

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REGINALD DONNELL DURHAM,

Plaintiff,

Case No: 99-73776
Judge Averm Cohn

-vs-

CITY OF DETROIT, a Municipal Corporation,
POLICE OFFICER SUSAN GUAJARDO,
POLICE OFFICER MIGUEL BENAVIDES,
POLICE OFFICER JILL POTTER,
POLICE OFFICER ERIC JONES,
POLICE OFFICER D. LOPEZ, and
POLICE OFFICER DANIEL CRETU (Badge #840),
Jointly and Severally,

Defendants.

LAURI R. ELLIAS (P31399)
Attorney for Plaintiffs
26000 West Twelve Mile Road
Southfield, MI 48034
(248) 355-1727

KRYSTAL A. CRITTENDON
Attorney for Defendants
CITY OF DETROIT LAW DEPARTMENT
1650 First National Building
Detroit, M 48226
(313) 237-3018

U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
DETROIT
FEB 14 11 49 AM '00
FILED

**DEFENDANTS CITY OF DETROIT and DETROIT POLICE OFFICERS
SUSAN GUAJARDO, MIGUEL BENAVIDES, JILL POTTER,
ERIC JONES, DAVID LOPEZ and DANIEL CRETU'S
MOTION FOR SUMMARY JUDGMENT and PARTIAL SUMMARY JUDGMENT**

**NOW COME Defendants, CITY OF DETROIT and DETROIT POLICE OFFICERS
SUSAN GUAJARDO, MIGUEL BENAVIDES, JILL POTTER, ERIC JONES, DAVID**

29

LOPEZ and DANIEL CRETU, by and through their attorney, Krystal A. Crittendon, and move this Honorable Court to enter an Order granting Summary Judgment and Partial Summary Judgment in their favor. This motion is being brought in accordance with Federal Rule of Civil Procedure 56(b), as there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law. In support of its motion, Defendants state the following:

1. Plaintiff initiated this five count civil action against Defendants, alleging the following theories of liability: Assault and Battery; Deprivation of Civil Rights, False Arrest and Imprisonment; Abuse of Process and Malicious Prosecution;
2. The action was removed to this Honorable Court, invoking the Court's federal jurisdiction, because the Plaintiff bases the action, in part, on the United States Constitution and 42 U.S.C. Section 1983;
2. The parties have engaged in discovery which has revealed the following uncontroverted facts:
 - a. Plaintiff was at a nightclub in the City of Detroit on July 26, 1998;
 - b. Defendants, City of Detroit Police Officers Eric Jones and Miguel Benavides entered the nightclub at approximately closing time, 2:00 a.m., as part of their routine patrol;
 - c. A male bar patron assaulted a female bar patron and the assault was observed by Officer Jones who then attempted to stop the assault;
 - d. Officers Jones claims that Plaintiff attempted to prevent him from arresting the aforementioned male bar patron by grabbing Officer Jones;
 - e. Plaintiff was told by Officers Jones that he was under arrest and was handcuffed after a brief struggle;
 - f. Officer Benavides was summoned by a bar employee and attempted to assist Officer Jones as he struggled with Plaintiff;

- g. Officers Lopez, Cretu, Potter and Guajardo entered the nightclub *after* Plaintiff had been told by Officer Jones that he was under arrest;
- h. Officers David Lopez and David Cretu conveyed Plaintiff to the Fourth Precinct for further processing after his arrest;
- i. Plaintiff was cited with violation of the City of Detroit misdemeanor ordinance prohibiting "Interfering with a City Employee in the Performance of their Duty";
- j. The charge against Plaintiff was dismissed by the Court, without prejudice, because the arresting officers were not present in the courtroom on the scheduled trial date;

3. Plaintiff's Complaint alleges that the individually named defendants are liable to him for the commission of the following intentional torts: Assault and Battery, False Arrest and Imprisonment, Abuse of Process and Malicious Prosecution;

4. Plaintiff's Complaint further alleges that the individually named police officers and the City of Detroit are liable to him pursuant to 42 USC §1983 and under the Michigan Constitution for unconstitutional customs, policies or practices which caused violations of the Fourth and Fourteenth Amendments;

5. Depositions of Plaintiff and all Defendant Police Officers have been taken and all Defendants deny that they assaulted and/or battered Plaintiff;

6. Other than Officers Eric Jones and Miguel Benavides, Plaintiff cannot identify any officer who had physical contact with him to support his claim that he was assaulted and/or battered by any of the other named defendants. (See Exhibit A - Plaintiff's deposition transcript pp. 62-67, 71, 72);

7. Officers Susan Guajardo, Jill Potter, David Lopez and Daniel Cretu are, therefore, entitled to summary judgment on the claims of Assault and Battery, as there is no genuine issue of

material fact regarding whether they assaulted and battered Plaintiff;

8. Additionally, Officers Guajardo, Potter, Lopez and Cretu merely assisted Officer Jones in effectuating Plaintiff's arrest;

9. As Officers Benavides, Guajardo, Potter, Lopez and Cretu were not the arresting officers, then there is no genuine issue of material fact regarding whether they caused Plaintiff to be falsely arrested or imprisoned, maliciously prosecuted or whether they abused process in causing Plaintiff to be arrested;

10. Officers Benavides, Guajardo, Potter, Lopez and Cretu are, therefore, entitled to summary judgment on the claims of False Arrest and Imprisonment, Abuse of Process and Malicious Prosecution;

11. Moreover, MCL 600.2907 provides, in pertinent part, that a cause of action exist for Malicious Prosecution against "(e)very person who shall,... *maliciously, cause or procure* any other to be arrested, attached, or in any way proceeded against...." (Emphasis added);

12. Only Officer Jones, as the arresting officer, caused the proceedings to be instituted against Plaintiff and Officers Benavides, Guajardo, Potter, Lopez and Cretu are, therefore, entitled to summary judgment on the claims of Abuse of Process and Malicious Prosecution;

13. Furthermore, a cause of action for malicious prosecution may be maintained only if a proceeding terminates in a Plaintiff's favor, there was not probable cause for the initiation or continuation of the proceeding and the proceeding was initiated with malice or a primary purpose other than that of bringing an offender to justice. *Markowitz v Pappas*, 102 Mich App 1 (1980);

14. The criminal proceedings against Plaintiff were dismissed by the Court before trial because the arresting officer was not present in the courtroom and such dismissal was *without*

prejudice; the proceedings were, therefore, not terminated in Plaintiff's favor. (See Exhibit A - Plaintiff's deposition transcript p. 83.);

16. As the charge against Plaintiff was not terminated in his favor, Plaintiff cannot maintain a cause of action for Malicious Prosecution against Officer Eric Jones and he is also, therefore, entitled to summary judgment on the claims of Abuse of Process and Malicious Prosecution;

17. FINALLY, pursuant to 42 USC § 1983, a police officer who acts in good faith in performing his job duties are entitled to qualified immunity from the imposition of liability;

18. No genuine issue of material fact exists regarding whether Defendants Miguel Benavides, Susan Guajardo, Jill Potter, David Lopez and Daniel Cretu acted in good faith and while performing their job duties as police officers when they assisted Officer Eric Jones in effectuating the arrest of Plaintiff, as they entered the nightclub *after* Officer Jones had already advised Plaintiff that he was under arrest;

19. Plaintiff has not demonstrated that officers Benavides, Guajardo, Potter, Lopez or Cretu knew or should have known that there was an alleged lack of probable cause for his arrest;

20. Defendants Miguel Benavides, Susan Guajardo, Jill Potter, David Lopez and Daniel Cretu are, therefore, qualifiedly immune from the imposition of liability pursuant to 42 U.S.C. § 1983;

21. Moreover, pursuant to 42 U.S.C. § 1983, a governmental body cannot be held liable merely because it employs a tortfeasor. Monell v. Dept. of Social Services, 436 U.S. 658 (1978);

22. A governmental agency such as the City of Detroit, may be held liable for the violation of an individual's constitutionally protected rights only when the agency, acting through

the execution of its policies or practices directly inflicts the injury. Monell v. Dept. of Social Services, 436 U.S. 658 (1978);

23. Plaintiff has not identified any City of Detroit unconstitutional customs, policies or practices which caused the injury for which Plaintiff complains and Defendant City of Detroit is, therefore, not liable to Plaintiff for any constitutional deprivations under 42 US § 1983;

24. FURTHERMORE, Assault, Battery, False Arrest, False Imprisonment and Malicious Prosecution are intentional tort theories of liability;

25. The Governmental Immunity Act at MCL 691.1407 provides, in pertinent part, that “(E)xcept as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function;”

26. MCL 691.1401 defines a “governmental function” as “an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.”;

27. The management, operation and control of a police department is a governmental function. Moore v City of Detroit, 128 Mich.App. 491, 340 N.W.2d 640, *appeal denied* 222 Mich 891, 368 N.W.2d 228 (1983);

28. Defendant CITY OF DETROIT is, therefore, immune from the imposition of tort liability on the counts Assault, Battery, False Arrest, False Imprisonment and Malicious Prosecution of because these causes of action are not statutory exceptions to Defendant’s governmental immunity and the City of Detroit is entitled to summary disposition pursuant to the governmental immunity statute, MCL 691.1401 et seq.;

29. Moreover, a municipality is cannot be held vicariously liable for the actions of its employees. Ross v. Consumers Power Co. (On Rehearing), 420 Mich 567, 363 NW2d 641 (1984);

30. Federal Rule of Civil Procedure 12(b)(6) provides that a party may move for summary judgment if an opposing party has failed to state a claim upon which relief can be granted;

31. Federal Rule of Civil Procedure 56(b) provides that a "party whom a claim, counterclaim, or cross-claim is asserted..... may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.";

32. Federal Rule of Civil Procedure 56(c) provides that the judgment sought shall be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law;

33. As to whether Defendants are immune from the imposition of tort liability under MCL 691.1407 MSA 3.996(107) and entitled to qualified immunity under 42 U.S.C. § 1983 on the claims discussed above, there is no genuine issue as to any material fact and they are entitled to judgment as a matter of law.

WHEREFORE, predicated upon the facts presented and the authorities cited above, Defendants City of Detroit, Eric Jones, Miguel Benavides, Susan Guajardo, Jill Potter, David Lopez and Daniel Cretu respectfully request the court dismiss this action, in whole and in part, with prejudice, for the reasons detailed above.

Respectfully submitted,



KRYSTAL A. CRITTENDON (P49981)

Attorney for Defendant City of Detroit
CITY OF DETROIT LAW DEPARTMENT
1650 First National Building
Detroit, MI 48226
(313) 237-3018

DATED: February 9, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REGINALD DONNELL DURHAM,

Plaintiff,

Case No: 99-73776
Judge Avern Cohn

-vs-

CITY OF DETROIT, a Municipal Corporation,
POLICE OFFICER SUSAN GUAJARDO,
POLICE OFFICER MIGUEL BENAVIDES,
POLICE OFFICER JILL POTTER,
POLICE OFFICER ERIC JONES,
POLICE OFFICER D. LOPEZ, and
POLICE OFFICER DANIEL CRETU (Badge #840),
Jointly and Severally,

Defendants.

LAURI R. ELLIAS (P31399)
Attorney for Plaintiffs
26000 West Twelve Mile Road
Southfield, MI 48034
(248) 355-1727

KRYSTAL A. CRITTENDON
Attorney for Defendants
CITY OF DETROIT LAW DEPARTMENT
1650 First National Building
Detroit, M 48226
(313) 237-3018

U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
DETROIT
FEB 14 11 48 AM '00
FILED

**DEFENDANTS CITY OF DETROIT and DETROIT POLICE OFFICERS
SUSAN GUAJARDO, MIGUEL BENAVIDES, JILL POTTER, ERIC JONES,
DAVID LOPEZ and DANIEL CRETU'S BRIEF IN SUPPORT
OF THEIR MOTION FOR SUMMARY JUDGMENT
and PARTIAL SUMMARY JUDGMENT**

**NOW COME Defendants CITY OF DETROIT and DETROIT POLICE OFFICERS
SUSAN GUAJARDO, MIGUEL BENAVIDES, JILL POTTER, ERIC JONES, DAVID**

LOPEZ and DANIEL CRETU, by and through their attorney, Krystal A. Crittendon, and in accordance with Federal Rule of Civil Procedure 56(b), for its **Brief in Support of their Motion for Summary Judgment and Partial Summary Judgment**, state as follows:

Introduction

Plaintiff seeks damages from Defendants pursuant to 42 USC §1983 for alleged violations of the Fourth and Fourteenth Amendments. He further asserts the state tort claims of Assault, Battery, False Arrest, False Imprisonment and Malicious Prosecution against the individually named defendants.

Statement of Issues

One commits an Assault if he places another under an unjustified fear of imminent harm and/or danger. A Battery is committed if commits an unjustified harmful or offensive contact. An individual, including a police officer, may be liable to another for Assault and Battery. The issue in this case is whether in the absence of any evidence that police officers Susan Guajardo, Jill Potter, David Lopez and Daniel Cretu assaulted or battered Plaintiff, may they still be held liable to Plaintiff for the intentional torts of Assault and Battery.

A police officer may be liable for the arrest and subsequent imprisonment of an individual if the officer lacked probable cause to make the arrest and actually arrested or caused an individual to be arrested. The issue in this case is whether any genuine issue of material fact exists regarding whether Defendants Miguel Benavides, Susan Guajardo, Jill Potter, David Lopez and Daniel Cretu knew or should have known that there was no probable cause for Plaintiff to be arrested, as he alleges.

MCL 600.2907 provides that a cause of action exist for Malicious Prosecution against "(e)very person who shall, ... maliciously, cause or procure any other to be arrested, attached, or in any way proceeded against...." Such a cause may be maintained *only if* the proceeding terminates in a Plaintiff's favor, there was not probable cause for the initiation or continuation of the proceeding and the proceeding was initiated with malice or a primary

purpose other than that of bringing an offender to justice. The first issues relative to this claim in this case is whether claims for Abuse of Process and Malicious Prosecution may be maintained against Defendants Benavides, Guajardo, Potter, Lopez and Cretu, even though they were not the arresting officers who caused the charges to be initiated against Plaintiff. A second issue is whether claims for Abuse of Process and Malicious Prosecution may be maintained against the arresting officer, Officer Jones, even though the proceedings were not terminated in Plaintiff's favor and were dismissed by the Court before trial *without prejudice*.

A governmental agency, such as the City of Detroit, may be held liable for the deprivation of an individual's federal constitutional rights only where, through the implementation of the agency's policies, customs, or practices, the agency directly causes such deprivation. In the absence of any evidence establishing the existence of a City policy, custom, or practice causally related to an alleged deprivation, do Plaintiffs' federal constitutional claims fail?

Pursuant to 42 USC § 1983, a police officer who acts in good faith in performing his job duties is entitled to qualified immunity from the imposition of liability. Plaintiff does not contend that Defendants Miguel Benavides, Susan Guajardo, Jill Potter, David Lopez and Daniel Cretu knew or should have known that allegedly, there was no probable cause for his arrest. The issue in this case is whether in the absence of any evidence that the officers were not acting in good faith, can Defendants Benavides, Guajardo, Potter, Lopez and Cretu be held liable for alleged constitutional deprivations or are they qualifiedly immune from the imposition of liability pursuant to 42 U.S.C. § 1983?

Authority
The FRCP 56 Predicate

In accordance with FRCP 56, any party may move for summary judgement on the ground there is no genuine issue of fact, and when as a consequence, judgment is proper as a matter of law.

Various matters in addition to the pleadings may be considered in connection with an FRCP 56 summary judgment motion. Such matters may include affidavits,¹ depositions, answers to interrogatories, and admissions,² and oral testimony.³

In deciding an FRCP 56 motion, the court must concern itself solely with the existence of any genuine issue of material fact,⁴ and must view the pleadings, the supporting matters, and all reasonable inference drawn therefrom in the light most favorable to the non-moving party.⁵ Consequently, when the pleadings, the supporting matters, and reasonable inferences demonstrate a material factual dispute, summary judgment is inappropriate.⁶ Not every issue of fact or conflicting inference, however, presents a genuine issue of material fact requiring denial of an FRCP 56 summary judgment motion.⁷ Instead, the substantive law governing the case will determine what issues are material.⁸ The party opposing an FRCP 56 motion must also present more than a mere scintilla of affirmative evidence to establish a material factual dispute.⁹ A simple showing of some

¹ Supporting affidavits must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein; see, FRCP 56(e).

² See, FRCP 56(c)

³ See, FRCP 43(e).

⁴ Jaroslawicz v Seedman, 528 F2d 727 (2d Cir 1975) (it is not the court's responsibility to weigh the evidence or judge the credibility of witnesses, and, in effect, try the case).

⁵ Diebold v Civil Service Commission of St. Louis City, 611 F2d 697 (8th Cir 1979); Inland Oil and Transport Co v United States, 600 F2d 725 (8th Cir 1979), cert den 444 US 991

⁶ Meredith v Hardy, 554 F2d 764 (5th Cir 1977); United States v Diebold, supra.

⁷ Anderson v Liberty Lobby, 477 US 242, 106 Sct 2505, 91 LED2D 202 (1986).

⁸ Street v J.C. Bradford & Co., 886 F2d 1472 (6th Cir 1989); Anderson v Liberty Lobby, supra at 2510.

⁹ Street v J.C. Bradford & Co., supra; Anderson v Liberty Lobby, Inc., supra; Celotex Corp., v Catrett, 477 US 317, 106 Sct 2548, 91 Led2d 265 (1986); Matsushita Electric Industrial Co., Ltd. V Zenith Radio Corp., 475 US 574, 106 Sct 1348, 89 Led2d 538 (1986).

degree of metaphysical doubt regarding the material facts is insufficient.¹⁰

Statement of Material Facts

On July 26, 1999 at approximately 1:45 a.m., City of Detroit police officers Eric Jones and Miguel Benavides, while on routine patrol, entered the Perfect Beat nightclub. The nightclub, located in southwest Detroit, was the subject of a "special attention" bulletin issued by the Detroit Police Department because of several prior incidences which had occurred near closing time which was 2:00 a.m. The officers entered the nightclub to ensure that all was well and give a "police presence" to the bar patrons.

While the officers were in the nightclub, Officer Jones observed a male patron, Lemuel Daniel, strike a female patron, Corina Stevenson. Mr. Daniel and Ms. Stevenson are both acquaintances of Plaintiff, Reginald Durham and Plaintiff was in the nightclub to celebrate Ms. Stevenson's brother's birthday. Officer Jones attempted to intercede in the altercation between Mr. Daniel and Ms. Stevenson. Mr. Daniel took offense at Officer Jones' intervention and a struggle ensued between Mr. Daniel and Officer Jones. A large crowd which included Plaintiff Reginald Durham decided to assist Mr. Daniel as he struggled with Officer Jones. A bar employee, Lynette Turner, ran to get Officer Jones partner, Officer Benavides, and informed him that Officer Jones was in trouble and needed assistance. Officer Benavides broadcast an "officer in trouble" call over his police radio which prompted several police officers to quickly respond to the nightclub. Defendants Detroit Police Officers Susan Guajardo, Jill Potter, David Lopez and Daniel Cretu were some of the responding officers.

Plaintiff has testified that Officer Jones told him that he was under arrest for violating the City of Detroit misdemeanor ordinance prohibiting "interfering with a city employee in the performance of their duty." He claims that when Officer Jones attempted to handcuff him, a struggle ensued. Officers Guajardo, Potter, Lopez and Cretu entered the nightclub after Plaintiff had been told by Officer Jones that he was under arrest. Plaintiff claims that he was struck and kicked by officers as he was struggling, but he cannot identify who allegedly battered him. (See Exhibit A - Plaintiff's deposition transcript pp. 62-67, 71, 72). All officers deny striking or kicking Plaintiff.

¹⁰ Street v J.C. Bradford & Co., supra at 1480; Matsushita Electric Industrial Co. v Zenith Radio Corp., supra at 1356.

Plaintiff was eventually handcuffed and conveyed by Officers Lopez and Cretu to the Fourth Precinct for further processing.

On January 20, 1999, the charge against Plaintiff was dismissed, without prejudice, in the Thirty-Sixth District Court. The case was dismissed by the Court because the officers were not present in the courtroom at the time the case was called for trial. All officers have stated that they were not subpoenaed to appear for trial. Plaintiff now has filed this civil action against the City of Detroit, Officers Eric Jones, Miguel Benavides, Susan Guajardo, Jill Potter, David Lopez and Daniel Cretu. Plaintiff's five count Complaint alleges the following theories of liability: Assault and Battery; Deprivation of Civil Rights, False Arrest and Imprisonment; Abuse of Process and Malicious Prosecution. For the following reasons, all Defendants are entitled to summary judgment as a matter of law.

Application

a. Assault and Battery

Lack of Evidence that Defendants' Committed Assault and/or Battery

One commits an Assault if he places another under an unjustified fear of imminent harm and/or danger. A Battery is committed if one commits an unjustified harmful or offensive contact. An individual, including a police officer, may be liable to another for Assault and Battery.

In this case, in order to hold Defendants Guajardo, Potter, Lopez and Cretu liable for Assault and Battery, Plaintiff must establish that these officers actually placed in fear or apprehension of harm and had physical harmful or offensive contact with him. This Plaintiff cannot do. Plaintiff claimed at his deposition that he was struck and kicked by someone as he struggled with Officer Jones. When asked to identify who struck and kicked him, Plaintiff could not do so. (See Exhibit A - pp. 62-67, 71, 72). All officers deny that they struck or kicked Plaintiff. Based upon these facts, it is clear that Plaintiff cannot maintain an action against Officers Guajardo, Potter, Lopez or Cretu for Assault or Battery.

b. False Arrest and Imprisonment

Lack of Evidence that Defendants did not Reasonably Believe they had Probable Cause to Arrest

A police officer may be liable for the arrest and subsequent imprisonment of an individual if the officer lacked probable cause to make the arrest and actually arrested or caused an individual

to be arrested. In this case, Plaintiff now contends that he did not violate the City's ordinance which prohibits "interfering with a city employee in the performance of their duty." He does not, however, alleged that Defendants Benavides, Guajardo, Potter, Lopez and Cretu knew or should have known that there was no probable cause for his arrest. It is uncontroverted that it was only one officer (discovery has revealed that it was Officer Jones) who advised Plaintiff that he was under arrest while the other officers were not present. (See Exhibit A - pp. 62-67, 71, 72). This being the case, Defendants Benavides, Guajardo, Potter, Lopez and Cretu are entitled to summary judgment on the claims of False Arrest and Imprisonment.

c. Malicious Prosecution and Abuse of Process
The Criminal Proceedings were Initiated by only one
Defendant and were not Terminated in Plaintiff's Favor.

MCL 600.2907 provides that a cause of action exist for Malicious Prosecution against "(e)very person who shall,... *maliciously, cause or procure* any other to be arrested, attached, or in any way proceeded against...." Such a cause may be maintained *only if* the proceeding terminates in a Plaintiff's favor, there was not probable cause for the initiation or continuation of the proceeding and the proceeding was initiated with malice or a primary purpose other than that of bringing an offender to justice.

Malicious prosecution is a tort that "runs counter to obvious policies of the law in favor of encouraging proceedings against those who are apparently guilty, and letting finished litigation remain undisturbed and unchallenged." *Prosser & Keeton, Torts (5th ed)*, § 119, p 876. Malicious prosecution actions are not favored or encouraged except in plain, compelling cases. *Koski v Vohs*, 137 Mich App 91 (1984). Balancing the interests involved, actions for malicious prosecution have historically been limited by restrictions that make them difficult to maintain. *Renda v Int'l Union. UAW*, 366 Mich 58 (1962).

The elements of a malicious prosecution cause of action have been consistently defined by courts in Michigan. In order to prevail, Plaintiff has the burden of establishing *each* of the following:

1. Defendant caused or continued a prosecution against the plaintiff.
2. The proceeding was terminated in favor of the plaintiff.

3. Defendant initiated or continued the proceeding without probable cause.
4. Defendant initiated or continued the proceeding with malice or a primary purpose other than that of bringing an offender to justice.

See *Rivers v Ex-Cell-O Corp*, 100 Mich App 824 (1980), citing *Weiden v Weiden*, 246 Mich 347 (1929); *Raudabaugh v Baley*, 133 Mich App 242 (1983); *Markowitz v Pappas*, 102 Mich App 1 (1980). In a malicious prosecution action, where facts are undisputed, want of probable cause is a question of law to be determined by the court. *Modla v Miller*, 344 Mich 21(1955); *Markowitz supra*.

Michigan courts have consistently held that the only situation in which an action for malicious prosecution properly lies against a police officer is where the officer knowingly swears to false facts in a complaint, without which there is no probable cause. *Payton v City of Detroit*, 211 Mich App 375 (1995), appeal denied 453 Mich 855. When a prosecuting attorney conducts an independent investigation and decides to seek prosecution based on his own findings, Michigan courts have failed to sustain malicious prosecution claims. *Koski supra*.

If it is determined that a Defendant caused a Plaintiff to be prosecuted, Plaintiff must then establish that a proceeding terminated in his favor to maintain a cause of action for malicious prosecution. Unless and until proceedings terminate in favor of a plaintiff, an action for malicious prosecution cannot be maintained. *Parisi v Mich Twps Ass'n*, 123 Mich App 512 (1983). See also *Gianotta v Holderid*, 143 Mich App 249(1985).

In the case at hand, Plaintiff will be unable to establish the four elements of a Malicious Prosecution claim against all defendants. First, Defendants Benavides, Guajardo, Potter, Lopez and Cretu were not the arresting officers who caused the charges to be initiated against Plaintiff. Secondly, the criminal proceedings were not terminated in Plaintiff's favor and were dismissed by the Court before trial *without prejudice*. Therefore, the Malicious Process claim asserted against the arresting officer, Officer Jones, cannot be maintained. For the same reasons, Plaintiff's Abuse of Process Claim must also fail.

d. City Policy, Practice, or Custom
Causal Connection to Plaintiff's Asserted Deprivations

Generally, a governmental agency such as the City of Detroit, may be held liable for the

violation of an individual's constitutionally protected rights only when the agency, acting through the execution of its policies or practices directly inflicts the injury.¹¹

Asserting the mere existence of a policy alone, however, is insufficient to create liability.¹² A plaintiff must also demonstrate the policy or practice was, in fact, promulgated by policy making authority,¹³ it was unconstitutional on its face or in its application, and that it was the moving force behind Plaintiff's injuries.¹⁴

¹¹ Monell v Department of Social Services, 436 U.S. 685; 98 SCT.2018; 56 LEd2d.2d 611 (1978) (a municipality may be liable under §1983 only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts may fairly be said to represent official policy, inflicts the injury..."); see also, Oklahoma v Tuttle, 471 US 808 (1985); St. Louis v Proprotnik, 485 US 112 (1988); Pembauer v Cincinnati, 475 US 469 (1986); Canton v Harris, 498 US 378 (1989).

¹² Such may be a formally adopted policy, or an informally developed custom, practice, or procedure. Monell v Department of Social Services, supra; see also, Collins v Harker Heights, 503 US 115 (1992). An act performed pursuant to a "custom" that has not been formally approved by an appropriate decision maker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law. Webster v Houston, 735 F2d 838 (5th Cir 1984) (Official policy is a persistent wide-spread practice of city officials or employees, which although not authorized or officially adopted or promulgated policy, is so common in law as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of a municipality or an official to whom that body has validated policy making authority. Actions of officers or employees of the municipality are liable under Section 1983 unless they execute official policy as above defined); See also, Bennett v City of Sildell, 735 F2d 861 (5th Cir 1984) and 472 US 1016 (1985); Lopez v Houston Independent School District, 871 F2d 351 (5th Cir 1987); Board of the County Commissioners of Bryan County, Oklahoma v Jill Brown et. al., No 95-1100; 1997 Lexis 2793 (April 28, 1997); Barneir v Szentmiklosi, 810 FSupp 594 (ED Mich 1987)(a 1983 action is unavailable where the plaintiff fails to allege or demonstrate any governmental practice or custom acted upon by the government's employee or agent); Laise v City of Utica, No. 96-40232, 1997 US Dist Lexis 10267 (ED Mich, July 14, 1997) (Although 6th Circuit does not require a heightened pleading standard, a complete failure to plead a policy or custom requires dismissal. Citing, Fluellen v US Department of Justice Drug Enforcement Administration, 816 F Supp 1206 (ED Mich 1993), citing Foster v Walsh, 864 F2d 416 (6th Cir 1988)); See also, Adickes v S.H. Kress & Co., 398 US 144 (1970), cited by Monell at 690-691;

¹³ Monell v Department of Social Services, supra.

¹⁴ Gonzales v Ysleta Independent School District, 996 F.2d 745 (5th Cir. 1993) (where a policy in some sense causes, but does not compel, a constitutional violation, plaintiffs must establish the particular harm-producing deficiency "resulted from conscious choice"; they must establish the "policy makers deliberately chose (measures) which would prove inadequate"; before municipal liability may attach, plaintiffs must of evidence not simply of a decision, but a "decision by the city itself to violate the Constitution; inadequate, but constitutional policies and decisions rise to the same actionable plane only upon a showing they were enacted or reached with deliberate indifference to their possible unconstitutional consequences); Gentile v County of Suffolk, 129 F.R.D. 435 (E.D.N.Y. 1990), aff'd 926 F.2d 142 (2nd Cir. 1991) (citing City of Canton v Harris, 489 U.S. 378 (1989) (a municipality can be liable under §1983 only where its policies are the "moving force behind the constitutional violation"); Monell v Department of Social Services, supra at 694 (Congress did not intend to impose liability on a municipality unless deliberate action attributable to the municipality itself is the "moving force" behind the

1. Existence of an Unconstitutional Policy, Custom, or Practice. Plaintiff's pleadings and the concomitant failure of of in this action defeat their federal constitutional claims against the City. Specifically, Count II, paragraph 30 of Plaintiffs' Complaint predicates liability upon Defendant City of Detroit, alleging that the City had "certain policies, rules and regulations, and defendant's police officers underwent training in police procedures that police officers are mandated to follow." Plaintiff does not specifically identify the alleged unconstitutional customs, policies or practices or state how the alleged policies or practices were implemented and/or adopted (i.e., failure to train, failure to discipline . . .) For these reasons, Count II of Plaintiff's Complaint which alleges liability against Defendant City of Detroit pursuant to 42 USC §1983 for alleged constitutional violations must fail, as Plaintiff has failed to state a claim upon which relief can be granted. Defendant City is, therefore, entitled to judgment as a matter of law on this claim.

2. Qualified Immunity of Defendant Police Officers. When a governmental officer violates an individual's clearly established constitutional rights, the defense of qualified immunity is available if (1) the officer believed his or her conduct did not violate those rights and (2) the officer's belief was objectively reasonable.¹⁵ The objective reasonableness of an official's action is determined by the law existing at the time of the conduct in question.¹⁶ Whether an official's belief is objectively reasonable depends on the facts of the particular case.¹⁷ Specifically, the officer's conduct under the existing circumstances is measured against the knowledge of a reasonable officer acting in similar circumstances.¹⁸ Qualified immunity is available if a reasonable officer would be uncertain regarding the manner in which the law applies to the particular facts with which he or she is

Plaintiff's federal rights deprivation); Board of the County Commissioners of Bryan County, Oklahoma v Jill Brown et. al., No 95-1100; 1997 Lexis 2793 (April 28, 1997). Polk v County of Dodson, 454 U.S. 312 (1981); Pembauer v Cincinnati, 475 U.S. 469 (1986) (municipal liability limited to action for which the municipality is actually responsible).

¹⁵ Davis v Sherer, 468 US 183; 104 SCt 3012; 82 LEd2d 139; reh den 468 US 1226 (1984).

¹⁶ Anderson v Creighton, 483 US 635; 107 SCt 3034; 97 LEd2d 523 (1987) on remd 724 FSupp 654 (D Minn 1989); Henry v Metropolitan Sewer District, 922 F2d 332 (6th Cir 1990).

¹⁷ Hurlman v Rice, 927 F2d 74 (2nd Cir 1991).

¹⁸ Bovle v Burke, 925 F2d 497 (1st Cir 1991); Lopez v Robinson, 914 F2d 497 (4th Cir 1990); Auriemma v Rice, 910 F2d 1449 (7th Cir 1990), cert den 111 SCt 2796; 115 LEd2d 970 (1991).

confronted.¹⁹ Similarly, if reasonable officers could disagree regarding the lawfulness of a particular act, the defense of qualified immunity is appropriate.²⁰ Since the objective reasonableness of an official's conduct determines his or her entitlement to qualified immunity, subjective factors and surrounding circumstances generally are not relevant to the determination.²¹

Whether the official's conduct conforms to the objective reasonableness standard may be established as a matter of law when there is no genuine issue of fact regarding the official's conduct.²²

In the case at hand, Count II of Plaintiff's Complaint against Defendants Miguel Benavides, Susan Guajardo, Jill Potter, David Lopez and Daniel Cretu must also fail. As detailed above, Plaintiff has not demonstrated that Defendants Benavides, Guajardo, Potter, Lopez or Cretu knew or should have known that there was no probable cause to arrest him. Each officer possessed a reasonable and objective belief that they had the authority to assist Officer Jones in taking Plaintiff into police custody. Consequently, each is immune to liability from Plaintiffs' claims. Assuming, arguendo, that these Defendants arrest of Plaintiff constituted a direct deprivation of his constitutional rights, Defendants acted at all times in good faith. The Defendants are, therefore, the officers are immune from liability under 42 USC § 1983.

Summary judgment is proper absent a specific claim or showing of a custom policy or practice which leads to deprivation of a constitutional protected that a Plaintiff alleges.²³ In the instant matter, Plaintiff is without a source of factual support to establish, as a matter of policy, custom, or practice that the City of Detroit has employed or adopted any unconstitutional customs, policies or practices. In the absence of any evidence establishing the existence of a deliberately indifferent City policy, custom, or practice and since the defendant officers acted in good faith,

¹⁹ Hopkins v Stice, 916 F2d 1029 (5th Cir 1990).

²⁰ Pfannstiel v Marion, 918 F2d 1178 (5th Cir 1990).

²¹ Davis v Sherer, supra; Harlow v Fitzgerald, 457 US 800, 102 S Ct 2727; 73 LEd2d 396 (1982); Mitchell v Forsyth, 472 US 511; 105 S Ct 2806; 86 LEd2d 411 (1985) (Harlow "rejected the inquiry into state of mind in favor of a wholly objective standard").

²² Thorsted v Kelly, 858 F2d 571 (9th Cir 1988).

²³ City of Canton v Harris, supra; Smith v Yono, 613 F.Supp. 50 (D. Mich. 1985).

Plaintiff fails to present a genuine issue of material fact for resolution by the trier of fact. Consequently, summary judgment is appropriate.

Conclusion

Predicated upon the facts presented, the authorities cited, and the arguments advanced above, Defendants hereby respectfully requests the court grant their Motion for Summary Judgment and Partial Summary Judgement dismiss Plaintiff's claims, in whole and in part, against Defendants, with prejudice and with costs and attorney fees.

Respectfully submitted,



KRYSTAL A. CRITTENDON (P-49981)

Assistant Corporation Counsel

CITY OF DETROIT LAW DEPARTMENT

1650 First National Building

Detroit, Michigan 48226

(313) 237-3018

DATED: February 9, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SEE CASE FILE FOR
ADDITIONAL
DOCUMENTS OR PAGES
THAT WERE NOT
SCANNED