

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

JARRELL WILLIAMS,

Plaintiff,

v.

CITY OF MEMPHIS, CHRISTOPHER
MURPHY (Badge #5226), SAMUEL
HEARN (Badge #5287), CHRISTOPHER
BROWN (Badge #5139), JACOB MINOR
(Badge #5222), JAMES DOLAN (Badge
#5353), MATTHEW HERBERT (Badge
#4922), JON CARROLL (Badge #
unknown), and ERIC LEE (Badge #
unknown)

Defendants.

No. 2:12-cv-2864-SHL-cgc

**ORDER GRANTING DEFENDANT CITY OF MEMPHIS’S MOTION FOR SUMMARY
JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANT
OFFICERS’ MOTION FOR SUMMARY JUDGMENT**

Before the Court is Defendant City of Memphis’s Motion for Summary Judgment (ECF No. 29), and the Motion for Summary Judgment filed by officers Christopher Brown, Jon Carroll, James Dolan, Samuel Hearn, Matthew Herbert, Eric Lee, Jacob Minor, and Christopher Murphy (ECF No. 28), both filed March 17, 2014. Plaintiff Jarrell Williams (“Mr. Williams”) filed responses in opposition to both motions on April 14, 2014. (ECF Nos. 31 & 32.) The officers filed a Reply on April 28, 2014. (ECF No. 35.) City of Memphis filed its reply on April 30, 2014. (ECF No. 37.) For the following reasons, Defendant City of Memphis’s Motion to Dismiss is GRANTED. The Defendant Officers’ Motion to Dismiss is GRANTED in part and DENIED in part.

I. STATEMENT OF THE CASE¹

Mr. Williams was with a group of friends on Beale Street in downtown Memphis, Tenn., in the early morning hours of October 2, 2011, when he got into an altercation with several Memphis Police Department (“MPD”) Officers. Several fights had broken out in the area prior to the incident, and MPD supervisors instructed officers to begin clearing Beale Street at about 3 a.m. (Pl.’s Resp. to Defendant Officers’ Statement of Undisputed Facts (“Pl.’s Resp.”), ECF No. 32-1 at ¶¶ 1, 2.) Officers announced to the Beale Street revelers that they had to either enter one of the businesses on the street or leave the area. (Id. at ¶ 5.)

The Plaintiff and Defendants’ versions of what happened after that diverge. Officer Christopher Murphy (“Officer Murphy”) alleged that Mr. Williams and his group were not complying with instructions to clear Beale Street, which Mr. Williams denies. (Id. at ¶ 6.) Officer Murphy said that he approached Mr. Williams and placed his hand upon Mr. Williams’s lower back. (Id. at ¶ 8.) Mr. Williams alleges that Officer Murphy used his hand to push and grab him. (Id.)

Officer Murphy alleges that Plaintiff turned and became aggressive, pushing the officer. (Id. at ¶ 11.) Plaintiff disputes that allegation, instead claiming that as soon as he turned around, Officer Murphy grabbed him and slammed him into a wall before taking him to the ground. (Id.) Officers Christopher Brown (“Officer Brown”), Samuel Hearn (“Officer Hearn”), Matthew Herbert (“Officer Herbert”), James Dolan (“Officer Dolan”), and Jacob Minor testified that they saw Mr. Williams push Officer Murphy, and rushed to aide their fellow officer in taking Mr. Williams into custody. (Id. at ¶¶ 12, 13.) In the ensuing scuffle, Officer Brown stated that he attempted to strike Mr. Williams around his shoulder blades with his 8.5-inch flashlight to effect

¹ The following facts come from the Defendant City of Memphis’s Statement of Undisputed Facts (ECF No. 29-2), and Plaintiff’s Response thereto (ECF No. 32-1.)

his arrest, but inadvertently struck Mr. Williams in the back of the head instead. (Id. at ¶¶ 14, 15.)

Once on the ground, Defendants allege that Mr. Williams resisted being taken into custody by kicking and fighting the officers. (Id. at ¶ 16.) Mr. Williams maintains that he was not resisting, but rather trying to defend himself against an aggressive group of officers. (Id.) The officers ordered Mr. Williams to show his hands. (Id. at ¶ 18.) Defendants allege that Mr. Williams would not comply with the request, and instead pulled his arms under his body. (Id. at ¶¶ 17, 19.) Mr. Williams says that every time he extended his hands to the officers, the officers would hit him in the hands and face. (Id. at ¶ 18.) The officers admitted to striking Mr. Williams. Officer Brown testified that he struck Plaintiff in the back two to three times. (Id. at ¶ 20.) Officer Hearn testified that he struck him two or three times in his mid-body. (Id. at ¶ 22.) Officer Herbert testified to striking Mr. Williams once in the shoulders. (Id. at ¶ 23.) Officer Herbert testified that he accidentally struck Mr. Williams in the head while aiming for his shoulder. (Id. at ¶ 24.) The officers claim the blows were an attempt to get Mr. Williams to stop resisting. Mr. Williams does not dispute the officers' version of how and where he was struck, but claims he sustained the blows while trying to comply with the officers' commands. (Id. at ¶¶ 22-25.)

As the scuffle continued, Officer Dolan managed to manacle one of Mr. Williams's hands, but said he had to strike a flailing Mr. Williams twice in his side in an attempt to gain control of his other hand. (Id. at ¶ 25.) Mr. Williams again maintains that Officer Dolan struck him as he was trying to comply with the officer's commands. (Id.) At that point, Officer Brown, perceiving Mr. Williams to still be resisting arrest, sprayed him with pepper spray. (Id. at ¶ 26.) Mr. Williams claims that he was trying to comply with the officers' demands when he was

pepper sprayed. (Id.) Officer Dolan eventually secured both of Mr. Williams's hands with the handcuffs. (Id. at ¶ 28.) After being treated for pepper spray exposure by an ambulance at the scene, the ambulance transported Mr. Williams to Methodist Central Hospital. (Id. at ¶¶ 34, 35.) After his release from Methodist Central Hospital, Mr. Williams was transported to the Shelby County Criminal Justice Center at 201 Poplar Avenue. (Id. at ¶¶ 39.) He was discharged the same day. (Id. at ¶ 40.)

Mr. Williams was eventually found not guilty of disorderly conduct and resisting arrest. (Id. at ¶ 59.) On October 18, 2011, Mr. Williams filed an Internal Affairs Complaint with the City of Memphis Police Division, Inspectional Services Bureau ("ISB"). (Id. at ¶ 43.) The ISB had been attempting to contact Mr. Williams regarding the incident in the weeks leading up to the filing of his complaint as it investigated the incident. (Id. at ¶ 42.) The ISB investigation found that none of the officers involved in the incident used excessive force during the incident involving Mr. Williams. (Id. at ¶ 46.)

II. PROCEDURAL HISTORY

Plaintiff filed his lawsuit on October 1, 2012. (ECF No. 1.) In his suit, he alleged that the named police officers in their individual capacities and as agents of the City of Memphis, as well as the City of Memphis, violated his civil rights under the Fourth and Fourteenth Amendments, pursuant to 42 U.S.C. §§ 1983 and 1988. He stated claims for false arrest, malicious prosecution, abuse of process, excessive force and police brutality, and defamation of character. He sued for \$500,000 in compensatory damages, interest, and the cost of prosecuting his lawsuit. He also sued for \$250,000 in punitive damages.

The individual officers filed their answers on February 26, 2013. (ECF Nos. 8-16.) The City of Memphis filed its answer on March 7, 2013. (ECF No. 18.) The Motions for Summary

Judgment before the Court were both filed on March 17, 2014. (ECF Nos. 28 & 29.) Plaintiff originally filed suit against eight Memphis Police Department officers. The claims against officers Lee, Minor, and Carroll were dismissed with prejudice on October 22, 2014. (ECF No. 47.) Officers Brown, Dolan, Hearn, Herbert, and Murphy remain parties to the suit in their individual capacities.

III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). “In considering a motion for summary judgment, [a court] must draw all reasonable inferences in favor of the nonmoving party.” Phelps v. State Farm Mut. Auto. Ins. Co., 680 F.3d 725, 730 (6th Cir. 2012) (citing Matsushita Electric Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). While the court views all evidence and factual inferences in a light most favorable to the non-moving party, “the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The movant has the initial burden of “demonstrat[ing] the absence of a genuine issue of material fact.” Celotex, 477 U.S. at 323. The burden then shifts to the non-moving party to “go beyond the pleadings” and “designate specific facts showing there is a genuine issue for trial.” Id. at 322. Ultimately, in evaluating the appropriateness of summary judgment, the court must determine “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson, 477 U.S. at 251-52.

IV. ANALYSIS

A. City of Memphis's Motion for Summary Judgment

Plaintiff asserted four grounds for recovery against the City of Memphis under 42 U.S.C. §§ 1983 and 1988: false arrest, excessive force and police brutality, malicious prosecution, and abuse of process. City of Memphis asserts that none of Plaintiff's charges state a claim upon which relief can be granted.

Each of Plaintiff's claims for civil rights violations against the City of Memphis is evaluated using the same approach. That is, a municipality cannot be held liable for an injury caused by its agents or employees under § 1983 "solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." Monell v Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) (emphasis in original). To set forth a cognizable § 1983 claim against a municipality, then, a plaintiff must allege that (1) agents of the municipality, while acting under color of state law, (2) violated the plaintiff's constitutional rights, and (3) that a municipal policy or policy of inaction was the moving force behind the violation. Memphis, Tenn. Area Local, Am. Postal Workers Union, AFL-CIO v. City of Memphis, 361 F.3d 898, 902 (6th Cir. 2004) (citing City of Canton v. Harris, 489 U.S. 378, 379 (1989)). A municipality may only be liable in a § 1983 suit if the plaintiff can show the challenged action occurred pursuant to an officially executed policy or toleration of a custom that leads to, causes, or results in the deprivation of a constitutionally protected right. Doe v. Claiborne County Tennessee, 103 F.3d 495, 507 (6th Cir. 1996) (citing Monell, 436 U.S. at 690-691).

Plaintiff's allegations regarding false arrest, excessive force, malicious prosecution, and abuse of process all have a similar foundation. In each instance, Plaintiff alleges that the City of

Memphis's custom or policy is the proximate cause of the inappropriate action. In each instance, Plaintiff alleges that the custom or policy is driven by the City's failure to train its officers in how to avoid engaging in the alleged activities, its failure to investigate and reprimand officers who engage in the alleged activities, and its employment of an agent who assists in falsifying charges and documents in order to substantiate those illegitimate claims.

In its Motion for Summary Judgment, Defendant City of Memphis does not dispute that its officers are agents of the municipality or that they were operating under color of law. Nor does it directly address whether Mr. Williams's allegations rise to the level of a constitutional violation. The City maintains that it is entitled to summary judgment because it does not maintain any policies or customs that lead to any of the alleged violations of Mr. Williams's constitutional rights.

1. Failure to Train

One way to prove an unlawful policy or custom – and one of the means employed by Plaintiff in this case – is to show a policy of inadequate training or supervision. Ellis ex rel. Pendergrass v. Cleveland Mun. School Dist., 455 F.3d 690, 700 (6th Cir. 2006) (citing City of Canton, 489 U.S. at 387). However, “[a] municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.” Connick v. Thompson, — U.S. —, 131 S. Ct. 1350, 1359 (2011). For Mr. Williams to sustain a failure to train claim, he must prove three elements: (1) that the City’s training program is inadequate to the tasks that the officers must perform; (2) that the inadequacy is the result of the City’s deliberate indifference; and (3) that the inadequacy is closely related to or actually caused the plaintiff’s injury. Plinton v. Cnty. of Summit, 540 F.3d 459, 464 (6th Cir. 2008) (citing Hill v. McIntyre, 884 F. 2d 271, 275 (6th Cir. 1989)).

Plaintiff has failed to allege facts sufficient to contradict the City's evidence that its training policies are adequate. In fact, as the City of Memphis pointed out in its Reply to Plaintiff's Response to City of Memphis's Motion (ECF No. 37), Plaintiff failed to address the abundant information that the City has provided in support of its contention that it provides adequate training regarding arrest procedures, use of force, and crowd control. The City points to the numerous hours each of its officers is required to spend at the police training academy regarding lawful arrest, use of force, and crowd control. (Statement of Undisputed Facts, ECF No. 29-2 at ¶¶ 14-20.) In addition, the City points to the policies and procedures manual that governs use of force, lawful arrest, use of chemical agents, drafting and filing affidavits, complaints and charging instruments, among other topics, of which, it asserts, all MPD officers are familiar. (*Id.* at ¶¶ 32-50.)

Plaintiff offered no response to the City's Statement of Undisputed Facts. While he did submit a statement of additional facts in response, none of the eight facts provided therein address the substantive assertions the City has put forth supporting the adequacy of its training programs. Nor has Plaintiff pointed to any facts in the record that would suggest that the alleged inadequacy of training was the result of a deliberate indifference on the City's part.

"[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick*, — U.S. —, 131 S. Ct. at 1359 (citing *Board of Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 410 (1997)). Without specific facts to put the City on notice that the training was somehow inadequate, the proof that the officers received some training in the areas of contention indicates that the City was not deliberately indifferent to the constitutional rights of citizens. *Harvey v. Campbell Cnty., Tenn.*, 453 F. App'x 557, 567 (6th Cir. 2011).

Plaintiff has failed to comply with Federal Rule of Civil Procedure 56(e), in that his response “fails to properly support an assertion of fact” and “fails to properly address” the City’s assertion of facts. As a result, he has, in effect, relied on his pleadings to support his claims, which cannot be used to demonstrate that there is a genuine dispute of material fact regarding the adequacy of the City’s training programs. Under Rule 56(e), the party opposing a properly supported motion for summary judgment “may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” Anderson, 477 U.S. at 248 (internal quotations omitted). Because Plaintiff’s reliance on his pleadings fails to show that there is a genuine issue for trial, summary judgment is appropriate regarding all of his failure to train claims.

2. Failure to Investigate/Discipline

Plaintiff’s claims based on a failure to investigate and reprimand – or discipline – are similarly bereft of any supporting evidence in the record. Demonstrating a failure to discipline requires a demonstration of deliberate indifference that shows “a history of widespread abuse that has been ignored by the City.” Berry v. City of Detroit, 25 F.3d 1342, 1354 (6th Cir. 1994) (citing City of Canton, 489 U.S. at 397)).

The City of Memphis detailed the MPD’s system for receiving and responding to complaints of police misconduct, whether filed by citizens, by the MPD itself, or gleaned from its confidential information line. (Statement of Undisputed Facts ¶¶ 51, 53.) It also detailed the lengths it went to in its investigation of the incident involving Mr. Williams. The police department said that its investigation included taking statements from several witnesses, reviewing documentary evidence, reviewing video evidence from a witness’s cell phone and from a nearby business’s security camera, and making several unsuccessful attempts to reach the

Plaintiff himself prior to him filing his complaint with the Inspectional Services Bureau on October 18, 2011. In addition to the evidence involving investigations generally and the investigation into the incident involving Mr. Williams specifically, Defendant points to its annual analysis of its response to resistance incidents as evidence that it was not deliberately indifferent in regard to conducting investigations and disciplining its officers. (Id. at ¶ 72.)

Plaintiff has not challenged the adequacy of the City of Memphis's evidence regarding its approach to investigating and disciplining its officers. Nor do any of Plaintiff's additional material facts dispute that evidence. Even if the Court were to assume, *arguendo*, that the incident involving Mr. Williams resulted in a faulty investigation, or that the lack of discipline doled out in its wake was evidence that supported Mr. Williams's assertions, the lone incident could not support a finding of "a history of widespread abuse that has been ignored by the City." "Proof of a single incident of unconstitutional activity is not sufficient to impose liability. . . unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-824 (1985). Plaintiff has offered no proof that would support his claims that the City botched the investigation into his arrest. Nor has he offered any proof that it was one of many botched investigations. Because Plaintiff has failed to demonstrate that there is a genuine issue of material fact regarding the means by which the City of Memphis and MPD investigates claims and disciplines officers, Plaintiff's claims based on Defendant's failure to investigate and discipline also must be dismissed.

3. Falsifying Documents

Finally, Plaintiff has not pointed to anything in the record to support his allegations that the City of Memphis or the MPD employs a person or persons to help falsify affidavits of

complaint and other documents to help cover up any police department wrongdoing and allow it to skirt liability. Again, none of his additional facts even remotely establishes such a person exists. Defendant relies on the affidavit from Deputy Chief Arley Knight (“Dep. Chief Knight”) (ECF No. 29-20) to refute Plaintiff’s claims. Dep. Chief Knight testified that he reviewed Plaintiff’s Complaint and declared there is no merit to the allegations regarding the existence of an employee to assist in fabricating affidavits, and helping to manufacture probable cause where none exists. (Id.) Plaintiff has offered nothing to contradict this evidence, nor any evidence, generally, to support his claims. As such, his claims regarding the existence of the MPD employee who consciously and deliberately coaches officers in falsifying documents must be dismissed.

Plaintiff has failed to offer any support in the record to buttress his claims of the MPD’s failure to train or failure to investigate and discipline, and nothing to support the proposition that there is a person on the MPD staff employed to assist in the fabrication of documents to cover up police malfeasance or to generate justifications for police intrusions on personal liberties where none exists. Because all of Plaintiff’s constitutional claims rely on this rickety foundation, none of them can survive the Defendant’s motion for summary judgment.

4. Plaintiff’s Tennessee Governmental Tort Liability Act (“TGTLA”) Claim

Insofar as Plaintiff has pled a TGTLA claim against the City of Memphis, it, too, cannot survive summary judgment. In his complaint, Plaintiff included no specific claim pursuant to the TGTLA against the City, nor did he include the cause of action in the Complaint’s Claim for Relief. The Plaintiff’s only reference to the TGTLA in his Complaint came in his statement of Jurisdiction and Venue. Nevertheless, in its Motion for Summary Judgment, the City addressed each of Plaintiff’s potential causes of action that it might be subjected to under the TGTLA.

Although it is unclear that Plaintiff has properly alleged a claim under the TGTLA, for the sake of completeness, the Court will address those potential claims as well.

Defendant asserts that summary judgment is appropriate for the Plaintiff's potential TGTLA claims for three reasons. First, Plaintiff has failed to plead waiver of sovereign immunity as is required under the TGTLA. Next, it asserts the Plaintiff's negligence and other state law claims fall within the TGTLA's "civil rights" exception. Finally, it argues the TGTLA's discretionary function exception precludes liability.

The fact that Plaintiff has failed to plead waiver of immunity under the TGTLA is not fatal to his claims. The court in Alexander v. Beale Street Blues Co., Inc., 108 F. Supp. 2d 934, 948 (W.D. Tenn. 1999), held that, when filing a negligence claim against a municipality, it is a jurisdictional requirement for plaintiffs to affirmatively plead the City's waiver of its immunity under the TGTLA to satisfy Federal Rule of Civil Procedure 8(a). However, the Alexander court also granted Plaintiff leave to amend, pursuant to Federal Rule of Civil Procedure 15, to comply with the jurisdictional pleading requirement. Id. Even if this Court were to grant Plaintiff leave to amend to satisfy that pleading requirement, however, summary judgment for his state law claims would still be appropriate.

Tennessee has removed governmental immunity from suit for injuries "proximately caused by a negligent act or omission of any employee within the scope of his employment." Tenn. Code Ann. § 29-20-205; Alexander, 108 F. Supp. 2d at 948. There are exceptions to the removal of immunity, including when an injury arises out of "[t]he exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused." Tenn. Code Ann. § 29-20-205(1); see Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73 (Tenn. 2001). Additional exceptions apply when the injury arises out of other types of offenses,

including false arrest, malicious prosecution, abuse of process, libel, slander and violations of civil rights. Tenn. Code Ann. § 29-20-205(2); Alexander, 108 F. Supp. 2d at 948. The City clearly cannot be liable for claims of false arrest, malicious prosecution, or abuse of process under the TGTLA, as the law clearly exempts governmental entities in those instances.

Plaintiff also argues that immunity does not apply in this situation to his cause of action for assault and battery. Tennessee's Supreme Court explicitly ruled in Limbaugh that immunity did not apply to intentional torts not listed among the exceptions in Tennessee Code Annotated § 29-20-205. Limbaugh, 59 S.W.3d at 83-84. While this is an accurate statement of the law, it does not end the analysis. Mr. Williams's response later concludes that the assault and battery was in violation of his Fourth Amendment rights against unreasonable seizure.

It is generally true that the simultaneous pleading of civil rights violations and intentional tort claims "does not automatically invoke the exception to the waiver of immunity on the negligence claim against the City." See Alexander, 108 F. Supp. 2d at 948 (citing McKenna v. City of Memphis, 544 F. Supp. 415, 419 (W.D. Tenn. 1982)). Neither, however, does it exclude the possibility that the exception is invoked. The question one must ask is whether the essence of the suit remains a civil rights violation. See, e.g., Campbell v. Anderson Cnty., 695 F. Supp. 2d 764, 778 (E.D. Tenn. 2010) ("these torts are alleged to have been committed solely in the context of the violation of [plaintiff's] civil rights – this is in essence a civil rights suit."); Butler v. City of Englewood, No. 1-07-cv-184, 2008 WL 4006786, at *13 (E.D. Tenn. Aug. 25, 2008) (if claims arise out of, and directly flow from, allegations that a police officer violated a person's civil rights, municipal immunity under the TGTLA is applicable.) Because the assault and battery charge, at its core, is a civil rights violation, the City is entitled to municipal immunity.

Finally, the City of Memphis also asserts immunity from the charges that it fails to investigate and discipline officers who are accused of violating the rights of citizens, claiming that the discretionary exception of the TGTLA applies. Plaintiff addresses this assertion by claiming that coupling a civil rights claim with a negligence claim removes the discretionary exception. However, he fails to address Defendant's underlying argument, and the operative facts, that investigation and discipline are essential discretionary functions of the MPD. The discretionary function exception prevents the use of tort actions to second-guess what are essentially executive or legislative decisions involving social, political, economic, scientific, or professional policies or some mixture of these policies. Doe v. Coffee County Bd. of Educ., 852 S.W.2d 899, 907 (Tenn. Ct. App. 1992). "Applying the discretionary function exception requires a thorough examination of the challenged conduct, the decision-making process producing the conduct, and the propriety of permitting the courts to review the decision." Id. at 907 (citing Bowers v. City of Chattanooga, 826 S.W.2d 427, 431 (Tenn. 1992)).

The training, supervision, investigation, and discipline of MPD officers fall squarely within the discretionary function exception of the TGTLA. If the Court were to find otherwise it would result in endless judicial entanglement of second-guessing of departmental policies – precisely what the discretionary exception aims to prevent. As a result, if Plaintiff has adequately pled these claims against the City of Memphis, they, too, must be dismissed.

B. Officers' Motion for Summary Judgment

Plaintiff alleges claims against each of the officers remaining party to the suit – Brown, Dolan, Hearn, Herbert, and Murphy – in their individual capacity for excessive force and physical brutality, negligence, and assault and battery. Mr. Williams also alleges false arrest and defamation of character against officers Murphy and Brown. Finally, Mr. Williams accuses

Officer Brown of malicious prosecution and abuse of process. The officers deny violating any of Mr. Williams's constitutional rights. Even if there was a constitutional violation, the officers argue that their actions were objectively reasonable in light of clearly established laws, and that each is entitled to qualified immunity. The officers also argue that they are immune from any negligent acts they may have committed while acting under the scope of their employment under the TGTLA.

Before analyzing Mr. Williams's claims, the Court must address the Defendant Officers' contention that several of the officers escape liability because they were not directly involved in the seizure of Mr. Williams. "Where . . . the district court is faced with multiple defendants asserting qualified immunity defenses, the court should consider whether each individual defendant had a sufficiently culpable state of mind." Bishop v. Hackel, 636 F.3d 757, 767 (6th Cir. 2011) (quoting Phillips v. Roane Cnty., Tenn., 534 F.3d 531, 542 (6th Cir. 2008)). The claims against officers Lee, Minor and Carroll were dismissed after the Defendant Officers' Motion for Summary Judgment was filed. Officer Murphy, who was the first officer to confront Mr. Williams and his party, also maintains that his involvement in the seizure of Mr. Williams ended after their initial interaction. There is no evidence in the record to contradict Officer Murphy's assertion, so the Court must only consider his initial interaction with Mr. Williams in its analysis. Defendants point out in their motion that Plaintiff admitted to having no independent knowledge regarding the specific conduct of officers Hearn, Brown, Dolan, and Herbert. However, there is ample evidence in the record, through the officers' sworn affidavits, to analyze their individual conduct in relation to Mr. Williams's allegations.

1. Mr. Williams's Claims Under § 1983

Each of the individual officers denies violating any of Plaintiff's constitutional rights. Defendants further assert that, even if there were any constitutional violations, they are entitled to the defense of qualified immunity.

a. Constitutional Violation

To establish individual liability under § 1983, a plaintiff must allege that a person acting under color of law violated a right secured by the Constitution and laws of the United States. West v. Atkins, 487 U.S. 42 (1988). Defendants do not challenge whether they were acting under the color of state law when they arrested Mr. Williams. The dispute is whether there was a violation of Mr. Williams's constitutional rights, namely his right to be free from the use of excessive force under the Fourth Amendment.

A claim based on the use of excessive force first requires the seizure of a person. See Brower v. Cnty. of Inyo, 489 U.S. 593, 596-600 (1989) (determining use of a blind roadblock was a Fourth Amendment seizure, and remanding to determine, *inter alia*, if seizure was reasonable). There is no debate as to whether Mr. Williams was seized. Given a seizure, the court then must evaluate its reasonableness. When claims of a constitutional deprivation are based on allegations of excessive force during the course of an arrest, investigatory stop, or other type of seizure, an officer's conduct is examined under the Fourth Amendment's reasonableness standard rather than under a substantive due process approach. Graham v. Connor, 490 U.S. 386, 395 (1989).

A court must weigh different factors in making its reasonableness determination. "Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at

stake.” Graham, 490 U.S. at 396 (internal quotations omitted). Reasonableness of force is an objective evaluation and “depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene and not with 20/20 hindsight.” Dunn v. Matatall, 549 F.3d 348, 353 (6th Cir. 2008). “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.” Graham, 490 U.S. at 396-397. Under these so-called “Graham factors,” courts determine reasonableness by evaluating “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.” Id. at 396 (citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1985)). Ultimately, what the Graham factors contemplate is “whether the totality of the circumstances justifies a particular sort of seizure.” Graham, 490 U.S. at 396.

Defendants argue that an analysis of these factors points to a finding that their actions were reasonable. However, given the significant differences in the accounts of what occurred that night, the Court cannot conclude that the officers’ actions were reasonable as a matter of law. In fact, analyzing the facts in a light most favorable to Plaintiff, as is required at this stage, the Court arrives at the opposite conclusion. First, Mr. Williams’s alleged crimes were disorderly conduct and resisting arrest. Under the Tennessee code, a person commits disorderly conduct when he:

in a public place and with intent to cause public annoyance or alarm: (1) Engages in fighting or in violent or threatening behavior; (2) Refuses to obey an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard or other emergency; or (3) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose

...

Tenn. Code Ann. § 39-17-305.

Also Under the Tennessee Code,

It is an offense for a person to intentionally prevent or obstruct anyone known to the person to be a law enforcement officer, or anyone acting in a law enforcement officer's presence and at the officer's direction, from effecting a stop, frisk, halt, arrest or search of any person, including the defendant, by using force against the law enforcement officer or another.

Tenn. Code Ann. § 39-16-602.

First, Mr. Williams maintains that he was peacefully leaving Beale Street when Officer Murphy pushed, grabbed, and hurled him against a wall without provocation. Furthermore, Mr. Williams maintains that he was not resisting arrest, but rather that he was surrendering when the officers repeatedly struck him. Even if he were engaged in conduct that violated Tennessee law, the crimes he was alleged to have committed are not severe. Tennessee classifies disorderly conduct as a Class C misdemeanor, the least severe category of misdemeanor, punishable by up to thirty days in jail and a fine not to exceed \$50. Tenn. Code Ann. § 40-35-111(e)(3). Obstruction of law enforcement is a Class B misdemeanor, a classification one step up from Class C, whose penalties include jail time of up to six months and fines up to \$500. Tenn. Code Ann. § 40-35-111(e)(2). Neither of the charges alleged against Plaintiff are severe enough to warrant the type of treatment Plaintiff alleges he suffered at the hands of the police. Defendant is correct in asserting that the fact that the charges were subsequently dismissed against Mr. Williams does not automatically make his arrest unreasonable. Defendant points to the Supreme Court's decision in Michigan v. DeFillippo, which held

The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest. We have made clear that the kinds of degree

of proof and the procedural requirements necessary for a conviction are not prerequisites to a valid arrest.

Michigan v. DeFillippo, 443 U.S. 31, 36 (1979).

At the same time, however, the validity of the arrest cannot depend on the mere fact that the officers made it. In this instance, the first of the Graham factors favors the plaintiff.

An analysis of the second Graham factor – whether Mr. Williams posed an immediate threat to the safety of police officers and others – hinges on whose version of events one believes. Mr. Williams alleges that he was pushed and taken to the ground by Officer Murphy and then beaten by the officers who came to his aide. Officer Murphy and his fellow officers allege that Mr. Williams posed a threat of harm to Officer Murphy. Mr. Williams alleges that, once he was on the ground, he tried to surrender to the police, but they continued to beat him anyway. The officers allege that Mr. Williams was resisting arrest, which necessitated the amount of force they used to take him into custody. With these conflicting narratives, it cannot be said definitively whether or not Mr. Williams posed an immediate threat to the officers. Viewing the facts in a light most favorable to Mr. Williams, however, suggests that he did not.

Evaluating the third Graham factor is equally dependent on whose version of events you believe. There is no allegation that Mr. Williams attempted to flee from the officers, so the question under this factor is whether he resisted arrest. Mr. Williams's testimony is that he did not resist arrest at any time during the altercation. Rather, he claims that any time he tried to offer his hands to the police officers as directed, they struck him in the hands and face. Defendants argue that Mr. Williams was resisting arrest the entire time. They argue that, if he were not, the officers would not have had to repeatedly tell him to show them his hands. What this debate reveals, however, is that there is a factual dispute as to what transpired that morning on Beale Street. Defendants' reference to the subsequent ISB investigation which found the

officers' actions in compliance with the Memphis Police Department's policies is equally as irrelevant to this Court's determination of the reasonableness of the officers' actions as was the dismissal of all charges against Mr. Williams. A § 1983 claim may not be based upon a violation of a state procedure that does not violate federal law. Brody v. City of Mason, 250 F.3d 432, 437 (6th Cir. 2001). Similarly, an internal investigation by the city that exonerates the officers regarding a potential violation of departmental policies does not factor into the Court's calculus of reasonableness. When viewed in a light most favorable to Plaintiff, the third Graham factor favors him as well.

The Court is mindful of the fact that when analyzing the reasonableness of an officer's action, "deference must be given to the judgment of reasonable officers on the scene." Saucier v. Katz, 533 U.S. 194, 205 (2001) (citing Graham, 490 U.S. at 393, 396). Ultimately, even considering this deference, when the facts are viewed in the light most favorable to Mr. Williams, as they must be at this stage, it is clear that there is a factual question as to the reasonableness of the officers' actions, making summary judgment inappropriate. Defendants have failed to demonstrate the lack of the existence of questions of material fact regarding the objective reasonableness of the Defendant Officers' use of force, giving rise to legitimate claims of a deprivation of the Plaintiffs' constitutional rights.

b. Qualified Immunity

Defendant Officers argue that even if they were mistaken regarding the amount of force necessary to control Mr. Williams, they are entitled to qualified immunity. In certain circumstances, even if there is a constitutional violation by a person acting under the color of state law, there is no liability because the person enjoys qualified immunity. Qualified immunity is a government official's "entitlement not to stand trial or face other burdens of litigation."

Saucier, 533 U.S. at 200. Government officials enjoy immunity from civil damages when performing discretionary functions, “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The protection is broad and “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.” Malley v. Briggs, 475 U.S. 335, 341 (1986). Plaintiffs bear the burden of showing that defendants are not entitled to qualified immunity. Untalan v. City of Lorain, 430 F.3d 312, 314 (6th Cir. 2005).

Courts in the Sixth Circuit typically follow a three-step analysis to determine the presence of qualified immunity: first, whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiff shows that a constitutional violation has occurred. Feathers v. Aey, 319 F.3d 843, 848 (6th Cir. 2003). As the foregoing analysis suggested, in viewing the facts in a light most favorable to Mr. Williams, he sustained constitutional violations involving the use of excessive force by each of the remaining officers in the case. The second step in the analysis calls on courts to consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. Id. A right is clearly established if “a reasonable officer would understand that what he is doing violates that right.” Anderson v. Creighton, 483 U.S. 635, 640 (1987). “[A]n action’s unlawfulness can be apparent from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs.” Feathers, 319 F.3d at 848 (citing Hope v. Pelzer, 536 U.S. 730 (2002)). “Finally, courts must determine whether the plaintiff has offered sufficient evidence “to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.” Feathers, 319 F.3d at 848. If a plaintiff fails to

establish each of the three elements, qualified immunity must be granted. Radvansky v. City of Olmsted Falls, 395 F.3d 291, 302 (6th Cir. 2005).

In order to perform its qualified immunity analysis, the Court first must identify the specific actions that each of the remaining Defendant Officers is accused of engaging in that potentially violated Plaintiff's constitutional rights. Plaintiff's allegations against Officer Murphy do not extend beyond the initial altercation that ended with him taking Plaintiff to the ground. To set the stage, Defendants allege that officers told Plaintiff to leave Beale Street at least twice, and Plaintiff was non-responsive. This account contradicts Plaintiff's testimony. While Plaintiff admits that he did not verbally respond to the officers' request, he instead said that he "proceeded to walk southbound towards the way that they were pointing." (Dep. of Jarrell Williams ("Williams Dep."), ECF No. 28-7 at 6.) Mr. Williams's testimony indicates that he was complying with the commands to leave Beale Street. As he was doing so, he claimed that Officer Murphy put his hand on Plaintiff's lower back. When Mr. Williams turned around to see who it was, he alleges that Officer Murphy grabbed him and slung him into a wall. (Williams Dep., ECF No. 28-7 at 8.)

Plaintiff's allegations against Officer Murphy are thus restricted to whether a reasonable officer would understand that the use of force he used in grabbing and slinging into a wall a person who is abiding by an official's orders – Mr. Williams's version of the events from that evening – would be a constitutional violation. The undisputed facts show that Beale Street was chaotic on the night in question. There were other arrests, and the early-morning rabble rousers prompted police to clear the street. Even given what was potentially a rapidly evolving situation, however, it is clear that a person abiding by the instructions of an officer has the right to be free from this type of excessive force, that is, free from being grabbed and thrown against a wall. A

reasonable officer would have realized that such an act would violate Mr. Williams's right to be free from the use of excessive force.

Finally, under the last element of the tripartite qualified immunity test, the Court must look at whether what Officer Murphy allegedly did in this situation was objectively unreasonable in light of Mr. Williams's clearly established constitutional rights. The Court finds that it is, again viewing the evidence in light most favorable to Plaintiff. The extreme use of force in this instance is inconsistent with the actions of a reasonable officer confronted by these circumstances. Officer Murphy, therefore, is not entitled to qualified immunity.

The potentially unconstitutional actions of officers Brown, Dolan, Hearn, and Herbert involve the use of excessive force while trying to take Mr. Williams into custody. Mr. Williams alleges that Officer Brown's use of pepper spray also was excessive force. The remaining officers do not dispute the type of force they exerted upon Mr. Williams. Each of the officers alleges that their actions cannot be construed as constitutional violations because they were responding to what they perceived to be a threat to the safety of their fellow officer. The crux of Mr. Williams's complaint again revolves around his contention that the officers greeted his efforts to surrender with strikes from their batons and flashlights.

Having established the presence of a constitutional violation when viewing the facts in the most favorable light to Mr. Williams, the Court must then determine whether Mr. Williams's right is clearly established under these specific circumstances. The Court is thus confronted with this question: Would a reasonable officer understand that repeatedly striking a surrendering suspect in order to get him to surrender is a clearly established right? To ask the question is to answer it. "It is axiomatic that individuals have a constitutional right not to be subjected to excessive force during an arrest, investigatory stop, or other 'seizure' of his person." Chapell v.

City of Cleveland, 585 F.3d 901, 908 (6th Cir. 2009) (citing Graham, 490 U.S. at 388, 395). In the Sixth Circuit, “the law is clearly established that an officer may not use additional gratuitous force once a suspect has been neutralized.” Alkhateeb v. Charter Township of Waterford, 190 F. App’x 443, 452 (6th Cir. 2006). The nature of the excessive force Mr. Williams says that he endured, while he says he was surrendering to the police officers, violated a clearly established right against the use of excessive force that a reasonable officer would have been aware of.

Just as the Court found in determining that Officer Murphy’s actions were objectively unreasonable in light of Mr. Williams’s clearly established rights, so, too, are the actions of the remaining officers in this instance. Given Mr. Williams’s version of events, his treatment at the hands of officers Brown, Dolan, Hearn, and Herbert was clearly unreasonable.

Finally, Officer Brown also stands accused of using excessive force in pepper spraying Mr. Williams in the face. Mr. Williams maintains that he was sprayed while he was trying to surrender. Officer Brown alleges that he deployed the pepper spray because Mr. Williams was resisting arrest. In a similar, if not perfectly analogous case to the case at bar evaluating qualified immunity and whether a right was clearly established, the Sixth Circuit in Greene v. Barber ruled that a reasonable officer “would not necessarily have known that it might be unlawful for him to use pepper spray” on a person who, like Mr. Williams, was suspected of committing a low-level disturbance in a public place and was not threatening anyone’s safety or attempting to evade arrest by flight. Greene v. Barber, 310 F.3d 889, 899 (6th Cir. 2002). Unlike Mr. Williams, however, the plaintiff in that case did not contradict the officers’ testimony that he refused to be handcuffed. The court in Greene found that the plaintiff was actively resisting arrest, which entitled the pepper-spraying officer to qualified immunity. The fact that Mr. Williams alleges that he never resisted arrest distinguishes his actions from the plaintiff’s in

Greene. Because there is a dispute as to whether Mr. Williams was non-cooperative – and it is Mr. Williams’s version of events that the court must rely on for the purposes of this motion – it would be clear to a reasonable officer that the act of spraying an allegedly acquiescent suspect with pepper spray would be unlawful.

In taking the facts in the most favorable light to Mr. Williams, Officer Brown’s act of spraying him with pepper spray, while he was on the ground, being struck by other police officers and trying to surrender, was objectively unreasonable in light of his clearly established rights. Officer Brown is therefore also not entitled to qualified immunity regarding his use of pepper spray on Mr. Williams.

Officers Murphy, Brown, Dolan, Hearn, and Herbert’s claims of qualified immunity, at least to the specific actions in violation of § 1983 that Mr. Williams accuses them of, therefore cannot be sustained. Their motion for summary judgment on these grounds must therefore be denied.

2. Mr. Williams’s State Law Claims

To reiterate, Mr. Williams alleges state law causes of action against each of the remaining officers for negligence and assault and battery. He also alleges false arrest and defamation of character against officers Brown and Murphy. Finally, Mr. Williams accuses Officer Brown of malicious prosecution and abuse of process.

Defendants claim immunity for their alleged negligent acts under the Tennessee Governmental Tort Liability Act (“TGTLA”). As was explained supra IV.A.4, Tennessee has removed governmental immunity from suit for injuries “proximately caused by a negligent act or omission of any employee within the scope of his employment.” Tenn. Code Ann. § 29-20-205; Alexander, 108 F. Supp. 2d 934, 948. “Where the City has waived its immunity, municipal

employees are granted immunity from suit.” Tenn. Code Ann. § 29-30-310(b); Robinson v. City of Memphis, 340 F. Supp. 2d 864, 873 (W.D. Tenn. 2004). Because the City of Memphis’s immunity is waived regarding the negligent acts of its officers, Mr. Williams’s negligence claims against the officers must be dismissed.

Defendant Officers also claim they are entitled to qualified immunity for Plaintiff’s allegations involving the remaining state law claims because “the Court of Appeals in Tennessee made clear that the same defense of qualified immunity that is available to police officers in causes of action under § 1983 is also available in causes of action under Tennessee state law.” Willis v. Neal, No. 1:04-CV-305, 2006 WL 1129388, at *2 (E.D. Tenn. April 24, 2006) (citing Youngblood v. Clepper, 856 S.W.2d 405, 407-08 (Tenn. Ct. App. 1993)). The Sixth Circuit has held that Tennessee law provides qualified or good faith immunity of government employees for state law torts. Willis v. Neal, 247 F. App’x 738, 745 (6th Cir. 2007) (citing Rogers v. Gooding, 84 F. App’x 473, 477 (6th Cir. 2003)). The court in Youngblood decided that while this common law immunity was generally applicable to those performing “quasi-judicial” functions, the determining factor as to whether it applied to judicial or executive officers turned on whether the function performed was discretionary. Youngblood, 856 S.W.2d at 406. Ultimately, the court held that “[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.” Id. (citing Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974)).

A case from the Middle District of Tennessee, Harris v. Metro. Gov’t of Nashville, No. 3:06-0868, 2007 WL 4481176 (M.D. Tenn. Dec. 18, 2007), provides an appropriate framework for analyzing Mr. Williams’s state law claims under the qualified immunity backdrop. In that

case, the parents of a juvenile filed suit against police officers and the government after the boy was arrested for allegedly gambling. Id. at *1. The causes of action included § 1983 claims, assault and battery, false arrest, and malicious prosecution, just as in the case before this Court. Id. The court in Harris evaluated each of the plaintiff's state law causes of action, first to determine whether the causes of action survived summary judgment, and then whether the specific right at issue was clearly established at the time of the incident. Id. at *9. This Court will analyze the Defendants' motion for summary judgment regarding Mr. Williams's remaining state law claims with the same approach.

a. Assault and Battery

In Harris, the court held that the § 1983 excessive force analysis applied with the same validity as the state law assault and battery claim. "Because Tennessee courts apply the same 'excessive force' principles to assault and battery claims against the police officers, the plaintiff has additionally set forth adequate ground against each of the officers for assault and battery under Tennessee law." Id. The analysis is the same in this case. Because Mr. Williams has demonstrated that qualified immunity does not exist for the officers regarding his § 1983 claims, immunity from the assault and battery claims is also not warranted.

b. False Arrest

Officers Brown and Murphy also do not warrant qualified immunity regarding Mr. Williams's false arrest charge. False imprisonment in Tennessee is the intentional restraint or detention of another without just cause. Newsom v. Thalhimer Bros., Inc., 901 S.W.2d 365, 367 (Tenn. Ct. App. 1994) (citing Brown v. SCOA Indus., Inc., 741 S.W.2d 916, 919 (Tenn. Ct. App. 1987)). The elements of the tort of false imprisonment are (1) the detention or restraint of one against his will and (2) the unlawfulness of such detention or restraint. Newsom, 901 S.W.2d at

367 (citing Coffee v. Peterbilt of Nashville, Inc., 795 S.W.2d 656, 659 (Tenn. 1990)).

Effectuating a legal arrest requires police to have either a warrant or probable cause. Harris, 2007 WL 4481176, at *11 (citing State v. Nicholson, 188 S.W.3d 649, 656 (Tenn. 2006)).

Officers Brown and Murphy do not allege that they had a warrant to arrest Mr. Williams, but suggest that there was probable cause to detain him. Viewing the facts in the light most favorable to the plaintiff, there is a factual dispute as to the presence of probable cause. Mr. Williams maintains that he was not engaged in any unlawful activity when police initially confronted him, and that he did not engage in any activity after the altercation started that would have warranted his arrest.

Having established that a probable cause dispute exists, the next question in the qualified immunity analysis is whether Mr. Williams's right against unlawful arrest was clearly established at the time of the incident. As the court in Harris found, the tort of false arrest is a "longstanding cause of action in Tennessee." Harris, 2007 WL 4481176, at *11. The right to be free of unlawful arrest is clearly established and a reasonable officer would have understood that subjecting an individual to arrest without the presence of probable cause was objectively unreasonable given these circumstances. While the officers in this instance assert facts that contradict such a finding, Mr. Williams's version of the events of the incident is what the Court must rely on in making its summary judgment determination. Considering that, Defendants are not entitled to summary judgment on the false arrest claim.

c. Defamation

The state law claim that remains against both officers Brown and Murphy is for defamation of character. Mr. Williams alleges that the officers disseminated false information concerning Plaintiff's conduct in their record of arrest, affidavit of complaint, and sworn

testimony during his criminal trial. Plaintiff has failed to plead any facts that would suggest that the actions of either of the officers resulted in the defamation of his character. In Tennessee, to be actionable, “an allegedly defamatory statement must constitute a serious threat to the plaintiff’s reputation.” Davis v. The Tennessean, 83 S.W.3d 125 (Tenn. Ct. App. 2001) (internal quotations omitted).

Furthermore, Tennessee courts have recognized a conditional public interest privilege that applies to precisely the sort of communications Mr. Williams alleges defamed him. See Southern Ice Co. v. Black, 136 Tenn. 391 (1916); Travis v. Bacherig, 7 Tenn. App. 638 (1928). “The defense of privileged communication must be made in good faith in the prosecution of an inquiry regarding a crime which has been committed, and for the purpose of detecting and bringing to punishment the criminal.” Pate v. Service Merchandise Co., Inc., 959 S.W.2d 569 (Tenn. Ct. App. 1996) (citing Southern Ice Co., 136 Tenn. at 401). The court in Pate held that the rationale for such a conditional privilege can be established because “[t]he interests of the public in preventing crime and punishing criminals outweigh the interest of any plaintiff concerning statements of accusation, as long as the accusation is made in good faith and without express malice.” Pate, 959 S.W.2d at 576.

Mr. Williams has not identified any specific statements that the officers made that would have constituted a serious threat to his reputation. Moreover, he has not provided any information, beyond the allegations contained within his pleadings, which would support a finding that any of the unspecified communications in question were not made in good faith, and thus would not be protected by the public interest privilege. As a result of this lack of any evidence that supports the presence of defamation or the absence of the public interest privilege,

Mr. Williams's defamation claims against officers Brown and Murphy cannot survive summary judgment.

d. Malicious prosecution

Finally, the last two state law causes of action apply only to Officer Brown, and pertain to the affidavit of complaint he swore out against Mr. Williams. The first alleges that the complaint contained false allegations, which would justify a finding of malicious prosecution. Malicious prosecution is the employment of legal process for its apparent purpose, but without probable cause. Swepson v. Davis, 70 S.W. 65 (Tenn. 1902). To prevail on this claim, Mr. Williams must show that "(1) a prior suit or judicial proceeding was instituted without probable cause; (2) that the defendant brought the action with malice; (3) that the action was finally terminated in the plaintiff's favor. Harris, 2007 WL 4481176, at *12 (quoting Majors v. Smith, No. M2000-01430-COA-R30CV, 2001 WL 219656, at *2 (Tenn. Ct. App. March 7, 2001)).

There is no dispute that Mr. Williams faced trial and the action was terminated in his favor. The question that must be answered is whether the suit against him was initiated without probable cause and with malice. "A showing of a lack of probable cause will give rise to a rebuttable presumption of malice." Harris, 2007 WL 4481176, at *12 (citing Smith v. Hartford Mutual Ins. Co., 751 S.W.2d 140, 143 (Tenn. Ct. App. 1987)). Because the defendant has not challenged a finding of malice, demonstrating a lack of probable cause is the only determination that needs to be made. As the Court has previously explained, there is a question as to the presence of probable cause to make the arrest. Viewing the facts in a light most favorable to Mr. Williams, there is also a question as to whether probable cause existed to support his continued prosecution. Tennessee courts have held that probable cause "is established where 'facts and circumstances [are] sufficient to lead an ordinarily prudent person to believe the accused was

guilty of the crime charged.” Roberts v. Federal Exp. Corp., 842 S.W.2d 246, 248 (Tenn. 1992) (quoting Logan v. Kuhn’s Big K Corp., 676 S.W.2d 948, 951 (Tenn. 1984)). Mr. Williams stood accused of resisting arrest and disorderly conduct. If Mr. Williams did not resist arrest and was abiding by the officers’ instructions the morning of the incident, which the Court must assume at this stage in the proceedings, it would be impossible for an ordinarily prudent person to believe he was guilty of the crime charged.

Having established that Mr. Williams’s claim for malicious prosecution can survive summary judgment initially, the question becomes whether the right against malicious prosecution was clearly established at the time of the incident. As the Harris court determined, “[t]he tort of malicious prosecution, like that of unlawful arrest and battery, is longstanding, and the liability of a police officer for issuing a citation for which there was no probable cause should have been clear.” Harris, 2007 WL 4481176, at *13. Because Officer Brown should have understood that his actions contravened Mr. Williams’s clearly established rights, his motion for summary judgment regarding malicious prosecution must be denied.

e. Abuse of Process

Mr. Williams’s last claim is that he suffered an abuse of process at the hands of Officer Brown because the affidavit of complaint the officer swore out had the sole intent to protect the Defendants from liability for damages for false arrest. In order to prevail for a claim of abuse of process, a Plaintiff must establish by evidence two elements: “(1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge.” Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383 (Tenn. 2002) (quoting Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., 986 S.W.2d 550, 555 (Tenn. 1999)).

Mr. Williams alleges Officer Brown's ulterior motive for swearing out the affidavit of complaint against him was, essentially, to cover up the false arrest. Mr. Williams fails to establish how such an act could have accomplished this. In Bell, the Tennessee Supreme Court held that the "the gist of the [abuse of process] tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." Bell, 986 S.W.2d at 555. Mr. Williams has not indicated how Officer Brown's mere act of swearing out the complaint could achieve his collateral goal of protecting his fellow officers from liability. Because he has failed to do so, his claim against Officer Brown for abuse of process cannot survive summary judgment.

V. CONCLUSION

For the foregoing reasons, Defendant City of Memphis's Motion for Summary Judgment is GRANTED. The Defendant Officers' Motion for Summary Judgment is DENIED in part and GRANTED in part. The motion for summary judgment regarding the § 1983 and assault and battery claims against officers Brown, Dolan, Hearn, Herbert, and Murphy is DENIED. The motion for summary judgment regarding the negligence claims against the same officers is GRANTED. The motion for summary judgment by officers Brown and Murphy regarding the false arrest claims is DENIED. The motion for summary judgment against the same two officers regarding the defamation claim is GRANTED. Officer Brown's motion for summary judgment for the malicious prosecution claims is DENIED. His motion for summary judgment regarding Mr. Williams's claims for abuse of process is GRANTED.

IT IS SO ORDERED, this 5th day of December, 2014.

/s/ Sheryl H. Lipman
UNITED STATES DISTRICT JUDGE