UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH SAAD, INDIVIDUALLY, ZIHRA SAAD, INDIVIDUALLY, PLAINTIFFS, - VS - CITY OF DEARBORN HEIGHTS, ET AL., DEFENDANTS.	CIVIL CASE NO. 2:11-CV-10103 **PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO AMEND COMPLAINT** – HONORABLE PATRICK J. DUGGAN – – MAGISTRATE JUDGE MARK A. RANDON –

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PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO AMEND COMPLAINT

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Plaintiffs sought concurrence in the relief sought in their Motion for Leave to Amend prior to filing the same. Defendants did not concur. (Exhibit 9 – Hadous Correspondence).

I. DEFENDANTS HAVE UNDULY DELAYED AND SUFFER NO PREJUDICE

"Delay alone, regardless of its length is not enough to bar [amendment] if the other party is not prejudiced." *Moore v. City of Paducah,* 790 F.2d 557, 560 (6th Cir. 1986).

Plaintiffs requested the audio/video recordings of the events giving rise to this cause of action on or about August 1, 2011. Defendants produced these recordings in a supplemental response to Plaintiffs' requests for production of documents on or about October 6, 2011. These recordings, which Plaintiffs were unaware existed prior to October 6, 2011, establish that Defendant Keller was not physically assaulted (shoved) by Joseph—a contention which precipitated the Defendants' entry into Plaintiffs home, Plaintiffs' subsequent arrest, and the criminal proceedings against Plaintiffs.

Defendants now contend that Plaintiffs have unduly delayed in seeking to amend the Complaint even though Defendants failed to timely disclose the evidence necessitating Plaintiffs' proposed amendments and denied similar evidence existed in the Related Action.[1] Defendants cite *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999) to support their contention even though *Duggins* actually undermines their position.

In *Duggins*, the plaintiff became aware of the facts underlying her proposed claims months before she actually sought leave to amend the Complaint. *Duggins*, at 835. That is not the case here. Plaintiffs were provided with the audio/video recordings on or about October 6, 2011 and sought leave to amend on October 21, 2011. Further, by the time the plaintiff in

[1] There were multiple police vehicles present during the incident giving rise to the Related Action. When a request for similar audio/video recordings was made in the Related Action, Defendants responded "Defendant has no such recordings." After Defendants produced the audio/video recordings giving rise to the instant cause of action, Mr. Hadous questioned why Defendants did not produce the in-car audio/video in the Related Action. Defendants insist these do not exist. Given the number of responding officers, Plaintiffs simply do not believe that no audio/video recordings of the incident giving rise to the Related Action **ever existed**. **Defendants admit to producing the dispatch recording in the Related Action on or about October 28, 2011. This is over one full year after Plaintiffs requested it. Defendant's response then was that Defendant "had no such recordings." This concealment of evidence evinces zero regard for consequence or for the Federal Rules of Civil Procedure.**

Duggins sought leave to amend her complaint, discovery had closed, the dispositive motion deadline had passed, and the defendants' motion for summary judgment was pending. Again, that is not the case here. Discovery does not close until December 16, 2011, the dispositive motion deadline does not pass until January 3, 2012, and no dispositive motions are pending.

Further, the Court in *Duggins* noted that there appeared no justification for the delay, and the plaintiff proposed none. Here, any delay is solely attributable to Defendants' own misconduct in refusing to timely produce material evidence.

Defendants contend they will suffer prejudice because Plaintiffs' proposed amendments "overhaul" Plaintiffs' theory of the case and would require Defendants to conduct "additional discovery." *See, Serrano v. Cintas Corp.*, 271 F.R.D. 479 (E.D. Mich. 2010).

In *Serrano*, the Court found undue prejudice because discovery had closed and the proposed claims would cause the defendant to engage in substantially more discovery (since the proposed amendment appeared to "overhaul" the plaintiff's theory of the case.) *Cintas*, at 485.

Here, none of those concerns are present. Discovery is still ongoing and none of the proposed claims departs from Plaintiffs' "overall theme" (a civil rights action alleging police abuse and misconduct). Further, Plaintiffs' malicious prosecution claim is similar to the proposed claims. And, as aforementioned, any delay by the Plaintiffs in asserting the proposed claims arises solely from Defendants' failure to timely disclose material evidence they possessed since the date of the incident. Accordingly, there would be minimal additional discovery (if any) for Defendants to conduct and Defendants would suffer no prejudice. **If there is prejudice, it is suffered by Plaintiffs.**

It is **appalling** that Defendants would even contend that Plaintiffs have unduly delayed and that Defendants would suffer prejudice when Plaintiffs only learned of the existence of the audio/video recordings in October 2011 (over one full year after Defendants' initiated false unfounded criminal proceedings against Plaintiffs). Plaintiffs might have been convicted had they limited access to counsel or to counsel of their choice. Regrettably, there are many less fortunate individuals with little to no access to counsel of their choice who inevitably suffer at the hands those who would manufacture probable cause and fabricate evidence to convict them. Defendants are an **abomination** to law enforcement and undermine the public health, safety, and welfare.

II. PLAINTIFFS' PROPOSED CLAIMS ARE NOT FUTILE

A. THE INTRACORPORATE CONSPIRACY DOCTRINE DOES NOT APPLY WHEN INDIVIDUALLY-NAMED DEFENDANTS ACT OUTSIDE THE SCOPE OF EMPLOYMENT

Plaintiff Zihra Saad's conspiracy claim in the Related Action was dismissed on standing—not the intracorporate conspiracy doctrine. Defendants are free to review the record to the extent they would contend otherwise.

The intracorporate conspiracy doctrine has its genesis in basic principles of agency. Under principles of agency, a corporation acts only through the authorized acts of its agents (i.e., its corporate directors, officers, and employees). The core of this doctrine is that a corporate officer and the entity itself should not inherently be thought of as two separate persons for the purpose of a conspiracy.

Since a conspiracy requires at least two persons or distinct entities for, *inter alia*, a "meeting of the minds," a corporation acting through its agents cannot conspire with itself. *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 753, (6th Cir. 2004) (An entity cannot conspire with its own agents or employees). However, the intracorporate conspiracy doctrine is inapplicable when defendants' conduct exceeds the scope of their employment. *Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 840 (6th Cir. 1994)[2]:

> The intracorporate conspiracy doctrine, if applied to broadly, could immunize all private conspiracies from redress where the actors coincidentally were employees of the same company.
>
> * * *
>
> Thus, a conspiracy could be established if . . . . the aim of the conspiracy exceeds the reach of legitimate corporate activity.

The *Johnson* Court ultimately held,

> After a careful review of the authorities, we hold that when employees act outside the course of their employment, they and the corporation may form a conspiracy under 42 U.S.C. § 1985(3).

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[2] *See also, Williams v. Morgan Stanley & Co., Inc*. 2009 WL 799162, 4 -5 (E.D. Mich. 2009).

Id. at p. 841.

1. "SCOPE OF EMPLOYMENT" IS GENERALLY A QUESTION OF FACT

Whether an employee was acting within the scope of his or her employment is a question of fact unless the issue may be decided as a matter of law where it is clear that the employee was acting to accomplish some purpose of his own [or vice versa]. *Bryant v. Brannen*, 180 Mich. App. 87, 98, 446 N.W.2d 847, 853 (Mich. App. 1989). See also, *Briner v. City of Ontario*, 2010 WL 3982755, 15 (N.D. Ohio 2010) (because there are questions of fact as to whether the acts were performed within the scope of employment, summary judgment for these individual defendants on the issue of the intracorporate conspiracy doctrine would be inappropriate).

2. DEFENDANTS CATES AND KELLER EXCEEDED THE SCOPE OF THEIR EMPLOYMENT BY DELIBERATELY PRESENTING FALSE EVIDENCE TO COVER-UP DEFENDANT KELLER'S EGREGIOUS POLICE ABUSE AND MISCONDUCT

Deliberate police misconduct unrelated to the performance of any legitimate duty does not fall within the scope of a police officer's employment. *See, Nail v. City of Henryetta*, 911 P.2d 914, 918 (Okla.1996) (Police officer who was acting within the scope of employment in arresting suspect may have exceeded the scope of employment in shoving and injuring suspect); *Jones v. City of Youngstown*, 980 F. Supp. 908 (N.D. Ohio 1997) (Genuine issue of material fact as to whether city police officers were acting outside scope of their employment when they joined with city housing inspector to conduct inspections that were pretext for warrantless searches for drugs precluded summary judgment on civil rights claim that officers conspired to violate residents' constitutional rights).

Here, Defendant Keller submitted a police report asserting that he was physically shoved by Joseph Saad and that this act precipitated the entry into Plaintiffs' home and Plaintiffs' subsequent arrest and criminal prosecution.[3] Defendant Keller testified to this during both the

[3] In addition to multiple testimonial inconsistencies, Defendant Keller testified that after Joseph purportedly shoved him and then attempted to close the front door to his home but was prevented from doing so because the deadbolt had been reengaged. Defendant Keller further testified that it was this which allowed him to put his foot into the doorway to prevent Joseph from closing the front door. The trial court was unwilling to accept this testimony as credible because it did not accept Defendant Keller's testimony that Joseph—who intended to close the front door—would re-engage the deadbolt (something which would prevent the door from closing) prior to purportedly shoving Defendant Keller.

preliminary exam and the criminal trial.

Defendant Keller's report and testimony conflicted with the report written by Defendant Cates insofar as the Cates report provided that the purported assault occurred when Joseph attempted to close the front door but Defendant Keller's boot prevented him from doing so (i.e., according to Defendant Cates Joseph "assaulted" Defendant Keller by attempting to close the door while Defendant Keller's foot was in the doorway). Further, the Cates report provided that it was Defendant Skelton who advised Defendant Keller that Joseph needed to be placed under arrest (Exhibit 10 – Cates Report). Defendant Cates testified during the preliminary examination that it was Defendant Skelton who gave the order to arrest Joseph.

> Q. So Officer Skelton then gives you the order to—or not you the other four officers those being, Officer Keller, Officer Gondek, Reserve Officer Nason, and yourself, that's when he gives the order [to arrest]?
>
> A. Correct.

(Exhibit 11 – Cates Preliminary Exam Testimony at 23:19 – 23:22).

Nevertheless, Defendant Cates changed her testimony during the criminal trial by testifying that Defendant Keller had given the order to arrest Joseph.

> Q. [S]o are you sure about who gave you the—who decided there was gonna be an arrest?
>
> A. Yes, I'm positive. Officer Keller decided that we were going to arrest him.

(Exhibit 12 – Cates Trial Testimony at 171:10 – 171:14).

During the preliminary examination Defendant Cates testified Defendant Keller never stated that he would be arresting Joseph prior to when Defendant Skelton arrived.

> Q. Never did you hear Officer Keller say I'm arresting you, correct?
>
> A. Correct.

(Exhibit 11 – Cates Preliminary Exam Testimony at 22:22 – 22:23)

Again, Defendant Cates changed her testimony during the criminal trial.

> Q. Did you ever hear Officer Keller—from the time you arrived on the scene up until the point where the officers were meeting and Officer Keller said we're gonna arrest Mr. Saad, did you ever hear him say Mr. Saad I'm gonna be placing you under arrest for assault?

A. Yes.

Q. When?

A. While we were in the door—on the porch area.

Q. Okay. How many times did you hear him say that?

A. Several, I believe.

(Exhibit 12 – Cates Trial Testimony at 172:1 – 172:11).

Defendant Cates provided false testimony while under oath— more importantly though, her testimony was calculatedly changed to support Defendant Keller's fabricated claim of a purported assault by Joseph. This change was done at the behest of and in concert with Defendant Keller—who has been the defendant in multiple civil actions alleging similar police abuse and misconduct—and was intended to "cover-up" another instance of Defendant Keller's egregious police abuse and misconduct.

While prosecuting a violation of the law is certainly within the purview of a police officer's employment, engaging in "cover-up" calculated to conceal police abuse and misconduct exceeds the scope of a police officer's employment as it cannot fairly be said to be within the purview of a legitimate municipal aim/objective. As the Sixth Circuit in *Johnson v. Hills & Dales Gen. Hosp.*, cautioned, "The intracorporate conspiracy doctrine, if applied to broadly, could immunize all private conspiracies from redress where the actors coincidentally were employees of the same company." 40 F.3d at 840.

The change in Defendant Cates's testimony evidences a concerted effort between her and Defendant Keller to "cover-up" Defendant Keller's police abuse and misconduct. The City of Dearborn Heights and its' residents have an interest in ensuring that the City's police officers uphold the Constitution and that officers are held accountable for police abuse and misconduct. When individual police officers conspire to undermine the City's interest in proper law enforcement and to "cover-up" their misconduct, these officers become private actors. Accordingly, the intracorporate conspiracy doctrine is inapplicable. To the extent Defendants would disagree, a genuine issue of material fact regarding whether Defendant Cates and Defendant Keller exceeded the scope of their employment as aforementioned precludes application of the intracorporate conspiracy doctrine.

B. ABSOLUTE IMMUNITY IS INAPPLICABLE TO PRETRIAL FABRICATION OF EVIDENCE

Defendants contend that Plaintiffs intend to assert Count Twenty on the basis of Defendant Keller's perjured testimony at trial. The plain English of Plaintiffs' proposed Count Twenty provides that the claim arises from Defendant Keller's role as a "complaining witness" by his submission of fabricated written reports prior to trial. Amended Complaint at ¶¶ 222–227.

Absolute immunity does not apply to the pretrial fabrication of evidence. *Kalina v. Fletcher*, 522 U.S. 118, 131, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (absolute immunity unavailable to prosecutor who submitted affidavit to support finding of probable cause); *Malley v. Briggs*, 475 U.S. 335, 340-41, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). *Gregory v. City of Louisville*, 444 F.3d 725, 738-739, (6th Cir. 2006) (absolute immunity does not relate backwards to protect a defendant for any activities he allegedly engaged in prior to taking the witness stand for his testimony); *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999); *Alioto v. City of Shively*, 835 F.2d 1173, 1174 (6th Cir. 1987) (absolute immunity unavailable to police officer who engaged in non-testimonial acts such as persuading a witness to lie and fabricating evidence); *Mastroianni v. Bowers*, 160 F.3d 671, 677 (11th Cir. 1998).

Defendants **ignore** Plaintiffs' allegations that Defendant Keller engaged in non-testimonial acts that occurred prior to trial—something the defendants in *Spurlock v. Satterfield* tried unsuccessfully:

> Satterfield **ignores** the fact that plaintiffs allege that he engaged in testimonial and non-testimonial acts that occurred both before and after he and other defendants rendered false testimony at trial. Thus, Satterfield's argument **misses** the point, for plaintiffs do not merely allege that Satterfield gave false testimony and conspired to present false testimony, but also that he committed, and conspired to commit, non-testimonial acts, such as manufacturing probable cause and fabricating evidence. It is for these alleged violations that we conclude that Satterfield is not entitled to absolute immunity.

Spurlock, at 1002 (emphasis added).

Because Defendant Keller engaged in non-testimonial pretrial acts while acting in a "complaining witness" capacity (persuading Defendant Cates to lie and to change her testimony, and submitting false written reports to establish probable cause), absolute immunity is inapplicable. This Court has acknowledged, "It is both common sense and fundamental to the profession of policing that law enforcement officers understand the impropriety of fabricating

evidence of a crime." *Smith v. Geelhood*, 2009 WL 4730455 (E.D. Mich. 2009) (Hon. Mark A. Randon).

For clarity, Plaintiffs will re-caption proposed Count Twenty, "42 U.S.C. § 1983 – Fourteenth/Fourth Amendment – Due Process: Fabricating Evidence."

C. PLAINTIFFS WERE UNAWARE DEFENDANTS POSSESSED EXCULPATORY AND IMPEACHMENT EVIDENCE

Pages 11–14 of Defendants' Response scarcely merit reply. As aforementioned, Plaintiffs were never provided with the audio/video recordings of the incident giving rise to this cause of action—in fact Defendant denied similar evidence existed in the Related Action. A *Brady* violation is predicated upon the suppression of evidence. To contend that Plaintiffs were somehow aware of a claim based on the Defendants' suppression of evidence which Defendants initially led Plaintiffs to believe did not exist is disingenuous.

The audio/video recordings speak for themselves. Plaintiffs would highlight the following:

(1) At no point during the audio/video recordings does Defendant Keller (or any other Defendant) ever state that he was assaulted (**shoved**) by Joseph even though this was the subsequent justification for the Defendants' entry, Plaintiffs' arrest, and the criminal proceedings against Joseph.

(2) Plaintiffs repeatedly ask the Defendants for the basis of Joseph's arrest. Not once does any of the Defendants state that it was because Joseph had assaulted Defendant Keller by shoving him. **In fact, Defendant Keller answers this question himself by stating that he was placing Joseph under arrest for (initially) refusing to produce his driver's license and trying to shut the door to his home**.

(Defendants' Exhibit 1 – Audio/Video Recordings)

D. PLAINTIFFS ASK THE COURT TO ADOPT AN APPROACH WHICH RECOGNIZES AN EXPRESS BRADY CLAIM REGARDLESS OF WHETHER A CRIMINAL TRIAL RESULTS IN AN ACQUITTAL

To assert a successful *Brady* claim, a plaintiff must show three essential elements: (1) the evidence is favorable; (2) the evidence was suppressed by the Government; and (3) the suppression caused prejudice. *U.S. v. Holder*, 657 F.3d 322, 328 - 329 (6th Cir. 2011), *citing*, *Banks v. Dretke*, 540 U.S. 668, 691, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004) (quoting

Strickler v. Greene, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)).

A prosecutor has an absolute duty to disclose exculpatory or impeachment evidence regardless of a request by the defense. *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), *see also, United States v. Agurs*, 427 U.S. 97, 108, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (government has an affirmative duty to volunteer exculpatory evidence).

The *Brady* mandates apply equally to police officers.

> In addition to this practical justification, it is evident that the constitutional principles recognized in *Brady* apply just as equally to similar conduct on the part of police, and thus support our recognizing that the police can commit a constitutional deprivation analogous to that recognized in *Brady* by withholding or suppressing exculpatory material.
>
> As far as the Constitution is concerned, a criminal defendant is equally deprived of his or her due process rights when the police rather than the prosecutor suppress exculpatory evidence because, in either case, the impact on the fundamental fairness of the defendant's trial is the same.

Moldowan v. City of Warren, 578 F.3d 351, 378 - 379 (6th Cir. 2009):

The audio/video recordings of the incident giving rise to Plaintiffs' cause of action are unquestionably favorable as: (1) they establish that Plaintiff Joseph Saad never assaulted (shoved) Defendant Keller; and (2) directly impeach Defendant Keller's written report and oral testimony. This evidence was suppressed by Defendants during the criminal proceedings against Plaintiffs as it was never provided to Plaintiffs' defense counsel.

At issue here is prejudice. To demonstrate prejudice, a plaintiff must show that the evidence at issue is "material." *Strickler*, 527 U.S. at 282. Evidence, is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (citations omitted).

Since Plaintiffs were both acquitted, an express *Brady* claim would appear moot. However, the Ninth Circuit holds that an acquittal speaks only to the amount of damages due and is irrelevant to whether one possesses a cause of action for a violation of due process. *Haupt v. Dillard*, 17 F.3d 285, 287 – 88 (9th Cir. 1994). *See also*, *Carey v. Piphus*, 435 U.S. 247, 266, 98 S. Ct. 1042, 1053, 55 L. Ed. 2d 252 (1978) (violation of right to procedural due process actionable without proof of actual injury).

Last year, the Seventh Circuit explicitly reserved the question regarding whether it would recognize a *Brady* claim when a criminal trial results in acquittal. *Mosley v. City of Chicago*, 614 F.3d 391 (7th Cir. 2010).

Compelling public interest concerns would favor recognition of a *Brady* claim regardless of the outcome of a criminal trial. If a defendant is convicted he is sentenced. If a defendant is acquitted he is precluded from asserting a *Brady* claim on the basis of a "harmless error" approach. This approach disregards the tribulation of an unnecessary criminal prosecution in cases where the criminal proceedings would terminate but for the exculpatory evidence withheld. The right to a fair trial is no less important than the right to be free from criminal prosecution absent probable cause. The "free pass" afforded to an unscrupulous prosecutor or police officer in the event of acquittal creates perverse incentives to conceal evidence at one's discretion.

E. PLAINTIFFS' MONELL CLAIM IS NOT FUTILE

As Defendants' note, it is well-settled that there must be an underlying constitutional harm to assert a *Monell* claim. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986). Plaintiffs have alleged multiple constitutional harms. To date, no finding regarding whether the Defendants violated Plaintiffs' constitutional rights has been made by this Court or by a jury. Plaintiffs proposed *Monell* claim is not simply derivative of the proposed claims. It is well within the purview of Plaintiffs' constitutional and state law claims already asserted (e.g., Due Process, Malicious Prosecution, and Gross Negligence).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Honorable Court grant their Motion for Leave to Amend the Complaint to assert the following claims:

1. 42 U.S.C. § 1983 Conspiracy
   (Defendants Keller and Cates)

2. 42 U.S.C. § 1983 – Fourth/Fourteenth Amendment – Due Process: Fabrication of Evidence
   (Defendant Keller)

3. 42 U.S.C. § 1983 – Fourteenth Amendment – *Brady* Violation
   (Defendants Keller and Cates)

4. 42 U.S.C. § 1983 – Fourteenth Amendment – *Monell* Claim: Unconstitutional Custom, Policy, and Practice
   (Defendant City of Dearborn Heights)

* * * * *

RESPECTFULLY SUBMITTED THIS 11TH DAY OF NOVEMBER, 2011,

HADOUSCO. |PLLC

/S/NEMER N. HADOUS

BY: NEMER N. HADOUS |AZ: 027529 | CA: 264431|
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CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2011, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notice of such filing to all attorneys of record in this matter. Since none of the attorneys of record are non-ECF participants, hard copies of the foregoing have not been provided via personal delivery or by postal mail.

HADOUSCO. |PLLC

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