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

APRIL MALONE and
CELITRIA WATSON,

Plaintiffs,

v. No. 18-cv-2201-MSN-tmp

CITY OF MEMPHIS, OFFICER THERMAN RICHARDSON, Individually and in his Official Capacity and OFFICER JOHNATHAN OVERLY, Individually and in his Official Capacity,

Defendants.

ORDER GRANTING DEFENDANT CITY OF MEMPHIS' MOTION FOR SUMMARY JUDGMENT

This cause is before the Court on Defendant City of Memphis' ("The City") Motion for Summary Judgment. (ECF No. 165.) The City filed its motion on June 12, 2020. (*Id.*) To date, Plaintiffs have not responded. For the reasons below, The City's Motion is **GRANTED**. Additionally, Plaintiffs pending Motion to Compel, (ECF No. 180), is **DENIED AS MOOT**.

Background[1]

Plaintiffs originally filed this action against the City of Memphis, Shelby County, various attorneys with the Shelby County District Attorney's Office, and several officers in the Memphis

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1. The Court refers to both Plaintiffs' original Complaint, (ECF No.1), and their Amended Complaint, (ECF No. 106), in addition to The City's Statement of Undisputed Facts for the relevant background. Although an amended complaint normally "supersedes" the prior pleading, see Charles Alan Wright et al., *Federal Practice and Procedure § 1476* (3d. ed. Updated Aug. 2019), the Court refers to both due to Plaintiffs *pro se* status. *See Leggett v. W. Express Inc.*, No. 3:19-cv-00110, 2020 WL 1161974, at *1 n.1 (M.D. Tenn. Jan. 6, 2020). Further, reference to the original Complaint is needed to understand the allegations contained within the Amended Complaint. *See id.* (citing *White v. Demarco*, No. ELH-17-1623, 2019 WL 1696563, at *2 (D. Md. Apr. 6, 2018)).

Police Department back in March 2018. (ECF No. 1.) Plaintiffs initially proceeded *pro se*, but counsel has since made an appearance.[2] (ECF No. 166.) Plaintiffs raise both federal and state law causes of actions against the various Defendants. (ECF No. 1 at PageID 4–10.) Plaintiffs later filed an Amended Complaint with the Court's leave. (ECF Nos. 105, 106.) For purposes of this Order, the Court only addresses allegations made against The City.

A. Factual Background

The gravamen of Plaintiffs' action is that The City failed to adequately train and supervise its officers in addition to fostering a custom of tolerance towards constitutional violations. (ECF No. 1 at PageID 4–5; ECF No. 106 at PageID 451.) Prior to January 21, 2017, Plaintiffs contend that their cellphones were subjected to a wiretap. (ECF No. 1 at PageID 3.) These wiretaps were allegedly secured, in part, due to fabricated information created by Memphis police officers. (*Id.*)

Plaintiffs allege that Memphis police officers altered or created out of whole cloth text messages that implicated Plaintiffs in criminal activity. (*Id.*) In turn, these fabricated messages lead to the indictment of Plaintiffs on serious felony charges. (*Id.* at PageID 4.) These charges, however, were later dismissed. (*Id.*)

Plaintiffs later acquired the original text messages from their cell phone providers, albeit after several court appearances. (*Id.*) After reviewing these messages, Plaintiffs contend that the messages produced by Memphis police officers in their investigation contained several discrepancies related to what was communicated, dates messages were sent, and the times messages were sent. (*Id.*)

2. The Court stills afford Plaintiffs *pro se* status because the relevant pleadings for purposes of this Order occurred before counsel appeared.

On August 9, 2019, Plaintiffs filed their Amended Complaint. (ECF No. 106.) Plaintiffs further allege that The City provided officers with a "sting ray device" that enabled officers to listen in on their private phone calls without their knowledge. (*Id.* at PageID 448.) The City purportedly failed to train officers on how to use this device. (*Id.* at PageID 449.) Moreover, The City did not maintain a system that monitored how the device was being used or by who. (*Id.*)

I. Procedural Background

Plaintiffs' Original Complaint asserted causes of actions against the City of Memphis and Shelby County in their municipal capacity and against Assistant Attorney General Paul Hagerman, Assistant Attorney General Austin Scholfield,[3] Assistant Attorney General Chris Scruggs, Memphis police officer Therman Richardson,[4] Memphis police officer Johnathan Overly, and Memphis police officer William Acred in both their individual and official capacities. (ECF No. 1 at PageID 2–3.) As this litigation has progressed, various Defendants have been dismissed from this suit,[5] leaving only the claims against The City and Defendants Richardson and Overly left for adjudication.

On November 11, 2018, The City moved to have Plaintiffs' claims dismissed. (ECF No. 50.) The Court granted The City's motion in part. (ECF No. 105.) The Court's Order also

3. The correct spelling of Defendant Scholfield's name is "Scofield." (ECF No. 77-1 at PageID 264 n.1.)

4. Plaintiffs spelled Defendant Richardson's name as "Thurmond Richardson" in their Complaint. (ECF No.1 at PageID 2.) However, the correct spelling is "Therman." (ECF Nos 150 & 151.)

5. On February 21, 2019, the Court entered an Order dismissing Defendant Shelby County for this suit. (ECF No. 73.) On August 8, 2019, the Court entered an Order dismissing all claims against Defendants Mr. Hagerman, Mr. Scofield, and Mr. Scruggs. (ECF No. 102.) On September 18, 2019, the Court dismissed all claims against Defendant Acred in his individual capacity (ECF No. 113.)

allowed Plaintiffs to file an Amended Complaint to allege additional facts concerning their § 1983 claim against The City. (ECF No. 105 at PageID 447) ("Plaintiffs shall only be allowed to add facts regarding Defendant City of Memphis and regarding the § 1983 claims. Plaintiffs have not sought to add any additional facts addressing any other Defendants."). The Order dismissed Plaintiffs' claims against The City brought under the Tennessee Governmental Tort Liability Act and the Tennessee Human Rights Act with prejudice. (*Id.* at PageID 447.) On August 9, 2019, Plaintiffs filed their Amended Complaint. (ECF No. 106.)

On June 12, 2020, The City filed its motion for summary judgment. (ECF No. 165.) That same day, Defendants Richardson and Overly filed their motion for summary judgment.[6] (ECF No. 165.) To date, Plaintiffs have not submitted a response to either Motion.

On June 15, 2020, two years after suit had been filed, counsel appeared on behalf of Plaintiffs. (ECF No. 166.) That same day, Plaintiffs filed their Motion to Stay Summary Judgment and Extend Deadlines, seeking an extension of time to file their own motion for summary judgment. (ECF No. 169.) The Court denied Plaintiffs' request. (ECF No. 177.) The Court found an extension unwarranted considering that the deadline had previously been extended three (3) times, and Plaintiffs failed to take advantage of those extensions. (*Id.* at PageID 1589.)

In another motion filed on June 15, 2020, Plaintiffs requested that The City's Motion for Summary Judgment be struck. (ECF No. 168.) As grounds, Plaintiffs correctly argued that The City failed to disclose the identity of Colonel Marcus Worthy, who The City relied on in its Motion, in its discovery as an individual having knowledge relating to this case. (*Id.* at PageID 1424–25.) The Court agreed that The City failed to disclose the identity of Colonel Worthy but held that striking the Motion for Summary Judgment altogether was unwarranted. (ECF No. 177 at PageID

6. The Court will address the individual officers' Motion in a separate Order.

1588.) Instead, the Court struck Colonel Worthy's affidavit and explained that the Court would not consider it when ruling on The City's motion. (*Id.*) The Order also allowed Plaintiffs the opportunity to depose Colonel Worthy and another late-disclosed witness. (*Id.*) The Order made clear, though, that "the City's motion for summary judgment therefore remains pending and is ripe for adjudication." (*Id.*)

Legal Standard

Federal Rule of Civil Procedure 56 permits a party to move for summary judgment — and the Court to grant summary judgment — "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). A party asserting the presence or absence of genuine issues of material facts must support its position either by "citing to particular parts of materials in the record," including depositions, documents, affidavits or declarations, stipulations, or other materials, or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). In ruling on a motion for summary judgment, the Court must view the facts contained in the record and all inferences that can be drawn from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001). The Court cannot weigh the evidence, judge the credibility of witnesses, or determine the truth of any matter in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may discharge this burden either by producing evidence that demonstrates the absence of a genuine

issue of material fact or simply "by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Where the movant has satisfied this burden, the nonmoving party cannot "rest upon its . . . pleadings, but rather must set forth specific facts showing that there is a genuine issue for trial." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009) (citing *Matsushita*, 475 U.S. at 586; Fed. R. Civ. P. 56). The nonmoving party must present sufficient probative evidence supporting its claim that disputes over material facts remain and must be resolved by a judge or jury at trial. *Anderson*, 477 U.S. at 248–49 (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968)); *see also White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 475–76 (6th Cir. 2010). A mere scintilla of evidence is not enough; there must be evidence from which a jury could reasonably find in favor of the nonmoving party. *Anderson*, 477 U.S. at 252; *Moldowan*, 578 F.3d at 374.

The Court's role is limited to determining whether there is a genuine dispute about a material fact; that is, if the evidence in the case "is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Such a determination requires that the Court "view the evidence presented through the prism of the substantive evidentiary burden" applicable to the case. *Id.* at 254. Thus, if the plaintiff must ultimately prove its case at trial by a preponderance of the evidence, on a motion for summary judgment the Court must determine whether a jury could reasonably find that the plaintiff's factual contentions are true by a preponderance of the evidence. *See id.* at 252–53.

Finally, if the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the movant is entitled to summary judgment. *Celotex*, 477 U.S. at 323. The Court must construe Rule 56 with due regard not only for the rights of those "asserting claims and defenses that are adequately based in fact to have those

claims and defenses tried to a jury," but also for the rights of those "opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* at 327.

Analysis

This case is a federal civil rights lawsuit brought against The City for its alleged failure to properly train its officers and for maintaining a custom of tolerance towards constitutional violations. (ECF No.1 at PageID 4–5, 7–8; ECF No. 106 at PageID 451–52.) Plaintiffs bring this suit pursuant to 42 U.S.C. § 1983, which provides that:

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

42 U.S.C. § 1983. A *prima facie* § 1983 claim requires (1) a deprivation of a constitutional right and (2) that the deprivation arose from an individual acting under color of state law. *See Wittstock v. Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003).

Municipalities and other local government entities are subject to suit under 42 U.S.C. § 1983. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). However, municipal liability does not simply arise because the municipality employs a tortfeasor; in other words, a municipality does not incur liability simply under a theory of *respondeat superior*. *See Monell*, 436 U.S. at 691; *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005). Instead, liability arises "'when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury' of a constitutional violation." *David v. City of Bellevue*, 706 F. App'x 847, 850 (6th

Cir. 2017) (quoting *Monell*, 436 U.S. at 694); *see also Connick v. Thompson*, 563 U.S. 51, 60 (2011); *Epperson v. City of Humboldt*, 140 F. Supp. 3d 676, 684 (W.D. Tenn. 2015).

A party can establish municipal liability "by demonstrating one of the following: (1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013) (citing *Thomas*, 398 F.3d at 429). Plaintiffs' pleadings allege that The City "failed to provide adequate training or supervision" for its officers, and The City "was aware that the officers involved had deficiencies, which would lead to the type of injuries Plaintiff[s] suffered." (ECF No. 1 at PageID 4–5; ECF No. 106 at PageID 451.) Plaintiffs' allegations appear to implicate two of the situations in which a municipality can be liable under § 1983: (1) the existence of a policy of inadequate training or supervision and (2) the existence of a custom of tolerance or acquiescence of constitutional violations. The Court will address each in turn but finds that The City is entitled to judgment on each.

A. Failure to Train or Supervise

Plaintiffs allege that The City "failed to provide adequate training or supervision for the police officers and that their failure to train and supervise their officers has become a custom that has resulted in repeated substantiated excessive abuse claims against the City of Memphis." (ECF No. 106 at PageID 451.) "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick*, 563 U.S. at 61. Success on this claim requires the party show that: "(1) the training program was inadequate to the task the officer must perform, (2) the inadequacy is a result of the municipality's deliberate indifference, and (3) the

inadequacy is closely related to or actually caused the plaintiff's injury." *Epperson*, 104 F. Supp. 3d at 684; *see also Burgess*, 735 F.3d at 478

Deliberate indifference is a "stringent" standard, "requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Epperson*, 140 F. Supp. 3d at 684 (quoting *Regents v. City of Plymouth*, 568 F. App'x 380, 394 (6th Cir. 2014)). In other words, "a plaintiff 'must show prior instances of unconstitutional conduct demonstrating that the [municipality] has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury.'" *Bonner-Turner v. City of Ecorse*, 627 F. App'x 400, 414 (6th Cir. 2015) (quoting *Plinton v. Cty of Summit*, 540 F.3d 459, 464 (6th Cir. 2008)). Normally, "the easiest way for an individual to meet [this] burden is to point to past incidents of similar police conduct that authorities ignored." *Birgs v. City of Memphis*, 686 F. Supp. 2d 776, 780 (W.D. Tenn. 2010) (citation omitted).

In certain narrow circumstances, however, a municipality may be liable under a theory of a failure to train for a single instance of a constitutional violation for "recurring situations presenting an obvious potential for such a violation[.]" *Epperson*, 140 F. Supp. 3d at 685 (quoting *Bonner-Turner*, 627 F. App'x at 414). Under this theory, there must be a "complete failure to train" or training so "reckless or grossly negligent" that future misconduct is "substantially certain to result." *Harvey v. Campbell Cty.*, 453 F. App'x 557, 567 (6th Cir. 2011) (quoting *Hays v. Jefferson Cty.*, 668 F.2d 689, 874 (6th Cir. 1982)). Put differently, "the need for more or different training" must be obvious. *Id.* Ultimately, "mere allegations" of insufficient training or that better training could have prevented the injury do not suffice to establish a municipality's "deliberate indifference." *Id.* at 563.

The Court first notes that The City appears to only respond to allegations contained with Plaintiffs' Amended Complaint. (ECF No. 165-7 at PageID 1408.) As noted above, the Court's Order allowing for Plaintiffs to file an Amended Complaint limited Plaintiffs to add additional facts to support their § 1983 claim against The City. (ECF No. 105 at PageID 446–47.) Plaintiffs did not reallege nor incorporate by reference any of their prior factual allegations. In light of this and the Court's instructions, the Court will only rule on the allegations contained within Plaintiffs' Amended Complaint.[7]

Plaintiffs' Amended Complaint asserts that The City failed to properly train and supervise its officers regarding their use of a sting ray device. (ECF No. 106 at PageID 448–49.) This device allegedly allowed officers to listen in on Plaintiffs' communications without their knowledge. (*Id.* at PageID 449.) As a result, the conversations illegally recorded by officers later served as the basis for criminal charges against Plaintiffs. (*Id.* at PageID 450.)

The City counters Plaintiffs' allegations on two fronts. First, Plaintiffs cannot produce any evidence demonstrating that a sting ray device was even utilized by officers to listen in on Plaintiffs' communications. (ECF No. 165-7 at PageID 1409.) Second, Plaintiffs cannot demonstrate that The City had an inadequate training program. (*Id.*)

After review, the Court finds that The City is entitled to judgment in its favor. As a threshold issue, Plaintiffs do not produce any evidence establishing that officers utilized a sting ray device to monitor their phone conversations. Next, Plaintiffs fail to identify which training program is at issue nor do they explain how such program is deficient. Finally, Plaintiffs do not satisfy the "stringent" standard of showing that The City was deliberately indifferent.

7. Even if the Court were to address the allegations within Plaintiffs' original Complaint, The City would still be entitled to judgment in its favor for similar reasons. Plaintiffs fail to adduce any evidence supporting their claims.

As an initial obstacle, Plaintiffs fail to show that officers used a sting ray device. (ECF No. 165-7 at PageID 1409.) Given that Plaintiffs' claim hinges on the purported misuse of such a device, Plaintiffs must establish that such a device was used. *See Harvey v. Campbell Cty.*, 453 F. App'x 557, 565 (6th Cir. 2011) ("Plaintiffs, in response to a properly supported motion for summary judgment, cannot rely merely on allegations and arguments, but must set out specific facts showing a genuine issue for trial.") Plaintiffs have failed to do so. Rather, Plaintiff Watson, when asked "[w]hat evidence do you have that [officers] used a Stingray device," responded with "I'm not sure what — if they used— I mean, not sure, at least have no evidence of it[.]" (ECF No. 165-2 at PageID 1280.) Without establishing that officers utilized such a device, Plaintiffs cannot establish that they suffered any harm from The City's purported failures to properly train its officers on its proper usage.

Further, Plaintiffs have not established that The City's training of its officers was deficient nor that that The City was deliberately indifferent in the face of a deficient training program. *See Epperson*, 104 F. Supp. 3d at 684. After review of Plaintiffs' pleadings, they do not specify which training program is at issue and offer no explanation on how such unidentified training program was deficient.

Indeed, as a counter to Plaintiffs' allegations, The City has put forth evidence demonstrating that officers received adequate training. *See Harvey*, 453 F. App'x at 564–65. In support that officers receive adequate training, The City submits the affidavit of Lieutenant Colonel Dennis L. McNeil, Sr. ("Lt. Col. McNeil"). (ECF No. 165-5.) Lt. Col. McNeil has worked with the Memphis Police Department ("MPD") for thirty-one (31) years and serves as the "Commander of Training" at the police academy. (*Id.* at PageID 1293–94.) Because of this experience, he can attest to the kind of training officers receive. (*Id.* at PageID 1294.)

As an initial matter, all training received by Memphis police academy recruits is approved by a state regulatory body, the Tennessee Peace Officers Standards and Training Commission ("POST"). (*Id.* at PageID 1294–95.) As part of their approved training, recruits receive four-hundred and eighty (480) hours of instruction over various topics.[8] (*Id.* at PageID 1295.) The curriculum includes coverage of constitutional law, search and seizures, and civil liability. (*Id.* at PageID 1296.) Most important, there is extensive coverage of the Fourth Amendment, including thirty (30) hours devoted to search and seizures. (*Id.*) This also includes discussion of searches of persons with or without consent and issues around probable cause. (*Id.*) POST also mandates that commissioned officers receive forty (40) hours a year of in-service training.[9] (*Id.* at PageID 1295.)

Moreover, all officers are trained in the MPD's policies and procedures. (*Id.* at PageID 1299.) Officers are taught that they must always comply with these policies and procedures and are instructed to refer to the policy manual throughout their career. (*Id.*) Finally, the MPD enforces it policies and disciplines officers who violate the policies. (*Id.* at PageID 1300.)

Turning to the officers named in the Complaint, Defendant Richardson and Defendant Overly, it appears they received ample training. Defendant Richardson received over seven hundred (700) hours of training by the time of his commission as a Memphis police officer. (*Id.* at PageID 1297.) Similarly, Defendant Overly received over seven hundred (700) hours of instructions before his commission as a police officer. (*Id.* at PageID 1298.)

From the record, it appears that MPD officers received adequate training on the Fourth Amendment and more particularly, issues related to searches of persons with or without consent.

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8. At the time the officers named in this suit received training, the required number of hours was three-hundred and twenty (320). (ECF No. 165-5 at PageID 1295 n.1.)

9. The courses taught at in-service training vary from year to year and depend on what topics command staff recognize as needing greater instruction. (*Id.* at PageID 1296.)

Plaintiffs do not articulate how this training is "inadequate to the task the officer must perform." *Epperson*, 104 F. Supp. 3d at 684. Plaintiffs "rely instead on speculative, unsupported allegations to create metaphysical doubt, which clearly does not amount to a genuine issue of material fact." *Harvey*, 453 F. App'x at 565.

Plaintiffs also have not shown that The City was deliberately indifferent. *See id.; see also Bonner-Turner v. City of Ecorse*, 627 F. App'x 400, 414 (6th Cir. 2015) (quoting *Plinton v. Cty of Summit*, 540 F.3d 459, 464 (6th Cir. 2008)) ("[A] plaintiff must show prior instances of unconstitutional conduct demonstrating that the [municipality] has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury.") (internal quotations omitted). Plaintiffs point to no other instances of improper use of a sting ray device nor similar violations that would put The City on notice that additional training was needed. *See Connick*, 563 U.S. at 62 ("Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.'); *Birgs*, 686 F. Supp. 2d at 780 ("The easiest way for an individual to meet [this] burden is to point to past incidents of similar police conduct that authorities ignored.").[10] Thus, their claim fails for the reasons explained above.

B. Custom of Tolerance or Inaction toward constitutional violations

Plaintiffs further allege that The City "was aware that the officers involved had deficiencies which would lead to the type of injuries which the Plaintiffs suffered" but failed to take any action

10. The Court notes that deliberate indifference can be satisfied based on a single violation if the municipality failed to properly train its officers concerning "recurring situations presenting an obvious potential for such a violation[.]" *Epperson*, 140 F. Supp. 3d at 685. However, Plaintiffs do not allege this. Instead, they allege that The City's failure to train resulted in "a custom that has resulted in repeated substantiated excessive abuse claims against the City of Memphis." (ECF No. 106 at PageID 451. In other words, Plaintiffs allege "prior instances" of unconstitutional conduct. *See Ouza v. City of Dearborn Heights*, 969 F.3d 265, 287 (6th Cir. 2020).

to remedy the issue. (ECF No. 106 at PageID 451.) Another way Plaintiffs can establish municipal liability is to show "the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013). At bottom, this type of claim requires a party show "a pattern of inadequately investigating similar claims." *Id.*; *see also Nouri v. Cty. Of Oakland*, 615 F. App'x 291, 296 (6th Cir. 2015).

When a party alleges that a municipality has a custom of "inaction toward constitutional violations," the party must show: "(1) a clear and persistent pattern of misconduct, (2) notice or constructive notice on the part of the municipality, (3) the defendant's tacit approval of the misconduct, and (4) a direct causal link to the violations." *Nouri*, 615 F. App'x at 296 (citing *Powers v. Hamilton Cty. Pub. Defender Comm'n*, 501 F.3d 592, 607 (6th Cir. 2007)). The Sixth circuit has "never found notice of a pattern of misconduct (or the pattern itself) solely from the mistreatment of the plaintiff." *Id.* "To do so risks 'collapsing ... the municipal liability standard into a simple *respondeat superior* standard.'" *Id.* (quoting *Thomas*, 398 F.3d 426 at 432–33). "Like a claim based on failure to train employees, one grounded in a custom of tolerance requires a showing of deliberate indifference." *Epperson*, 140 F. Supp. 3d at 685–85 (citing *Key v. Shelby Cty.*, 551 F. App'x 262, 267 (6th Cir. 2014)); *see also D'Ambrosio v. Marino*, 747 F.3d 378, 388 (6th Cir. 2014).

The City is entitled to judgment on this claim because Plaintiffs have failed entirely to support this claim and have not established the existence of a genuine dispute. First, Plaintiffs do not cite to any previous incidents demonstrating a "clear and consistent pattern of misconduct." Building on that, without this pattern of misconduct, it cannot be said that The City received "notice or constructive notice" of a pattern of constitutional violations being committed by its officers. *See Nouri*, 615 F. App'x at 296. It appears that Plaintiffs intend to rely on this singular

alleged wrong by officers to support their claims. This they cannot do. *See id.* (explaining that a single instance never suffices to show a pattern of misconduct because to hold otherwise "risks 'collapsing ... the municipal liability standard into a simple *respondeat superior* standard'"). Finally, Plaintiffs have not shown the municipality's "tacit approval" of these purported violations or the requisite causal link. In sum, Plaintiffs custom of tolerance claim lacks any proof creating a genuine dispute to be resolved at trial. The City is entitled to judgment on this claim as well. Accordingly, the Court **GRANTS** The City's Motion for Summary Judgment and **DISMISSES** all claims **WITH PREJUDICE**.

Plaintiffs' Motion To Compel

As mentioned above, on October 23, 2020, Plaintiffs filed their pending Motion to Compel. (ECF No. 180.) Without reaching the merits of the motion, the Court **DENIES** the motion **AS MOOT**. Plaintiffs' Motion does not request that the Court hold off on ruling on The City's Motion for Summary Judgment. Indeed, the Court made Plaintiffs aware in a prior order that "the City's motion for summary judgment therefore remains pending and is ripe for adjudication." (ECF No. 177 at PageID 1588.) Accordingly, because the Court finds that The City is entitled to judgment in its favor, Plaintiffs' Motion is **DENIED AS MOOT**.

Conclusion

For the reasons above, The City's Motion for Summary Judgment is **GRANTED**. All claims against The City will be **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED, this 5th day of March, 2021.

s/ Mark Norris
MARK S. NORRIS
UNITED STATES DISTRICT JUDGE