (a) Directing that the matters embraced in the order or other designated facts shall be taken as established for purposes of the action as the prevailing party claims;
>
> (b) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
>
> * * *
>
> (f) Rendering a default judgment against the disobedient party[.]

{¶ 56} When imposing a discovery sanction, the trial court must impose the least severe sanction that is consistent with the purpose of the rules of discovery. *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987), paragraph two of the syllabus. When issuing discovery sanctions, the Ohio Supreme Court has held that "the trial court should weigh the conduct of the party offering [evidence] along with the level of prejudice suffered by the opposing party attributable to the discovery violation, in order to determine the appropriate sanction." *Savage v. Correlated Health Servs.*, 64 Ohio St.3d 42, 55, 591 N.E.2d 1216 (1992). And,

because the exclusion of reliable and probative evidence is such a severe sanction, it should only be imposed when necessary to enforce willful noncompliance or to prevent unfair surprise. *Nickey v. Brown*, 7 Ohio App.3d 32, 34, 454 N.E.2d 177 (9th Dist.1992).

{¶ 57} In August 2014, Black served interrogatories and requests for production of documents on appellants, seeking, among other things, the dash-camera video of Black's arrest, police reports and other documents concerning Black's arrest and criminal charges, booking records, jail records, inspection of any drug-related evidence allegedly seized at the scene of his arrest, and the personnel files of Hicks and O'Leary. Appellants never responded or produced a single piece of evidence. Indeed, they reported that all of these items were "gone" or destroyed. (Trial tr. 102-103.)

{¶ 58} In April 2016, the trial court issued an order requiring appellants to appear and show cause as to why they had not complied with Black's discovery requests. The order warned that failure to show cause would result in sanctions as provided in Civ.R. 41 and 37, "including precluding defendants from offering at trial evidence, witnesses, argument or comment regarding the evidence and witnesses they failed to so produce." (Journal entry Apr. 20, 2016.) It is not clear from the docket whether the court held the show cause hearing. However, following the delay caused by multiple interlocutory appeals, the trial court ultimately issued an order, dated April 5, 2019, granting a motion in limine to preclude appellants from presenting any evidence not disclosed pursuant to Black's discovery requests. The

journal entry indicates that appellants not only failed to respond to any discovery during the five years that the case was pending, but that they also failed to respond to the motion in limine.

{¶ 59} Despite having previously represented that none of the requested discovery existed, appellants attempted to circumvent the trial court's order by filing a motion titled, "Defense motion for discovery update from plaintiff with defendants' archival data attached." Attached to the motion, appellants produced, for the first time, selective documents purported to be a police report, a laboratory report, and a release receipt, all of which Black had requested five years earlier and none of which had been provided. Appellants did not provide any of the other requested documents or information, and trial was scheduled to take place within the next two months. Black moved to strike the attachments from the record. Appellants failed to respond to Black's motion, and the trial court granted it as unopposed.

{¶ 60} Following the court's discovery rulings, appellants attempted to introduce a police report O'Leary had made in connection with Black's arrest during the videotaped trial deposition of O'Leary. The trial court later struck those portions of the deposition that violated the previously imposed discovery sanctions. Appellants now contend the trial court abused its discretion by not allowing them to produce O'Leary's police report and his testimony regarding the subject of the report.

{¶ 61} However, appellants' failure to produce the requested discovery denied Black the opportunity to conduct discovery depositions of the authors and/or custodians of the documents to determine the truth of the information contained therein. Black was also denied the opportunity to inspect the evidence allegedly seized at the scene of the arrest to confirm the truth of the information contained in the alleged police report. Despite appellants' characterization of these items as "rebuttal evidence," they are not rebuttal evidence; they are materials that should have been produced years ago when they were requested during the course of pretrial litigation. Exclusion of these items was warranted by appellants' utter failure to comply with Black's discovery requests.

{¶ 62} The fourth assignment of error is overruled.

E. Jury Instructions

{¶ 63} In the fifth assignment of error, appellants argue the trial court erred by instructing the jury that the requests for admissions propounded on appellants were conclusively established. The trial court issued an order, dated May 26, 2016, granting Black's motion to have the admissions deemed admitted. Appellants argue this motion was a nullity because the court issued it while an appeal was pending and the court was without jurisdiction to make such a ruling.[2]

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[2] Appellants also complain that the trial court lacked jurisdiction to dismiss appellants' cross-claim against Hicks due to a pending appeal. Although the trial court initially entered a judgment dismissing appellants' cross-claim against Hicks on July 7, 2016, while an appeal was pending, the court later issued another judgment entry dismissing the cross-claim on August 12, 2019. The court had jurisdiction to issue the dismissal on August 12, 2019, because there was no appeal pending. Appellants have not provided

{¶ 64} However, appellants failed to object to the jury instructions at trial. (Trial tr. 335-336, 416.) The failure to object to jury instructions before the jury retires to consider its verdict constitutes a waiver of the argument for appeal. *Maynor v. Ewings*, 8th Dist. Cuyaghoga No. 83248, 2004-Ohio-5033, ¶ 12; Civ.R. 51(A). An appellate court may nevertheless recognize waived error if it rises to the level of plain error. *Goldfuss*, 79 Ohio St.3d 116, 679 N.E.2d 1099, at syllabus. However,

> [i]n appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.

Id. We find no error, much less plain error, in the trial court's charge to the jury in this case.

{¶ 65} Black served Hicks with requests for admissions on September 4, 2014. Hicks never responded to them. Under Civ.R. 36(A), requests for admissions are self-executing; if a party fails to respond to a request or an admission, the matter is automatically deemed admitted and no further action is required by the party requesting it. *Riddick v. Taylor*, 8th Dist. Cuyahoga No. 105603, 2018-Ohio-171, ¶ 22, citing *Smallwood v. Shiflet*, 8th Dist. Cuyahoga No. 103853, 2016-Ohio-7887, ¶ 18.

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any argument or citations to legal authority challenging the propriety of the court's dismissal of its cross-claim.

{¶ 66} The trial court charged the jury with respect to admissions, in relevant part, as follows:

> Admissions. Defendant Supervisor Detective Hicks has admitted certain facts relevant to this case.
>
> Mr. Black, the plaintiff, is not required to offer any further evidence to prove the following matters which are admitted by Detective Hicks, and which are conclusively established.

(Trial tr. 429.) The trial court then proceeded to read the admissions into the record, which included the facts that (1) Hicks repeatedly struck Black in the face and head during the traffic stop while Black was handcuffed, (2) Hicks had no legitimate reason to strike Black and did so according to department practices and training, (3) there was a customary use of violence in the East Cleveland Police Department, (4) Hicks caused physical harm to Black, (5) Hicks placed Black in the East Cleveland jail without probable cause, and (6) Spotts told Hicks "to keep quiet about striking Black." (Trial tr. 430-431.)

{¶ 67} Although these admissions were automatically deemed admitted pursuant to Civ.R. 36(A), they were consistent with Hicks's trial testimony wherein he admitted that he repeatedly struck Black's head while he was restrained in handcuffs. Hicks also described the policy and culture of violence in the East Cleveland Police Department at that time. We, therefore, cannot say that the court's recitation of these admissions into the record, accompanied by an instruction to the jury that these facts have been conclusively established, constituted reversible error.

{¶ 68} The fourth assignment of error is overruled.

F. Manifest Weight of the Evidence

{¶ 69} In the sixth assignment of error, appellants argue the jury's verdict is not supported by sufficient evidence and is against the manifest weight of the evidence.

{¶ 70} "'In civil cases, as in criminal cases, the sufficiency of the evidence is quantitatively and qualitatively different from the weight of the evidence.'" *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, paragraph two of the syllabus. Sufficiency of the evidence is a test of adequacy and asks "'[w]hether the evidence is legally sufficient to sustain a verdict * * * .'" *Id.* at ¶ 11, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). The relevant inquiry is whether, after viewing the evidence in a light most favorable to the plaintiff, the plaintiff presented some evidence going to every element of the claim. *Vega v. Tomas*, 8th Dist. Cuyahoga No. 104647, 2017-Ohio-298, ¶ 9; *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 71} In contrast to sufficiency, "'[w]eight of the evidence involves the inclination of the greater amount of credible evidence.'" *Eastley* at ¶ 12, quoting *Thompkins* at 387. While "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, * * * weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins* at 386-387.

{¶ 72} In reviewing a challenge to the manifest weight of the evidence, the reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses to determine "'"whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered."'" *Eastley* at ¶ 20, quoting *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). "In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the trier of fact." *Id*. at ¶ 21.

{¶ 73} Appellants' argument seems directed at the amount of damages awarded because they do not analyze the evidence establishing the elements of any specific claim, except to say that because Black did not present any expert testimony, there was no evidence to support the jury's verdict. Appellants assert that the jury was swayed by passion rather than by the weight of evidence. We, therefore, do not address the evidence supporting each individual claim; we address appellants' argument that the damages award was not supported by the evidence.

{¶ 74} As a preliminary matter, we note that Black did not allege any claims that required medical testimony or the submission of medical bills to support the damages award. As previously stated, Black alleged claims for malicious prosecution, abuse of process, spoliation of evidence, battery, false imprisonment, supervisory liability and a civil rights claim under 42 U.S.C. 1983. None of these

claims required proof of personal injury.[3] Therefore, expert medical testimony was not required to establish these claims.

{¶ 75} Both physical and emotional injuries caused by the constitutional deprivation are compensable under 42 U.S.C. 1983. *Carey v. Piphus*, 435 U.S. 247, 264, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (Mental and emotional distress caused by the denial of procedural due process is compensable under 42 U.S.C. 1983.); *Chainey v. Street*, 523 F.3d 200, 216 (3d Cir.2008) (Emotional distress injuries, such as mental anguish and suffering, are compensable under 42 U.S.C. 1983.); *Day v. Vaughn*, 56 F. Supp. 3d 1377, 1382 (S.D.G.A.2014); *Robinson v. St. Louis*, E.D.Mo. No. 4:17-CV-156 PLC , 2020 U.S. Dist. LEXIS 109155 (June 22, 2020).

{¶ 76} And, no formula exists for the determination of damages resulting from constitutional violations brought pursuant to 42 U.S.C. 1983. *See, e.g., King v. Zamiara*, 788 F.3d 207, 215 (6th Cir.2015) (holding that because there is no specific formula for calculating compensatory damages, the amount is left to the sound discretion of the fact); *Heard v. Finco*, 930 F.3d 772, 774 (6th Cir.2019), quoting *Walker v. Bain*, 257 F.3d 660, 674 (6th Cir.2001)("So courts generally let the jury decide how much money a plaintiff should receive when he has suffered such 'subjective injuries.'"); *Stokes v. Cetner*, E.D.Mich. No. 98-CV-70639-DT,

[3] Even Black's battery claim did not require proof of a physical injury. "Battery is an intentional contact with another that is harmful or offensive." *Stafford v. Columbus Bonding Ctr.*, 177 Ohio App.3d 799, 2008-Ohio-3948, 896 N.E.2d 191, ¶ 15 (10th Dist.), citing *Love v. Port Clinton*, 37 Ohio St.3d 98, 99, 524 N.E.2d 166 (1988).

2000 U.S. Dist. LEXIS 2162 (Jan. 28, 2000) ("No formula exists to determine with precision compensatory or punitive damages.").

{¶ 77} Black had admissions that conclusively established the elements of his claims. Moreover, Hicks admitted at trial that Black was arrested and detained without probable cause and that he repeatedly struck Black while he was handcuffed. (Trial tr. 91, 93, 98). Black's mother and his former fiancée, Eryka Bey, described how the incident changed Black's life. They testified that he sustained physical injuries, including swelling to the head, followed by headaches and vision problems. They also described emotional injuries, including anxiety, depression, paranoia, and social withdrawal. (Trial tr. 171-183, 196-209, 246-264.) After defense counsel asked Black's mother whether he received medical treatment for his injuries, she testified that Black underwent brain surgery to relieve pressure created by a brain bleed. (Trial tr. 180-182.) Therefore, Black presented competent, credible evidence that he was mentally and physically injured as a result of appellants' actions.

{¶ 78} A jury's determination of damages will "not be set aside unless the damages awarded were so excessive as to appear to have been awarded as a result of passion or prejudice, or unless the amount is so manifestly against the weight of the evidence as to show a misconception by the jury of its duties." *Berris v. Zaremba*, 8th Dist. Cuyahoga No. 60043, 1992 Ohio App. LEXIS 1906 (Apr. 9, 1992). Indeed, "it has long been held that the assessment of damages is so thoroughly within the province of the jury that a reviewing court is not at liberty to disturb the jury's

assessment absent an affirmative finding of passion and prejudice or a finding that the award is manifestly excessive." *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 655, 635 N.E.2d 331 (1994). And, "not only is the assessment of damages within the province of the jury, but the mere size of the jury award alone is not sufficient to prove passion and prejudice." *McNeil v. Kingsley*, 178 Ohio App.3d 674, 2008-Ohio-5536, 899 N.E.2d 1054, ¶ 18 (3d Dist.), citing *Elwer v. Carrol's Corp.*, 3d Dist. Allen No. 1-06-33, 2006-Ohio-6085, ¶ 14, citing *Pearson v. Cleveland Acceptance Corp.*, 17 Ohio App.2d 239, 245, 246 N.E.2d 602 (8th Dist.1969).

{¶ 79} A party seeking to challenge the jury's determination of damages generally does so by filing a motion under Civ.R. 59 for new trial and/or a motion for remittitur in the trial court. As previously stated, a litigant's failure to raise an issue before the trial court waives that party's right to raise the issue on appeal. *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993), citing *State ex rel. Gibson v. Indus. Comm.*, 39 Ohio St.3d 319, 530 N.E.2d 916 (1988).

{¶ 80} ""[A]n appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court."" *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, quoting *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968),

paragraph three of the syllabus. Thus, by failing to raise an issue to the trial court, an appellant forfeits that issue on appeal. *Risner v. Ohio Dept. of Natural Resources*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 26.

{¶ 81} Appellants filed neither a motion for new trial nor a motion for remittitur as permitted by Civ.R. 59. Thus, the trial court, who heard the heard the witnesses and weighed their credibility, did not have the opportunity to consider whether the jury's determination of damages was excessive. Appellants have therefore forfeited the issue for appeal.

{¶ 82} The sixth assignment of error is overruled.

G. Immunity

{¶ 83} Although the title of appellants' eighth assignment of error purports to again challenge Black's claims for supervisory liability against Spotts, the argument is devoted to an immunity defense. Appellants argue they are entitled to immunity from liability for Black's claims pursuant to the political subdivision immunity provided in R.C. Chapter 2744 and the common law doctrine of qualified immunity.

{¶ 84} However, appellants failed to request jury instructions on either political subdivision immunity or qualified immunity.[4] The failure to request a jury instruction on the law governing a particular defense constitutes a waiver of the defense. *Conti v. Corporate Servs. Group, Inc.*, 30 F. Supp.3d 1051, 1072 (W.D.

[4] Appellants also never filed a motion for summary judgment.

Wash.2014)(Defendants waived defense by failing to request jury instruction on it.); *Howe v. Akron*, E.D.Ohio No. 5:06CV2779, 2009 U.S. Dist. LEXIS 92255 (Oct. 2, 2009)("The City waived any defense related to the timeliness of the EEOC charge when it failed to request any jury instruction on the issue of timeliness."); *U.S. v. Cote*, 544 F.3d 88 (2d Cir.2008) (Finding that a defendant had "waived his statute of limitations defense by failing to raise the issue prior to or during his trial.").

{¶ 85} Therefore, the eighth assignment of error is overruled.

H. Evidence of Black's Surgery

{¶ 86} In the ninth assignment of error, appellants argue the trial court erred and should have granted a mistrial after Black's lawyers disclosed a photograph of Black's head scar from an unrelated surgical procedure.

{¶ 87} However, appellants never moved for a mistrial. A party who discovers he has been substantially prejudiced must make his objection and move for a mistrial as soon as he discovers the grounds for that motion. *Cleveland v. Wade*, 8th Dist. Cuyahoga No. 76652, 2000 Ohio App. LEXIS 3629 (Aug. 10, 2000), citing *Yerrick v. E. Ohio Gas Co.*, 119 Ohio App. 220, 198 N.E.2d 472 (9th Dist.1964). The failure to request a mistrial generally waives all but plain error. *State v. Wood*, 9th Dist. Medina No. 06CA0044-M, 2007-Ohio-2673, ¶ 23.

{¶ 88} "[I]n order for a court to find plain error in a civil case, an appellant must establish (1) a deviation from a legal rule, (2) that the error was obvious, and (3) that the error affected the basic fairness, integrity, or public reputation of the judicial process and therefore challenged the legitimacy of the underlying judicial

process." *State v. Morgan*, 153 Ohio St.3d 196, 2017-Ohio-7565, 103 N.E.3d 784, ¶ 40, citing *Goldfuss*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997).

{¶ 89} During the direct examination of Black, his lawyer displayed a photograph of Black's head following a surgery he had in 2015. The court noticed the photograph before appellants' counsel had the opportunity to object and ordered counsel to take it down. However, the jury heard testimony from both Black and his mother regarding Black's 2015 surgery before counsel displayed the photograph. Indeed, appellants "opened the door" to evidence of the surgery by asking Black's mother if and when Black had ever gone to the hospital. (Trial tr. 180.) Black's mother stated that he went to the hospital sometime after he visited her home after the incident, but she could not remember the exact date. Appellants' counsel continued to question her regarding which hospital Black went to and the timing of his hospital visit. (Trial tr. 180.) Appellants' counsel asked: "So, you just know that sometime between 2012, he went to Cleveland Clinic and University?" (Trial tr. 180.) Black's mother replied generally in the affirmative. On redirect, Black's mother testified that Black went to the Cleveland Clinic and University Hospitals complaining of pain in his head and that he underwent surgery at University Hospitals.

{¶ 90} Black's lawyers also questioned Black about the nature of his surgery. Black testified that he experienced internal bleeding inside his head and that he had tubes placed in his head. (Trial tr. 259.) Appellants' counsel did not object to this

testimony.[5] Therefore, even if the jury happened to see the photograph during the brief period of time that it was displayed, the photograph was cumulative to other evidence of Black's surgery, and it is unlikely that the photograph prejudiced the jury or affected the basic fairness, integrity, or public reputation of the judicial process.

{¶ 91} Therefore, the ninth assignment of error is overruled.

I. Statute of Limitations

{¶ 92} In the tenth assignment of error, appellants argue Black's claims against them are barred by the applicable statute of limitations.

{¶ 93} However, appellants failed to assert the statute of limitations as an affirmative defense in their answer. The failure to raise the statute of limitations in an answer fatally waives the defense. *Shury v. Greenaway*, 8th Dist. Cuyahoga No. 100344, 2014-Ohio-1629, ¶ 22; *Taylor v. Meridia Huron Hosp. of Cleveland Clinic Health Sys.*, 142 Ohio App.3d 155, 157, 754 N.E.2d 810 (8th Dist.2000). Pursuant to Civ.R. 8(C), a party must assert an affirmative defense, including the statute of limitations defense, with specificity or it is waived.[6]

{¶ 94} Therefore, the tenth assignment of error is overruled.

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[5] At one point, appellants' counsel objected to hearsay regarding what a doctor had told Black about his condition, and the court sustained the objection. Appellants later objected again, when Black made a statement regarding the cause of the brain bleed. Thereafter, the court addressed the issue at a sidebar off the record. But there was never any objection to Black's testimony about having had the surgery and having tubes placed in his ears.

[6] Even if the statute of limitations were not waived, Black filed his complaint within one year of the incident. He voluntarily dismissed the complaint and refiled it within the one-year time period required by the savings statute for refiling.

J. Judicial Notice

{¶ 95} In the eleventh assignment of error, appellants argue the trial court erred by refusing to take judicial notice of an indictment filed against Black in connection with the search of this vehicle following his arrest in this case. Appellants sought to introduce evidence of the indictment to impeach Hicks's testimony that Black was arrested and detained without probable cause.

{¶ 96} The admission or exclusion of evidence lies in the sound discretion of the trial court and a reviewing court will not reverse the trial court's decision absent an abuse of discretion. *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). An abuse of discretion implies a decision that is unreasonable, arbitrary, or unconscionable. *State ex rel. DiFranco*, 144 Ohio St.3d 571, 2015-Ohio-4915, 45 N.E.3d 987, at ¶ 13. When applying the abuse-of-discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Vannucci v. Schneider*, 2018-Ohio-1294, 110 N.E.3d 716, ¶ 22 (8th Dist.).

{¶ 97} Evid.R. 201 governs judicial notice and provides, in relevant part, that

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Evid.R. 201(B). Therefore, "[t]he only facts subject to judicial notice are those that are 'not subject to reasonable dispute.'" *State ex rel. Arnold v. Gallagher*, 153 Ohio St.3d 234, 2018-Ohio-2628, 103 N.E.3d 818, ¶ 31, quoting Evid.R. 201(B).

{¶ 98} Before being admissible, all evidence must pass the threshold test for relevancy set forth in Evid.R. 403. Evid.R. 403(A) provides that the trial court must exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Therefore, even if something qualifies as a "judicially noticed fact" under Evid.R. 201(B), it may nevertheless be inadmissible under Evid.R. 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or of misleading the jury.

{¶ 99} The fact that Black was indicted does not necessarily establish that there was probable cause for his arrest or that Black did not suffer any constitutional violations. And, as Hicks explained, there was no legitimate reason to justify Hicks repeatedly hitting Black's head while Black was restrained in handcuffs. Moreover, the indictment was subsequently dismissed, which suggests there may have been a problem with probable cause. Both Hicks and O'Leary admitted that they had no legitimate basis for stopping Black's vehicle on the night of the incident. Thus, even if the police found contraband in the car after it was stopped, the stop was illegal, and any evidence discovered as a result of the illegal stop was inadmissible as evidence as "fruit of the poisonous tree." *Wong Sun v. U.S.*, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963) (If the government obtains evidence through actions which violate the constitutional prohibition against unreasonable searches and seizures, such evidence must be excluded at trial as fruit of the poisonous tree.).

{¶ 100} The admission of Black's indictment into evidence under these circumstances would have been misleading and confusing to the jury because it would likely distract them from the fact that Black's constitutional rights were violated when he was illegally stopped and beaten. Indeed, Black's subsequent detention was also illegal even if the police found contraband in his car since the discovery of the contraband resulted from the illegal stop. We, therefore, cannot say that the trial court abused its discretion by excluding of evidence Black's indictment under the circumstances of this case.

{¶ 101} The eleventh assignment of error is overruled.

{¶ 102} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGER, ADMINISTRATIVE JUDGE

EILEEN A. GALLAGHER, J., and
MICHELLE J. SHEEHAN, J., CONCUR