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Attorney for Defendants
Washington Township, Brian Szymanski,
Derek Heymer, Brian Bigham, Michael Hade,
Philip Seabeck, Thomas Falleni, Andrew Tesori,
Jason Hensley, Michael Thompson,
Anthony Costantino, Roger Garrison

MICHAEL L. BARISONE, Plaintiff, -vs- WASHINGTON TOWNSHIP in Morris County, New Jersey, POLICE OFFICER BRIAN SZYMANSKI, POLICE OFFICER DEREK HEYMER, POLICE OFFICER BRIAN BIGHAM, POLICE OFFICER MICHAEL HADE, POLICE OFFICER PHILIP SEABECK, POLICE OFFICER THOMAS FALLENI, POLICE OFFICER ANDREW TESORI, POLICE OFFICER JASON HENSLEY, POLICE OFFICER MICHAEL THOMPSON, POLICE OFFICER ANTHONY COSTANTINO, POLICE OFFICER ROGER GARRISON, JOHN & JANE DOE 1-20, & ABC COMPANY 1-20, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO.: MRS-L-0001562-21 CIVIL ACTION **NOTICE OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT ON BEHALF OF DEFENDANTS WASHINGTON TOWNSHIP, POLICE OFFICER BRIAN SZYMANSKI, POLICE OFFICER DEREK HEYMER, POLICE OFFICER BRIAN BIGHAM, POLICE OFFICER MICHAEL HADE, POLICE OFFICER PHILIP SEABECK, POLICE OFFICER THOMAS FALLENI, POLICE OFFICER ANDREW TESORI, POLICE OFFICER JASON HENSLEY, POLICE OFFICER MICHAEL THOMPSON, POLICE OFFICER ANTHONY COSTANTINO, POLICE OFFICER ROGER GARRISON**

To: Christopher L. Deininger, Esq.
Deininger & Associates, LLP
415 Route 10, Suite 1
Randolph, NJ 07869

PLEASE TAKE NOTICE that the undersigned, counsel for Defendants, Washington Township, Brian Szymanski, Derek Heymer,

Brian Bigham, Michael Hade, Philip Seabeck, Thomas Falleni, Andrew Tesori, Jason Hensley, Michael Thompson, Anthony Costantino, and Roger Garrison (hereinafter, "Movants"), will Move before the Superior Court, Law Division, Morris County Courthouse, on Friday, October 22, 2021, at 9:00 a.m. or as soon thereafter as counsel may be heard, for an Order dismissing the Plaintiff's complaint with prejudice as to all Defendants.

In support of this motion, Movants respectfully rely upon the accompanying Letter Brief and Certification of William G. Johnson, Esq. A proposed form of Order is annexed hereto.

Pursuant to R. 1:6-2, Movants respectfully request oral argument if timely opposition to the within motion is filed.

Discovery End Date: None listed.
Arbitration Date: None listed.
Trial Date: None Listed.

Johnson & Johnson, Esqs.
Attorneys for Defendants
Washington Township, Brian Szymanski, Derek Heymer, Brian Bigham, Michael Hade, Philip Seabeck, Thomas Falleni, Andrew Tesori, Jason Hensley, Michael Thompson, Anthony Costantino, Roger Garrison

Dated: 09/21/2021

By: *William G. Johnson*
William G. Johnson, Esq.

CERTIFICATION OF SERVICE

I certify that the original moving papers have been forwarded to the Clerk of the Superior Court, Law Division, Morris County, via eCourts and regular mail. A true copy of the moving papers has been served on the following via ecourts:

Christopher L. Deininger, Esq.
Deininger & Associates, LLP
415 Route 10, Suite 1
Randolph, NJ 07869
Attorneys for Plaintiff

Johnson & Johnson, Esqs.
Attorneys for Defendants
Washington Township, Brian Szymanski, Derek Heymer, Brian Bigham, Michael Hade, Philip Seabeck, Thomas Falleni, Andrew Tesori, Jason Hensley, Michael Thompson, Anthony Costantino, Roger Garrison

Dated: 09/21/2021

By: *William G. Johnson*
William G. Johnson, Esq.

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MICHAEL L. BARISONE, Plaintiff, -vs- WASHINGTON TOWNSHIP in Morris County, New Jersey, POLICE OFFICER BRIAN SZYMANSKI, POLICE OFFICER DEREK HEYMER, POLICE OFFICER BRIAN BIGHAM, POLICE OFFICER MICHAEL HADE, POLICE OFFICER PHILIP SEABECK, POLICE OFFICER THOMAS FALLENI, POLICE OFFICER ANDREW TESORI, POLICE OFFICER JASON HENSLEY, POLICE OFFICER MICHAEL THOMPSON, POLICE OFFICER ANTHONY COSTANTINO, POLICE OFFICER ROGER GARRISON, JOHN & JANE DOE 1-20, & ABC COMPANY 1-20, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO.: MRS-L-0001562-21 CIVIL ACTION **ORDER DISMISSING PLAINTIFF'S COMPLAINT AS TO DEFENDANTS WASHINGTON TOWNSHIP, POLICE OFFICER BRIAN SZYMANSKI, POLICE OFFICER DEREK HEYMER, POLICE OFFICER BRIAN BIGHAM, POLICE OFFICER MICHAEL HADE, POLICE OFFICER PHILIP SEABECK, POLICE OFFICER THOMAS FALLENI, POLICE OFFICER ANDREW TESORI, POLICE OFFICER JASON HENSLEY, POLICE OFFICER MICHAEL THOMPSON, POLICE OFFICER ANTHONY COSTANTINO, POLICE OFFICER ROGER GARRISON**

THIS MATTER having been opened to the Court on motion of Johnson & Johnson, Esqs., (William G. Johnson, Esq., appearing) attorneys for Washington Township, Brian Szymanski, Derek Heymer, Brian Bigham, Michael Hade, Philip Seabeck, Thomas Falleni, Andrew Tesori, Jason Hensley, Michael Thompson, Anthony Costantino, and

Roger Garrison; on notice to Deininger & Associates, LLP (Christopher L. Deininger, Esq., appearing) Attorneys for Plaintiff Michael L. Barisone; for an Order Dismissing the Plaintiff's complaint, and the Court having considered the matter, and for good cause shown;

IT IS ON THIS _____ DAY OF _____, 2021

ORDERED that the Complaint of the Plaintiff, as to Defendants Washington Township, Brian Szymanski, Derek Heymer, Brian Bigham, Michael Hade, Philip Seabeck, Thomas Falleni, Andrew Tesori, Jason Hensley, Michael Thompson, Anthony Costantino, and Roger Garrison, is hereby dismissed; and it is further

ORDERED that a true copy of this Order shall be served on all parties within _____ days of the date hereof.

_____
, J.S.C.

____ Opposed

____ Unopposed

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MICHAEL L. BARISONE, Plaintiff, -vs- WASHINGTON TOWNSHIP in Morris County, New Jersey, POLICE OFFICER BRIAN SZYMANSKI, POLICE OFFICER DEREK HEYMER, POLICE OFFICER BRIAN BIGHAM, POLICE OFFICER MICHAEL HADE, POLICE OFFICER PHILIP SEABECK, POLICE OFFICER THOMAS FALLENI, POLICE OFFICER ANDREW TESORI, POLICE OFFICER JASON HENSLEY, POLICE OFFICER MICHAEL THOMPSON, POLICE OFFICER ANTHONY COSTANTINO, POLICE OFFICER ROGER GARRISON, JOHN & JANE DOE 1-20, & ABC COMPANY 1-20, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO.: MRS-L-0001562-21 CIVIL ACTION **CERTIFICATION OF WILLIAM G. JOHNSON, ESQ., IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT IN LIEU OF ANSWER PURSUANT TO R. 4:6-2(e) ON BEHALF OF DEFENDANTS WASHINGTON TOWNSHIP, POLICE OFFICER BRIAN SZYMANSKI, POLICE OFFICER DEREK HEYMER, POLICE OFFICER BRIAN BIGHAM, POLICE OFFICER MICHAEL HADE, POLICE OFFICER PHILIP SEABECK, POLICE OFFICER THOMAS FALLENI, POLICE OFFICER ANDREW TESORI, POLICE OFFICER JASON HENSLEY, POLICE OFFICER MICHAEL THOMPSON, POLICE OFFICER ANTHONY COSTANTINO, POLICE OFFICER ROGER GARRISON**

William G. Johnson, Esq., certifies as follows:

1. I am an attorney at law of the State of New Jersey and am a partner with Johnson & Johnson, Esqs., attorneys for

Defendants in the above-captioned matter. As such, I am fully familiar with the within matter.

2. Attached hereto as Exhibit A is a true and exact copy of the First Amended Corrected Complaint filed on behalf of the Plaintiff on July 22, 2021, in the within matter.

3. Attached hereto as Exhibit B is a true and exact copy of Bush v. City of Philadelphia, 1999 WL 55485 (E.D. Pa. 1999). I know of no contrary unpublished opinions.

4. Attached hereto as Exhibit C is a true and exact copy of Thompson v. Howard, 2013 WL 2338347 (W.D. Pa. 2013). I know of no contrary unpublished opinions.

5. I make this certification in support of the motion to dismiss plaintiff's complaint.

I certify that the foregoing statements made by me are true to the best of my ability. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Johnson & Johnson, Esqs.
Attorneys for Defendants
Washington Township, Brian Szymanski, Derek Heymer, Brian Bigham, Michael Hade, Philip Seabeck, Thomas Falleni, Andrew Tesori, Jason Hensley, Michael Thompson, Anthony Costantino, Roger Garrison

Dated: 09/21/2021

By: *William G. Johnson*
William G. Johnson, Esq.

MICHAEL L. BARISONE, Plaintiff, -vs- WASHINGTON TOWNSHIP in Morris County, New Jersey, POLICE OFFICER BRIAN SZYMANSKI, POLICE OFFICER DEREK HEYMER, POLICE OFFICER BRIAN BIGHAM, POLICE OFFICER MICHAEL HADE, POLICE OFFICER PHILIP SEABECK, POLICE OFFICER THOMAS FALLENI, POLICE OFFICER ANDREW TESORI, POLICE OFFICER JASON HENSLEY, POLICE OFFICER MICHAEL THOMPSON, POLICE OFFICER ANTHONY COSTANTINO, POLICE OFFICER ROGER GARRISON, JOHN & JANE DOE 1-20, & ABC COMPANY 1-20, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO.: MRS-L-0001562-21 CIVIL ACTION **BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT ON BEHALF OF DEFENDANTS WASHINGTON TOWNSHIP, POLICE OFFICER BRIAN SZYMANSKI, POLICE OFFICER DEREK HEYMER, POLICE OFFICER BRIAN BIGHAM, POLICE OFFICER MICHAEL HADE, POLICE OFFICER PHILIP SEABECK, POLICE OFFICER THOMAS FALLENI, POLICE OFFICER ANDREW TESORI, POLICE OFFICER JASON HENSLEY, POLICE OFFICER MICHAEL THOMPSON, POLICE OFFICER ANTHONY COSTANTINO, POLICE OFFICER ROGER GARRISON**

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William G. Johnson, Esq.
Of Counsel and On the Brief

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STATEMENT OF FACTS

On July 22, 2021, Plaintiff Michael Barisone ("Barisone") filed a First Amended, Corrected Complaint in the Morris County Superior Court against Washington Township and 11 of its police officers. Exhibit A to the Certification of William G. Johnson, Esq. Those 11 officers are Brian Szymanzki ("Szymanski"), Derek Heymer ("Heymer"), Brian Bigham ("Bigham"), Michael Hade ("Hade"), Philip Seabeck ("Seabeck"), Thomas Falleni ("Falleni"), Andrew Tesori ("Tesori"), Jason Hensley ("Hensley"), Michael Thompson ("Thompson"), Anthony Costantino ("Costantino"), and Roger Garrison ("Garrison") (hereinafter, "Defendants").

In his complaint, Plaintiff has alleged that he co-owned a farm located in Washington Township, New Jersey. Exhibit A. He further alleged that various persons occupied and visited the farm, including Lauren S. Kanarek ("Kanarek") and Robert Goodwin ("Goodwin"). Exhibit A. Plaintiff further alleged that he operated a business at the farm wherein he provided training services for persons interested in competing in dressage. Exhibit A. According to the Plaintiff, Kanarek became his client. Exhibit A. Plaintiff alleges that he began providing training to Kanarek in or about March of 2018. Exhibit A. Plaintiff further alleged that Kanarek and Goodwin began residing at the farm in or about May of 2019.

Plaintiff further alleged that, after Kanarek and Goodwin began residing at the farm, Kanarek "commenced displaying behavior towards BARISONE, Gray, and/or other farm residents and visitors, which was increasingly threatening and/or otherwise unacceptable." Exhibit A, Paragraph 39. Plaintiff further alleged that Kanarek harassed, stalked, and threatened him and others through various social media platforms. Exhibit A, Paragraphs 40 through 44. Plaintiff further alleged that Kanarek threatened him and others. Exhibit A, Paragraph 45. Plaintiff claims to have been placed in reasonable fear of physical harm by Kanarek's actions. Exhibit A, Paragraphs 46 through 47.

With respect to the factual allegations against the various individually named defendants, Plaintiff's complaint described those allegations based on when the events are alleged to have occurred. For ease of reference herein, the Plaintiff's allegations will be grouped similarly, based on the individual defendants that were alleged to have been involved in each specific incident.

According to the Plaintiff, Defendants Tesori and Seabeck allegedly authored a "false and misleading police report" regarding their investigation of a July 31, 2019, incident at the farm. In addition, Plaintiff alleged that Tesori and Seabeck "intentionally disregarded the facts and circumstances being reported to them and intentionally failed to act to protect"

Plaintiff based on that incident. Exhibit A, Paragraphs 48 through 55.

With respect to Defendants Hensley and Seabeck, Plaintiff alleged that they responded to the farm on August 1, 2019. Exhibit A, Paragraphs 56 through 77. Plaintiff further alleged that Hansley and Seabeck "intentionally disregarded the facts and circumstances being reported to them and intentionally failed to take appropriate action" with respect to that incident. Exhibit A, Paragraph 62. Plaintiff further alleged that Hensley and Seabeck "intentionally discounted, mischaracterized, and/or simply ignored" Plaintiff's reports regarding the August 1, 2019, incident. Exhibit A, Paragraph 70. Plaintiff further alleged that Hensley and Seabeck prepared a "false and misleading" police report documenting the August 1, 2019, incident. Exhibit A, Paragraph 71. Plaintiff further alleged that Defendant Seabeck had a conversation with an unidentified assistant prosecutor at the Morris County Prosecutor's Office wherein he failed to provide "a full, complete, truthful and/or accurate report" of the incident. Exhibit A, Paragraph 74.

Plaintiff has alleged that Defendants Thompson and Falleni responded to the Plaintiff's property on August 3, 2019. Exhibit A, Paragraphs 78 through 102. Plaintiff has alleged that these Defendants "failed to investigate . . . criminal acts . . . failed to take other appropriate non-discretionary action in response to

notification that such criminal conduct was occurring, and intentionally failed to intervene" regarding the August 3, 2019, incident. Exhibit A, Paragraph 95. Plaintiff also alleged that Defendants Thompson and Falleni "failed to act to intervene in what obviously was a police matter and not just a 'private dispute.'" Exhibit A, Paragraph 96. Plaintiff also alleged that these Defendants authored a "false and misleading" police report dated August 8, 2019. Exhibit A, Paragraphs 98 through 99.

In Paragraphs 103 through 118 of the Complaint, Plaintiff alleged that Defendants Bigham and Constantino responded to the Plaintiff's property on August 4, 2019. He further alleged that these Defendants "intentionally disregarded . . . the facts and circumstances being reported to them and intentionally failed to act to intervene..." Plaintiff further alleged that Defendants Bigham and Constantini authored an issued a "false and misleading" police report dated August 4, 2019.

In Paragraphs 119 through 132 of his Complaints, Plaintiff made various allegations against unidentified police officers regarding an incident at the Washington Township Police Department on August 5, 2019. Specifically, Plaintiff alleged that he arrived at the Washington Township Police Department on August 5, 2019 and requested to speak to a supervisor. Exhibit A, Paragraph 121. Plaintiff further alleged that despite his request, the unidentified officers he spoke with at that time "intentionally

ignored the facts and circumstances, intentionally blocked BARISONE from speaking with a supervisor above them in rank, intentionally mischaracterized the situation as a 'private dispute,' intentionally refused to aid or assist BARISONE, and forced him to leave the building without permitting him to speak to anyone having supervisory authority over them and/or the situation at the Farm." Exhibit A, Paragraph 130. In addition, Plaintiff alleged that these unidentified officers failed to prepare a police report. Exhibit A, Paragraph 131.

In Paragraphs 133 through 145 of Plaintiff's complaint, he set forth various allegations concerning an incident that is alleged to have occurred at midday on August 6, 2019. He alleged that various unidentified employees of Defendant Washington Township, including an individual identified as the "Chief Building Inspector" arrived at Plaintiff's premises to conduct inspections. It is further alleged by Plaintiff that he and other occupants were ordered to vacate various living spaces at the farm.

In Paragraphs 146 through 155 of Plaintiff's complaint, he alleged that various unidentified employees of Washington Township as well as unidentified Washington Township Police Officers returned to the Farm in the evening on August 6, 2019, to determine whether he and the other occupants had vacated the living quarters as had been previously ordered. Plaintiff further alleged that during that period, one of the occupants was bitten by a dog

belonging to another occupant and that Defendants refused to remove the dog from the premises. Exhibit A, Paragraphs 151 through 153. Plaintiff further alleged that Defendant Garrison and Defendant Hade authored a false police report on August 11, 2019, concerning this incident. Exhibit A, Paragraph 155.

Plaintiff has further alleged that on August 7, 2019, an incident occurred at the Farm wherein one of the occupants at the farm was shot in the chest multiple times. Exhibit A, Paragraph 156. Plaintiff further indicated that he was arrested and is presently being held in jail. Exhibit A, Paragraph 157.

Based on the factual allegations summarized above, Plaintiff has alleged that the Defendants violated his civil rights under both the United States and New Jersey Constitutions. Exhibit A, Paragraphs 168 through 175. Specifically, Plaintiff has alleged that the aforementioned conduct violated the following civil rights: 1. Freedom of speech, "including his right to make reports to the police;" 2. His civil right to "file and pursue appropriate petitions with the government (including reports of crime and/or emergency calls and to have those petitions addressed fully, completely, expeditiously, lawfully and appropriately;" 3. His civil right to "equal protection under the law;" 4. His right to be free from unlawful retaliation for exercising constitutionally protected rights;" 5. His New Jersey constitutional right "to protect his reputation and good name;" 6. His rights as a victim

of crime "to be treated with fairness, compassion, respect and the like;" 7. His substantive due process rights, procedural due process rights, and/or other statutory rights" as a victim of domestic violence; and 8. "other civil rights and interests." Exhibit A, Paragraph 171.

In addition to his allegations that his Civil Rights were violated by the Defendants, Plaintiff has also alleged that the actions of the Defendants violated the New Jersey Law Against Discrimination. Exhibit A, Paragraphs 176 through 181. Finally, Plaintiff alleged that the Defendants "committed the wrongful acts, actions, and omissions, which constituted intentional torts against BARISONE, including acts of official misconduct, criminal civil rights deprivations, and/or other wrongful conduct not subject to tort immunity. Exhibit A, Paragraphs 182 through 184.

In essence, the gravamen of the Plaintiff's cause of action is that the Defendants failed to conduct a proper investigation of his complaints regarding the behavior of Ms. Kanarak and Mr. Goodwin, failed to properly document those complaints, and failed to take appropriate action regarding those complaints, such as charging Ms. Kanarak and Mr. Goodwin with criminal offenses and removing them from the property.

As will be demonstrated below, even accepting the plaintiff's factual allegations as true, each of the Plaintiff's alleged causes

of action fail as a matter of law and, therefore, his complaint should be dismissed.

LEGAL ARGUMENT

POINT I

LEGAL STANDARD APPLICABLE TO MOTION TO DISMISS

A motion to dismiss a complaint for failure to set forth a claim upon which relief can be granted pursuant to New Jersey Court Rule 4:6-2(e) is governed by the principals enunciated by the New Jersey Supreme Court in Printing Mart v. Sharp Electronics, 116 N.J. 739. (1989).

> We approach our review of the judgment below mindful of the test for determining the adequacy of a pleading: whether a cause of action is "suggested" by the facts. In reviewing a complaint dismissed under *Rule* 4:6-2(e) our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. However, a reviewing court "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach. [Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). (Citations omitted).]

In addition, a motion to dismiss "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for [the] claim must be apparent from the complaint itself." Edwards v. Prudential Prop. & Cas. Co.,

357 N.J. Super. 196, 202 (App. Div. 2003). In ruling on a Rule 4:6-2(e) motion to dismiss, the Court may consider "'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 222 n. 3 (3d Cir.), cert. denied, 543 U.S. 918 (2004)).

In this case, it is respectfully submitted that the Plaintiff's complaint fails to set forth any viable cause of action against any of the Defendants and therefore must be dismissed.

POINT II

THE ALLEGATIONS CONTAINED IN PLAINTIFF'S COMPLAINT DO NOT SET FORTH A CAUSE OF ACTION FOR ANY CIVIL RIGHTS VIOLATION

The Plaintiff has alleged that various actions and omissions of the Defendants violated his Civil Rights under both the United States and New Jersey Constitutions. He enumerated the rights allegedly violated in Paragraphs 170 and 171 of the complaint. However, an analysis of the factual allegations set forth in the complaint leads to the unmistakable conclusion that those factual allegations, even if accepted as true, do not support any of the claimed civil rights violations. Therefore, Plaintiff's complaint must be dismissed.

Section 1983 of Title 42 of the United State Code provides a civil remedy against any person who, acting under color of state law, deprives another of rights protected by the United States Constitution. Mattern v. City of Sea Isle, 131 F.Supp.3d 305, 313 (Dist. N.J. 2015). To establish a claim under §1983, a plaintiff must demonstrate that his constitutional rights were violated and that a person acting under color of state law committed the deprivation. Id. at 313 (citing West v. Atkins, 487 U.S. 42, 48 (1988)). "The first step in evaluating a §1983 claim is to 'identify the exact contours of the underlying right said to have been violated' and to determine 'whether the plaintiff has alleged

a deprivation of a constitutional right at all.'" Nicini v. Morra, 212 F.3d 798, 806 (3rd Cir. 2000) (quoting Sacramento v. Lewis, 523 U.S. 833, 841 n. 5 (1998)).

A. THE FILING OF A FALSE POLICE REPORT IS NOT A CIVIL RIGHTS VIOLATION

It is the Plaintiff's claim that various civil rights were violated by the Defendants' failure to prepare and file accurate police reports. That claim is unsupported by the applicable law as there does not exist a civil right to an accurate police report. In Landrigan v. City of Warwick, 628 F.2d 736, 744 (1st Cir. 1980), the Court stated that "the mere filing of the false police reports, by themselves and without more, did not create a right of action in damages under 42 U.S.C. 1983." The Landrigan opinion has been cited favorably by United States District Court in Pennsylvania and by the Third Circuit Court of Appeals.

In Jarrett v. Twp. of Bensalem, 312 Fed. Appx. 505 (3rd Cir. 2009), the Court upheld the District Court's order granting summary judgment to the Defendants. The Court held that the Plaintiff did not have a no Constitutional right to a correct police report. Id. at 507. "The District Court correctly noted that '[c]ourts in the Eastern District of Pennsylvania and elsewhere have held that the filing of a false police report is not itself a constitutional violation.'" Ibid.

In Bush v. City of Philadelphia, 1999 WL 55485 (E.D. Pa. 1999), the Court dismissed the Plaintiff's complaint, noting that "[c]ases decided in this court and elsewhere show that conspiracy by police officers to file false reports and otherwise cover up wrongdoing by fellow officers is not in and of itself a constitutional violation." See Exhibit B to the Certification of William G. Johnson, Esq.

In Thompson v. Howard, 2013 WL 2338347 (W.D. Pa. 2013), the District Court dismissed most of the Plaintiff's claims against the defendants, including the claim that his civil rights were violated by the filing of a false police report. The Court stated that "the law is clear that there is no constitutional right to a correct police report." See Exhibit C to the Certification of William G. Johnson, Esq.

In his complaint, Plaintiff claims that his constitutional rights were violated by the Defendants due to their filing of false police reports. As the above cited cases make clear, there is no constitutional right to an accurate police report. As a result, even if one were to accept the Plaintiff's assertion that the various police reports referenced in the complaint contained falsehoods, that does not give rise to a civil rights violation. As a result, the plaintiff's claim that his civil rights were violated by the filing of false police reports must be dismissed.

B. THE FAILURE TO CONDUCT AN ADEQUATE INVESTIGATE IS NOT A CIVIL RIGHTS VIOLATION

It is the Plaintiff's claim that his civil rights were violated by the Defendants' failure to conduct a proper investigation of his claims.

In Rossi v. City of Chicago, 790 F.3d 729 (7th Cir. 2015), the Court affirmed the District Court's Order granted summary judgment to the Defendants. In so doing, the Court noted that plaintiff did "not have a constitutional right to have the police investigate his case at all, still less do so to his level of satisfaction." Id. at 735.

In Thomas v. City of Philadelphia, 290 F.Supp.3d 371, 386 (E.D. Pa. 2018), the court granted defendants' motion to dismiss in part, noting that the third circuit has not recognized a constitutional cause of action for "failure to investigate." See also, Wright v. City of Philadelphia, 229 F.Supp.3d 322, 332 n.3 (E.D. Pa. 2017) ("It certainly remains to be seen whether there is an independent cause of action under the Fourteenth Amendment for Count 2's claim for 'failing to conduct a constitutionally adequate investigation,' and the Court will not affirmatively recognize one here at this time.")

In his complaint, Plaintiff claims that his constitutional rights were violated by the Defendants due to their failure to adequately investigate his allegations against Ms. Kanarek and Mr.

Goodwin. As the above cited cases make clear, there is no constitutional right to an adequate investigation. As a result, even if one were to accept the Plaintiff's assertion that the Defendants' investigation of his complaint was inadequate, that does not give rise to a civil rights violation. As a result, the plaintiff's claim that his civil rights were violated due to the Defendants' failure to conduct an adequate investigation must be dismissed.

C. THE FAILURE TO INTERVENE IN A DISPUTE IS NOT A CIVIL RIGHTS VIOLATION

Throughout his complaint, Plaintiff alleges that the Defendants should have intervened in his dispute with Kanarek and Goodwin. In Paragraph 170 (d), Plaintiff complains that his constitutional rights were violated by "the defendants' intentional, deliberate, persistent false characterization of the occurrences at the Farm being reported to the defendants as private disputes between a landlord and tenant when, in reality, the occurrences were police matters that required the intervention of law enforcement." See Exhibit A. Since Defendants are immune from such claims under the New Jersey Tort Claims Act, this claim must be dismissed.

Two provisions of the Tort Claims Act are applicable to the Plaintiff's claims, N.J.S.A. 59:5-4 and N.J.S.A. 59:5-5. N.J.S.A. 59:5-4 provides that "Neither a public entity nor a public employee

is liable for failure to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service." N.J.S.A. 59:5-5 provides that "Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody." Often, Court have addressed the applicability of both provisions.

In Wuethrich v. Delia, 155 N.J. Super. 324 (App. Div. 1978), the Court affirmed the trial court's order granting summary judgment to defendants. The Court stated that "while it is true that police officers have a duty to investigate information from citizens concerning unlawful or criminal activity, the failure of the police to make an arrest as a consequence does not subject the municipality to tort liability." Id. at 326. More broadly, the Court stated that "A public entity such as a municipality is not liable in tort for its failure to protect against the criminal propensities of third persons." Ibid.

In Lee v. Doe, 232 N.J. Super. 569 (App. Div. 1989), the Court again affirmed the trial court's order granting summary judgment to the Defendants based on N.J.S.A. 59:5-5. There, the Plaintiff claimed that Defendants were liable for their alleged failure to take appropriate action in response to his request for assistance. Plaintiff had been at a "cook-out" at his home when he was threatened by another guest. The police were called but only

remained for a few minutes. The guest subsequently returned brandishing a shot gun. The police were called to the scene again, but the perpetrator had fled the scene. He returned a third time and proceeded to fire the shotgun, injuring the plaintiff.

The Plaintiff filed suit, claiming that the police failed to respond to his call for aid in a reasonable and professional manner and, after responding, acted in a negligent and unprofessional manner. The trial court granted Defendants' motion for summary judgment, ruling that they were immune from liability based on N.J.S.A. 59:5-5. The Appellate Division affirmed, finding that N.J.S.A. 59:5-5 barred the plaintiff's claims.

In Sczyrek v. County of Essex, 324 N.J. Super. 235 (App. Div. 1999), the Appellate Division affirmed the trial court's order granting summary judgment to the Defendants, based on the immunities contained in the Tort Claims Act. There, the widow of a police officer who was murdered in the Essex County Courthouse sued alleging that the Defendant County and its employees were liable for an inadequate security system and for their failure to appropriately respond to warnings concerning the murder plot. Id. at 238.

The trial court dismissed both the inadequate security claim and the negligence claim regarding the alleged failure to respond to warnings regarding the assailant. The Appellate Division found that the trial court properly dismissed that claim as it was barred

by N.J.S.A. 59:5-4. The court then addressed the failure to respond to the alleged warnings claim.

The Court noted that the immunity codified in N.J.S.A. 59:5-4 was motivated by a desire to shield governmental policy decisions from tort liability. Id. at 242. However, the statutory language is much broader.

> There is no reason, therefore, why the statutory immunity should not apply whenever there is a claim based on a "failure to provide police protection service."' This is so whether that failure is attributable to a policy decision at the highest level, a tactical decision by some lesser ranking official (perhaps a desk sergeant who determines what, if any, response is appropriate to a particular call), and even the alleged actions of telephone operators or other non-ranking employees which may lead to a "failure to provide police protection." [Id. at 242-43.]

The Court further noted its previous decisions in Lee v. Doe, supra, and Wuethrich v. Delia, supra, which held that N.J.S.A. 59:5-4 barred similar claims. "In both cases, police officers either refused to respond or refused to act to provide appropriate protection." Id. at 245. Under such circumstances, the Court found that N.J.S.A. 59:5-4 barred the plaintiff's claim that defendants had negligently failed to respond to warnings concerning the murder.

Here, the Plaintiff claims that the Defendants failed to appropriately intervene in the Plaintiff's dispute with Kanarek and Goodwin. Even if the Plaintiff's allegations concerning the Defendants failure to intervene are assumed to be true, that claim

is barred by both N.J.S.A. 59:5-4 and N.J.S.A. 59:5-5. As a result, those claims must be dismissed.

The claims made by the plaintiff are barred either because they do not involve actual civil rights of the plaintiff, such as the alleged right to an accurate police report and adequate police investigation or are barred by the applicable provisions of the Tort claims. In addition, the Plaintiff's allegations concerning the Defendant's alleged violation of the New Jersey Law Against Discrimination are similarly barred. Furthermore, Plaintiff's claim that the Defendants committed intentional torts, such as official misconduct are likewise barred. As a result, Plaintiff's complaint must be dismissed.

POINT III

DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

The second ground on which Defendants assert that Plaintiff's complaint must be dismissed is the doctrine of qualified immunity.

> When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action. [Anderson v. Creighton, 483 U.S. 635, 638-39 (1987) (citations omitted).]

In Pearson v. Callahan, 555 U.S. 223, 231 (2009), the Supreme Court stated the following,

> Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" [Id. at 231.]

Government officials engaged in discretionary functions, such as Defendants,

> are qualifiedly immune from suits brought against them for damages under section 1983 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' Where a defendant asserts a qualified immunity defense in a motion for summary judgment, the plaintiff bears the initial burden of showing that the defendant's conduct violated some clearly established statutory or constitutional right. Only if the plaintiff carries this initial burden must the defendant then demonstrate that no genuine issue of material fact remains as to the "objective reasonableness" of the defendant's belief in the lawfulness of his actions. This procedure eliminates the needless expenditure of money and time by one who justifiably asserts a qualified immunity defense from suit. Thus, we begin with the predicate question of whether Plaintiff's allegations are sufficient to establish "'a violation of a constitutional right at all.'" [Sherwood v. Mulvihill, 113 F.3d 396, 398-99 (3rd Cir. 1997) (citations omitted).]

The allegations of Plaintiff's complaint are barred by qualified immunity. As more fully set forth above, there is no civil right to an accurate police report or to an adequate police investigation. As a result, any such rights were not "clearly established" at any time during the various interactions between the named Defendants and the Plaintiff. The same is true with respect to the balance of the Plaintiffs allegations concerning the alleged violation of his civil rights, alleged violation of the New Jersey Law Against Discrimination as well as the claimed intentional torts alleged to have been committed by the Defendants. The Defendants are therefore entitled to qualified immunity from all the Plaintiff's claims and his complaint must be dismissed.

CONCLUSION

For the reasons more fully set forth above, it is respectfully requested that the Plaintiff's complaint be dismissed with prejudice as to all defendants named therein.

Johnson & Johnson, Esqs.
Attorneys for Defendants
Washington Township, Brian Szymanski, Derek Heymer, Brian Bigham, Michael Hade, Philip Seabeck, Thomas Falleni, Andrew Tesori, Jason Hensley, Michael Thompson, Anthony Costantino, Roger Garrison

Dated: 09/21/2021

By: *William G. Johnson*
William G. Johnson, Esq.

Exhibit A

M01014
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MICHAEL L. BARISONE, *Plaintiff,* **v.** **WASHINGTON TOWNSHIP in Morris County, New Jersey; POLICE OFFICER BRIAN SZYMANSKI; POLICE OFFICER DEREK HEYMER; POLICE OFFICER BRIAN BIGHAM; POLICE OFFICER MICHAEL HADE; POLICE OFFICER PHILIP SEABECK; POLICE OFFICER THOMAS FALLENI; POLICE OFFICER ANDREW TESORI; POLICE OFFICER JASON HENSLEY; POLICE OFFICER MICHAEL THOMPSON; POLICE OFFICER ANTHONY COSTANTINO; POLICE OFFICER ROGER GARRISON; JOHN & JANE DOE 1-20, & ABC COMPANY 1-20,** *Defendants.*	:	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MORRIS COUNTY** **DOCKET NO.: MRS-L-1562-21** **FIRST AMENDED, CORRECTED COMPLAINT WITH JURY DEMAND**

Plaintiff MICHAEL L. BARISONE ("Plaintiff" and/or "BARISONE"), by and through his attorneys DEININGER & ASSOCIATES, LLP, as and for his Complaint against the defendants, makes the following allegations:

THE PARTIES & OTHER ACTORS

1. BARISONE is a 57-year-old Caucasian male who, at all times relevant hereto, had an established career as a top Olympic trainer of horses and riders in the equestrian sport of dressage.

2. At all times relevant hereto, BARISONE co-owned a farm located at 411 West Mill Road, Long Valley, New Jersey (the "Farm"), where BARISONE built and operated an Olympic-level dressage horse farm and training facility and thriving business.

3. At all times relevant hereto, the Farm had various visitors and/or occupants including but not limited to: (a) BARISONE and his partner Mary Haskins Gray ("Gray"), together with Gray's minor children (the "children"); (b) Lauren S. Kanarek ("Kanarek") and her boyfriend Robert G. Goodwin ("Goodwin"); (c) Ruth Cox ("Cox"); (d) Justin Hardin ("Hardin"), a long-term employee of BARISONE working and living at the Farm; and (e) numerous other persons who worked at the Farm, trained at the Farm, boarded horses at the Farm, and/or otherwise visited or occupied the premises.

4. Defendant WASHINGTON TOWNSHIP ("WASHINGTON TOWNSHIP") is a municipality located in Morris County, New Jersey, where it operates, oversees, and/or manages various municipal services provided to its residents, including but not limited to public safety services provided by the *Washington Township Police Department*, located at 1 East Springtown Road, Long Valley, New Jersey 07853 (the "POLICE DEPARTMENT"); ambulance and associated medical services provided by a volunteer ambulance/EMT squad; and other services.

5. At all times relevant hereto, the following defendant-persons were members of the POLICE DEPARTMENT of WASHINGTON TOWNSHIP: (a) DEFENDANT POLICE OFFICER BRIAN SZYMANSKI ("SZYMANSKI"); (b) DEFENDANT POLICE OFFICER DEREK HEYMER ("HEYMER"); (c) DEFENDANT POLICE OFFICER BRIAN BIGHAM ("BIGHAM"); (d) DEFENDANT POLICE OFFICER MICHAEL HADE ("HADE"); (e) DEFENDANT POLICE OFFICER PHILIP SEABECK ("SEABECK"); (f) DEFENDANT POLICE OFFICER THOMAS FALLENI ("FALLENI"); (g) DEFENDANT POLICE OFFICER

ANDREW TESORI ("TESORI"); (h) DEFENDANT POLICE OFFICER JASON HENSLEY ("HENSLEY"); (i) DEFENDANT POLICE OFFICER MICHAEL THOMPSON ("THOMPSON"); (j) DEFENDANT POLICE OFFICER ANTHONY COSTANTINO ("COSTANTINO"); and (k) DEFENDANT POLICE OFFICER ROGER GARRISON ("GARRISON"). For purposes of this pleading, BARISONE may reference those persons collectively as the "POLICE OFFICER DEFENDANTS."

6. Upon information and belief, at all times relevant hereto, each and every one of the POLICE OFFICER DEFENDANTS lived, resided, and/or worked in Morris County, New Jersey.

7. Now and at all times relevant hereto, fictitiously named defendants JOHN DOE & JANE DOE 1 through 20 are persons presently unknown who, individually and/or in concert with the other defendants and/or other actors named here, and/or acting under the direction and control of one or more of the other defendants or actors named here, committed acts and omissions connected with injury and resulting damages caused to BARISONE.

8. Now and at all times relevant hereto, fictitiously named other defendants ABC COMPANY 1 through 20 corporations, partnerships, limited liability companies, and/or other types of entities, presently unknown which, individually and/or in concert with the other defendants and/or actors named here, and/or acting under the direction and control of one or more of the other defendants or actors named here, committed acts and omissions connected with injury and resulting damages caused to BARISONE.

ALLEGATIONS & CLAIMS

9. Commencing in or about the late 1990s, BARISONE became co-owner of the Farm and started transforming the property into a world-class training facility for dressage.

10. Himself a onetime highly competitive dressage rider who had grown up in Upstate New York where he started riding at an early age, BARISONE had gravitated towards training riders and horses in dressage, investing years of time, training and effort to become one of the sport's leading trainers.

11. BARISONE's career reached a milestone when, at the 2016 Olympics held in Brazil, multiple competitors trained and/or coached by BARISONE won medals in the competitions. BARISONE operated a thriving business through which he trained riders and/or horses, raised horses, and/or boarded horse.

12. People interested in excelling in the sport of dressage sought out BARISONE to become their trainer, boarding their horses at the Farm (including certain horses valued in excess of $500,000) and coming there to train with BARISONE and his business in his world-class dressage barn with an adjoining club room, office, locker room, and other facilities.

13. The Farm included as well a farm house, which was a single-family residence divided into two living spaces under one roof with shared spaces and facilities, such as hallways, entrances, porches, and the like.

14. While the farm house could be characterized as having two living spaces, the fact was that the farm house constituted a single domicile, with its residents living like a single household.

15. The physical layout of the Farm included frontage on West Mill Road, with the farm house about 400 feet back from the road, and the dressage barn and training facility another 1,600-1,700 feet up an unlit driveway behind the farm house.

16. Commencing in or about March 2018, Kanarek sought to become a pupil of BARISONE for purposes of training in dressage.

17. With her parents' financial support, Kanarek wanted to train with BARISONE and board her horses at the Farm during the summer season which covers (essentially) the months of April through November, following which (during the winter season) Kanarek would following BARISONE to Florida to continue her training.

18. Kanarek's aspirational goal, upon information and belief, was to "train for the Olympics" and become a "world class" dressage rider, though the reality seemed more likely to be that Kanarek would remain an amateur who enjoyed the sport and the personal satisfaction one has when they take lessons and improve in a pursuit they love.

19. At that time Kanarek presented as an attractive blonde woman in her mid- to late-30's, with acceptable horseback riding skills, an acceptable horse, and what appeared to be nearly limitless financial support and backing of her father, a wealthy attorney from Livingston, New Jersey.

20. But there was an exceptionally dark and disturbing reality concerning Kanarek that was being hidden from view by Kanarek and her parents.

21. Unbeknownst to BARISONE, Kanarek had a history of domestic conflict following which she was banished from residing with her family.

22. Unbeknownst to BARISONE, Kanarek was a heroin addict with a lengthy criminal history, including criminal assault.

23. Unbeknownst to BARISONE, Kanarek's background included criminal harassment and stalking, including harassment that involved extensive use of the Internet and/or social media to make veiled and direct threats of injury, mayhem, violence, and criminal acts against persons with whom she was having interpersonal conflict.

24. Unbeknownst to BARISONE, Kanarek's tactics in the past included making false reports and false statements against people she perceived to be her "enemy," to child-protective-services agencies and/or other governmental agencies, including the police.

25. Unbeknownst to BARISONE, Kanarek's past included owning firearms and at least two (2) incidents of discharging her firearm, out of anger and rage, at other people and/or their personal property; an incident of carrying a loaded weapon into a political campaign event where she was planning to confront people; and, another incident when Kanarek posted of photo of a gun to threaten someone on social media.

26. Unbeknownst the BARISONE, the United States Equestrian Federation and/or the U.S. Center for "*Safe Sport*" (which purports to protect people from abuse and harassment within the pursuit of sports) had multiple complaints about Kanarek from persons Kanarek had harassed, stalked, and/or otherwise endeavored to cause harm.

27. Unbeknownst the BARISONE, Kanarek's boyfriend Goodwin had an equally disturbing past, which included but was not limited to: drug addiction and heroin abuse; violence; criminal conduct; stalking; harassment; and the like.

28. But for BARISONE's lack of knowledge of Kanarek's hidden background, BARISONE would not have agreed to become her dressage trainer; would not have agreed to permit Kanarek's horse(s) to board at the Farm; and/or would not have engaged in any other form of relationship with Kanarek as coach, trainer, house guest, or otherwise.

29. Similarly, but for BARISONE's lack of knowledge of Goodwin's hidden background, BARISONE would not have agreed to permit Kanarek to bring Goodwin to the Farm as her boyfriend and/or in any other capacity Kanarek and Goodwin might have proffered.

30. BARISONE himself has a medical history which includes psychological trauma

from abuse as a child.

31. At all times relevant hereto, BARISONE had been in treatment and/or counseling for his past trauma and status as a victim of child abuse and resulting trauma.

32. In that regard, BARISONE was an "egg shell" victim of future trauma who was vulnerable and susceptible to sustaining injury from harassment, stalking, verbal assault, and threats of violence from persons like Kanarek and/or Goodwin.

33. At all times relevant hereto, BARISONE displayed the traits, characteristics and affect of a person having psychological vulnerability and potential victimization from abuse, in need of protection from the police under circumstances indicating a basis for being in fear of injury, harm, violence, and/or threats of same.

34. Commencing in or about May 2019, Kanarek and Goodwin became temporary house guests of BARISONE in the farm house at the Farm.

35. BARISONE had told Kanarek that she could not become a tenant at the Farm due to water damage to the farm house which made it unlivable.

36. Upon being informed of that circumstance, Kanarek's father commenced threatening BARISONE with abusive legal process and litigation for purposes of forcing BARISONE to permit Kanarek to live at the Farm, even temporarily, as BARISONE's house guest.

37. Upon information and belief, Kanarek's father did everything in his power to ensure that Kanarek and Goodwin would reside at the Farm (even temporarily) because Kanarek was banned from residing with her father and/or other immediate family in New Jersey due to Kanarek's past history of violence, abuse, assault, drug use, psychotic behavior, and the like.

38. Separate and apart from that temporary "house guest" arrangement, Kanarek was again boarding her horse in the barn at the Farm.

39. Soon after she started staying as a house guest at the Farm, Kanarek commenced displaying behavior towards BARISONE, Gray, and/or other Farm residents and visitors, which was increasingly threatening and/or otherwise unacceptable.

40. Kanarek's behavior included an upward spiral of harassment and stalking of BARISONE, Gray, and/or Gray's children, both on the Internet and throughout social media like Facebook, where Kanarek made veiled and direct threats against them of ever-increasing severity.

41. As the situation escalated, BARISONE commenced uncovering the highly problematic and threatening criminal and social backgrounds of Kanarek and Goodwin.

42. It was in or about June 2019, for example, that BARISONE learned of Kanarek's status as a drug addict, criminal, and person with a history of harassment, stalking, threats of violence, and violent assault, against others.

43. BARISONE and Gray began to observe, find, and/or otherwise become aware of Internet postings by Kanarek, in which Kanarek threatened harm, injury and/or violence against BARISONE, Gray, Gray's minor children living at the Farm, and/or horses boarding in the barn.

44. For example, on or about July 25, 2019, seeking to threaten and intimate BARISONE and Gray, Kanarek posted a ranting message on social media in which she bragged about her past stalking and harassment of people, which was reasonably understood by BARISONE to be Kanarek threating him, in which Kanarek spoke of "DEATH" in the context of those who were in conflict with her.

45. Thereafter, on or about July 31, 2019, Kanarek expressly threatened violence and

harm against BARISONE and Gray including Kanarek's threat that she would "destroy" Gray and everything Gray possessed, including Gray's children, BARISONE, the Farm, and/or their horses.

46. It was based upon those threats, other threats and statements made by Kanarek, and/or other behaviors by Kanarek and Goodwin, that BARISONE, Gray, and others at the Farm, were reasonably placed in fear of physical harm and property destruction by Kanarek and Goodwin.

47. As of July 31, 2019, and at all relevant times thereafter, BARISONE's affect, statements and behaviors evidenced outwardly that BARISONE was being psychologically assaulted and victimized by Kanarek and Goodwin, such that the defendants knew of, and intentionally and/or recklessly disregarded, BARISONE's mounting psychological distress and potential psychiatric breakdown that could occur unless appropriate and sufficient action was taken by the defendants to intervene.

The July 31, 2019 Incident

48. The situation continued to escalate out of control, with Kanarek increasing her terroristic threats, harassment, stalking, and/or other criminal behaviors until the night of July 31, 2019, when BARISONE made his first "911" call to the WASHINGTON TOWNSHIP POLICE DEPARTMENT seeking emergency assistance.

49. On July 31, 2019, at approximately 20:00 hours, BARISONE called "911" and reported that he had been assaulted verbally by Kanarek and/or Goodwin; that he and others at the Farm were being subjected to other criminal behaviors by Kanarek and/or Goodwin, including but not limited to behaviors which constituted unlawful criminal threats, harassment, cyber stalking, and cyber harassment; their fear; and other relevant information.

50. Thereafter, DEFENDANT TESORI and DEFENDANT SEABECK arrived at the Farm, whereupon BARISONE and/or others repeated their reports to WASHINGTON TOWNSHIP that there had been a verbal assault by Kanarek and/or Goodwin; that BARISONE and others at the Farm were being subjected to other criminal behaviors by Kanarek and/or Goodwin including but not limited to behaviors which constituted unlawful criminal threats, harassment, cyber stalking, and cyber harassment; and that BARISONE and others were in fear of immediate danger and injury to their physical health and/or wellbeing, and/or the wellbeing of their property.

51. DEFENDANT TESORI and DEFENDANT SEABECK intentionally disregarded the facts and circumstances being reported to them and intentionally failed to act to protect BARISONE and/or the others making the report to WASHINGTON TOWNSHIP against Kanarek and Goodwin.

52. For example, during the July 31, 2019 incident, BARISONE's affect, statements and behaviors evidenced outwardly that BARISONE was being psychologically assaulted and victimized by Kanarek and Goodwin, such that the police knew of, and intentionally and/or recklessly disregarded, BARISONE's mounting psychological distress and potential psychiatric breakdown that could occur unless appropriate and sufficient action was taken by the defendants to intervene in the developing criminal dispute.

53. Thereafter, DEFENDANT TESORI and DEFENDANT SEABECK intentionally authored and issued a *Washington Twp Police Department Investigation Report* that was materially false and misleading (the "August 1, 2019 Police Report"), knowing that the August 1, 2019 Police Report was materially false and misleading through the statements they made in that report and/or the information they omitted from it, and/or in actionable reckless disregard that the

report was materially false and/or misleading because of that.

54. The August 1, 2019 Police Report was materially false and misleading in that the report, inter alia: (a) failed to document the complaint by BARISONE and the others that some of them were in fear of immediate danger and injury to their physical health and wellbeing, and/or the wellbeing of their property; (b) failed to document the report by BARISONE and/or Gray that Kanarek had made the terroristic threat to injury Gray, her children and/or her property; and/or (c) failed to document other facts and circumstances necessary to accurately and effectively convey the true circumstances and resulting material threat of injury, harm, and/or other mayhem occurring at the Farm that day.

55. The August 1, 2019 Police Report documented as well that the responding DEFENDANT POLICE OFFICERS violated police protocol by interviewing Kanarek and Goodwin (the alleged criminal perpetrators) before interviewing BARISONE, the "911" complainant, evidencing unlawful bias by the defendants against BARISONE and evidencing other wrongs.

The August 1, 2019 Incident

56. The situation continued to escalate out of control, with Kanarek and Goodwin increasing their terroristic threats, harassment, stalking, and/or other criminal behaviors, against BARISONE, Gray, and other people on the premises of the Farm.

57. For example, on or about the morning of August 1, 2019, Goodwin cornered two minors residing at the Farm (students of BARISONE) and attempted to force the minors to agree with Goodwin's assertion that BARISONE was wrong to have call the police against him and Kanarek the prior day. The minors resisted Goodwin's bullying, whereupon Goodwin became aggressive toward one of the minors and threatened her physically.

58. The incident was extremely upsetting to the minor, whereupon she reported it to BARISONE and further argument and verbal assault was directed at BARISONE by Kanarek and/or Goodwin, following which BARISONE made his second "911" call to the WASHINGTON TOWNSHIP POLICE DEPARTMENT seeking emergency assistance.

59. On August 1, 2019, at approximately 18:00 hours, BARISONE called "911" and again reported that he had been assaulted verbally by Kanarek and/or Goodwin; that he and others at the Farm were being subjected to other criminal behaviors by Kanarek and/or Goodwin, including but not limited to behaviors which constituted unlawful criminal threats, harassment, cyber stalking, and cyber harassment; their fear; and other relevant information.

60. Thereafter, DEFENDANT HENSLEY and DEFENDANT SEABECK arrived at the Farm and, upon information and belief, in abject violation of standard police protocol, policy and procedure, interviewed Kanarek and Goodwin before the DEFENDANT POLICE OFFICERS interviewed BARISONE, the criminal complainant who called "911."

61. When DEFENDANT HENSLEY and DEFENDANT SEABECK finally did interview BARISONE and/or the others being threatened by Kanarek and/or Goodwin, BARISONE and/or others reported to WASHINGTON TOWNSHIP that there had been a verbal assault by Kanarek and/or Goodwin; that BARISONE and others at the Farm were being subjected to other criminal behaviors by Kanarek and/or Goodwin including but not limited to behaviors which constituted unlawful criminal threats, harassment, cyber stalking, and cyber harassment; and that BARISONE and others were in fear for their lives and in fear of immediate danger and injury to their physical health and wellbeing, and/or to the wellbeing of their property.

62. DEFENDANT HENSLEY and DEFENDANT SEABECK intentionally disregarded the facts and circumstances being reported to them and intentionally failed to take

appropriate action, choosing instead to avoid their duty to act by falsely characterizing the situation as a "private dispute," a tactic those defendants and the other defendants (in particularly, defendant WASHINGTON TOWNSHIP) utilized unlawfully as a practice, custom, and/or policy.

63. For example, during the August 1, 2019 incident, BARISONE's affect, statements, and behaviors evidenced outwardly that BARISONE was being psychologically assaulted and victimized by Kanarek and Goodwin, such that the police knew of, and intentionally and/or recklessly disregarded, BARISONE's mounting psychological distress and likely psychiatric breakdown that was going to occur unless appropriate and sufficient action was taken by the defendants to intervene in what was obviously a police matter and not a "private dispute."

64. When the responding DEFENDANT POLICE OFFICER finally made it up to the barn where BARISONE, Gray, and the other peaceful visitors/residence had congregated, the DEFENDANT POLICE OFFICER were presented with the minor who Goodwin had assaulted.

65. Speaking through a torrent of tears, the minor told the responding DEFENDANT POLICE OFFICERS how Goodwin had threatened her physically and placed her in fear for "in fear for her life"; whereupon the DEFENDANT POLICE OFFICES asked the minor "Did he [Goodwin] threaten to kill you?"

66. Upon hearing the minor's response, which was "no," the DEFENDANT POLICE OFFICERS turned away from her, stopped listening to her legitimate report of fear and threats, and failed to give the minor or her complaint any further audience or meaningful consideration.

67. Upon information and belief, to the responding DEFENDANT POLICE OFFICERS and WASHINGTON TOWNSHIP, the defendants would not offer to consideration to any type of threat of assault or assault short of one in which Goodwin and/or Kanarek threatened expressly to "kill" someone, regardless of what other physical harm or mayhem Kanarek and/or

Goodwin might threaten or cause short of killing someone.

68. BARISONE made further reports to the DEFENDANT POLICE OFFICES during their "911" visit to the Farm, including reports of stalking, trespass, and unauthorized attempts by Kanarek and/or Goodwin to enter the locked club house in the barn.

69. BARISONE reported to the responding DEFENDANT POLICE OFFICERS that BARISONE had found discarded boxes of "Suboxone" in the garbage Kanarek and/or Goodwin from the farm house, a drug used to treat heroin addiction.

70. But based upon the position they took in response to the minor's report, the defendants intentionally discounted, mischaracterized, and/or simply ignored, BARISONE's reports, in abject violation of applicable laws, rules, statute, policies and procedures (including the New Jersey Attorney General guidelines governing police conduct).

71. Thereafter, DEFENDANT HENSLEY and DEFENDANT SEABECK intentionally authored and issued a *Washington Twp Police Department Investigation Report* that was materially false and misleading (the "August 2, 2019 Police Report"), knowing that the August 2, 2019 Police Report was materially false and misleading through the statements they made in that report and/or the information they omitted from it, and/or in actionable reckless disregard that the report was materially false and/or misleading because of that.

72. The August 2, 2019 Police Report was materially false and misleading in that the report, inter alia: (a) failed to document the complaints by BARISONE and the others that they were in fear for their lives and/or in fear of immediate danger and injury to their physical health and wellbeing, and/or to the wellbeing of their property; (b) failed to document in any manner the responding officers' interview of the minor who Goodwin had threatened physically, and/or the minor's report to the responding officers that she was in fear for her life and of physical harm

from Kanarek and/or Goodwin; and/or (c) failed to document other facts and circumstances necessary to accurately and effectively convey the true circumstances and resulting material threat of injury, harm, and/or other mayhem occurring at the Farm that day.

73. In connection with their response to BARISONE's August 1, 2019 "911" call and their visit to the Farm, DEFENDANT SEABECK contacted a Morris County Assistant Prosecutor for purposes of discussing the August 1, 2019 incident with the Morris County Prosecutor's Office ("MCPO").

74. During that call with MCPO, DEFENDANT SEABECK failed intentionally to make a full, complete, truthful and/or accurate report of the incidents and evolving situation at the Farm, instead choosing intentionally to fail to report to MCPO that BARISONE and others had expressed that they were in fear for their lives, and/or in fear of immediate danger and injury to their physical health and/or wellbeing, and/or to the wellbeing of their property, from physical harm threatened by Kanarek and/or Goodwin.

75. Upon information and belief, the intentional inaccurate reporting of the August 1, 2019 incident was part of a practice, custom and policy adopted by WASHINGTON TOWNSHIP to endeavor to limit police involvement by falsely characterizing as "civil matters" and/or "private disputes" incidents which, in fact, were criminal in nature.

76. There are other residents of WASHINGTON TOWNSHIP who have been subjected to the same illegal and unlawful treatment by WASHINGTON TOWNSHIP and its POLICE DEPARTMENT.

77. The August 2, 2019 Police Report documented as well that the responding DEFENDANT POLICE OFFICERS violated police protocol by interviewing Kanarek and Goodwin (the alleged criminal perpetrators) before interviewing BARISONE, the "911"

complainant, evidencing unlawful bias by the defendants against BARISONE and evidencing other wrongs.

The August 3, 2019 Incident

78. The situation continued to escalate out of control, with Kanarek and Goodwin increasing their terroristic threats, harassment, stalking, and/or other criminal behaviors.

79. The behaviors of Kanarek and Goodwin at the Farm, for example, evidenced what others on the premises took to be planning, stalking, and threats to injury Gray's horse and/or other horse boarded in the barn, including the possibility that the barn might be set on fire.

80. But that was hardly the only mayhem Goodwin and Kanarek intentionally caused at the Farm now that the WASHINGTON TOWNSHIP and the responding DEFENDANT POLICE OFFICERS had empowered those perpetrators through the defendants' failures and refusals to take appropriate action following the first, two "911" calls BARISONE had made.

81. For the purpose of threatening BARISONE and Gray and to cause them fear for their lives and the lives of Gray's children, Kanarek and Goodwin commenced cyber-stalking Gray's children by sending them social media "friend requests" and/or like contacts.

82. The contacts initiated by Kanarek and/or Goodwin were particularly disturbing when taken in context, based upon Kanarek's prior expressed threat of violence and mayhem against Gray to "destroy" Gray and everything in Gray's life that was "important" to Gray, following Kanarek's Internet posting regarding "death" to her enemies.

83. Making matters even more threatening, Kanarek and/or Goodwin continued their efforts to trespass into the club room at the barn, where BARISONE, Gray and the other peaceful residents at the Farm had taken refuge from Kanarek and Goodwin.

84. An even more ominous phenomena was presented by Kanarek and/or Goodwin through text messages and statements they made to BARISONE and others, through which Kanarek and Goodwin revealed private information concerning BARISONE, Gray, and or others, information which could only have obtained through unlawful trespass, unlawful stalking, and/or the placement of illegal electronic listening devices in the private living area(s) at the barn.

85. As a result, BARISONE made his third "911" call to the WASHINGTON TOWNSHIP POLICE DEPARTMENT seeking emergency assistance.

86. On August 3, 2019, at approximately 9:00 hours, BARISONE called "911" and again reported that he and others at the Farm were being assaulted verbally by Kanarek and/or Goodwin; that he and others at the Farm were being subjected to other criminal behaviors by Kanarek and/or Goodwin, including but not limited to behaviors which constituted unlawful criminal threats, harassment, cyber stalking, and cyber harassment; their fear; and other relevant information.

87. Thereafter, DEFENDANT THOMPSON and DEFENDANT FALLENI arrived at the Farm and, upon information and belief, in abject violation of standard police protocol, policy and procedure, interviewed Kanarek and Goodwin before the DEFENDANT POLICE OFFICERS interviewed BARISONE, the criminal complainant who called "911."

88. When DEFENDANT THOMPSON and DEFENDANT FALLENI finally did interview BARISONE and/or the others being threatened by Kanarek and/or Goodwin, BARISONE and/or others reported to WASHINGTON TOWNSHIP that there had been a verbal assault by Kanarek and/or Goodwin; that BARISONE and others at the Farm were being subjected to other criminal behaviors by Kanarek and/or Goodwin including but not limited to behaviors which constituted unlawful criminal threats, harassment, cyber stalking, and cyber harassment;

and that BARISONE and others were in fear for their lives and in fear of immediate danger and injury to their physical health and wellbeing, and/or to the wellbeing of their property.

89. For example, BARISONE and/or the other victims reported expressly to the responding POLICE OFFICER DEFENDANTS a number of material, salient facts which they chose intentionally to disregard, including the following:

(a) Kanarek was believed to have possession of, and/or current access to, a loaded firearm;

(b) Kanarek had a history of threatening to discharge and/or actually discharging her loaded firearm at people and property for the purpose of causing harm, injury and/or damage;

(c) Kanarek expressly threatened BARSIONE and others to use firearms against them through Kanarek's posting and/or other statements indicating that she was coming to get them with "weapons hot," meaning that she was armed and ready to discharge a firearm at them;

(d) Kanarek was making threats of harm, physical harm, violence, and/or mayhem against BARISONE, Gray, and/or others, in writing, on the Internet through social media posting which were and/or could be made available for the DEFENDANT POLICE OFFICERS to see;

(e) Kanarek was claiming that she had uncontrollable "multiple personalities" through which she would cause harm to BARISONE and others at the Farm; and/or,

(f) Kanarek had a criminal history, history as a drug addict, and other personal

history demonstrating that Kanarek was a clear, immediate, and present danger to BARISONE, Gray, Gray's children, others at the Farm, and/or horses being boarded at the Farm.

90. BARISONE even provided the responding DEFENDANT POLICE OFFICERS printouts of examples of Kanarek's overtly threatening, Interne t postings, and told the DEFENDANT POLICE OFFICERS that BARISONE wanted – in fact, insisted – that he get to speak with a supervisor, a detective, and/or a mental health professional to deal with the developing, dangerous circumstances.

91. During the August 3, 2019 Incident, Kanarek and/or Goodwin expressly told the responding DEFENDANT POLICE OFFICERS that Kanarek/Goodwin had place electronic devices on the premises, permitting Kanarek and Goodwin to intercept and thereafter disclose private oral communications BARISONE, Gray, and/or others were having at the Farm (hereinafter, the "Eavesdropping").

92. The placement of those devices without consent of the property owner, upon information and belief, is criminal trespassing under New Jersey law.

93. The Eavesdropping was unlawful under New Jersey law.

94. Moreover, the disclosure of unlawfully intercepted oral communications is a crime under New Jersey law.

95. Nevertheless, the responding DEFENDANT POLICE OFFICERS failed to investigate the criminal acts Goodwin has reported to them he and/or Kanarek had committed, failed to take other appropriate non-discretionary action in response to notification that such criminal conduct was occurring, and intentionally failed to intervene.

96. DEFENDANT THOMPSON and DEFENDANT FALLENI intentionally disregarded all of those facts and circumstances being reported to them and intentionally failed to act to intervene in what obviously was a police matter and not just a "private dispute."

97. Those POLICE OFFICER DEFENDANTS also disregarded, during the August 3, 2019 incident, BARISONE's affect, statements, and behaviors evidenced outwardly that BARISONE was being psychologically assaulted and victimized by Kanarek and Goodwin, such that the police of, knew and intentionally and/or recklessly disregarded, BARISONE's mounting psychological distress and likely psychiatric breakdown about to occur unless appropriate and sufficient action was taken by the defendants to intervene.

98. Thereafter, DEFENDANT THOMPSON and DEFENDANT FALLENI intentionally authored and issued a *Washington Twp Police Department Investigation Report* that was materially false and misleading (the "August 8, 2019 Police Report"), knowing that the August 8, 2019 Police Report was materially false and misleading through the statements they made in that report and/or the information they omitted from it, and/or in actionable reckless disregard that the report was materially false and/or misleading because of that.

99. The August 8, 2019 Police Report was materially false and misleading in that the report, inter alia: (a) failed to document the complaint by BARISONE and the others that some of them were in fear for their lives and in fear of immediate danger and injury to their physical health and wellbeing, and/or the wellbeing of their property; (b) failed to document the facts and circumstances concerning Kanarek's actual or potential possession of a loaded firearm, and her threats to use the firearm against BARISONE and others by coming for them with "weapons hot"; and/or (c) failed to document other facts and circumstances necessary to accurately and effectively convey the true circumstances and resulting material threat of injury, harm, and/or other mayhem

occurring at the Farm that day.

100. In connection with their response to BARISONE's August 3, 2019 "911" call and their visit to the Farm, the responding DEFENDANT POLICE OFFICERS finally bothered to contact the MCPO but then proceeded to give the MCPO a materially misleading report by, among other things, failing to advised the MCPO of the Kanarek-Goodwin statement that they were using eavesdropping devices on the premises.

101. Upon information and belief, the intentional inaccurate reporting of the August 3, 2019 incident was another example of the practice, custom and policy adopted by WASHINGTON TOWNSHIP to endeavor to limit police involvement by falsely characterizing as "civil matters" and/or "private disputes" incidents which, in fact, were criminal in nature.

102. Upon information and belief, had the defendants (especially the responding DEFENDANT POLICE OFFICERS) acted appropriately in response to BARISONE's criminal complaint and "911" emergency call on August 3, 2019, the defendants would have discovered that in the early morning hours on or about August 4, 2019, Goodwin was conducting Internet searches in an effort to find address information for the location where Gray's children were about to be attending a family reunion; that Goodwin and Kanarek were stalking Gray's children for criminal, deviant, and illegal purposes (including the purpose of physically harming those children); and that there was probable cause to intervene in the situation which was not a private dispute but, rather, a criminal matter.

The August 4, 2019 Incident

103. The situation continued to escalate out of control, with Kanarek and/or Goodwin increasing their terroristic threats, harassment, stalking, and/or other criminal behaviors, causing BARISONE to make his fourth "911" call to the WASHINGTON TOWNSHIP POLICE

DEPARTMENT seeking emergency assistance.

104. On August 4, 2019, at approximately 16:00 hours, BARISONE called "911" and again reported (now for the fourth time, at least) that he and others at the Farm were being assaulted verbally by Kanarek and/or Goodwin; that he and others at the Farm were being subjected to other criminal behaviors by Kanarek and/or Goodwin, including but not limited to behaviors which constituted unlawful criminal threats, harassment, cyber stalking, and cyber harassment; and other relevant information demonstrating that the dispute was escalating, and demonstrating that BARISONE and others were in fear of immediate danger and injury to their physical health and wellbeing, and/or the wellbeing of their property.

105. While BARISONE was on the phone with the "911" operator, Goodwin could be heard in the background of the phone call screaming terroristic threats against BARISONE and Cox, including words to the effect that Goodwin would harm BARISONE and would "take down" (i.e., physically harm) Cox should she attempt to intervene – words which reasonably placed BARISONE, Cox and others in fear for their lives from violence against them by Kanarek and/or Goodwin.

106. BARISONE expressly told the "911" operator that he, Gray, and the others were in fear, as the operator (had he/she been listening) could hear Goodwin screaming his threats violence and mayhem in the background.

107. Thereafter, DEFENDANT BIGHAM arrived first at the Farm; DEFENDANT CONSTANTINO responded later based on his intentional choice to treat BARISONE's "911" emergency call as a "non emergency."

108. In abject violation of standard police protocol, policy and procedure, DEFENDANT BIGMAN interviewed Kanarek and Goodwin before the DEFENDANT POLICE

OFFICERS interviewed BARISONE, the criminal complainant who called "911."

109. When DEFENDANT CONSTANTINO and DEFENDANT BIGHAM finally did interview BARISONE and/or the others being threatened by Kanarek and/or Goodwin, BARISONE and/or others reported to WASHINGTON TOWNSHIP that there had been a verbal assault by Kanarek and/or Goodwin; that BARISONE and others at the Farm were being subjected to other criminal behaviors by Kanarek and/or Goodwin including but not limited to behaviors which constituted unlawful criminal threats, harassment, cyber stalking, and cyber harassment; and that BARISONE and others were in fear of immediate danger and injury to their physical health and wellbeing, and/or the wellbeing of their property.

110. For example, BARISONE, Cox and others recounted to the responding DEFENDANT POLICE OFFICERS that Goodwin and Kanarek made threats of violence against them, and they were in fear for their lives.

111. As he had done numerous times in the past during the prior incidents, BARISONE informed the responding DEFENDANT POLICE OFFICERS that if they were going to do nothing BARISONE wanted to speak to a supervisor, such as a Sergeant and/or Detective. BARISONE's request, once again, was rejected by the responding DEFENDANT POLICE OFFICERS, who said "no."

112. BARISONE again advised WASHINGTON TOWNSHIP (through the responding DEFENDANT POLICE OFFICERS) of many other material, salient facts which the defendants chose intentionally to disregard, including the fact that Kanarek was believed to have possession of, and/or current access to, a loaded firearm.

113. DEFENDANT COSTANTINO and DEFENDANT BIGHAM intentionally disregarded all of those the facts and circumstances being reported to them and intentionally failed

to act to intervene on behalf of BARISONE and/or the others making the report to WASHINGTON TOWNSHIP against Kanarek and Goodwin.

114. Those POLICE OFFICER DEFENDANTS also disregarded, during the August 4, 2019 incident, BARISONE's affect, statements, and behaviors evidenced outwardly that BARISONE was being psychologically assaulted and victimized by Kanarek and Goodwin, such that the police knew of, and intentionally and/or recklessly disregarded, BARISONE's mounting psychological distress that was about to cause a psychiatric breakdown because appropriate and sufficient action was not taken by the defendants to intervene in what obviously was a criminal matter, not a private dispute.

115. Thereafter, DEFENDANT CONTANTINO and DEFENDANT BIGHAM intentionally authored and issued a *Washington Twp Police Department Investigation Report* that was materially false and misleading (the "August 4, 2019 Police Report"), knowing that the August 4, 2019 Police Report was materially false and misleading through the statements they made in that report and/or the information they omitted from it, and/or in actionable reckless disregard that the report was materially false and/or misleading because of that.

116. The August 4, 2019 Police Report was materially false and misleading in that the report, inter alia: (a) failed to document the complaint by BARISONE and the others that some of them were in fear for their lives and in fear of immediate danger and injury to their physical health and wellbeing, and/or to the wellbeing of their property; (b) failed to document the facts and circumstances concerning Kanarek's access to and threats to use a loaded firearm against BARISONE and others; and/or (c) failed to document other facts and circumstances necessary to accurately and effectively convey the true circumstances and resulting material threat of injury, harm, and/or other mayhem occurring at the Farm that day.

117. In connection with their response to BARISONE's August 4, 2019 "911" call and their visit to the Farm, the responding DEFENDANT POLICE OFFICERS failed to contact the MCPO and/or any of its assistant prosecutors for purposes of discussing the August 4, 2019 incident and/or reporting to the MCPO the escalating, increasingly dangerous situation at the Farm.

118. Upon information and belief, the intentional inaccurate reporting of the August 4, 2019 incident was another example of the practice, custom, and policy adopted by WASHINGTON TOWNSHIP to endeavor to limit police involvement by falsely characterizing as "civil matters" and/or "private disputes" incidents which, in fact, were criminal in nature.

The August 5, 2019 Incident

119. The situation continued to escalate out of control, with Kanarek and/or Goodwin increasing their terroristic threats, harassment, stalking, and/or other criminal behaviors, causing BARISONE to make his fourth "911" call to the WASHINGTON TOWNSHIP POLICE DEPARTMENT seeking emergency assistance.

120. Kanarek continued posting threats of death, harm and/or mayhem on social media, including expressed statements by Kanarek that she had "guns" and "hollow point bullets," placing BARISONE, Gray and the other peaceful people at the Farm in fear for their lives once again.

121. On August 5, 2019, at or about 16:00 hours, BARISONE drove to the WASHINGTON TOWNSHIP POLICE DEPARTMENT building to speak directly to an officer of supervisory authority.

122. BARISONE's purpose was to speak to a detective, the Police Chief, and/or someone else above the level of the responding DEFENDANT POLICE OFFICERS to personally

again advise WASHINGTON TOWNSHIP of the true state of facts, circumstances, and affairs at the Farm, including but not limited to Kanarek's firearms threats, and the fact that BARISONE and others at the Farm were in fear for their lives.

123. Upon entering the building BARISONE approached the receptionist and expressly asked to see the Police Chief (answer, "no"), asked for the Police Chief's phone number (answer, "no"), and advised her of other material information about the dangerous situation at the Farm that WASHINGTON TOWNSHIP and its responding DEFENDANT POLICE OFFICERS were intentionally ignoring.

124. BARISONE said to the receptionist, in sum and substance, words to the effect that "I have a HUGE problem at the Farm … I have called this place 15 times looking to speak to a human … No one has EVER picked up … I have left messages … No one has EVER called me back … My family and I are in danger … in fear for our lives …I NEED to speak to an official NOW."

125. As he spoke those words, BARISONE displayed the affect of a person on the verge of having a mental/emotional/psychological breakdown; he was visibly shaking, visibly agitated, visibly upset, and visibly demonstrating the affect of a person in fear for his life and the lives of others.

126. Minutes later three uniformed officers confronted BARISONE in the lobby where he stood. The officers appeared to be some of the DEFENDANT POLICE OFFICERS encountered by BARISONE when WASHINGTON TOWNSHIP came to the Farm on the prior "911" calls.

127. The DEFENDANT POLICE OFFICERS, with hands on their belts (indicating that weapons could be drawn against BARISONE), stood stone-faced, staring at BARISONE, pushing

out their chests and doing whatever they could to intimidate BARISONE.

128. Nevertheless, BARISONE mustered the courage to confront the officers, telling them, in words and/or in substance, the following:

> I NEED a supervisor. A Detective. We are in danger. I have LUNATICS attacking me and my family at the Farm. They are drug addicts. They are violent criminals. They have guns. They are posting deadly threats against us on social media. We need protection. They have been served vacate orders today. There WILL be trouble. WE ARE IN FEAR FOR OUR LIVES. What they are posting is JUST LIKE Parkland School. They WILL harm us. I need a mental health professional to look at this stuff. **I have papers in my truck in the parking lot showing the threats and violent messages they are posting.** I need a ranking officer to deal with this situation. It is your job. WE ARE IN FEAR FOR OUR LIVES.

129. Throughout his speech to the police officers in the lobby during this incident BARISONE was visibly shaking, visibly agitated, visibly in fear, visibly distressed, and visibly evidencing multiple signs of emotional/psychological/psychiatric distress being caused by WASHINGTON TOWNSHIP's intentional mishandling of the circumstances.

130. Despite those compelling circumstances and statements, the responding DEFENDANT POLICE OFFICES which BARISONE confronted in the lobby of the Police Department that afternoon intentionally ignored the facts and circumstances, intentionally blocked BARISONE from speaking with a supervisor above them in rank, intentionally mischaracterized the situation as a "private dispute," intentionally refused to aid or assist BARISONE, and forced him to leave the building without permitting him to speak to anyone having supervisory authority over them and/or the situation at the Farm.

131. Upon information and belief, on behalf of WASHINGTON TOWNSHIP, those responding DEFENDANT POLICE OFFICERS failed intentionally to write up any police report

of this incident, choosing instead to intentionally hide it from the record of what was occurring up at the Farm. That was yet another intentional wrong perpetrated by the defendants.

132. Those POLICE OFFICER DEFENDANTS intentionally disregarded BARISONE's affect, statements, and behaviors evidenced outwardly that BARISONE was being psychologically assaulted and victimized by Kanarek and Goodwin, such that the police knew of, and intentionally and/or recklessly disregarded, BARISONE's mounting psychological distress and that BARISONE was on the verge of experiencing a psychiatric breakdown arising from the defendants' refusal to take appropriate and sufficient action to intervene in what obviously was a criminal matter and not a private dispute.

The August 6, 2019, Midday Incident

133. On August 6, 2019, at or about 13:00 hours, WASHINGTON TOWNSHIP descended upon the Farm with a line of official vehicles and township actors.

134. WASHINGTON TOWNSHIP proceeded to invade the premises in response to a complaint Kanarek and Goodwin made to WASHINGTON TOWNSHIP that the buildings on the Farm had unpermitted renovations, alterations, and/or construction work being performed and/or performed in the past.

135. Had the defendants truly believed that what was occurring at the Farm was a "private matter," "private dispute," and/or other non-police matter, defendants would not have undertaken such an extreme intervention in response to Kanarek's complaint.

136. The reports made by Kanarek and Goodwin were part of the stalking and harassment they were directing and BARISONE, Gray, and other peaceful residents/visitors at the Farm, only now Kanarek and Goodwin were committing those unlawful acts with the active participation and assistance of WASHINGTON TOWNSHIP.

137. Fearful, shaken, and in distress as a result of the totality of the circumstances, BARISONE was visibly shaking while he repeatedly told the WASHINGTON TOWNSHIP officials present that BARISONE, Gray, and the others were in fear for their lives due to acts and threats of Kanarek and Goodwin, and the abject failure and refusal of WASHINGTON TOWNSHIP and/or the DEFENDANT POLICE OFFICERS to take appropriate action.

138. During the encounter, BARISONE spoke expressly to the WASHINGTON TOWNSHIP Chief Building Inspector who was present that day (the "Chief Building Inspector"), who confirmed verbally to other WASHINGTON TOWNSHIP officials that Kanarek and Goodwin would not qualify as "tenants" at the Farm.

139. While BARISONE was speaking to the WASHINGTON TOWNSHIP public officials in the barn, Goodwin (who was also present to listen in) glared at BARISONE and mouth the words that BARISONE should "get ready," which BARISONE understood to mean "get ready for more mayhem, destruction, injury and harm."

140. Therefore, at that point in time, the defendants had actual knowledge that the occurrence at the Farm occurring since July 31, 2019, was not a "private," "landlord-tenant" dispute they could sidestep to avoid taking non-discretionary action to intervene.

141. Nevertheless, the defendants persisted intentionally in their disregard of the complaints being made against Kanarek and Goodwin by BARISONE, Gray and the other at the Farm.

142. WASHINGTON TOWNSHIP issued orders that various living spaces occupied on the Farm were ordered to be vacated immediately until further notice and that WASHINGTON TOWNSHIP would return later in the day to confirm whether BARISONE, Grey, Kanarek and Goodwin had, in fact, vacated the buildings.

143. Having issued such an order, it was the duty and obligation of WASHINGTON TOWNSHIP to force Kanarek and Goodwin to vacate the Farm house; but when BARISONE requested that WASHINGTON TOWNSHIP do just that, WASHINGTON TOWNSHIP refused and directed BARISONE that it was his obligation to physically eject them. BARISONE advised WASHINGTON TOWNSHIP at that time, once again, that he was in fear for his life from violence threatened against him by Kanarek and Goodwin, which WASHINGTON TOWNSHIP again ignored intentionally.

144. During and throughout this incident, WASHINGTON TOWNSHIP and its officials in attendance intentionally disregarded BARISONE's affect, statements, and behaviors evidencing that BARISONE was being psychologically assaulted and victimized by Kanarek and Goodwin, such that the police knew of, and intentionally and/or recklessly disregarded, the fact that BARISONE was now experiencing profound psychological distress and was in the process of experiencing a psychiatric breakdown.

145. During this incident, a WASHINGTON TOWNSHIP employee at the Farm on behalf of the township observed BARISONE's profound level of psychological and emotional distress, his uncontrollable shaking and shivering, and his repeated statements that he was "in fear" for his life.

The August 6, 2019 Evening Incident

146. On August 6, 2019, at or about 17:00 p.m., WASHINGTON TOWNSHIP again descended upon the Farm with a line of official vehicles and township actors.

147. Utilizing its building inspector, fire marshal, and police, WASHINGTON TOWNSHIP proceeded to invade the premises again to determine whether, in fact the living spaces had been vacated as ordered by WASHINGTON TOWNSHIP.

148. Fearful, shaken, and in distress as a result of the totality of the circumstances, BARISONE was visibly shaking while he repeatedly told the WASHINGTON TOWNSHIP officials present that BARISONE, Gray, and the others were in fear for their lives due to acts and threats of Kanarek and Goodwin, and the abject failure and refusal of WASHINGTON TOWNSHIP and/or the DEFENDANT POLICE OFFICERS to take appropriate action.

149. BARISONE advised WASHINGTON TOWNSHIP that the township needed to expel Kanarek and Goodwin from the living spaced in order to comply with the township's order to vacate the premises because, as BARISONE, he was in fear for his life.

150. It was following that discussion that WASHINGTON TOWNSHIP officials sought access to the farm house to enter the area Kanarek and Goodwin were occupying.

151. WASHINGTON TOWNSHIP took Cox to the Farm house to make that entry, whereupon Cox was viciously attacked and bitten by Kanarek's violent dog.

152. A WASHINGTON TOWNSHIP ambulance was called to the scene, whereupon Cox was treated for the dog bite.

153. The WASHINGTON TOWNSHIP police were in attendance as well; they refused to remove the dog from the premises or even to advise Kanarek that she could not lawfully occupy the premises.

154. During their visit to the Farm, one or more of the WASHINGTON TOWNSHIP ambulance attendants observed BARISONE sufficiently to note that BARISONE's affect, statements, and behaviors evidenced outwardly psychological distress and psychiatric breakdown that was occurring due to the defendants' failure to take appropriate action.

155. The police officers in attendance during this incident, namely DEFENDANT

OFFICER GARRISON and DEFENDANT OFFICER HADE, intentionally disregarded the situation and falsely reported about the material facts and circumstances following the incident, including false reporting in the August 11, 2019, written police report they authored/approved knowing that the August 11, 2019 police report was materially false and misleading through the statements they made in that report and/or the information they omitted from it, and/or in actionable reckless disregard that the report was materially false and/or misleading because of that.

The August 7, 2019 Incident

156. On August 7, 2019, following the aforementioned protracted, intentional, derelict interactions which WASHINGTON TOWNSHIP and the DEFENDANT POLICE OFFICERS had with BARISONE, Kanarek, Goodwin, and/or others at the Farm, there was an incident at the Farm in which Kanarek was shot twice in the chest (the "August 7, 2019 Incident").

157. BARISONE was indicted for the August 7, 2019 Incident, was charged criminally, and is presently being held in jail awaiting trial.

158. BARISONE has no recollection of the shooting and has entered a "not guilty" plea.

159. A renowned, board-certified psychiatrist has determined that BARISONE was mentally incompetent at the time of the August 7, 2019 Incident, having suffered from mental disease, condition, and/or defect which, in sum and/or substance, rendered BARISONE to be insane.

160. In the aftermath of the August 7, 2019 Incident, WASHINGTON TOWNSHIP Police assembled people at the Farm, at the time of the shooting (exclude BARISONE, Kanarek, and/or Goodwin) in the club of the barn and interviewed them as potential witnesses.

161. In the presence of the people being interviewed, a WASHINGTON TOWNSHIP Police Officer stated anecdotally, in words, sum and/or substance, that: (a) there are numerous reports to the Police in WASHINGTON TOWNSHIP of shots fired to which the police respond or investigate; (b) the high number of such calls was due to the fact that WASHINGTON TOWNSHIP has people who fire guns while hunting; (c) when the report came over the radio of a shooting at the Farm, the officer concluded it was a real shooting, not an incident of shots fired for the purpose of hunting; and (d) "we had been worried that something like that might happen."

Other Allegations

162. By the time that the August 7 Incident occurred, Kanarek and/or Goodwin had made express threats and/or undertaken act of assault, threatening behavior, and harm against no fewer than seven (7) people at the Farm, namely: BARISONE; Gray; Gray's two minor children; the two students Goodwin intimidated; and, Cox.

163. By the time that the August 7 Incident occurred, Kanarek and/or Goodwin had expressly, directly, and/or indirectly threatened "death"; destruction; using firearms; coming for people with "weapons hot" loaded firearms; "taking down" whoever might get in the way of their plan to harm BARISONE and/or Gray; possessing "guns" and "hollow point bullets"; and other material threats.

164. WASHINGTON TOWNSHIP and the other defendants were advised repeatedly of that information but, nevertheless, unlawfully chose to disregard it unlawfully

165. The aforementioned acts, actions, and omissions of the defendant public employees (including but not limited to the DEFENDANT POLICE OFFICERS) constituted crimes, acts of commission and omission committed with actual malice against BARISONE, and/or acts of commission and omission constituting willful misconduct.

166. The aforementioned acts, actions, and omissions of the defendant public employees (including but not limited to the DEFENDANT POLICE OFFICERS) constituted acts of commission and omission of "official misconduct" made criminal under N.J.S.A. § 59:3-14.

167. The aforementioned acts, actions, and omissions of the defendant public employees (including but not limited to the DEFENDANT POLICE OFFICERS) included a conspiracy to violate BARISONE's protected rights and interests, including violations arising from the preparation and submission of false police reports to concealing the true state of affairs and occurrences at the Farm between July 31, 2019 and August 7, 2019.

Civil Rights Violations

168. Under the New Jersey *Civil Rights Act* N.J.S.A. §10:6-2, and/or under 42 U.S.C. §1983, it is unlawful for WASHINGTON TOWNSHIP, the DEFENDANT POLICE OFFICERS, and/or the other defendants, to perpetrate acts, actions, and omissions, resulting in the unlawful deprivations of, unlawful interferences with, and/or unlawful attempted interferences with, BARISONE's rights, privileges, immunities, and interests (collectively, the "rights") under the U.S. Constitution and/or under the New Jersey Constitution.

169. During and in connection with the aforementioned incidents, WASHINGTON TOWNSHIP, the DEFENDANT POLICE OFFICERS (acting under color of law), and/or the other defendants, committed intentional acts, actions, and omissions which were the direct and proximate cause of injury to BARISONE by and through the deprivation, interference with, denial of, and violation of BARISONE's rights under the New Jersey State Constitution and/or under the U.S. Constitution.

170. The unlawful acts, actions, and omissions were perpetrated against BARISONE for the purpose of depriving him of his constitutionally protected rights, and/or for the purpose of

interfering with and/or attempting to interfere with same, including but not limited to the following:

(a) The unlawful, intentional falsification of written reports and statements concerning, about and/or against BARISONE which were created, drafted, executed, and publicized for the unlawful purpose of depriving, interfering with, or attempting to interfere with, BARISONE's protected civil rights;

(b) The unlawful intentional retaliation against BARISONE for his exercise of his protected constitutional rights, including but not limited to BARISONE's right to operate his business and the Farm, and his right to make reports of wrongdoing to senior members of the WASHINGTON TOWNSHIP Police Department;

(c) The unlawful intentional failure to conduct to completion, appropriate investigations of complaints filed by BARISONE with WASHINGTON TOWNSHIP and/or with the DEFENDANT POLICE OFFICERS and/or matters referred to and reported to the Morris County Prosecutor's Office;

(d) The defendants' intentional, deliberate, persistent false characterization of the occurrences at the Farm being reported to the defendants as private disputes between a landlord and tenant when, in reality, the occurrences were police matters that required the intervention of law enforcement;

(e) WASHINGTON TOWNSHIP's failure to properly train, monitor, manage, supervise; and/or control its municipal officials, officers, employees, and/or agents (including people acting under color of law), which caused and resulted in the mistreatment of BARISONE and/or unlawful violations of his rights;

(f) The defendants' intentional, deliberate, persistent failure to treat BARISONE with fairness, compassion, and respect as a victim of crime and/or criminal conduct; and

(g) Other unlawful acts, actions, and omissions which violated the New Jersey *Civil Rights Act* and/or 42 U.S.C. § 1983.

171. The specific constitutionally protected civil rights BARISONE is asserting to have been deprived, interfered with, and/or attempted to be interfered with, by WASHINGTON TOWNSHIP, by the DEFENDANT POLICE OFFICERS, and/or by the other defendants, include but are not limited to the following:

(a) BARISONE's civil right to freedom of speech, including his right to make reports to the police which, as a matter of law, were to be conveyed accurately and completely to others as a non-discretionary duty the defendants owed BARISONE;

(b) BARISONE's civil right to file and pursue appropriate petitions with the government (including reports of crime and/or emergency calls) and to have those petitions addressed fully, completely, expeditiously, lawfully, and appropriately;

(c) BARISONE's civil right to equal protection under the law;

(d) BARISONE's civil right to exist free from unlawful retaliation directed at him for exercising his constitutionally protected rights and interests, including freedom from retaliation in the form of intentional dereliction of duty in the performance of responding to "911" calls and reports of emergencies that require police intervention;

(e) BARISONE's New Jersey constitutional right to protect his reputation and good name;

(f) BARISONE's right under Article 1, Section 22 of the New Jersey Constitution and under N.J.S.A. § 52:4B-36, as a victim of crime, to be treated with fairness, compassion, respect, and the like, arising from and in connection with the criminal acts being perpetrated against BARISONE by Kanarek, Goodwin, and/or the DEFENDANT POLICE OFFICERS;

(g) BARISONE's substantive due process rights, procedural due process rights, and/or other statutory and constitutional rights, under N.J.S.A. §§ 2C:25-19 et. seq., as a victim of domestic violence perpetrated against him by Kanarek and/or Goodwin; BARISONE's rights as a victim of unlawful, criminal interception of wire, electronic, and/or oral communications and the contents thereof perpetrated by Kanarek and/or Goodwin at the Farm, and BARISONE's rights as a victim of the crime of "official deprivation of civil rights" as defined under N.J.S.A. §§ 2C:30-6; and/or

(h) Other civil rights and interests with which BARISONE is vested by and/or through the U.S. Constitution and/or the New Jersey Constitution.

172. As a direct and proximate result of the unlawful acts, actions, and omissions committed against BARISONE under color of law, which deprived him of his constitutional rights and interest, interfered with his exercise of those rights and interests, and/or were unlawful attempts to interfere with those rights and interests, WASHINGTON TOWNSHIP, the DEFENDANT POLICE OFFICERS, and/or the other defendants, individually and jointly caused BARISONE to suffer injury-in-fact of a concrete, particularized, and actual nature.

173. In addition to any and all direct liability it has based upon the claims and allegations set forth above, defendant WASHINGTON TOWNSHIP also has derivative municipal liability for the unlawful acts and omissions of the other defendants, based upon defendant

WASHINGTON TOWNSHIP's failure to properly monitor, supervise, control and/or train the DEFENDANT POLICE OFFICERS and/or other defendants.

174. But for the defendants' unlawful violations of BARISONE's civil rights, the August 7, 2019 Incident and other incidents would not have occurred, and/or would have occurred differently and without injury or harm caused to BARISONE, his business, the Farm, and/or the other people at the Farm.

175. As a direct and proximate result of the acts, actions, and omissions of the defendants which violated BARISONE's civil rights, BARISONE suffered: (a) economic loss (including lost income from his business); (b) damage to his reputation in the community and his professional reputation; (c) emotional distress; (d) harm to his family and personal relationships; (e) consequential damages; (f) injury to his future earnings capacity; (g) loss of his freedom; and (h) other injury, damages, and loss including mental anguish, physical discomfort, physical injury and harm, pain and suffering, shame and embarrassment and other emotional distress injuries.

LAD Violations

176. Alternatively, during and throughout the aforementioned protracted, intentional, derelict interactions which WASHINGTON TOWNSHIP and the DEFENDANT POLICE OFFICERS had with BARISONE and Kanarek, WASHINGTON TOWNSHIP, the DEFENDANT POLICE OFFICERS, and/or the other defendants, ignored, dismissed, hid, failed to report, failed to acknowledge, failed to take seriously, and/or otherwise rejected, BARISONE and/or his reports to them due to BARISONE's advanced age (he was in his fifties), BARISONE's gender (he was a male reporting stalking and harassment by a female), BARISONE's status as a person who suffered from mental illness, and/or based upon other traits and characteristics

protected against unlawful discrimination under the New Jersey *Law Against Discrimination* (the "LAD").

177. At the time of the incidents, BARISONE was a Caucasian male in his 50's, whereas Kanarek was an attractive, blonde, Caucasian female in her 30's.

178. At the time of the incidents, BARISONE was a person suffering from various emotional, psychological and/or psychiatric maladies, the presence of which was readily apparent to and known by the defendants, individually and collectively, and to others who interacted with BARISONE during the incidents.

179. At the time of the incidents, WASHINGTON TOWNSHIP, the DEFENDANT POLICE OFFICERS, and/or the other defendants individually, jointly, and/or severally, committed the wrongful acts, actions and omissions, motivated by unlawful discrimination against BARISONE based upon his protected traits, including but not limited to his age, his gender, and/or his status as a person suffering from mental disease, maladies, and/or defects (the "unlawful discrimination").

180. As a direct and proximate result of the unlawful discrimination against BARISONE, WASHINGTON TOWNSHIP, the DEFENDANT POLICE OFFICERS and the other defendants intentionally ignored, dismissed, and/or otherwise rejected BARISONE's complaints, urgings, requests for assistance, requests to speak with police supervisors, and "911" reports of crime and criminal behaviors.

181. But for the defendants' unlawful discrimination, the August 7, 2019 Incident and other incidents would not have occurred, and/or would have occurred differently and without injury or harm caused to BARISONE, his business, the Farm, and/or the other people at the Farm.

Intentional Torts

182. Alternatively, at the time of the incidents, WASHINGTON TOWNSHIP, the DEFENDANT POLICE OFFICERS, and/or the other defendants individually, jointly, and/or severally, committed the wrongful acts, actions and omissions, which constituted intentional torts against BARISONE, including acts of official misconduct, criminal civil right deprivations, and/or other wrongful conduct not subject to tort immunity.

183. In addition to any and all direct liability it has based upon the claims and allegations set forth above, defendant WASHINGTON TOWNSHIP also has derivative municipal liability for the unlawful acts and omissions of the other defendant, based upon defendant WASHINGTON TOWNSHIP's failure to properly monitor, supervise, control and/or train the DEFENDANT POLICE OFFICERS and/or other defendants.

184. As a direct and proximate result of the acts and omissions of the defendants which constituted violations of the LAD, BARISONE suffered: (a) economic loss (including lost income from his business); (b) damage to his reputation in the community and his professional reputation; (c) emotional distress; (d) harm to his family and personal relationships; (e) consequential damages; (f) injury to his future earnings capacity; (g) loss of freedom; and (h) other injury, damages, and loss including mental anguish, physical discomfort, physical injury and harm, pain and suffering, shame and embarrassment and other emotional distress injuries.

WHEREFORE, Plaintiff demands judgment in his favor, and against each and every one of the defendants, jointly and severally, awarding plaintiff the following:

A. Permanent restraints barring the defendants from committing civil rights violations;

B. Permanent restraints barring the defendants from perpetrating violations of the New Jersey *Law Against Discrimination*;

C. Compensatory damages (including loss of business income);

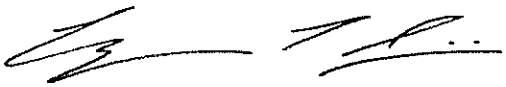
D. Damages for psychological distress, psychiatric injury, humiliation, and mental and emotional distress;

E. Attorneys' fees and costs of suit;

F. Lawful interest; and

G. Such other, further, and different relief as the Court deems just and proper.

DEININGER & ASSOCIATES, LLP
Attorneys for Plaintiff



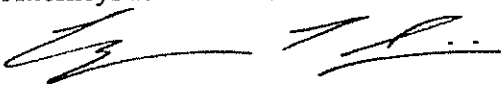
By: _____
CHRISTOPHER L. DEININGER, ESQ.

Dated: July 22, 2021

JURY DEMAND

Plaintiff demands a trial by jury as to all issues.

DEININGER & ASSOCIATES, LLP
Attorneys for Plaintiff



By: _____
CHRISTOPHER L. DEININGER, ESQ.

Dated: July 22, 2021

CERTIFICATION PURSUANT TO RULE 4:5-1

The undersigned, Christopher L. Deininger, Esq., certifies on behalf of the Plaintiff as follows:

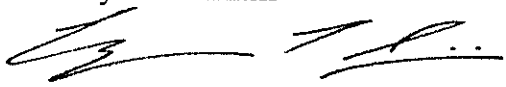
1. I am an attorney admitted to practice law in the State of New Jersey, counsel for the above-named Plaintiff in the subject action.

2. The matter in controversy in this case is not, to my knowledge, the subject of any other action pending in any Court or pending arbitration proceeding, nor is any other action or arbitration proceeding contemplated, although there are other criminal and civil matters arising from the August 7, 2019 Incident.

3. There are no other parties who should be joined in this action that we are aware of at the present time, although plaintiff has named fictitious parties which could result on the subsequent addition of other parties.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DEININGER & ASSOCIATES, LLP
Attorneys for Plaintiff



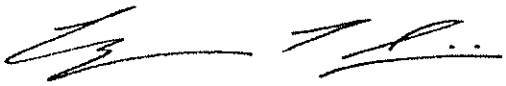
By : _____
CHRISTOPHER L. DEININGER, ESQ.

Dated: July 22, 2021

CERTIFICATION UNDER R. 4:5-1(b)(3)

I certify that confidential personal identifying information has been removed from the documents now submitted to the Court, and will be redacted from all documents submitted in the future in accordance with R. 1:38-7(b).

DEININGER & ASSOCIATES, LLP
Attorneys for Plaintiff



By: _____
Christopher L. Deininger, Esq.

Dated: July 22, 2021

Exhibit B

1999 WL 554585
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

Raymond B. BUSH

v.

CITY OF PHILADELPHIA, et al.

No. Civ.A. 98–0994.

July 15, 1999.

Attorneys and Law Firms

E. William Hevenor, Philadelphia, PA, for Raymond B. Bush, Plaintiff.

James A. Rocco, Kolansky & Strauss, P.C., Philadelphia, PA, Vincent J. Morrison, Marquess, Morrison & Trimble, P.A., Philadelphia, PA, for William H. Jordan, Defendant.

James A. Rocco, (See above), for Donna Duckenfield, Defendant.

Thomas M. Zaleski, for City of Philadelphia, Defendant.

ORDER AND OPINION

HART, Magistrate J.

I. *Background and Facts*

*1 There are many unfortunate things that can happen to innocent people in this world as a result of improper conduct by state officials. Not all of these unfortunate things, however, result in the denial of one's Constitutional rights. The present case serves as a perfect example.

Viewing the facts in the light most favorable to the plaintiff reveals the following. On February 19, 1997, Raymond Bush was driving his pick-up truck East on Race Street in Philadelphia, when he attempted to turn into a parking lot on the south side of the street. Defendant William Jordan, a Philadelphia police officer in full uniform, but driving his civilian van, attempted to pass Bush on the right before plaintiff could complete the turn. Jordan's van collided with the right front portion of Bush's vehicle.

Bush got out of his truck, approached Jordan, and suggested that the two exchange license, insurance and registration information. In fact, Bush provided his cards to Jordan. The officer, however, would not reciprocate. He gave Bush nothing, not even his name. Bush noticed, however, that the Jordan vehicle had a 1995 inspection sticker on its windshield. Undaunted by Jordan's refusal to exchange information, Bush went back to his truck and retrieved a camera to take pictures. Jordan told Bush that if he took any pictures he would be arrested. At this point Bush insisted that Jordan summon an investigating officer, which Jordan did. While Jordan was using the nearby pay phone, Bush took several pictures of the vehicles and accident scene. Jordan returned to the scene and again objected to the picture taking. Bush told Jordan that he had a right to take the pictures. Jordan was upset, but he neither arrested Bush, physically threatened him, nor interfered with the photography.

In response to Jordan's phone call, defendant officer Donna Duckenfield arrived on the scene. Both men appeared at the driver's side window of her car simultaneously. Jordan immediately seized the initiative and began telling Duckenfield that Bush had

made a right turn from the left lane. When Bush tried to correct Jordan, Duckenfield told the plaintiff to go back to his vehicle and wait until she called him to talk. Bush complied with this request.

Bush waited between ten and fifteen minutes while Jordan and Duckenfield conferred. Bush then observed Jordan walk back to his van and drive away. At this point, Bush exited his truck and walked up to Duckenfield's car. He asked the officer for Jordan's full name and for the name of his insurance company. Duckenfield provided neither. Instead, she simply handed Bush a piece of paper with her own name, phone number and police district on it, telling the plaintiff to have his insurance company call to get the police report. Bush attempted to tell Duckenfield his version of the accident, and did so "in basic form" (Bush dep. at p. 38, 1.8), but he eventually stopped his own narrative when he noticed that she was not taking down any of his information.

*2 It turned out that Jordan had no automobile insurance, no valid inspection sticker, and no proper registration. Nonetheless, Duckenfield failed to issue her fellow officer any citations. Moreover, because of Jordan's lack of insurance, plaintiff's own carrier had to pay for the damage to Bush's van, $846.62, with Bush himself shouldering most of this load as a result of his $500.00 deductible.

On March 13, 1997, Bush was finally able to get a copy of Duckenfield's accident report. The text of that report contained a number of false statements, the worst being her narrative of the accident itself. Relying solely on Jordan's version of the facts, Duckenfield identified Jordan, not Bush, as the "complainant" and wrote in her report that the Bush vehicle collided with the Jordan van, apparently as Bush was making an illegal right turn from the left traffic lane of Race Street. At her deposition, Duckenfield testified that Bush admitted to her at the scene that he had tried to make a right turn from the left lane, in order to enter the parking lot. (Duckenfield dep. at p. 28, 1.18).

Now furious, having read the report, on May 1, 1997, Bush filed a formal complaint against both officers with the Police Department Internal Affairs Division. Police Sgt. Maria Cianfrani investigated the complaint. At her deposition she testified that she found Bush to be a credible witness. She also said that based on his complaint, IAD investigated Jordan to see if he was still driving his van without proper registration, inspection or insurance. When it turned out that he was, Jordan was issued citations. The tickets were dismissed in traffic court, however, when another policeman, traffic court liaison Officer Von Collin, apparently at Jordan's urging, failed to give the judge an accurate summary of the offenses.

Sgt. Cianfrani testified that Von Collin was reprimanded for his conduct, and Duckenfield was written up for having failed to perform a proper accident scene investigation. No charges, civil or criminal, were filed against Jordan.

The date on which the IAD investigation results became known to Bush is not in the record. Nevertheless, Bush has confirmed that the delay caused by Duckenfield's filing an inaccurate accident report was not so long as to prevent his filing an action for damages. Responses to Requests for Admissions attached to Duckenfield's Motion as Exhibit D.

As a result of these events, Bush filed a two-count lawsuit in the Philadelphia Court of Common Pleas against Officers Jordan and Duckenfield, and the City of Philadelphia. Count One was a negligence count against Jordan only, seeking recovery of the $846.72 Bush spent to repair his car: Count Two, filed against all of the defendants, alleged a conspiracy to inflict emotional distress upon Bush and to violate his civil rights. Based upon the constitutional allegations, purporting to state a cause of action under 42 U.S.C. § 1983, defendants removed the case to this Court.

*3 Officer Duckenfield has now moved for summary judgment. For the reasons set forth below, her motion will be granted in part and denied in part.

II. *Summary Judgment Standard*

Summary judgment is warranted where the pleadings and discovery, as well as any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pr. 56. The moving party has the burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S.

317, 323 (1986). In response, the non-moving party must adduce more than a mere scintilla of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex Corp. v. Catrett, supra* at 325; *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir.1989).

When ruling on a summary judgment motion, the court must construe the evidence and any reasonable inferences drawn from it in favor of the non-moving party. *Anderson v. Liberty Lobby, supra* at 255; *Tiggs Corp. v. Dow Coming Corp.*, 822 F.2d 358, 361 (3d Cir.1987). Nevertheless, Rule 56 "mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial ." *Celotex Corp. v. Catrett, supra,* at 323.

III. *Discussion*

In his complaint, Bush alleges that all defendants, including Duckenfield, deprived him of his rights to due process and equal protection by preparing and filing a false accident report, by intimidating him, and by failing to enforce the motor vehicle laws against Jordan. He also states in his response to Duckenfield's motion for summary judgment that defendants retaliated against him for attempting to exercise his First Amendment rights. This contention is apparently based on the fact that Duckenfield would not listen to Bush's version of the accident.

To maintain a cause of action under 42 U.S.C. § 1983 a plaintiff must establish both that the alleged conduct was committed by a person acting under color of state law, and that the conduct deprived the plaintiff of rights, privileges and immunities secured by the Constitution or laws of the United States. *Moser v. Exeter Township Borough Council Members,* No. 98–cv–3525 (E. D.PA., Sept. 4, 1998) at *1; *citing, Hicks v. Feeney,* 770 F.2d 375, 377 (3d Cir.1985):

> Section 1983 is not a source of substantive rights; it only provides "a method for vindicating federal rights elsewhere conferred." *Graham v. Connor,* 490 U.S. 386, 393–94 (1989).... Consequently, § 1983 does not provide "a right to be free of injury whenever the State may be characterized as the tortfeaser"—the plaintiff must show a deprivation of a federally protected right. *Paul v. Davis,* 424 U.S. 693, 701 ... (1976).

*4 *Moser v. Exeter* at *1.

Thus, not every wrong committed by a state actor provides grounds for a § 1983 action. Cases decided in this court and elsewhere show that conspiracy by police officers to file false reports and otherwise cover up wrongdoing by fellow officers is not in and of itself a constitutional violation. It provides the basis for a § 1983 action only if it results in some constitutional harm to the plaintiff.

In the present case, no reasonable jury could find the existence of any such harm. Bush was not touched by any officer; he was not arrested; he was not cited for any traffic violations; he was not even prevented from suing Jordan for damages. At most, he was inconvenienced and angered (quite justifiably) by the two officers' actions. However, plaintiff has failed to identify a single reported decision, nor has this Court found one, where a successful § 1983 action was maintained on these or similar facts. To the contrary, all of the cases we have found that involve police covering up for one another by preparing false reports fail to find a civil rights violation in the absence of some evidence that the plaintiff was actually harmed in some way by those reports.

In *Moser v. Exeter, supra,* Moser was severely injured in an automobile accident, and hanged herself while under the influence of narcotic painkillers. Her companion, Mr. Oliver, filed a wrongful death action in her name, which included § 1983 charges against the police officers who filed the accident report, claiming that they "intentionally, maliciously, and deliberately" minimized the severity of the accident. *Id.* at *3. The complaint alleged that the officer who was present at the accident failed to cite or bring criminal charges against Osterling, the driver of the other vehicle "due to his personal relationship" with her, "knowing her and her family on friendly terms." *Id.* The other officer, he claimed, intentionally and maliciously approved the "false and factually misleading" accident report.

The District Court for the Eastern District of Pennsylvania dismissed the § 1983 charges:

> Oliver's allegations fail to implicate federal rights, in fact, there is no description of what, if any harm, federally protected or otherwise, befell Moser as a result of the belittling accident report or Osterling's escape from criminal or civil sanctions for her part in the accident. Accordingly, Oliver's Section 1983 claims against the [police officers] will be dismissed.

Id.

In *Olender v. Bensalem,* 32 F.Supp.2d 775 (E.D.PA.1999), the plaintiff claimed that police detectives who arrested him deprived him of his constitutionally protected right of access to the courts (as discussed in *Brown v. Grabowski,* 992 F.2d 1097 (3d Cir.1990)) "by not conducting a fair, impartial and thorough investigation, and threatening [a witness] to implicate Plaintiff." *Id.* at 785. This charge was dismissed because Olender failed to provide evidence that the detectives either prevented him from pursuing a separate cause of action in court or hindered his defense in the underlying criminal proceeding. *Id.* The court concluded: "Olender has thus failed to meet his initial burden of establishing that the Detective Defendants' actions violated a statutory or constitutional right." *Id.* at 785–86.

***5** Although Bush has not claimed he was deprived of his right of access to the court, *Olender,* like *Moser,* shows that a bad police investigation is actionable under § 1983 only if it results in a constitutional deprivation of some right.

This is spelled out explicitly in *Landrigan v. City of Warwick,* 628 F.2d 736 (1st Cir.1980). There, the plaintiff had recovered $42,000 in a state action in which he alleged that a police officer broke his leg. He then filed a federal § 1983 action alleging conspiracy by the police officers to conceal the details of the incident in which his leg was broken, asserting that "the result of such collaboration was the filing of deliberately false police reports concerning the incident." *Id.* at 744. The district court dismissed his action and the Court of Appeals for the First Circuit affirmed:

> It seems to us that the focus of plaintiff's complaint is the allegedly false charge pending against him—the police reports are mainly relevant to the extent they resulted in that charge. For purposes of recovering damages, at least, we do not see how the existence of a false police report, sitting in a drawer in a police station, by itself deprives a person of a right secured by the Constitution and the laws. If action is subsequently taken on the basis of that report, or if the report is disseminated in some manner, plaintiff's constitutional rights may well then be violated ... and in that event a section 1983 action may lie. The focus, however, ordinarily should be on the consequences, if any, not on the mere existence of the report. We therefore agree with the district court that the mere filing of the false police reports, by themselves and without more, did not create a right of action in damages under 42 U.S.C. § 1983.

Id. at 744–45. (Emphasis supplied).

In *Bailey v. Tricolla,* No. CV–94–4597, 1995 WL 548714 (E.D.N.Y., Sept. 12, 1995), the District Court for the Eastern District of New York cited much of this language from *Landrigan* in dismissing a claim under § 1983 that police officers filed false reports regarding the plaintiff. In another case from the same district, the court dismissed a § 1983 claim based on a police officer's failure to write an accident report, stating: "Neither the First Amendment (as plaintiff claims) nor any other theory supports such a cause of action." *Scott v. Abate,* No. CV–93–45889, 1995 WL 591306 (E.D.N.Y., September 27, 1995).

Two Michigan cases make the same point, also citing *Landrigan.* In *White v. Tamlyn,* 961 F.Supp. 1047 (E.D.Mich.1997), the plaintiff claimed that officers filed reports which did not mention abuse and tear gassing she sustained during her arrest. The court dismissed this claim: "[T]he filing of such reports alone does not itself deprive a person of a constitutional right under the Fourteenth Amendment. Such action only constitutes a due process violation when the falsified reports lead to an unconstitutional deprivation of life, liberty or property." *Id.* at 1056.

***6** In an even more recent case, *Hullett v. Smiedendorf,* No. 1:98–CV–273, 1999 WL 402426 (W.D. Mich., June 11, 1999), the plaintiff was knocked off his bicycle by a police officer who then filed a misleading report which concealed his own role in the accident. Hullett filed a § 1983 action in which one charge was that the officer and another officer present at the scene conspired to falsify police reports. He argued that this delayed the investigation of the incident for two weeks, and that it caused

him "substantial emotional distress." *Id.* at *6. The court said that the conspiracy was not, in itself, a violation of Hullett's civil rights, and that Hullett's claimed damages as a result of the conspiracy were not constitutional in nature. It granted the defendants summary judgment on the conspiracy charge. *Id.*

Similarly, in *Vasquez v. Hernandez,* 60 F.3d 325 (7th Cir.1995), the Court of Appeals for the Seventh Circuit dismissed a plaintiff's § 1983 claim of violation of her right of access to the courts based on police officers' false reports and failure to investigate an incident in which one of the officers, while target-shooting, shot the plaintiff:

> The cornerstone of our decision in Bell [in which a right to access claim was upheld] was that the conspiracy had prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow the plaintiffs' right of access. In this case, the cover-up failed to achieve such ends. There are no allegations claiming that the Vasquezes have been prevented from pursuing a tort action in state court or that the value of such an action has been reduced by the cover-up. We agree, therefore, with the district court in holding that the delay caused by the defendants' alleged conspiracy failed to deprive the Vasquezes of their right to access.

Id. at 329.

Based on this precedent, it is quite clear that, even if Bush can prove the truth of all of his allegations regarding Duckenfield's behavior, he has not set forth a cognizable § 1983 claim against her, because her alleged behavior did not cause him a constitutional deprivation. Bush's last minute claim—made only in his response to the Duckenfield motion—that this defendant somehow interfered with his First Amendment right of free speech, obviously has no merit. Bush is not claiming that he attempted some sort of public protest about the incident, but was prevented from doing so by Duckenfield. He bases his First Amendment claim solely on the fact that she would not listen to his side of the story. Were this, by itself, sufficient to implicate the First Amendment, then *any* action taken by a police officer to prevent a person from speaking during *any* on-scene investigation of *any* incident would entitle the muzzled person to recovery. It is not surprising that plaintiff provides us no authority for such a proposition. Moreover, if the false report itself cannot sustain a civil rights violation, it is hard to imagine how the investigatory process that produced such a report could do so independently.

*7 Bush's argument that he can recover based on a jury finding that Duckenfield's behavior "shocks the conscience" is also unpersuasive. While the "shocks the conscience" inquiry is a starting point in deciding whether a deprivation rises to the level of a constitutional violation, it does not substitute for the deprivation itself. In *Miller v. City of Philadelphia,* for example, which is cited by Bush, the plaintiff sued a social worker who removed a child from the plaintiff's custody. The court engaged in the "shocks the conscience" inquiry only after noting that "the Supreme Court has recognized 'a fundamental liberty interest of natural parents in the care, custody, and management of their child.' " 174 F.3d 368, 374–75 (3d Cir.1999). By contrast, there is no "fundamental liberty interest" in having police perform a proper, impartial automobile accident investigation. That they *should* do so is obvious. That the United States Constitution requires them to do so, however, is simply wrong.

Thus, a jury cannot consider whether Duckenfield's conduct "shocks the conscience" unless it is proved that her conduct violated some fundamental interest belonging to Bush which is protected by the Constitution. Bush has not proved this. He has attached to his opposition to Duckenfield's Motion only transcripts from the depositions of Officer Duckenfield and Officer Cianfrani, who conducted the IAD investigation. These transcripts tend to prove the truth of Bush's factual allegations but they provide no evidence at all of a resulting constitutional injury to Bush.

Bush's complaint does not even allege such injury. The sole deprivation he claims is the damage to his car, and this is an alleged result of Jordan's negligent driving, not of anything Duckenfield did. Even if the facts supported Bush's claim of retaliation, this would be irrelevant because it did not interfere with Bush's constitutional rights. *Vasquez v. Hernandez, supra* .

Bush next claims damages for emotional distress. Since he has combined this claim and his civil rights claim in a single count, it is not clear whether he intends to plead emotional distress as a separate state tort count, or as part of his civil rights action. Out

of an abundance of caution, we shall treat the complaint as if it alleges both a state and a federal claim based on the infliction of emotional distress.

"Compensatory damages are available to an individual under 42 U.S.C. § 1983 for emotional distress caused by a violation of the plaintiff's legal rights." *Gravely v. City of Philadelphia,* No. 90–CV–3620, 1998 WL 47289 at *5 (E. D.PA., Feb. 6, 1998). However, to the extent that Bush's emotional distress claim is a part of his civil rights claim, he must first show an underlying violation of his constitutional rights in order to recover emotional distress damages under § 1983. *See, Hullett v. Smiedendorf, supra.* Just as in the case of the false police report, there is no independent constitutional right to be free of emotional distress caused by state action. Since Bush cannot show the requisite underlying constitutional violation, he cannot recover under § 1983 for emotional distress, even if proved.

***8** Finally, in his response to Duckenfield's Motion, Bush suggests that the existence of the false accident report will interfere with his right to obtain the best insurance rates. We need not decide whether Bush has a constitutional right to favorable insurance rates, however, because Bush has provided no evidence that he has ever suffered such injury. Bush is not entitled to rely on factually unsupported allegations in a response to a summary judgment motion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986); *Celotex Corp. v. Catrett, supra* at 325; *Williams v. Borough of West Chester,* 891 F.2d 458, 460 (3d Cir.1989). Given the existence of an exonerating IAD investigation, the Court cannot assume that Bush will suffer such damages.

Also, when the *Landrigan v. City of Warwick* court dismissed a claim based on the filing of a false arrest report, it noted: "As plaintiff has not specifically asked that the report be expunged, we have no occasion to decide whether he might ever be entitled to such relief in the context of a section 1983 suit." 628 F.2d 736, 745 at ftn. 5. The same is true here.

Because Bush has not proved that Duckenfield's actions deprived him of any constitutional right, he cannot maintain a § 1983 action against her. Therefore, Duckenfield's motion for summary judgment must be granted to the extent it challenges the sufficiency of plaintiff's civil rights claim against her.[1]

1 In any case, Duckenfield is entitled to the protection of qualified immunity: "Government officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ' *Showers v. Spangler,* No. 98–7122 at slip op. 10 (3d Cir., June 29, 1999); *Wilson v. Layne,* No. 98–83, 1999 WL 320817, at *8 (3d Cir., May 24, 1999), *quoting, Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). On the basis of the discussion herein, even if this Court had concluded that Duckenfield did violate Bush's constitutional rights, it would not have found that her conduct violated a "clearly established" right. To the contrary, in the absence of a single reported case suggesting that a citizen has a constitutional right either to participate in the on-scene investigation of an auto accident or to receive an accurate police report, it would be almost folly to suggest that Officer Duckenfield should have known that her conduct violated a constitutional right that was "clearly established" on February 18, 1997. Qualified immunity is not lost simply because the state actor knows that the First or Fourteenth Amendment to the Constitution exists. She must also know, or have reason to know, that her specific conduct *violates* those amendments.

As for the state tort of intentional infliction of emotional distress, we are left in somewhat of a "no-man's land" on the present state of the record. If Duckenfield were the only defendant, we would not hesitate to decline to exercise pendant jurisdiction as to the only remaining claim against her. However, since the case is still alive at this time with respect to Jordan and the City of Philadelphia, judicial economy suggests that—at least for the present—we leave viable Bush's state law claim against Duckenfield. This is especially true since not even Duckenfield has briefed the issue of whether summary judgment would be appropriate in the case of the state torts alleged in Count II.

We repeat now the theme with which we began this opinion. Our decision today is somewhat counterintuitive, given the truly unpleasant actions Bush attributes to Duckenfield. It should be stressed that the opinion of this Court is not based on any conclusion that Duckenfield's actions were trivial. On the contrary, the actions alleged are exactly the sort of petty abuse of power that is likely to cause community distrust of the police.

Instead, the result here is based solely on the fact that Duckenfield's actions caused Bush no constitutional deprivation. As cases like *Vasquez* and *Moser* show, this principle results in the dismissal of a § 1983 action even where a state actor is alleged to have caused a claimant substantial physical injury or even death. Civilian outrage, even if well founded, is simply insufficient to convert a tort action into a civil rights action.

***9** An appropriate Order follows.

ORDER

And now, this 15 day of July, 1999, upon consideration of Defendant Officer Donna Duckenfield's Motion for Summary Judgment, and plaintiff's response thereto, it is hereby ORDERED that Duckenfield's Motion for Summary Judgment is GRANTED in part and DENIED in part. All claims against her based upon 42 U.S.C. § 1983 in the above-captioned matter are DISMISSED. To the extent that Bush has set forth a separate state tort claim for intentional infliction of emotional distress, the motion is DENIED without prejudice to Duckenfield's right to seek Summary Judgment specifically on such claim.

All Citations

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Exhibit C

2013 WL 2338247
Only the Westlaw citation is currently available.
United States District Court,
W.D. Pennsylvania.

James S. THOMPSON, Plaintiff

v.

Norman HOWARD, Roy Mehalik, Trooper Broadwater, Defendants.

Civil Action No. 09–1416.
|
May 29, 2013.

Attorneys and Law Firms

James S. Thompson, Dallas, PA, pro se.

Karin M. Romano, Thomas P. McGinnis, Thomas, Thomas & Hafer, Pittsburgh, PA, for Defendants.

MEMORANDUM OPINION

LISA PUPO LENIHAN, United States Chief Magistrate Judge.

*1 Presently before the Court are the Motions to Dismiss filed by Defendant Pennsylvania State Trooper Broadwater ("Broadwater") at ECF No. 73, Defendant Officer Roy Mehalik ("Mehalik") at ECF No. 75, and the partial Motion to Dismiss filed by Defendant Officer Norman Howard ("Howard") at ECF No. 79 (collectively "Defendants"). The Motions to Dismiss will be granted except for Mehalik's motion as it relates to Plaintiff's claim for excessive force relating to those events after Mehalik arrived on the scene.

FACTUAL AVERRMENTS

Plaintiff, James S. Thompson ("Plaintiff" or "Thompson"), proceeding pro se, avers the following in his Amended Complaint at ECF No. 65. Around March 2008, Plaintiff became the victim of excessive force, false arrest, malicious prosecution, fabrication of false evidence, conspiracy and "cruel punishment." (ECF No. 65 at 1.) Plaintiff avers that he was riding in a car driven by Rae Lynn Sigwalt ("Sigwalt"), when they were stopped by Officer Howard. Howard asked for Sigwalt's identification. (ECF No. 65 at 2.) Howard ran a background check on Sigwalt in his police car and determined that she had an outstanding warrant. (ECF No. 65 at 2.) Howard returned to the driver's side of the car and placed Sigwalt into custody. (ECF No. 65 at 2.) Upon placing Sigwalt into the police car, Plaintiff avers that Howard made the following remark: "What's a pretty white woman like you doing with a nigger?" (ECF No. 65 at 2.)

Officer Howard then approached the passenger side of the vehicle and told Plaintiff to step out of the vehicle. (ECF No. 65 at 3.) Plaintiff avers that Howard patted him down and found nothing. Howard asked Plaintiff if he had any outstanding warrants and Plaintiff replied that he did not. Howard told Plaintiff that he was going to run a warrants check on Plaintiff, and that if no warrants were found, Howard would let Plaintiff go. Howard's check revealed no outstanding warrants. (ECF No. 65 at 3.)

Just before returning to Plaintiff, Howard received a radio call from Defendant Officer Mehalik who told Howard that Plaintiff was dangerous and to be careful. (ECF No. 65 at 3.) Howard then told Plaintiff that he was going to place handcuffs on him. (ECF No. 65 at 3.) When Plaintiff inquired with Howard as to why he was being cuffed, Howard simply responded that "I want

to." (ECF No. 65 at 4.) Plaintiff protested, telling Howard that he had no right to handcuff him. Plaintiff avers that Howard told him that if Plaintiff did not go into cuffs, that Howard would tase him. (ECF No. 65 at 4.) Plaintiff avers that at this point, Howard's actions amounted to a Fourth Amendment false arrest violation. (ECF No. 65 at 4–5.)

Plaintiff alleges that Howard became frustrated with Plaintiff and told Plaintiff he was going to tase him. Plaintiff warned Howard that he had heart and lung disease and that a taser would probably kill him. Plaintiff alleges that Howard then attempted to tase him but was unable to do so after two attempts. Plaintiff then avers that Howard became very angry, pulled out his baton and began beating him, while shouting the following: "Get the f ___ down you f ___ nigger. Get the f ___ down or I'll kill you you f ___ nigger. Get the f ___ down you f ___ nigger. You f ___ black bastard." (ECF No. 65 at 5–6.) Plaintiff concludes that he was afraid for his life and afraid that Officer Mehalik, his childhood menace, would arrive on the scene. (ECF No. 65 at 6.)

*2 Next, Plaintiff avers that he has "an agonizing morbid fear of Officer Mehalik steming[sic] from childhood torment and terror." (ECF No. 65 at 6.) Plaintiff avers in great detail facts from his childhood that precipitated his "agonizing morbid fear of Officer Mehalik." (ECF No. 65 at 6–8.) Plaintiff states that because of these childhood experiences with Mehalik, Plaintiff suffers from Post–Traumatic Stress Disorder. (ECF No. 65 at 8.) Plaintiff continues that because of this agonizing morbid fear of Mehalik, Plaintiff felt he had to flee in order to save his own life "from two racist policemen with a reputation for having racist attitudes and conduct for brutality." (ECF No. 65 at 8.) Plaintiff continues that he then jumped back into the car to flee. At this point, Howard approached the driver's side door and smashed out the driver's side window. Plaintiff avers that the glass hit him in the face, blinded him momentarily, as he ducked toward the passenger side of the car to avoid being hit in the face by the police baton. (ECF No. 65 at 9.) Plaintiff alleges that he started the car from this "ducked" position and drove away. He avers that he could not see what was in front of him as he drove away because he was afraid of being shot. He heard something hit the driver's side of the car but never saw "what hit [him]." (ECF No. 65 at 9.)

Plaintiff continues that as he drove away "a sudden barrage of gunfire hit the car ...." (ECF No. 65 at 10.) Plaintiff alleges that Mehalik and Howard shot at the car. According to Plaintiff, the car, at that point, was in a densely populated area and Mehalik and Howard nearly shot a woman in the head in her home nearby. Plaintiff also avers that he was unarmed. Plaintiff states that this behavior by Mehalik and Howard violated the Eighth Amendment as to himself and the woman Mehalik and Howard almost shot. Plaintiff continues that this conduct also violated the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. (ECF No. 65 at 10.)

With regard to Trooper Broadwater and Officer Howard, Plaintiff states that it his theory that Broadwater and Howard conspired "to create inflammatoy[sic] news releases that had the possibility to incite uncontroled[sic] rage in other police and so-called vigilantes desiring to help police capture or kill a wanna-be cop killer." (ECF No. 65 at 11.) This rage was precipitated by the actions of Broadwater and Howard when, after consulting with one another, "they both released false or fabricated news releases." (ECF No. 65 at 11.) The false news release issued by Howard indicated that Plaintiff was armed and fired shots at police. (ECF No. 65–2.) The false news release issued by Broadwater indicated that Plaintiff had a previous homicide conviction. (ECF No. 65–3.) Plaintiff avers that contrary to the news releases attached to the Amended Complaint, Plaintiff shot at no one. Plaintiff states that he "never had a gun to do anything except to flee in self-defense to save my life." (ECF No. 65 at 11.) Further, Plaintiff avers that he has never had a previous homicide conviction. (ECF No. 65 at 11.) Plaintiff continues that these false news releases created "hysteria that generated overwhelming fear" in Plaintiff and violated the Eighth Amendment against cruel and unusual punishment. Plaintiff also avers that this conduct by Broadwater and Howard violated the Fifth and Fourteenth Amendments. Plaintiff continues that Broadwater and Howard knew from the very beginning of the investigation that Plaintiff never shot at Howard or any police, and that Plaintiff had no previous homicide convictions. (ECF No. 65 at 12.) In support of his conspiracy theory, Plaintiff notes that the press releases came out within one day of each other, evidencing a concerted effort on the part of Broadwater and Howard. (ECF No. 65 at 13.)

*3 In his prayer for relief, Plaintiff seeks a declaration that Defendants violated his constitutional rights, compensatory damages of $100,000, and punitive damages in the amount of $200,000. (ECF No. 65 at 14.)

Finally, attached to Plaintiff's Amended Complaint is the October 2, 2009 Order of Judge Steve P. Leskinen of the Court of Common Pleas of Fayette County, Pennsylvania, Criminal Division. (ECF No. 65–1 at 1.) Judge Leskinen indicated that Plaintiff, the criminal defendant in state court, was charged with resisting arrest, aggravated assault, and criminal mischief. (ECF No. 65–1 at 1.) Judge Leskinen ordered that the resisting arrest charge be dismissed because Howard's attempt to handcuff Plaintiff was not a lawful arrest. The charges of aggravated assault, and criminal mischief, however, were not dismissed by Judge Leskinen because Plaintiff placed Officer Mehalik in danger of serious bodily injury or death, and because the vehicle Plaintiff was driving caused approximately $1,000.00 in damage to the police vehicle. (ECF No. 65–1 at 4.) Judge Leskinen determined that Plaintiff was not privileged to remove Sigwalt's vehicle from the scene, because Sigwalt had been stopped pursuant to a lawful warrant and the arresting officer had not yet had the opportunity to perform a lawful search of the passenger compartment of the vehicle. (ECF No. 65–1 at 3.) Judge Leskinen also found that Plaintiff "intentionally drove the car directly into the side of [Mehalik's] patrol vehicle, another action he was not privileged to do ...." (ECF No. 65–1 at 3.)

After a jury trial, Plaintiff was found guilty of 1 count of aggravated assault, 1 count of simple assault, and 1 count of criminal mischief. (State Court Docket No. CP–26–CR–0000527–2008, ECF No. 80–1; ECF No. 65 at 4 n.1.) Plaintiff avers that he is undertaking an appeal of these convictions. (ECF No. 65 at 4 n.1); *see also* State Court Docket No. CP–26–CR–0000527–2008 at 19 (Plaintiff filed Post–Conviction Relief Act ("PCRA") Petition on July 5, 2011). It appears from the state court docket sheet that Plaintiff's PCRA Petition is pending.

LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of a complaint. *Kost v. Kozakiewicz,* 1 F.3d 176, 183 (3d Cir.1993). A complaint must be dismissed for failure to state a claim if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 554, 556 (2007) (rejecting the traditional 12(b)(6) standard set forth in *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (May 18, 2009) (citing *Twombly,* 550 U.S. at 555–57). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949 (citing *Twombly,* 550 U.S. at 556). The Supreme Court further explained:

> *4 The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' "

Id. (citing *Twombly,* 550 U.S. at 556–57).

In *Fowler v. UPMC Shadyside,* 578 F.3d 203 (3d Cir. Aug.18, 2009), the United States Court of Appeals for the Third Circuit discussed its decision in *Phillips v. County of Allegheny,* 515 F.3d 224, 232–33 (3d Cir.2008) (construing *Twombly* in a civil rights context), and described how the Rule 12(b)(6) standard had changed in light of *Twombly* and *Iqbal* as follows:

> After *Iqbal,* it is clear that conclusory or "bare-bones" allegations will no longer survive a motion to dismiss: "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 129 S.Ct. at 1949. To prevent dismissal, all civil complaints must now set out "sufficient factual matter" to show that the claim is facially plausible. This then "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1948. The Supreme Court's ruling in *Iqbal* emphasizes that a plaintiff must show that the allegations of his or her complaints are plausible. *See Id.* at 1949–50; *see also Twombly,* 505 U.S. at 555, & n. 3.

Fowler, 578 F.3d at 210.

Thereafter, In light of *Iqbal,* the United States Court of Appeals for the Third Circuit in *Fowler v. UPMC Shadyside,* 578 F.3d 203 (3d Cir.2009), set forth the following two-prong test to be applied by the district courts in deciding motions to dismiss for failure to state a claim:

> First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. [*Iqbal,* 129 S.Ct. at 1949]. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." *Id.* at 1950. In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts. *See Phillips,* 515 F.3d at 234–35. As the Supreme Court instructed in *Iqbal,* "[w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.' " *Iqbal,* 129 S.Ct. at 1949. This "plausibility" determination will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Fowler, 578 F.3d at 210–11.

Courts generally consider only the allegations of the complaint, the attached exhibits, and matters of public record in deciding motions to dismiss. *Pension Benefit Guar. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir.1993). Factual allegations within documents described or identified in the complaint may also be weighed if the plaintiff's claims are based upon those documents. *Id.* (citations omitted). A district court may consult those documents without converting a motion to dismiss into a motion for summary judgment. *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1426 (3d Cir.1997).

*5 Finally, the Court must liberally construe the factual allegations of Plaintiff's complaints because pro se pleadings, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007); *Haines v. Kerner,* 404 U.S. 519, 520–21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Further, Federal Rule of Civil Procedure 8(e) requires that all pleadings be construed "so as to do justice." Fed.R.Civ.P. 8(e).

ANALYSIS

Section 1983 of the Civil Rights Act provides as follows:

> 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 any 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 ....

42 U.S.C. § 1983. To state a claim for relief under this provision, a plaintiff must demonstrate that the conduct in the complaint was committed by a person or entity acting under color of state law and that such conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or the laws of the United States. *Piecknick v. Commonwealth of Pennsylvania,* 36 F.3d 1250, 1255–56 (3d Cir.1994). Section 1983 does not create rights; it simply provides a remedy for violations of those rights created by the United States Constitution or federal law. *Kneipp v. Tedder,* 95 F.3d 1199, 1204 (3d Cir.1996).

False Police Reports and Conspiracy to File False Police Reports

In support of their Motions to Dismiss, Defendants Broadwater and Howard argue that there is no constitutional right to a correct police report, and no constitutional violation resulted from the allegedly false reports. (ECF No. 74 at 3–4; ECF No. 80 at 9–10.) Plaintiff responds that the false statements in the police reports amount to malicious prosecution, and Plaintiff was harmed thereby because he suffered severe emotional distress as a result of the false police reports. (ECF No. 82 at 1–3.)

First, the law is clear that there is no constitutional right to a correct police report. *Jarrett v. Twp. Of Bensalem,* 312 Fed. Appx. 505, 507 (3d Cir.2009); *Bush v. City of Philadelphia,* No. Civ. A. 98–0994, 1999 WL 554585, at *4 (E.D.Pa. July 15, 1999) (surveying cases and finding no civil rights violation for filing of false police reports in absence of some evidence that plaintiff

was actually harmed by false reports). *See also Landrigan v. City of Warwick,* 628 F.2d 736, 744–45 (1st Cir.1980) (mere existence of false police report does not state cognizable constitutional injury).

Plaintiff avers that as a result of the false police reports, he suffered severe anguish and overwhelming fear, and that the false reports were meant to create wide spread hysteria among other police because the reports falsely indicated that Plaintiff was a "wanna be cop killer and former killer." (ECF No. 65 at 12.) Plaintiff's claim, however, fails as a matter of law. "Defamation is actionable under 42 U.S.C. § 1983 only if it occurs in the course of or is accompanied by a change or extinguishment of a right or status guaranteed by state law or the Constitution." *Clark v. Twp. of Falls,* 890 F.2d 611, 619 (3d Cir.1989) (citing *Paul v. Davis,* 424 U.S. 693, 701–12, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976)); *see also Sturm v. Clark,* 835 F.2d 1009, 1012 (3d Cir.1987) ("Absent the alteration or extinguishment of a more tangible interest, injury to reputation is actionable only under state defamation law.") (internal citations omitted). Here, Plaintiff avers only that he suffered severe emotional distress and fear that the false reports would create "wide spread hysteria among other police[,] news media and the surrounding public." (ECF No. 65 at 12.) Plaintiff does not attempt to aver that he was denied a "liberty" or "property" interest protected by the Due Process Clause of the Fourteenth Amendment as a result of the false police reports. *See Paul,* 424 U.S. at 712. Further, the facts and circumstances giving rise to Plaintiff's excessive force claim occurred before Broadwater and Howard allegedly filed the false police reports. That is, Plaintiff's excessive force claim is not related in any way to the issuance of the reports.

***6** Likewise, although Plaintiff may recover damages for emotional distress pursuant to § 1983, Plaintiff "must first show an underlying violation of his constitutional rights in order to recover emotional distress damages ...." *Bush,* 1999 WL 554585, at *7. Hence, because there is no cognizable constitutional claim for filing a false police report, *Jarrett,* 312 Fed. Appx. at 507, Plaintiff may not recover damages for emotional distress sustained as a result of the filing of a false police report. *See Bush,* 1999 WL 554585, at *7. Therefore, Plaintiff's claim for the issuance of false police reports will be dismissed as a matter of law. Any attempt to amend the Complaint would be futile as a matter of law.[1]

1 The United States Court of Appeals for the Third Circuit in *Phillips v. County of Allegheny* has ruled that if a district court is dismissing a claim pursuant to Fed.R.Civ.P. 12(b)(6) in a civil rights case, it must *sua sponte* "permit a curative amendment unless such an amendment would be inequitable or futile." 515 F.3d 224, 245 (3d Cir.2008).

Finally, because Plaintiff is unable to make out a claim against Broadwater and Howard for filing false police reports, Plaintiff's claim against Broadwater and Howard for conspiracy to file false police reports must also fail as a matter of law. That is, there can be no § 1983 conspiracy claim without an underlying constitutional violation. *White v. Brown,* 408 F. App'x 595, 599 (3d Cir.2010). Therefore, Plaintiff's claims against Broadwater and Howard for conspiracy to file false police reports will be dismissed. Likewise, any attempt to amend would be futile as a matter of law.

False arrest

In support of his Motion to Dismiss the Amended Complaint as it relates to Plaintiff's claim of false arrest, Howard advances several arguments. First, Howard argues that Plaintiff's claim for false arrest should be dismissed with prejudice because probable cause for Plaintiff's arrest is conclusively established by his conviction of several of the offenses with which he was charged.[2] Howard, on supplemental brief, also argues that he is protected by qualified immunity because his actions in handcuffing Plaintiff after receiving the radio warning from Mehalik that Plaintiff was dangerous was not unreasonable, incompetent, or a violation of a clearly established right under the circumstances. Plaintiff responds that when Howard attempted to place handcuffs on him, Howard's actions amounted to a false arrest. In support of this assertion, Plaintiff directs the Court to the October 2, 2009 Order of Judge Leskinen. In his response to Howard's supplemental brief, Plaintiff also argues that Plaintiff is not protected by qualified immunity for those claims brought against him in his personal capacity.

2 The Court agrees with Defendant Mehalik that Plaintiff avers no facts to suggest that Mehalik was involved in the events giving rise to Plaintiff's claim for false arrest. (ECF No. 76 at 15.)

The Fourth Amendment's prohibition against unreasonable seizures protects individuals from arrest without probable cause. *Orsatti v. New Jersey State Police,* 71 F.3d 480, 482 (3d Cir.1995) (citing *Papachristou v. City of Jacksonville,* 405 U.S. 156, 169, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972)). "Probable cause exists whenever reasonably trustworthy information or circumstances within a police officer's knowledge are sufficient to warrant a person of reasonable caution to conclude that an offense has been committed by the person being arrested." *United States v. Myers,* 308 F.3d 251, 255 (3d Cir.2002) (citing *Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964)). The law of the state where the arrest occurred controls whether the arrest is valid. *Myers,* 308 F.3d at 255 (citing *Ker v. California,* 374 U.S. 23, 37, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963)). In determining whether probable cause exists to support an arrest, the analysis must be based upon the totality of circumstances including "the objective facts available to the officers at the time of the arrest." *Sharrar v. Felsing,* 128 F.3d 810, 818 (3d Cir.1997) (citing *Illinois v. Gates,* 462 U.S. 213, 230–31, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Subjective intentions of police officers are irrelevant to a Fourth Amendment probable cause analysis. *Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

*7 It is important to note that "[t]he Constitution also allows officers to reasonably detain and even handcuff [vehicle] occupants without probable cause to protect the officers' safety." *United States v. Seigler,* 484 Fed. App'x 650, 654 (3d Cir.2012) (citing *Arizona v. Johnson,* 555 U.S. 323, 331–32, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009); *Brendlin v. California,* 551 U.S. 249, 258, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007); *United States v. Johnson,* 592 F.3d 442, 447–48 (3d Cir.2010) ("[P]lacing a suspect in handcuffs while securing a location or conducting an investigation [does not] automatically transform an otherwise valid *Terry* stop into a full-blown arrest.")).

State officials performing discretionary acts enjoy "qualified immunity" from money damages in § 1983 causes of action when their conduct does not violate "clearly established" statutory or constitutional rights of which a "reasonable person" would have known at the time the incident occurred. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The first inquiry under a qualified immunity analysis is whether the plaintiff has established a violation of a "clearly established constitutional right" as follows:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citations omitted).

The second inquiry concerns the reasonableness of the defendant's actions. The test for qualified immunity is based on objective reasonableness, that is, "whether a reasonable officer could have believed [the challenged action] to be lawful, in light of clearly established law and the information the [ ] officers possessed." *Giuffre v. Bissell,* 31 F.3d 1241, 1255 (3d Cir.1994) (quoting *Anderson,* 483 U.S. at 641). "The ultimate issue is whether, despite the absence of a case applying established principles to the same facts, reasonable officers in the defendants' position at the relevant time could have believed, in light of what was in the decided case law, that their conduct was lawful." *Giuffre,* 31 F.3d at 1255 (internal quotation omitted). It is the defendant's burden to establish that they are entitled to qualified immunity. *See Stoneking v. Bradford Area Sch. Dist.,* 882 F.2d 720, 726 (3d Cir.1989).

In *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the United States Supreme Court clarified the two-step qualified immunity inquiry. The Court directed that, in deciding whether a defendant is protected by qualified immunity, a court first must determine whether, "[t]aken in the light most favorable to the party asserting the injury, ... the facts alleged show the officer's conduct violated a constitutional right." *Id.* at 201. If the facts do not establish the violation of a constitutional right, no further inquiry concerning qualified immunity is necessary. *Id.* If the plaintiff's factual allegations do show a violation of his rights, then the court must proceed to determine whether the right was "clearly established," that is, whether the contours of the right were already delineated with sufficient clarity to make a reasonable officer in the defendant's circumstances aware that what he was doing violated the right. *Id.* at 201–02. Finally, in *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009), the United States Supreme Court concluded that while the two-step sequence identified in *Saucier* "is often appropriate, it should no longer be regarded as mandatory." *Id.* at 236.

*8 Here, even though Judge Leskinen dismissed the resisting arrest charge because there was no probable cause to arrest Plaintiff at that point (ECF No. 87–1 at 2), Howard's actions in attempting to handcuff Plaintiff were reasonable under the circumstances and protected by qualified immunity. As averred by Plaintiff, Howard received a warning from Mehalik over the police radio that Plaintiff was dangerous and that Howard should be careful. (ECF No 65 at 3.) Consequently, in an effort to protect himself while completing his duties at the scene, Howard attempted to handcuff Plaintiff. According to the averments of the Amended Complaint, Howard had just placed Ms. Sigwalt in custody after discovering she had an outstanding warrant. Immediately thereafter, he received the warning concerning Plaintiff. Consequently, even though the facts of the Amended Complaint suggest that there was no probable cause to arrest Plaintiff at the time he was initially approached by Howard, the officer did not violate clearly established law when he attempted to handcuff Plaintiff so as to reasonably protect his own safety while securing the scene after Sigwalt's arrest. Therefore, Defendant Howard is protected by qualified immunity as to Plaintiff's claim for false arrest. Hence, Howard's Motion to Dismiss Plaintiff's false arrest claim will be granted. Any attempt to amend as to the false arrest claim would be futile as a matter of law.

Malicious Prosecution

As noted above, Plaintiff also avers that the actions of Broadwater and Howard in issuing false police reports amounted to malicious prosecution. (ECF No. 65 at 13; ECF No. 82 at 1–3.)[3]

3 Again, the Court agrees with Defendant Mehalik that Plaintiff avers no facts concerning his involvement in the events that may give rise to the claim for malicious prosecution. (ECF No. 76 at 15 .)

In order to establish a Fourth Amendment malicious prosecution claim pursuant to § 1983, a plaintiff must show the following: 1) the defendant initiated a criminal proceeding; 2) the criminal proceeding ended in the plaintiff's favor; 3) the proceeding was initiated without probable cause; 4) the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice; and 5) the plaintiff suffered a deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding. *McKenna v. City of Philadelphia,* 582 F.3d 447, 461 (3d Cir.2009) (citing *Estate of Smith v. Marasco,* 318 F.3d 497, 521 (3d Cir.2003)).[4]

4 The elements of a state law claim for malicious prosecution are the same but for the fifth element, which is not required to make out a claim for malicious prosecution under Pennsylvania state law. *Kossler v. Crisanti,* 564 F.3d 181, 186 n. 2 (3d Cir.2009) (citing *Merkle v. Upper Dublin Sch. Dist.,* 211 F.3d 782, 791 (3d Cir.2000).

Here, Plaintiff's averments concerning malicious prosecution are limited to the following:

> Lastly, your plaintiff was nothing less than a victim of Malicious Prosecution with a hoped outcome of grave injury or hopeful death. With wide spread belief your plaintiff quickly became an intended cop killer with a previous homicide conviction. This was nothing less than a prescription for death for all whom may have come across your plaintiff to shoot and kill him out of the hyped up dear that your plaintiff was armed and dangerous. Both news releases said this.

(ECF No. 65 at 13.) Clearly, Plaintiff's averments of malicious prosecution against Howard and Broadwater have nothing to do with a criminal proceeding.[5] Therefore, Defendants' Motion to Dismiss Plaintiff's malicious prosecution claim will be granted. Any attempt to amend will be futile as a matter of law.

5 Even if the Court affords Plaintiff's averments their most liberal construction and interprets his malicious prosecution claim as attacking his prosecution for aggravated assault and criminal mischief, Plaintiff's malicious prosecution claim fails as a matter of law because Plaintiff will be unable to show that the criminal proceeding ended in his favor.

Official Capacity Claims

*9 Defendants Mehalik and Howard argue that the claims against them made in their official capacities must be dismissed because they are essentially claims against the entity for which they are employed, and Plaintiff avers no facts to make out a claim of municipal liability. Plaintiff does not respond to this argument.

The law is clear that official capacity suits " 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' " *Kentucky v. Graham,* 473 U.S. 159, 165–66, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (quoting *Monell v. New York City Dep't of Soc. Servs.,* 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). Plaintiff, however, avers no facts to make out a claim against these officers' employing entities for municipal liability. That is, Plaintiff avers no facts to suggest that a "policy or custom, whether made by [ ] lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflict[ed Plaintiff's] injury."[6] *Monell,* 436 U.S. at 694. Therefore, the Court will dismiss all official capacity claims against Howard and Mehalik. Any further attempt to amend would be futile as a matter of law.

6 In fact, the docket sheet in this case reflects that on August 20, 2012, Luzerne Township, the Pennsylvania State Police, Redstone Township, and the Commonwealth of Pennsylvania were terminated as parties to this action.

Fourth and Fourteenth Amendment Excessive Force claim against Mehalik[7]

7 Defendant Howard notes that the excessive force claim, as pled, is not appropriate for disposition at the motion to dismiss stage, although he disputes Plaintiff's allegations regarding the alleged force used in the incident. (ECF No. 80 at 4 n.2.) Hence, Defendant Mehalik is the only movant on the excessive force claim.

First, Defendant Mehalik argues that many of the facts concerning allegations of excessive force occurred prior to his arrival on the scene. Consequently, Mehalik argues that the Motion to Dismiss Plaintiff's excessive force claims should be granted as to those facts for which Mehalik was not present. The Court agrees. A § 1983 defendant must have some personal involvement in the actions giving rise to the complaint. *Rode v. Dellarciprete,* 845 F.2d 1195, 1207 (3d Cir.1998) (civil rights defendant must have personal involvement in alleged wrongdoing; personal involvement can be shown through allegations of personal direction or actual knowledge and acquiescence). Here, Plaintiff avers no facts to suggest Mehalik's personal involvement before he arrived on the scene.[8] Hence, Plaintiff's excessive force claim against Mehalik as to any activities that occurred at the scene before his arrival will be dismissed.

8 Plaintiff only avers that when speaking to Howard on the police car radio, Mehalik warned Howard that Plaintiff was dangerous and to be careful. (ECF No. 65 at 3.)

Next, as to those facts and circumstances for which Mehalik was present, Mehalik contends that these actions were reasonable because Plaintiff was resisting arrest, and therefore protected by qualified immunity. (ECF No. 76 at 10, 12–15.)

Plaintiff responds that Mehalik used excessive force when he fired gunshots at Plaintiff when he was attempting to flee, even though Plaintiff did nothing to place Mehalik in danger. (ECF No. 82 at 4–10.)

In evaluating a Fourth Amendment excessive force claim, the Court must determine whether the force used to effect a seizure was "reasonable" under the circumstances. *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Although not easily defined or mechanically applied, the test for determining whether the force was reasonable "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham,* 490 U.S. at 396 (citing *Bell v. Wolfish,* 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) and *Tennessee v. Garner,* 471 U.S. 1, 8–9, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). The test is an objective one: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham,* 490 U.S. at 397 (other citations omitted).

***10** Here, Plaintiff has alleged "enough facts to state a claim [for excessive force] that is plausible on its face." *Twombly,* 550 U.S. at 556. Plaintiff avers that as he was attempting to flee the scene, he was subjected to a "barrage of shooting." Plaintiff was not under arrest, he was unarmed, and did not pose an immediate threat to the safety of the officers or others. Hence, Mehalik's Motion to Dismiss as it relates to Plaintiff's Fourth Amendment claim of excessive force concerning the events after Mehalik arrived on the scene will be denied.

Further, the facts as alleged do not demonstrate that Mehalik's conduct was objectively reasonable; that is, whether a reasonable police officer in Mehalik's situation could have believed that his conduct comported with established legal standards regarding the use of excessive force. Discovery may reveal otherwise, but the Court must deny the grant of qualified immunity at this time.

Finally, with regard to Plaintiff's invocation of the Fourteenth Amendment relating to his excessive force claim, the Court notes that in *Graham,* the United States Supreme Court held as follows:

> *[A]ll* claims that law enforcement officers have used excessive forcedeadly or not-in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.

490 U.S. at 395 (emphasis in original) (footnote omitted). Consequently, Plaintiff's claims against Defendants must be brought under the Fourth Amendment, rather than the Fourteenth. Therefore, Plaintiff's Fourteenth Amendment excessive force claim will be dismissed. Any attempt to amend will be futile as a matter of law.

Cruel Punishment—Eighth, Fourteenth, and Fifth Amendments

Defendants Howard and Mehalik argue that Plaintiff has failed to plead facts sufficient to state a plausible claim that he was subjected to "cruel punishment." Specifically, Defendants argue that the protections against cruel and unusual punishment are afforded to convicted prisoners through the Eighth Amendment, and to pretrial detainees through the Fourteenth Amendment. Further, Defendants argue that Plaintiff's claim for alleged "acts of cruelty" pursuant to the Fifth Amendment must likewise be dismissed because the Fifth Amendment only protects against federal pretrial detainee violations.

The Eighth Amendment provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In *Whitley v. Albers,* 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), the United States Supreme Court noted that the "Cruel and Unusual Punishments Clause 'was designed to protect those convicted of crimes,' and consequently the Clause applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.' " 475 U.S. at 318 (*quoting Ingraham v. Wright,* 430 U.S. 651, 664, 671 n. 40, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (other citations omitted)). Therefore, the Eighth Amendment has no application to Plaintiff's averments of "cruel punishment." Consequently, Defendants' Motion to Dismiss Plaintiff's Eighth Amendment claim will be granted.

***11** The protections of the Fourteenth Amendment against cruel and unusual punishment are directed to pretrial detainees. *Bell v. Wolfish,* 441 U.S. 520, 538, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (applies Fourteenth Amendment due process principles to pretrial detainees, rather than the cruel and unusual punishment standard of the Eighth Amendment). *Langella v. Cnty. of McKean,* Civ. A. No. 09–cv–311 E, 2010 WL 3824222, *13 (W.D.Pa. Sept.23, 2010) (citing *Hubbard v. Taylor,* 399 F.3d 150 165–66 (3d Cir.2005)). *See also Montgomery v. Ray,* 145 F. App'x 738, 739–40 (3d Cir.2005) (vacating an order and remanding case where district court evaluated pretrial detainee's claim involving inadequate medical treatment under the same standards as Eighth Amendment claims). In *Montogmery,* the court of appeals noted its recent decision in *Hubbard,* which clarified the following:

> [T]he Eighth Amendment only acts as a floor for due process inquiries into medical and non-medical conditions of pretrial detainees. While "the due process rights of a [pre-trial detainee] are *at least* as great as the Eighth Amendment protections available to a convicted prisoner," *Hubbard,* 399 F.3d at 166 (citation omitted), the proper standard for examining such claims is the standard set forth in *Bell v. Wolfish, ... i.e.,* whether the conditions of confinement (or here, inadequate medical treatment) amounted to punishment prior to an adjudication of guilt, *Hubbard,* 399 F.3d at 158.

145 F. App'x at 740 (emphasis and brackets in original). Here, Plaintiff's claims for "cruel punishment" do not involve facts or circumstances relating to his status as a pretrial detainee. Hence, Plaintiff's claims for "cruel punishment" pursuant to the Fourteenth Amendment will also be dismissed.

Finally, Plaintiff's Fifth Amendment claim regarding "cruel punishment" must also fail because it pertains only to federal pre-trial detainees. *Hubbard,* 399 F.3d at 158 n. 13.

Any attempt by Plaintiff to amend his claims regarding "cruel punishment" relating to the Eighth, Fourteenth, or Fifth Amendments would be futile as a matter of law.

Punitive Damages

Defendants Howard and Mehalik argue that Plaintiff's claim for punitive damages against them in their official capacities should be dismissed because official capacity claims are really claims against the municipality for which a defendant is employed, and municipalities are immune from punitive damages. (ECF No. 80 at 13; ECF No. 76 at 16.) Plaintiff does not respond to this argument.

It is well settled that municipal entities are immune from punitive damages pursuant to § 1983. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 271, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). *See also Vermont Agency of Natural Res. v. U.S. ex rel. Stevens,* 529 U.S. 765, 784–85, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (holding punitive damages inappropriate in suits against governmental entities); *Bolden v. Southeastern Pa. Transp. Auth.,* 953 F.2d 807, 830 (3d Cir.1991) (holding municipalities immune from punitive damages under § 1983); *Malone v. Econ. Borough Mun. Auth.,* 669 F.Supp.2d 582, 612 (W.D.Pa.2009) ("Section 1983 precludes punitive damages against a municipality."). Based on the nature of § 1983 claims, the immunity from punitive damages would naturally extend to any state or municipal actors sued in their official capacities. As noted above, a "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will,* 491 U.S. at 71. *See also Brandon v. Holt,* 469 U.S. 464, 471, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985). Therefore, a suit against a government employee in his or her official capacity is no different than a suit against the governmental entity itself. *Will,* 491 U.S. at 71. Hence, punitive damages are not available against individual municipal actors sued in their official capacity. Therefore, the Court will grant Defendants' Motion to Dismiss as it relates to Plaintiff's claim for punitive damages against the individual Defendants in their official capacities. Any attempt to amend on this issue would be futile as a matter of law.

Plaintiff's Attempt to Raise an Additional Claim in his Responsive Brief

***12** In Plaintiff's Response to Defendants' Motions to Dismiss at ECF No. 82, Plaintiff sets forth averments relating to a claim that is not included in his Amended Complaint. Specifically, Plaintiff states that Defendants Howard and Mehalik conspired to falsify their statements that Plaintiff rammed Mehalik's police car. (ECF No. 82 at 5.) Plaintiff attaches trial transcript excerpts from two trial witnesses and a hand written document that appears to be written by Plaintiff, setting forth the statement of Rae Lynn Sigwalt. Plaintiff contends that these documents demonstrate that it was Mehalik that rammed the Plaintiff's car. Consequently, Plaintiff contends that Howard and Mehalik conspired to falsify their version of events, and that such conspiracy constitutes "a fabrication of false evidence and conspiracy as well as cruel punishment." (ECF No. 82 at 5.)

Any attempt by Plaintiff to include these new averments as part of this civil action would be futile as a matter of law. This Court is bound by the jury's findings in the Court of Common Pleas of Fayette County, Criminal Division, where a jury found Plaintiff guilty of aggravated assault, simple assault and criminal mischief.

The Full Faith and Credit Act provides as follows:

> The records and judicial proceedings of any court of any such State, Territory or Possession ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738. In other words, it requires "federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment." *Minnick v. City of Duquesne,* 65 F. App'x 417, 420 (3d Cir.2003) (quoting *McDonald v. City of West Branch,* 466 U.S. 284, 287, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984)). "The federal court, in determining the collateral estoppel effect of a state court proceeding, should apply the law of the state where the criminal proceeding took place...." *Grier v. Scorpine,* No. 04–1888, 2008 WL 655865, at *5 n. 1 (W.D.Pa.2008) (quoting *Anela v. City of Wildwood,* 790 F.2d 1063, 1068 (3d Cir.1986)).

Here, the jury convicted Thompson of aggravated assault, simple assault, and criminal mischief. 18 Pa. Cons.Stat. Ann. § 2702(a) (1) provides that a person is guilty of aggravated assault if he "attempts to cause serious bodily injury to [a police officer], or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." In his Order of October 2, 2009 on pretrial motion, Judge Leskin en stated that "Thompson intentionally drove the car directly into the side of the other officer's patrol vehicle, another action he was not privileged to do, causing substantial damage and endangering the officer in the car." (ECF No. 65–1 at 3 .) Judge Leskinen indicated that the basis for the aggravated assault charge was the fact that "[Plaintiff] placed the other officer in danger of serious bodily injury or death." (ECF No. 65–1 at 4.) 18 Pa. Cons.Stat. Ann. § 3304(a)(2) provides that a person is guilty of criminal mischief if he "intentionally or recklessly tampers with tangible property of another so as to endanger person or property." Judge Leskinen indicated that the basis for this charge was the fact that "the vehicle [Plaintiff] was driving caused approximately $1,000.00 in damage to the police vehicle." (ECF No. 65–1 at 4.) The jury convicted Plaintiff of these charges on August 4, 2010. "Operative facts necessary for criminal convictions are admissible as conclusive facts in civil suits arising from the same events and circumstances." *DiJoseph v. Vuotto,* 968 F.Supp. 244, 247 (E.D.Pa.1997) (citing *Folino v. Young,* 523 Pa. 532, 568 A.2d 171, 172 (Pa.1990)). In Pennsylvania, "it is well established that a criminal conviction collaterally estops a defendant from denying his acts in a subsequent civil trial." *Shaffer v. Smith,* 543 Pa. 526, 673 A.2d 872, 874 (Pa.1996). Therefore, under Pennsylvania law, the facts underlying Plaintiff's jury trial conviction for aggravated assault and criminal mischief are conclusive and may not be disputed. Hence, Plaintiff may not attempt to raise this new claim in his responsive brief because an attempt to amend his complaint to include the claim would be futile as a matter of law.

CONCLUSION

***13** For the above reasons, Defendants' Motions to Dismiss at ECF Nos. 73, 75 and 79 will be granted except for Mehalik's motion at ECF No. 75 as it relates to Plaintiff's claim for excessive force relating to those events after Mehalik arrived on the scene.

An appropriate order will follow.

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