UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY BETH KNUDSEN

CASE NO.: 6:09-CV-1060-ORL-31GJK

Plaintiff,

v.

DAVID HIGGINS, individually, and
BEN F. JOHNSON, in his official capacity as
VOLUSIA COUNTY SHERIFF,

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

1. On September 29, 2009, Plaintiff filed an Amended Complaint against Defendants David Higgins[1], individually and Ben F. Johnson, in his official capacity as Volusia County Sheriff. (Doc. 25).

2. Plaintiff alleges in her Amended Complaint that Defendant Higgins acted without probable cause or legal justification when he took certain actions against her on May 5, 2008. (Doc. 25. ¶5).

3. Plaintiff sued Defendant Johnson in his official capacity as Volusia County Sheriff which is tantamount to a suit against the governmental entity of Volusia County. (Doc. 17). Hereafter, Defendant Johnson will be referred to as Defendant Volusia County Sheriff (VCS) and Defendant David Higgins as Defendant Higgins. *References*

[1]Defendant Higgins is identified as a deputy sheriff and investigator with the Volusia County Sheriff's Office who, at all times material to this action, was acting in the course and scope of his employment. (Doc. 25 ¶¶2, 5)

to depositions will be referred to etc....

II. GENERAL FACTS ALLEGED

Plaintiff alleges that on May 5, 2008, Defendant Higgins, a Volusia County Sheriff's Deputy, intentionally battered her and threw her headfirst onto a concrete driveway without probable cause or legal justification. (Doc. 25 ¶5). She further alleges that Defendant Higgins handcuffed and arrested her and placed her in jail. (Doc. 25 ¶ 5). Plaintiff asserts that all actions taken by Defendant Higgins were done in the course and scope of his employment as a deputy sheriff for Defendant VCS.

III. UNDISPUTED MATERIAL FACTS

On May 5, 2008, there was a domestic dispute between Plaintiff and her estranged husband which resulted in a call to the Volusia County Sheriff's Office . (Doc. 25 ¶ 12-13, Deposition of Plaintiff). Defendant VCS had responded to numerous domestic calls at Plaintiff's residence in the previous 18 months. (Deposition of Defendant Higgins ; Deposition of Plaintiff). Defendant Higgins was assigned to the area in which Plaintiff lived and had personally responded to at least three incidents there, including one which occurred less than a month prior to the incident at issue herein, that resulted in Plaintiff being involuntarily committed pursuant to the Baker Act. (Deposition Defendant Higgins).

Upon arrival, Defendant Higgins saw Plaintiff at the side door of her next door neighbor, approximately 10 feet from her own garage. (Deposition of Defendant Higgins:) Recognizing from previous encounters that she was agitated and believing from past experience that she would probably calm down in time, Defendant Higgins decided to go first inside Plaintiff's home to talk to her husband, Scott. (Deposition of Defendant Higgins). Scott Knudsen informed Defendant Higgins that Plaintiff had attempted to shut the tailgate of her vehicle on him while he was still halfway inside of it, striking the back of his head. (Doc. 25 ¶12; Deposition of Defendant Higgins: ;

Deposition of S. Knudsen:).

Based on Scott Knudsen's description of events, Defendant Higgins believed Plaintiff had committed a battery on her husband but, based on his prior dealings with the couple which involved mutual accusations against one another, he intended to ask Plaintiff her side of the story prior to arresting her for domestic violence. (Deposition of Defendant Higgins,). Defendant Higgins contacted Plaintiff in her yard near her neighbor's door and indicated to her verbally and with his actions, that he needed to talk to her. (Doc. 25 ¶14; Deposition of Defendant Higgins: ; Deposition of Plaintiff: 48:8-14, 20-22; 49:17-18). She said "okay" and began walking towards him but passed directly by Defendant Higgins without stopping, walking toward her open garage approximately 10 feet away. (Doc. 25 ¶15, Deposition of Plaintiff 50:18-21; 51:9-11, 21-23; 72:22-23, Deposition of Defendant Higgins:). Defendant Higgins told Plaintiff to stop, that he needed to talk to her about what had happened and she again said, "okay" but kept walking away from him towards her garage. (Deposition of Plaintiff 51:15-16; 52:14-16; 72:3-5, 19, 22; Deposition of Defendant Higgins). In passing by Defendant Higgins without stopping, Plaintiff was then between the garage and Defendant Higgins which, he felt, created a potential threat to his safety, as well as the Plaintiff's and her husband's. (Deposition of Defendant Higgins:)

At that point, Defendant Higgins turned and grabbed Plaintiff's left arm in an attempt to stop her from going into her garage for officer's safety, as well as for the safety of Plaintiff. (Deposition of Defendant Higgins:). He told her to stop, while simultaneously placing his right hand on her right arm and, in order to gain control of her, used his right leg to take her legs out from under her and lowered her to the ground. (Deposition of Defendant Higgins: Deposition of Plaintiff:). Due to her small stature, Defendant Higgins did not want to use other approved uses of force to stop her advancement towards the garage, such as an arm bar takedown, as he felt his

action in lowering her to the ground was the least likely to injure her. (Deposition of Defendant Higgins:). As she was escorted to the ground, Plaintiff's nose hit the driveway resulting in an injury to her nose. (Deposition of Plaintiff: ; Deposition of Defendant Higgins:).

Defendant Higgins called for medical treatment and Plaintiff was taken to the hospital for evaluation. (Deposition of Defendant Higgins:). Plaintiff was subsequently arrested for domestic violence, due to her actions in the incident involving her husband and resisting arrest without violence based on her actions while Defendant Higgins was attempting to investigate the domestic violence charge. (Deposition of Defendant Higgins:). Plaintiff was booked into the Volusia County jail on May 5, 2008 and probable cause was found for both charges. (See certified copy of probable cause finding).

IV. COUNTS ALLEGED IN THE AMENDED COMPLAINT

Plaintiff's Amended Complaint contains five counts in which both Defendants are named. Plaintiff seeks both compensatory and punitive damages, as well as attorney's fees, against both Defendants in all counts. (Doc. 25). Specifically, the claims are as follows:

A. Count I - 42 U.S.C. §1983

In this count, Plaintiff alleges that the Defendants violated her "constitutional right to be free from unreasonable arrest, seizure and physical injury" when Defendant Higgins "with legal malice" arrested her without probable cause or reasonable suspicion, assaulted and battered her and placed her in jail for 36 hours. (Doc. 25 ¶10-11). Further, it is alleged that the Defendants "attempted to seek criminal prosecution of Plaintiff." (Doc. 25 ¶17). To support this §1983 claim against Defendant VCS, Plaintiff alleges only that this Defendant "by its policies and procedures and specifically by its approval of Deputy Higgins' acts... jointly, participated in said acts."

(Doc. 25 ¶18).

B. Count II - Battery

Plaintiff alleges herein that Defendant Higgins confronted her in her yard while investigating allegations of domestic violence against her and, when she turned to walk away from him, he grabbed her arm and slammed her headfirst into the driveway without probable cause. (Doc. 25 ¶26-27, 30). It is alleged that Defendant Higgins used excessive and unreasonable force "under the circumstances as Plaintiff is a female approximately 4 feet 10 inches tall and approximately 100 pounds." (Doc. 25 ¶30).

C. Count III - False Arrest

Plaintiff alleges that Defendant Higgins unlawfully restrained, handcuffed and arrested her against her will, intentionally and maliciously causing her loss of liberty. (Doc. 25 ¶33, 37). Plaintiff further alleges that Defendant Higgins' personal participation in the arrest and detention renders him personally liable for damages and that Defendant VCS is also liable because it "approved the seizure and arrest" which was without legal authority, unreasonable and unwarranted. (Doc. 25 ¶35, 36, 39).

D. Count IV - Malicious Prosecution

Plaintiff alleges in this count that there was no probable cause for Plaintiff's arrest and that the criminal proceeding "was terminated" in favor of Plaintiff. (Doc. 25 ¶41, 43-44). Further, Plaintiff alleges that the "Defendants acted maliciously by instituting and pursuing" criminal prosecution of Plaintiff, "which they knew was not warranted or proper". (Doc. 25 ¶45-46).

E. Count V - Intentional Infliction of Emotional Distress

To support this claim, Plaintiff alleges that both Defendants acted intentionally with knowledge that Plaintiff would suffer emotional distress, and that their conduct was outrageous, beyond the bounds of decency, "atrocious and utterly

intolerable in civilized community". (Doc. 25 ¶48-49). Plaintiff alleges that she suffered severe emotional distress due to the conduct of the Defendants (Doc. 25 ¶50-51).

MEMORANDUM OF LAW

I. STANDARD OF REVIEW

In reviewing a motion to dismiss, the Court must view a complaint in the light most favorable to the plaintiff, considering only the pleadings and any exhibits attached thereto. Stephens v Dept. of Health and Human Servs., 901 F.2d 1571,1573 (11th Cir.1990). In ruling on such a motion, "conclusory allegations, unwarranted factual deductions or legal conclusions, masquerading as facts will not prevent dismissal." Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir. 2003). In addition, Defendants have filed depositions with this Motion which are incorporated by attachment and referenced herein. As such, the Court may treat this motion as one for summary judgment and dispose of it as provided in Fed.R.Civ.P. 12(d). In the instant case, Plaintiffs' Amended Complaint and the undisputed material facts[2], when viewed most favorably to Plaintiff, fails to state a cause of action on several grounds, as set forth below. The Amended Complaint should be dismissed and/or summary judgment granted in favor of Defendants.

II. FAILURE TO STATE A CAUSE OF ACTION FOR VIOLATIONS OF 42 U.S.C. §1983

A. AS TO DEFENDANT DAVID HIGGINS IN HIS INDIVIDUAL CAPACITY - QUALIFIED IMMUNITY

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[2]A party is entitled to summary judgment when there is no genuine issue as to any material fact and the facts establish that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2). "Which facts are material depends on substantive law applicable to the case." Tepper v. Canizaro, 2005 WL 2484644 (M.D. Fla. 2005) citing Anderson v. Liberty Lobby, Inc., 477 US 242 (1986).

1. False Arrest Claim

Plaintiff has alleged in Count 1 of her Amended Complaint that, at all material times relevant thereto, Defendant Higgins was a deputy sheriff, acting within the course and scope of his employment with Defendant VCS. Plaintiff' decision to proceed against Defendant Higgins in his individual capacity entitles him to assert qualified immunity as this doctrine, if established, completely shields government officials sued in their individual capacities. Penley v. Eslinger, 605 F. 3d 843 (11th Cir. 2010) and cases cited therein. Defendant Higgins is entitled to qualified immunity as a matter of law as Plaintiff has failed to state a §1983 cause of action.

Qualified immunity from personal liability for monetary damages protects a governmental official who is performing discretionary functions unless the performance of such functions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." McElligott v. Foley, 182 F.3d 1248 (11th Cir. 1999). This defense can be raised and considered in a motion to dismiss, which should be granted if the complaint fails to allege the violation of a clearly established constitutional right. St. George v. Pinellas County, 285 F.3d 1334 (11th Cir. 2002), citing Williams v. Alabama State Univ., 102 F.3d 1179 (11th Cir. 1997). Qualified Immunity can also be raised in a motion for summary judgment at which point the factual basis for a plaintiff's claim is usually easier to identify. Case v. Eslinger, 555 F.3d 1317 (11th Cir. 2009)

When raised as a defense, the doctrine of qualified immunity is analyzed by a "multi-step, burden shifting process." Penley, 605 F. 3d at 849. First, a defendant must prove that he was performing a discretionary function "when the allegedly wrongful act occurred." Rich v. Dollar, 841 F.2d 1558, 1563 (11th Cir. 1988). If the defendant satisfies this initial requirement, the burden then shifts to the plaintiff to show that qualified immunity is not appropriate because the plaintiff's allegations, if true, establish that the

public official's actions violated an actual constitutional right which was clearly established at the time of the allegation violation. Gonzalez v. Reno, 325 F.3d 1228 (11th Cir. 2003), Ziegler v. Jackson, 716 F.2d 847 (11th Cir. 1983).

A defendant's actions are within the scope of his discretionary authority, if "objective circumstances....compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." Rich, 841 F.2d at 1564. "Discretionary acts are defined as those acts that require the exercise of personal deliberation, judgment or discretion in the performance of an official duty." Hackett, 238 F.Supp. at 1368.

In this matter, Plaintiff has conceded that Defendant Higgins was acting in his capacity as a deputy sheriff at all times. Objectively, it appears that Defendant Higgins' actions were taken pursuant to the performance of his duties and within the scope of his authority. This satisfies Defendant Higgins' burden to establish that he was acting within the scope of his discretionary duties when the allegedly wrongful acts occurred. Zeigler, 716 F.2d at 849.

In analyzing a claim of immunity after a defendant has established that he/she was performing a discretionary duty, a court must determine whether the facts alleged when taken in the light most favorable to the plaintiff, show that the defendant's conduct violated a constitutional right and if so, "whether, at the time of the incident, every objectively reasonable police officer would have realized the acts violated already clearly established federal laws." Garrett v. Athens-Clarke County, 378 F.3d 1274, 1278-79 (11th Cir. 2004). This two party inquiry can be addressed by the Court, at its discretion, in any order. Pearson v. Callahan, 129 S. Ct. 808 (2009). However, if it is initially determined that no constitutional right was violated , the plaintiff has failed to state a claim for relief and no further inquiry is necessary.

Since the Plaintiff in the instant case has asserted a §1983 claim against both the

deputy, who can assert qualified immunity, and the governmental entity, which cannot, the Court should first determine whether Defendant Higgins violated a constitutional right because such a finding is a prerequisite to Defendant VCS's liability. Pearson, 129 S.Ct. at 822.

Plaintiff has asserted an unreasonable arrest and seizure in her §1983 claim. It is well-established that the Fourth Amendment protects individuals from unreasonable searches and seizures and that an arrest is a seizure pursuant thereto. Case, 555 F.3d at 1326. Further, a warrantless arrest without probable cause violates the Constitution and provides a basis for a §1983 claim. However, the existence of probable cause at the time of the arrest constitutes an absolute bar to a §1983 action for false arrest." Id at 1326-27 (citing Kingsland v. City of Miami: 382 F.3d 1220, 1226 (11th Cir. 2004)(internal quotation marks omitted). Plaintiff bears the burden of establishing the absence of probable cause to succeed on a §1983 claim. Rankin v. Evans, 133 F.3d 1425, 1436 (11th Cir. 1998).

Defendant Higgins does not dispute that it was clearly established that Plaintiff's arrest had to be supported by probable cause under the Fourth Amendment. The issue is whether Defendant Higgins had probable cause, whether arguable[3] or actual.

"Probable cause to arrest exists when law enforcement officials have facts and circumstances within their knowledge sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime." Id at 1327 (citing U.S. v. Gonzalez, 969 F.2d 999, 1002 (11th Cir. 1992))(internal quotation marks omitted). The standard is wehther a reasonable person would have believed probable cause existed had he known

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[3]Defendant Higgins is shielded from §1983 liability even if Plaintiff's arrest was without probable cause, a fact which is not conceded, if arguable probable cause existed. Case, 555 F.3d at 1327. Probable cause is more than mere suspicion but less than convincing proof, only reasonably trustworthy information is required to establish probable cause. Rankin, 133 F.3d 1435.

all fo the facts known by the officer. For probable cause to exist, the arrest "must be objectively reasonable under the totality of the circumstances." Rankin, 133 F.3d at 1433. Thus, Defendant Higgins had probable cause to arrest Plaintiff if a reasonable person in his position could have believed the Plaintiff had committed a crime.

The undisputed material facts establish that Defendant Higgins was dispatched to Plaintiff's home to investigate a domestic violence call. Upon arrival, Plaintiff's husband told Defendant Higgins that, during a verbal altercation, Plaintiff slammed the hatch of her car on the back of his head, causing pain and a bump on his head. Defendant Higgins observed Plaintiff's husband to be somewhat disheveled but calm in his demeanor. Defendant Higgins concluded at the time that Plaintiff had committed an act of domestic violence, pursuant to §784.03(1)(a)1, Fla. Stat. (2008), as defined in §741.28(2) Fla. Stat. (2008), by battering her husband. Based on the totality of the circumstances, Defendant Higgins believed he had probable cause to arrest Plaintiff. Due to his prior encounters with Plaintiff and her husband, which usually involved verbal altercations. Defendant Higgins went outside to contact Plaintiff to provide her with an opportunity to explain her side of what had happened. This was the first time that Defendant Higgins had responded to Plaintiff's residence where there was evidence of actual physical violence.

The undisputed material facts in the instant case show that Defendant Higgins was in the lawful execution of his duties when he advised Plaintiff, by both his actions and his words, that he wanted to talk to her about the incident involving her husband. It is further undisputed that Plaintiff understood Defendant Higgins' request and that, rather than stop to talk to him, she walked right past him towards her open garage less than 10 feet away. Plaintiff disobeyed Defendant Higgins directions by her conduct. Section 843.02, Fla. Stat. (2008) provides that it is a first degree misdemeanor to "resist, obstruct or oppose any officer....in the lawful execution of any legal duty, without offering or doing

violence to the person of the officers." The two elements of this offense are (1) "the officer must be engaged in the lawful execution of a legal duty" and (2) "the defendant's action, be it by words, conduct or a combination therefore, must constitute obstruction or resistence of that lawful duty." Zivojinovich v. Barner, 525 F.3d 1059, 1071 (11th Cir. 2008)(citing N.D. v. State, 890 So.2d 514, 516-17(Fla. 3d DCA 2005)(internal quotations omitted) . §843.02 applies in circumstances other than where the officer is attempting to arrest the suspect as "legal duties encompass more than just making arrests." Id.

Clearly, Defendant Higgins had facts and circumstances within his knowledge which were sufficient to warrant a reasonable belief that Plaintiff had committed a criminal act of domestic violence battery, as well as resisting arrest without violence. Defendant Higgins therefore had probable cause to arrest Plaintiff and thus is entitled to qualified immunity. Plaintiff asserts that the charges against her were subsequently dismissed by the State Attorney's office. (Doc. 25 ¶19). However, the validity of an arrest is not vitiated and an arresting officer is not stripped of entitlement to qualified immunity on a claim of false arrest as long as there was probable cause to arrest for some offense. Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002), Stachel v. City of Cape Canaveral, F.Supp 2d 1326 (M.D. Fla. 1999)("The claim for false arrest does not cast its primary focus on the validity of each individual charge; instead we focus on the validity of the arrest. If there is probable cause for any of the charges made...then the arrest was supported by probable cause, and the claim for false arrest fails.")(quoting Wells v. Bonner, 45 F.3d 90, 95 (5th Cir. 1995). The establishment of probable cause for an arrest is an absolute bar to a § 1983 claim for false arrest. Defendant Higgins had actual probable cause to arrest Plaintiff and therefore is entitled to qualified immunity.

2. Excessive Force Claim

In Count I, Plaintiff also alleges that Defendant Higgins deprived her "of her constitutional right to be free from unreasonable...physical injury" when he assaulted and

battered her without probable cause or reasonable suspicion causing her to suffer serious injury. (Doc. 25 ¶10-11) Plaintiff also alleges therein that Defendant Higgins "conducted a takedown maneuver" and "slammed Plaintiff headfirst" into her driveway "causing her to break her nose and several teeth, and causing other significant injuries". (Doc. 25 ¶16)

Defendant Higgins asserts that these allegations, as pled, are insufficient to state a cause of action for a §1983 excessive force claim. In addition, in the Eleventh Circuit, "a claim that any force in an illegel stop or arrest is excessive is subsumed in the illegal stop or arrest claim and is not a discrete excessive force claim." Jackson v. Sauls, 206 F.3d 1156, 1171 (11th Cir. 2000). However, in the event the Court should determine otherwise, a qualified immunity analysis as to such claim will be addressed.

It is well established that a §1983 claim alleging the use of excessive force by a police officer during a seizure is analyzed under the Fourth Amendment reasonableness standard. Graham v. Connor, 490 U.S. 386 (1989); Penley, 605 F.3d at 849 and cases cited therein. It has been noted by the 11th Circuit that as to excessive force claims, "no bright line exists for identifying when force is excessive;" thus, "unless a controlling and materially similar case declares the official's conduct unconstitutional, a Defendant is usually entitled to qualified immunity." Neal v. City of Bradenton, 2006 WL 1804585 (M.D. Fla. June, 2006 citing Priester v. City of Riviera, Fl., 208 F.3d 919, 926 (11th Cir. 2000). The reasonableness inquiry in such a case is an objective one: "whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation." Zivojinovich, 525 F.3d at 1072 (citing Kesinger v. Herrington, 381 F.3d 1243, 1248 (11th Cir. 2004)). The court must consider the "totality of the circumstances" and "not just a small slice of the acts that happened at the tail of the string." Goodman v. City of Largo, 2009 WL 1651524 (M.D. Fla. June 2009) citing Garrett v. Athens-Clarke County, Ga., 378 F.3d

1274, 1280 (11th Cir. 2004)

The determination as to whether a reasonable officer would believe that the level of force was necessary in light of the facts of the case must be decided "on a case by case basis from the perception of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." Id at 1072 (citing Post v. City of Fort Lauderdale, 7 F.3d 1552, 1559)(11th Cir. 1993), Graham, 490 U.S. at 398. The Supreme Court has long recognized that "the right to make an arrest of investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Id. at 396. An analysis of the reasonableness of a §1983 excessive use of force claim centers around certain factors which must be carefully evaluated based on the circumstances by the officer in the situation at hand. Crenshaw v. Lister, 556 F. 3d 1283 (11th Cir. 2009). These factors include the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether the suspect actively resisted arrest or attempted to evade arrest by flight. Id. at 1290[4]. The analysis of these factors must allow for the "fact that police officers are often forced to make split second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 396-97.

It is well established that "some use of force by a police officer when making a custodial arrest is necessary and altogether lawful, regardless of the severity of the alleged offense" or whether the use of otherwise reasonable force results in severe injury to the Plaintiff. Durruthy v. Pastor, 351 F.3d 1080 (11th Cir. 2003); Godman, 2009 WL 1651524 *7, and cases cited therein. An injury, even a serious one, does not preclude qualified immunity where the force used was objectively reasonable based on

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[4]Other factors for consideration include the need for the use of force, the relationship between the need and amount of force used and the extend of injury inflicted. Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004).

the totality of the circumstances.

In this case, Defendant Higgins was familiar with and had several prior law enforcement contacts with Plaintiff. He knew that she had been mentally unstable in the recent past and he had a reasonable belief that she had allegedly physically battered her husband on this occasion, which was an escalation from past incidents of verbal domestic disputes. By her own admission, Plaintiff ignored the verbal commands and lawful order of Defendant Higgins to stop and continued walking towards her garage, an area Defendant Higgins felt was potentially unsafe for both Plaintiff and him. Defendant Higgins conduct was objectively reasonable in light of the facts confronting him and when viewed from the perspective of a reasonable officer, on the scene, the use of force was reasonable and necessary under the circumstances. See Rodriguez v. Farrell, 280 F.3d 1341 (11th Cir. 2002) (officer permitted to grab an arrestee's arm, twist it around his back and jerk it high to shoulder to apply handcuffs; fact that it may result in severe injury does not make action unlawful).

B. DEFENDANT VOLUSIA COUNTY SHERIFF

Count I of the Amended Complaint also sets forth a 42 U.S.C. §1983 claim against Defendant VCS. This count fails to state a cause of action against Defendant VCS and should be dismissed.

In order to prevail on a claim under 42 U.S.C. §1983, Plaintiff must demonstrate both that Defendant VCS deprived her of a right secured under the Constitution or federal law and that the deprivation occurred under color of state law. Aldinger v. Howard, 427 U.S. 1 (1976); Arrington v. Cobb County, 139 F.3d 865 (11th Cir. 1998). In order to establish that the action was under color of state law, she must establish that the Defendant VCS's actions were pursuant to a custom, policy or practice and that said custom, policy or practice deprived her of a constitutional right. Aldringer; Parratt v. Taylor, 451 U.S. 527 (1981); Brooks v. Scheib, 813 F.2d 1194 (11th Cir.1987). Thus,

the essential elements that Plaintiff must initially establish are that Defendant Higgins' conduct was done "under color of state law and he"[5] acted pursuant to a custom, policy or practice of Defendant VCS. Plaintiff has failed to meet this initial burden and thus has failed to state a cause of action for violation of §1983.

1. Under Color of State Law

Plaintiff failed to allege that the Defendant Higgins acted under color of state law, an essential requirement to assert a §1983 claim against a governmental entity. A defendant in a §1983 suit acts under color of state law when he abuses his position with the agency. Doe v. Mann, 2006 WL 3060036 (M.D. Fla. Oct. 26, 2006). The facts alleged by the Plaintiff as to Defendant VCS are that "by its policies and procedures, and specifically by its approval of Defendant Higgins' acts... jointly participated in the acts of Deputy Higgins which it is alleged, were without probable cause." These allegations clearly do not rise to the level of an abuse of power by Defendant VCS or Defendant Higgins. The actions of Defendant Volusia County Sheriff, as alleged, were not "under color of state law" and thus Plaintiff has not established a prima facie §1983 claim.

2. Custom and/or Policy

It is well established that in order to find municipal liability under §1983, liability "must be predicated upon more than a theory of respondeat superior." Fundiller v. City of Cooper City, 777 F.2d 1436, 1442 (11th Cir. 1985). Instead, municipal liability under §1983 may be established by evidence that: 1) the constitutional deprivation was caused by a policy or custom of the entity, or 2) the final policymakers of the entity acted with deliberate indifference to a constitutional deprivation, or 3) the final policymakers delegated their authority to a subordinate who then caused a constitutional deprivation or

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[5]In a civil rights action, it is required that a plaintiff state facts as to the specific actions of each named defendant which establish the alleged constitutional violation. Fullman v. Gaddick, 739 F.2d 553 (11th Cir. 1984)

4) the final policymakers ratified a constitutionally impermissible decision or recommendation of a subordinate employee. Sherrod v. Palm Beach County School District, 424 F.Supp 2d 1341 (S.D. Fla. 2006).

Such liability can be asserted "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 that the government as an entity is responsible under §1983." Monell, 436 U.S. 658, 694 (1978). Whether the claim is based on an official policy or an unofficially adopted custom, it must be the "moving force behind the constitutional deprivation before liability may attach." Fundiller, 777 F.2d at 1442. The governmental body must be at fault for establishing a policy or custom and there must be a causal link between said custom or policy and the alleged violation of a constitutional right. Id.

In the instant case, Plaintiff does not allege that a custom or official policy led to the alleged violations asserted in Count I but instead alleges that Defendant VCS "by its policies and procedures", without identifying same, and by its approval of Defendant Higgins' actions, participated in the alleged illegal acts of Higgins. Since Plaintiff fails to identify any specific custom, policy or procedure, Defendant VCS is unable to address same and Plaintiff has thereby failed to state a viable §1983 cause of action. Assuming arguendo that Plaintiff intended to rely on an unofficial or defacto policy, she has failed to allege sufficient facts to establish same.

To prove §1983 liability against a municipal defendant based on a de facto policy, a plaintiff must allege and prove a widespread practice which is so permanent and well settled as to constitute a "custom or usage with the force of law." Brown v. City of Ft. Lauderdale, 923 F.2d 1474, 1481 (11th Cir. 1991). In other words, a plaintiff must prove that the policy making officials must have known about it but failed to take action to stop it in order to establish that a longstanding widespread practice is deemed to have been

authorized by the municipality.

In this case, Plaintiff has not set forth sufficient factual allegations to establish that any official with Volusia County, including the named Defendant, Sheriff Ben Johnson, had actual knowledge of any alleged wrongdoing by Defendant Higgins. The conclusory allegations with insufficient facts to support same do not establish a prima facie case of a §1983 violation against Defendant VCS. Plaintiff has failed to present sufficient facts of a custom, policy or practice to which Defendant VCS was deliberately indifferent so as to hold it liable for a violation of §1983. Hackett v. Fulton County School Board District, 238 F.Supp 2d 1330 (N.D. Ga. 2002).

IV. STATE COURT CLAIMS

A. FAILURE TO COMPLY WITH §768.28, FLA. STAT. (2008) - COUNTS II THROUGH V - DEFENDANT VOLUSIA COUNTY SHERIFF

Counts II-V are state law claims against both Defendants. (Doc. 25, ¶¶23-52) Although it is not alleged, Plaintiff is apparently relying on this Honorable Court's supplemental jurisdiction of said claims pursuant to 28 U.S.C. §1367.

As a political subdivision, Defendant VCS may only be sued in tort pursuant to a waiver of sovereign immunity as provided in §768.28, Fla. Stat. (2008). Metropolitan Dade County v. Lopez, 889 So.2d 146 (Fla. 3rd DCA 2004) In order to bring a state law claim against a governmental entity, a plaintiff is required to comply with certain conditions precedent and also to allege such compliance in the complaint. §768.28, Fla. Stat. (2008). Specifically, §768.28(6)(a) provides, in pertinent part, that "an action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency... within 3 years after such claim accrues" and the agency denies the claim in writing. Failure of an agency to make a final disposition of a claim in writing within six months of its filing is considered a denial of the claim. §768.28(6)(d), Fla. Stat. (2008).

In addition, subsection (b) provides that "the requirement of notice to the agency and denial of the claim pursuant to paragraph (a) are conditions precedent to maintaining an action..." and compliance with same must be so pled. "Under §768.28(6), not only must the notice be given before a suit may be maintained, but also the complaint must contain an allegation of such notice..." Wagatha v. City of Satellite Beach, 865 So.2d 620, 622 (Fla. 5th DCA 2004) (citing Mendez v. North Broward Hosp. Dist., 537 So.2d 89, 91 (Fla. 1988)); McCreary v. Brevard County, 2010 WL 298395 (M.D. Fla. Jan. 20, 2010).

In the instant case, Plaintiff submitted a notice of claim to Defendant VCS which was received on January 16, 2009. See Exhibit C. Defendant VCS did not respond thereto, as is its right, and specifically did not deny the claim in writing. Plaintiff filed the instant Complaint on June 19, 2009, which is clearly less than six months after the submission of the notice of claim. Notwithstanding, Defendant VCS's receipt of the statutory notice, the Complaint does not allege compliance with §768.28 (Fla. Stat. 2008). The state claims are premature and the Complaint is deficient in not pleading the requisite conditions precedent. The state claims must be dismissed.

B. BATTERY

Plaintiff alleges that Defendant Higgins committed a battery by inflicting, "offensive contact" on Plaintiff without probable cause and with excessive and unreasonable force.[6]

"Traditionally, a presumption of good faith attaches to an officer's use of force in making a lawful arrest and an officer is liable for damages only where the force used is clearly excessive." Jennings v. City of Winter Park, 250 So.2d. 900 (Fla. 4th DCA 1971) The focus in a battery claim based on an allegation of excessive force during an arrest is whether the force used was reasonable under the circumstances. City of Miami v.

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[6]Plaintiff apparently relies on the fact that she is 4ft. 10in. tall and 100lbs. as prima facie proof that the force used by Defendant Higgins in detaining her was excessive and unreasonable.

Sanders, 672 So.2d 46 (Fla. 3rd DCA 1996) It is not enough to sustain a battery claim that an act was intentionally done - the Defendant must intend the harm itself (the consequences of an act, not simply the act itself) or be substantially certain the harm will occur. Godman, 2009 WL 1651524 at *9.

In the instant case, the undisputed material facts establish that there is no evidence that Defendant Higgins intended to commit an unlawful battery when he detained Plaintiff and took her to the ground to stop her from walking away during the course of his investigation. There is no allegation of malicious intent as to this count nor is there any evidence of such. Defendant Higgins used the amount of force that was necessary and therefore reasonable under the circumstances. It is not "clearly excessive" and thus does not constitute an unlawful battery. Defendant VCS is entitled to summary judgment on this count.

As to Defendant Higgins individually, §768.28(9)(a) provides that in order for an officer to be held personally liable for an injury resulting from an act committed in the course and scope of his employment, the officer must have acted in bad faith, with a malicious purpose or in a willful and wanton manner. Prieto v. Malgor, 361 F.3d 1313 (11th Cir. 2004) Something more than mere intentional contact is necessary to establish such liability. Tepper v. Canizaro, 2005 WL 2484644 (M.D. Fla. Oct. 7, 2005) There are no allegations of such herein nor is there any evidence to support same. Defendant Higgins is entitled to summary judgment on this count.

C. FALSE ARREST

Plaintiff alleges that Defendant Higgins, in the course and scope of his employment, arrested her without probable cause, intentionally and with malice, causing Plaintiff's loss of liberty and damages. The undisputed evidence establishes that a neutral magistrate found probable cause for Plaintiff's arrest for domestic violence-battery and resisting arrest without violence. In addition, if an officer "has

probable cause (or substantial reason) to believe that an arrested person was committing a misdemeanor in his presence", the officer is not liable for false arrest. City of Hialeah v. Rehm, 455 So.2d 458, 461 (Fla. 3rd DCA 1984), Freeman v. Town of Eatonville, Fla., 225 Fed.Appx. 775 (11th Cir. 2006)

In other words, the existence of probable cause is a complete bar to an action for false arrest. Andrade v. Miami-Dade County, 2010 WL 4009128 (S.D. Fla. 2010) The Court must determine whether probable cause exists by examining the totality of circumstances in this case. Plaintiff admits that she failed to comply with Defendant Higgins' order to stop, which was a lawful order in light of the circumstances, as set forth in the undisputed material facts. Defendant Higgins' actions in arresting Plaintiff were lawful and therefore this count is barred.

D. MALICIOUS PROSECUTION AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In Counts IV and V, Plaintiff asserts that the Defendants acted maliciously in instituting a criminal prosecution of Plaintiff without probable cause and that their conduct intentionally inflicted severe emotional distress on Plaintiff. The latter is alleged to have occurred while Defendant Higgins was acting in the course and scope of his employment. §768.28, Florida Statutes (2008) provides for governmental liability only where an employee acts negligently within the course and scope of his duties. The allegations herein that Defendant Higgins acted with malice and with the intent to cause emotional distress precludes Defendant VCS from being found liable for these two claims as it is entitled to sovereign immunity therefrom. Rance v. Jenn, 2008 WL 5156675 (S.D. Fla. Dec. 9, 2008)

In addition, the Complaint fails to assert facts to support that Defendant Higgins acted with an intent to cause harm or with malice. Conclusory allegations of such

conduct with no facts to support same do not state a prima facie claim for these two intentional torts. Malice is an essential element of a malicious prosecution claim and can be proven through either evidence of actual malice or by inferring legal malice. Miami-Dade County v. Asad, 2009 WL 605330 (3rd DCA March 11, 2009) Legal malice is inferred when there is a finding of no probable cause. Reed v. State, 837 So.2d 366 (Fla. 2002) In this case, there is no evidence of actual malice and probable cause was found. This count should be dismissed as to Defendant Higgins.

II. PUNITIVE DAMAGES AGAINST DEFENDANT VOLUSIA COUNTY SHERIFF

The Plaintiff seeks punitive damages against Defendant VCS in all counts of the Amended Complaint. It is well-established that punitive damages cannot be assessed against governmental entities. Kentucky v. Graham, 473 U.S. 159 (1985) Accordingly, all punitive damage claims against Defendant VCS should be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY to the accuracy of the foregoing and I certify that on January 31, 2011, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, and have sent copies by U.S. Mail to: **DENNIS WELLS, ESQUIRE**, Counsel for Plaintiff, 280 Wekiva Springs Road, Suite 2090, Longwood, FL 32779.

/s/ Nancye R. Jones
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