If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

MIJUAN BARBOUR,

Plaintiff-Appellant,

v

CITY OF DETROIT, JOSE MARTINEZ, ZACHARY DIGIACOMO, and JAMES AUDE,

Defendants-Appellees,

and

DETROIT POLICE DEPARTMENT, TREEHOUSE CLUB MARIJUANA DISPENSERY, FABIO DALLO, KESHAUNA BUTLER, DEON DOE, DEANDRE MACK, and TROMELL ROBINSON,

Defendants.

UNPUBLISHED
November 23, 2021

No. 355866
Wayne Circuit Court
LC No. 18-006258-NO

Before: GLEICHER, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right following the trial court's order granting summary disposition in favor of defendants,[1] the City of Detroit (the city), Detroit Police Corporal Jose Martinez, Detroit Police Officer Zachary Digiacomo, and Detroit Police Detective James Aude. This matter arises out of a brutal beating and sexual assault plaintiff suffered at the hands of several individuals

[1]The Detroit Police Department was dismissed by stipulation, and the remaining defendants, the Treehouse Club Marijuana Dispensary (the Treehouse), Fabio Dallo, Keshauna Butler, Deon Doe, Deandre Mack, and Tromell Robinson were never served with the complaint and never filed an appearance in the trial court or in this Court. Therefore, we refer to the city, Corporal Martinez, Officer Digiacomo, and Detective Aude as "defendants," and the Treehouse, Dallo, Butler, Doe, Mack, and Robinson as "the Treehouse defendants." We note as well that "Dispensery" in the caption of this opinion reflects the spelling used in plaintiff's complaint.

associated with the Treehouse Club Marijuana Dispensary (the Treehouse), following an investigation into a break-in at the Treehouse by Officer Digiacomo and Corporal Martinez, during which they arrested plaintiff as a suspect. During the investigation, Martinez took a picture of plaintiff with his cellphone and texted the picture to a Treehouse employee. Plaintiff was savagely assaulted by several Treehouse employees following his release from incarceration. Plaintiff generally contends that the photograph was responsible for bringing about the assault, and the other police defendants facilitated the assault by covering up the transmission of the photograph. The trial court expressed sympathy for plaintiff, but it concluded that responsibility for the assault could not be attributed to the police defendants. We agree and affirm.

I. FACTUAL BACKGROUND

In the early morning hours of April 24, 2017, Officer Digiacomo and Corporal Martinez arrived at the Treehouse in Detroit in response to a report of a breaking and entering. According to the report, the breaking and entering had been committed by a man was wearing a red scarf and carrying a pipe, and another man who was carrying a backpack. After they arrived, Digiacomo and Martinez arranged for a Treehouse employee to meet them at the business. While they waited for the employee, Digiacomo and Martinez noticed that someone had recently called 911 to report that there was a car parked at a nearby vacant house. Plaintiff estimated that the Treehouse was about "eight houses down" from that vacant house.

Officer Digiacomo and Corporal Martinez went to the vacant house and discovered a car parked in the driveway. They heard a rear garage door close, and, upon further investigation, they discovered plaintiff, Morris Broadnex, and Javion Moore inside of the vacant house's garage. Plaintiff testified that Broadnex had invited him to the house to smoke marijuana, he had arrived at about 10:50 p.m. to find Moore also present, and he had been there for two to three hours when the police arrived. The police initially ordered the three individuals out at gunpoint, but they lowered their guns when plaintiff, Broadnex, and Moore followed their commands; the police did not otherwise threaten plaintiff. Digiacomo and Martinez also found a red scarf and a blue backpack in the garage, and a sledgehammer near the garage. Digiacomo and Martinez placed plaintiff, Broadnex, and Moore in a police car, and drove the men to the Treehouse.

After they arrived at the Treehouse, Digiacomo and Martinez met with Deandre Mack, who worked at the Treehouse. Mack showed Digiacomo and Martinez a surveillance video recording, which depicted the breaking-and-entering, and still photographs taken from that video. The surveillance video showed a man, whom Digiacomo and Martinez identified as Moore, wearing a red scarf and using a sledgehammer to destroy security cameras, and another man who was wearing a backpack. Mack told Digiacomo and Martinez that only a portion of the surveillance video was available because the building had lost power during the breaking-and-entering, and that more footage would be available in the future.

After he saw the video, Martinez went outside, and he arranged plaintiff, Moore, and Broadnex on the driver's side of a police car. Martinez used his cellphone to take individual photographs of each of the three men, then he sent the photographs to Mack via text message. Digiacomo was apparently talking to Mack at that time. Ultimately, Martinez and Digiacomo arrested plaintiff, Broadnex, and Moore for the breaking-and-entering, and drove them to the Detroit Detention Center. Martinez testified that he believed plaintiff had been involved in the

breaking-and-entering because of the sledgehammer and because plaintiff was also committing the crime of entering a property without the owner's permission at that time. However, his report only listed the breaking-and-entering offense. At his deposition, Martinez believed that the incomplete surveillance video showed plaintiff breaking lights and a utility box, and "two other persons" standing near an alley. However, Digiacomo admitted that only Moore was actually identified using the surveillance video, which depicted Moore wearing a red scarf and carrying a pipe or sledgehammer, and it further depicted one other man wearing a backpack.

On deposition, plaintiff testified that he was released from the Detention Center on April 27, 2017, and he was told that "all the charges were dropped or something." According to Detroit Police Investigator Tamara Foster, a "Mr. Ghassan Hanna" was the owner of the Treehouse,[2] and Hanna had declined to speak with the prosecutor because "they'll get out anyway" and he did not want "to cooperate with the courts to pursue charges against the 3 defendants." After he was released, plaintiff spoke with, and "had text messages and calls" on his Snapchat[3] from Deon Doe, who worked at the Treehouse. Doe asked plaintiff to meet him at the Treehouse to discuss a construction job for plaintiff. Plaintiff knew Doe "from the east side," and he asked Doe "what was up with that construction job." Doe replied that plaintiff's "name had come up about that Tree House being broken into," and he said that he would talk to plaintiff the next day about a construction job. Plaintiff's uncle drove him to the Treehouse at the arranged time.

According to plaintiff, after he went inside the Treehouse, five men grabbed him, threw him to the floor, and placed handcuffs on him. Plaintiff recounted that the people he recognized inside the Treehouse during the attack were the Treehouse's "owner," "Deon," "Dre," "Mack," "some fat guy," and "some short guy with dreads." Plaintiff described being punched, choked, struck on the head with a firearm, and ultimately sodomized with an object. During the attack, one man threatened to harm plaintiff's family if plaintiff did not give him more than $10,000 for the damage caused to the Treehouse. Also during the attack, someone showed plaintiff a cellular phone that displayed "the exact picture that the officer took" of him in handcuffs. The incident lasted about two hours, following which plaintiff was taken outside to his uncle's car. Plaintiff's uncle drove plaintiff home, whereupon plaintiff's mother drove him to the hospital. Plaintiff remained at the hospital for about five days.

Plaintiff was interviewed by Detroit Police detectives at the hospital regarding the attack, and Detective Aude was eventually assigned to investigate. Later, a Detroit Police Internal Affairs investigation concluded that Corporal Martinez's transmission of the photographs to Mack constituted misconduct which may have assisted the Treehouse defendants in identifying and then attacking plaintiff. The prosecutor assigned to prosecute the men who attacked plaintiff indicated that Detective Aude failed to disclose that Corporal Martinez had been the person who sent the photograph of plaintiff. Similarly, the Internal Affairs investigation concluded that Detective Aude also engaged in misconduct when he failed to mention Martinez's transmission of the photographs in written search warrants related to the investigation into the attack on plaintiff.

[2] Hanna's ownership of the Treehouse appears to be undisputed, but there is no evidence in the record directly establishing that ownership.

[3] Snapchat is a hybrid social media platform and messaging program.

Plaintiff's mother indicated to the Internal Affairs investigator that plaintiff "was afraid to talk to anyone because he was told by unknown people that he would be killed if he talk[ed]." It is not clear to us whether any of the men involved in the assault were ever charged or convicted with any crime.

Plaintiff raised six claims in his amended complaint: (1) a 42 USC 1983 claim against Corporal Martinez and Officer Digiacomo for a Fourth Amendment violation, (2) a § 1983 claim against Martinez, Digiacomo, and Detective Aude alleging a state-created danger, (3) a claim of municipal liability against the city under § 1983 for constitutional violations, (4) a claim of intentional infliction of emotional distress against Martinez, Digiacomo, Aude, and the Treehouse defendants,[4] (5) a § 1983 conspiracy claim against Martinez, Digiacomo, Aude, and the Treehouse defendants, and (6) a claim of assault and battery against Martinez, Digiacomo, and the Treehouse defendants. Defendants moved for summary disposition, and the trial court granted the motion. This appeal followed.

II. STANDARDS OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*. at 119. "A defendant is entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's claims are barred because of immunity granted by law." *Milot v Dep't of Transp*, 318 Mich App 272, 275; 897 NW2d 248 (2016). This Court reviews de novo whether an individual is entitled qualified immunity. *Thomas v McGinnis*, 239 Mich App 636, 644; 609 NW2d 222 (2000).

III. CLAIMS UNDER 42 USC 1983

As discussed, plaintiff brought four claims pursuant to 42 USC 1983: false arrest, state-created danger, municipal liability for constitutional violations,[5] and conspiracy to deprive plaintiff of his civil rights. Although Martinez's act of sending the photograph, and the other officers'

[4] Because the Treehouse defendants were never properly made parties to this matter, we will not discuss the claims as against them. See footnote 1.

[5] This count in plaintiff's complaint did not explicitly cite 42 USC 1983, but it is clear that plaintiff's argument is premised on 42 USC 1983. We look to the substance of pleadings rather than formal names or labels applied by the parties. *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011).

failure to mention Martinez having sent the photograph, reflect extremely poor judgment, we are not persuaded that defendants' conduct rises beyond honest, if tragic, negligent error.

42 USC 1983 provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . 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 . . . .

This Court has explained that "42 USC 1983 is the all-purpose federal civil rights statute, providing a remedy for violations of the federal constitution and other federal law." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 195; 761 NW2d 293 (2008). "Section 1983 itself is not the source of substantive rights; it merely provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *York v Detroit*, 438 Mich 744, 757-758; 475 NW2d 346 (1991). "There must be an underlying violation of the federal constitution or a federal law, in order for a § 1983 claim to lie." *Mettler*, 281 Mich App at 196. Thus, a "plaintiff must demonstrate that the defendants, acting under color of state law, deprived it of a right secured by the constitution or the laws of the United States." *Id*. at 195.

A "municipality constitutes a 'person' to which 42 USC 1983 applies." *Johnson v Vanderkooi*, 502 Mich 751, 762; 918 NW2d 785, 791 (2018). A municipality may be liable under § 1983 "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 . . . " *Monell v Dep't of Social Servs*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978).

A. FALSE ARREST

Plaintiff argues that the trial court erred by dismissing his claim of false arrest. We disagree.

"[T]he Fourth Amendment of the United States Constitution guarantees the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' " *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 23; 672 NW2d 351 (2003), quoting US Const Am IV. "False imprisonment has been defined by this Court as an unlawful restraint on a person's liberty or freedom of movement." *Id*. at 17. "A false arrest is an illegal or unjustified arrest, and the guilt or innocence of the person arrested is irrelevant." *Id*. at 18. "To prevail on a claim of false arrest or false imprisonment, a plaintiff must show that the arrest was not legal, i.e., the arrest was not based on probable cause." *Id*. Thus, "the existence of probable cause is relevant to the analysis; a claim of false arrest or false imprisonment cannot be sustained if the arrest was legal." *Odom v Wayne Co*, 482 Mich 459, 481; 760 NW2d 217 (2008). "Probable cause justifying an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Peterson Novelties*, 259 Mich App at 23 (quotation marks and citations omitted).

"Where the facts are undisputed, the determination whether probable cause exists is a question of law for the court to decide." *Id*. at 18.

The probable-cause standard is a "practical, nontechnical conception" that concerns "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Maryland v Pringle*, 540 US 366, 370; 124 S Ct 795; 157 L Ed 2d 769 (2003) (quotations omitted). "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Id*. at 371. The "substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized." *Id*. (quotation marks and citations omitted).

Plaintiff asserts that the trial court erred by ruling that his arrest was supported by probable cause, arguing that there was no evidence connecting him to the breaking-and-entering at the Treehouse. We disagree, and we hold that the record supported the trial court's conclusion that Corporal Martinez and Officer Digiacomo had probable cause to arrest plaintiff under the totality of the circumstances. As discussed, when Digiacomo and Martinez received the breaking-and-entering report, they were advised that two perpetrators had been present: a man wearing a red scarf and carrying a pipe or sledgehammer, and another man carrying a backpack. It was not unreasonable to suspect that the report of a car at a nearby vacant house, which was boarded up and without power, might be connected. Upon arrival at the house, they found a scarf, a backpack, and a sledgehammer similar to those depicted in the surveillance imagery from the Treehouse. Even though the video showed only two men,[6] Moore was positively identified on the video, and one of the men at the house said that they had been together all night. Under the totality of the circumstances, a prudent person would be persuaded that plaintiff was not merely present at the scene of a crime, but had actually been a participant in the breaking-and-entering at the Treehouse. The trial court properly dismissed plaintiff's false arrest claim.

B. STATE-CREATED DANGER

Plaintiff asserts that the trial court erred by dismissing his state-created danger claim. We disagree.

The Fourteenth Amendment of the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. Textually, the Fourteenth Amendment only guarantees procedural due process, but it nevertheless prohibits the government from invading individual liberty or property interests, irrespective of procedural fairness, through arbitrary exercises of power. *People v Sierb*, 456 Mich 519, 522-523; 581 NW2d 219 (1998); *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003). Generally, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v Winnebago Co Dep't of Social Servs*, 489 US 189, 195; 109 S Ct 998; 103 L Ed 2d 249 (1989). "The Clause

[6] Plaintiff contends that Martinez and Digiacomo lied at their depositions when they stated they believed they had identified plaintiff in the video. However, plaintiff has not shown anything more than imperfect memory after three years.

is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *Id*. However, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id*. at 199-200. The rationale is that when a government actor affirmatively restrains a person's liberty and makes that person incapable of caring for their own needs, the government actor must take responsibility for those needs. *Id*.

"Although the United States Supreme Court did not explicitly adopt a cause of action for 'state-created danger,' various federal appellate courts have relied on the Court's language to support a constitutional claim for state-created danger under 42 USC 1983 and the Due Process Clause of the United States Constitution." *Mays v Snyder*, 323 Mich App 1, 75; 916 NW2d 227 (2018), aff'd sub nom *Mays v Governor*, 506 Mich 157 (2020). "[T]he state-created-danger exception applies in situations in which an individual in the physical custody of the state, by incarceration or institutionalization or some similar restraint of liberty, suffers harm from third-party violence resulting from an affirmative action of the state to create or make the individual more vulnerable to a danger of violence." *Id*. at 76.

"Although the elements of a state-created-danger cause of action vary slightly between federal circuits . . . most federal appellate courts have adopted a test substantially similar to the one employed by the Sixth Circuit Court of Appeals." *Mays*, 323 Mich App at 77. We are not bound by decisions of lower federal courts, even where they are unanimous, but we may consider them to be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004) (citation omitted). The test employed by Sixth Circuit has been applied by this Court to evaluate state-created danger claims brought under 42 USC 1983. *Manuel v Gill*, 270 Mich App 355, 365-367; 716 NW2d 291 (2006), aff'd in part and rev'd in part on other grounds 481 Mich 637 (2008); *Dean v Childs*, 262 Mich App 48, 53-57; 684 NW2d 894 (2004), aff'd in part and rev'd in part on other grounds 474 Mich 914 (2005).

The Sixth Circuit's test for state-created danger claims is as follows:

> 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff. [*Mays*, 323 Mich App at 77, quoting *Cartwright v Marine City*, 336 F3d 487, 493 (CA 6, 2003) (quotation marks omitted).]

The third element requires a plaintiff to "demonstrate that the state acted with the requisite culpability to establish a substantive due process violation under the Fourteenth Amendment." *McQueen v Beecher Community Sch*, 433 F3d 460, 469 (CA 6, 2006) (quotation marks and citation omitted). A deliberate-indifference standard is appropriate in settings that provide an opportunity for unhurried judgments, but "a higher bar may be necessary when opportunities for reasoned deliberation are not present." *Id*. (quotation marks and citations omitted). The Sixth Circuit has "equated deliberate indifference with subjective recklessness, which means that the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id*. (quotation marks and citations omitted).

"Subjective recklessness can be proven circumstantially by evidence showing that the risk was so obvious that the official had to have known about it." *Id*. (quotation marks and citation omitted).

In his amended complaint, plaintiff raised a § 1983 claim of state-created danger, premised on violations of his right to procedural and substantive due process, against Corporal Martinez, Officer Digiacomo, and Detective Aude based on the allegation that Martinez's dissemination of a photograph of plaintiff resulted in the Treehouse defendants' viciously attacking him. We agree with the trial court that Martinez's act of texting the photograph to Mack clearly satisfied the first two elements of the Sixth Circuit's state-created danger test. Texting the photograph was an affirmative act, it was specific to plaintiff, and, given that it was shown to plaintiff during the attack, it obviously exposed plaintiff to a physical attack. The closer question is whether Martinez should have known that texting the photograph would place plaintiff in danger. Ultimately, although it was easily a negligent decision, we are not persuaded that it rises to the level of deliberate indifference.

We observe at the outset that it would have been foolish for Martinez to be completely unaware of at least the possibility of vigilante retaliation. The concept of "street justice" is not an obscure one, especially in a community that may have some suspicion that justice will not be obtained through the courts. However, it would be reasonable to presume that anyone interested in meting out such "street justice" would be interested in meting it out to the correct person or persons. Thus, it would have been reasonable to presume that if plaintiff did not, in fact, match any person depicted in the Treehouse's surveillance videos, plaintiff would simply be disregarded. It would also have been reasonable to presume that if plaintiff was a match to a person in the videos, plaintiff would be duly prosecuted. Martinez explained that he sent the photographs to Mack for the purpose of obtaining a "good ID." We are not persuaded that his actions therefore lacked a legitimate governmental purpose. Under the circumstances, Martinez's decision to pursue a somewhat informal and loose manner of trying to obtain that identification as quickly and efficiently as possible does not appear to have been an act of deliberate indifference. Put another way, Martinez had some valid reason for sending the photograph, and the risk of vigilante retaliation was not *so* obvious that he *must* have known about it.[7]

Regarding Officer Digiacomo and Detective Aude, we are unable to discern how plaintiff contends they were involved in sending the photograph to Mack, or how their actions contributed to endangering plaintiff following the transmission of the photograph. Irrespective of whether it was improper for them to fail to note in their reports that Martinez had sent the photographs, by that point, the damage had been done. In any event, there is no reason why they should have held

[7] Plaintiff describes it as "amazing" that Martinez denied knowing "what the assailants were going to do with the photo once [Martinez] sent it to them." Plaintiff apparently extrapolates out of context Martinez's statement that he sent the photo "so that when the rest of the video was uploaded, *they* could match the photos to the video, and have a good ID" (emphasis added). We take judicial notice that the word "they" has, in recent years, become a widely-accepted de-facto epicene singular pronoun. Furthermore, even if Martinez expected that more than one Treehouse employee might review the photo, that is not tantamount to expecting the photo to be abused.

any greater expectation that plaintiff would be savagely beaten and sexually assaulted as a consequence. The trial court therefore properly dismissed plaintiff's state-created danger claim.

C. CIVIL CONSPIRACY

Plaintiff contends that the trial court erred by dismissing his civil conspiracy claims. We disagree.

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). In bringing a civil conspiracy claim, "the plaintiff must establish some underlying tortious conduct." *Urbain v Beierling*, 301 Mich App 114, 132; 835 NW2d 455 (2013). Thus, "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003) (quotation marks and citation omitted), aff'd 472 Mich 91 (2005). Pursuant to the intracorporate-conspiracy doctrine, officers of a single entity generally cannot commit a conspiracy when they are acting in their official capacities on behalf of the entity. *Ziglar v Abbasi*, ___ US ___, ___; 137 S Ct 1843, 1867; 198 L Ed 2d 290 (2017); *Blair v Checker Cab Co*, 219 Mich App 667, 674; 558 NW2d 439 (1996). However, the intracorporate-conspiracy doctrine does not apply where the officers "have an independent personal stake in" the matter and "are actually acting on their own behalf." *Blair*, 219 Mich App at 674-675.

As the trial court observed, plaintiff's civil conspiracy claim was premised on allegations of two separate acts—Martinez's sending of the photographs to Mack which culminated in an attack on plaintiff, and Aude's later failure to document that act. As an initial matter, plaintiff's allegations articulate a claim that the police defendants acted on their own behalf, so the "intracorporate-conspiracy doctrine" does not apply. However, plaintiff does not provide a scintilla of evidence[8] that any of the police defendants ever intended to cause plaintiff harm. As discussed, Martinez did not engage in the wisest course of conduct by sending the photograph, but the evidence does not show that he sent it for improper reasons. There is no evidence that Digiacomo or Aude were involved in the transmission of the photograph. Even if we were to presume that the evidence might suggest a conspiracy to hide Martinez's mistake, by then the harm was already done, and it is not clear what kind of tort against plaintiff would ensue. We are therefore unpersuaded that we should accept plaintiff's minimally-briefed proposal to deem Aude an "accessory after the fact." The trial court therefore properly dismissed plaintiff's civil conspiracy claim.

D. MUNICIPAL LIABILITY

Plaintiff's claim of municipal liability under § 1983 for constitutional violations against the city was based on the allegation that the city failed to train its police officers regarding the

[8] Although proofs may be established by drawing reasonable inferences from circumstantial evidence, it is insufficient if a conclusion is merely plausible. See *Skinner v Square D Co*, 445 Mich 153, 163-165; 516 NW2d 475 (1994). We find plaintiff to have provided only speculation.

disclosure of information that might endanger citizens or suspects. Plaintiff asserts that the trial court erred by dismissing his municipal-liability claim. We disagree.

In relevant part, plaintiff must establish that his rights were violated by a policy or custom of the city. *Johnson*, 502 Mich at 762. "The policy or custom itself need not be unconstitutional," but "an alleged policy of inaction must reflect some degree of fault before it may be considered a policy upon which § 1983 liability may be based." *York*, 438 Mich at 755. Inadequate police training may constitute such a policy if the inadequacy "amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id*. (quotation marks and citation omitted). "Deliberate indifference contemplates knowledge, actual or constructive, and a conscious disregard of a known danger." *Id*. at 757. Mere negligence is insufficient. *Id*.

"A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." *Connick v Thompson*, 563 US 51, 62; 131 S Ct 1350; 179 L Ed 2d 417 (2011). "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." *Id*. "[I]n a narrow range of circumstances, a pattern of similar violations might not be necessary to show deliberate indifference." *Id*. at 63 (quotation marks and citation omitted). Although rare, "the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." *Id*. at 64. Such a consequence of failing to train must be "*so* predictable" that it amounts to a "*conscious disregard*" of a person's constitutional rights. *Id*. at 71 (emphases in original).

Corporal Martinez testified that he never received any training related to vigilante justice, or whether to photograph a suspect or disclose the identity of a citizen. Similarly, Martinez never received training to the effect that, if he disclosed the identity of a suspect to a victim, he should inform the suspect of the disclosure. We will presume, for the sake of argument, that Martinez's testimony establishes that the training provided by the city is inadequate. However, there is no evidence that any similar attacks followed similar disseminations of photographs to crime victims, nor does plaintiff even suggest that his attack was not unique. It is also not readily apparent that the assault was so blatantly predictable that the city should have known the assault to be an inexorable consequence of its inadequate training. The trial court therefore properly dismissed plaintiff's municipal liability claim. We note in addition that, having dismissed plaintiff's other claims, there can be no municipal liability in the absence of an underlying constitutional violation.

IV. QUALIFIED IMMUNITY

Plaintiff argues that the trial court erred by ruling that qualified immunity barred his claims against Corporal Martinez, Officer Digiacomo, and Detective Aude. The trial court never actually reached the question of qualified immunity, however, because it concluded that although plaintiff had suffered terribly, the police defendants had not violated his constitutional rights. We agree with the trial court. Because we have concluded that plaintiff's constitutional claims were properly dismissed, it is irrelevant whether the police defendants would have enjoyed qualified immunity.

V. GOVERNMENTAL IMMUNITY

Plaintiff asserted claims of assault and battery against Corporal Martinez and Officer Digiacomo, and claims of intentional infliction of emotional distress against all three police defendants. The trial court held that the police defendants were protected by governmental immunity. We agree.

A governmental employee is immune from intentional-tort liability "if (1) the employee's challenged acts were undertaken during the course of employment and the employee was acting, or reasonably believed he or she was acting, within the scope of his or her authority, (2) the acts were undertaken in good faith, or were not undertaken with malice, and (3) the acts were discretionary, rather than ministerial, in nature." *Oliver v Smith*, 290 Mich App 678, 688; 810 NW2d 57 (2010). The burden falls "on the governmental employee to raise and prove his entitlement to immunity as an affirmative defense." *Odom*, 482 Mich at 479. The governmental tort liability act, MCL 691.1401 *et seq*., explicitly preserved "the law of intentional torts as it existed before July 7, 1986." MCL 691.1407(3). Thus, whether an intentional tort claim lies against a governmental employee is governed by the common law. *Odom*, 482 Mich at 469-472.

"An assault is any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998) (quotation marks and citation omitted). Battery is defined as "the wilful and harmful or offensive touching of another person which results from an act intended to cause such contact." *Id*. (quotation marks and citation omitted). "To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004). "Liability attaches only when a plaintiff can demonstrate that the defendant's conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id*. (quotation marks and citations omitted).

We have been unable to discern precisely what conduct plaintiff alleges to have constituted intentional infliction of emotional distress. He essentially makes only vague and general references to defendants "actions," which he contends "were not in good faith, but rather were undertaken for the clear intent and purpose of causing him harm." For the reasons already discussed, we conclude that the evidence shows Martinez to have made a tragic but seemingly honest mistake, and to the extent the officers engaged in any subsequent cover-up, they appear to have been—at the most—endeavoring to avoid discipline. The trial court concluded, and plaintiff does not seemingly challenge on appeal, that plaintiff's intentional infliction of emotional distress claim was otherwise derived from his assault and battery claim.

To the extent plaintiff identifies any conduct allegedly constituting assault and battery, it could only have been committed by Martinez and Digiacomo, because Aude was simply not involved in the arrest. Plaintiff contends that the officers committed assault and battery by pointing their guns at him, handcuffing him, forcing him into their police vehicle, and shoving him. Plaintiff

conceded the officers did not injure him. Any reasonable person would regard a gun pointed in their direction with apprehension, and plaintiff likely found the physical contact with the officers offensive. However, plaintiff does not challenge the trial court's conclusions that Martinez and Digiacomo were acting within the scope of their employment when they arrested plaintiff and that their actions were discretionary.

Plaintiff only argues that their acts were not undertaken in good faith, as shown by the alleged cover-up of Martinez sending the photograph. Even if such a cover-up occurred, however, the evidence suggests that at the most, the police were attempting to cover up a mistake to avoid discipline. Furthermore, that cover-up has nothing to do with the arrest itself, or whether the police had probable cause to make the arrest. The police notably put their guns away as soon as it was clear that the men at the house were complying with commands, and it is not unreasonable for the police to have been concerned about the possibility of violence. The trial court properly found defendants' acts of arresting plaintiff to have been made in good faith, precluding plaintiff's claim for assault and battery. Furthermore, we are simply not persuaded that arresting someone upon probable cause, even at gunpoint, and even if the police made mistakes in the process, is the kind of appalling misbehavior that can constitute intentional infliction of emotional distress. The trial court properly dismissed plaintiff's intentional tort claims.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

MIJUAN BARBOUR,

Plaintiff-Appellant,

v

CITY OF DETROIT, JOSE MARTINEZ, ZACHARY DIGIACOMO, and JAMES AUDE,

Defendants-Appellees,

and

DETROIT POLICE DEPARTMENT, TREEHOUSE CLUB MARIJUANA DISPENSERY, FABIO DALLO, KESHAUNA BUTLER, DEON DOE, DEANDRE MACK, and TROMELL ROBINSON,

Defendants.

UNPUBLISHED
November 23, 2021

No. 355866
Wayne Circuit Court
LC No. 18-006258-NO

Before: GLEICHER, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

K. F. KELLY, J. *(concurring).*

I concur in the result only.

/s/ Kirsten Frank Kelly