No. 20-

IN THE

Supreme Court of the United States

BARRY DAMON MALLATERE,

Petitioner,

v.

TOWN OF BOONE, A NORTH CAROLINA MUNICIPAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NATHAN A. MILLER
Counsel of Record
MILLER & JOHNSON, PLLC
756 West King Street
Boone, NC 28607
(828) 264-1125
nathan@millerandjohnsonlaw.com

Counsel for Petitioner

298361

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The Fourth Circuit affirmed in part, vacated in part, and remanded the district court's dismissal over the Petitioner's, Barry Damon Mallatre, causes of action. The Petitioner pled a violation of 42 U.S.C. § 1983, Malicious Prosecution under North Carolina law and in the alternative that the Respondent violated the Petitioner's Rights under the Fourth Amendment to the United States Constitution.

Two Questions Presented:

1. Did the Fourth Circuit err in upholding the district court's dismissal of the Petitioner's claim for violation of 42 U.S.C. § 1983 in finding that the Petitioner did not properly allege that a policy maker's decision caused the Petitioner's harm?

2. Should the Court re-examine their holding in *Monell v. Dept. of Soc. Servs.*,436 U.S. 658 (1978) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) that municipalities can't be held liable for the violations of civil rights by their employees under the theory of *respondeat superior* no matter the policy or custom?

LIST OF PARTIES

The parties below are listed in the caption:

Barry Damon Mallatere, Petitioner

Town of Boone, a North Carolina Municipality, Respondent

CORPORATE DISCLOSURE STATEMENT

The Petitioner is not a corporation.

RELATED CASES

- *Mallatere v. Town of Boone,* No. 5:18-cv-00006-GCM, U.S. District Court for the Western District of North Carolina. Judgment entered June 3, 2019.

- *Mallatere v. Town of Boone,* No. 19-1698, U.S. Court of Appeals for the Fourth Circuit. Judgment entered June11, 2020.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is an unpublished opinion and is known by the file number of 19-1698. (A p 1a). The Fourth Circuit affirmed in part, vacated in part and remanded the June 3, 2019 decision of the United States District Court for the Western District of North Carolina. (A p 5a). See Appendences A and B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1331 as a Federal Question and 28 U.S.C. § 1332(a).

The Fourth Circuit's opinion was rendered on June 11, 2020. The Mandate was filed on July 6, 2020. The deadline to file a petition for writ of certiorari was extended by the March 19, 2020 Order number 589 U.S. for this filing by additional 60 days with the petition for writ of certiorari due 150 days from when the opinion was rendered.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend IV

The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 42 United States Code, Section 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Petitioner, Barry Damon Mallatere, owned a company known as Appalachian Hospitality Management, Inc., which leased and managed several nationally branded hotels in Boone, North Carolina. In 2012, the Petitioner's company contracted with a company to convert the indoor pool heater for the Best Western hotel in Boone, North Carolina from a propane heating burner to a natural gas heating burner. The company contracted to do the conversion, applied for and received a permit from the Town of Boone's (hereinafter referred to as "Boone") planning and inspection department. After the conversion was completed, Boone's planning and inspection department inspected the work and approved it as being

completed pursuant to the relevant building code. On April 16, 2013, Daryl and Shirley Jenkins stayed in room 225, which is directly above the indoor pool heater room and ventilation system at the Best Western in Boone, North Carolina where both passed away. The room was closed for a number of weeks as the death investigation continued, but Mr. Mallatere was never informed by Boone's employees that the room was unsafe to rent and was told by the investigating officer that the coroner had no cause for concern because the coroner believed the Jenkins had died from dual heart attacks. Mr. Mallatere then hired an outside company who confirmed that the room was free from gas leaks. In early June of 2013, one couple stayed in room 225 and reported no issues or complications. On June 8, 2013, Jeffrey Williams and his mother Jeannie Williams, stayed at the Best Western in room 225. During the night, Jeffery Williams was killed by carbon monoxide poisoning and his mother was severely injured. Approximately a week before Jeffrey Williams was killed and his mother severely injured by carbon monoxide poisoning in room 225, the coroner for Watauga County and Boone received an email from the state lab which stated that the Jenkins died from carbon monoxide poisoning. The coroner never opened that email until after Jeffrey Williams' death and subsequently never informed Mr. Mallatere of that fact. Boone investigated Mr. Mallatere through its police department and determined that no probable cause existed to charge the Mr. Mallatere with any crime in regards to the deaths of either of the Jenkins, the death of Jeffrey Williams or the serious injury of Mr. William's mother. Boone's police department felt political pressure by the policy makers, including the town council, police chief and others, and subsequently took the lead detective off the case and tasked new investigators with finding probable cause that Mr. Mallatere had committed a crime.

No probable cause existed that Mr. Mallatere had committed a crime. Regardless of that fact, Boone presented testimony to the grand jury to charge Mr. Mallatere with three counts of involuntary manslaughter and one count of assault inflicting serious injury. Boone knew these charges were false when they presented them. Boone utilized the turmoil during an election for district attorney to exploit the grand jury and obtain the charges. After a new district attorney was elected and the evidence was evaluated, all charges against Mr. Mallatere were dismissed. Mr. Mallatere and his company subsequently lost their contracts to manage the operations of various hotels.

On January 10, 2018 the Appellant filed their original Complaint against Appellee. On April 14, 2018 the Appellant timely filed their Amended Complaint. On April 26, 2018 the Appellee filed a Motion to Dismiss Plaintiff's Amended Complaint. More than one year later, on June 3, 2019, the district court issued a final order granting the Appellee's Motion to Dismiss Plaintiff's Amended Complaint. On June 27, 2019 the Appellant timely appealed the district court's final order. On June 11, 2020 the United States Court of Appeals for the Fourth Circuit issued their opinion which affirmed in part, vacated in part and remanded the District Court's Order.

REASON FOR ALLOWANCE OF THE WRIT

There exists a division, at least between the First Circuit Court of Appeals and the Fourth Circuit Court of Appeals, in regards to the heightened pleading requirements as required by the Supreme Court in the *Twombly* and *Iqbal* decisions. *Bell Atl. Corp. v. Twombly*,

550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d. 929 (2007) and *Ashcroft v. Iqbal*, ---- U.S. -----, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

This split among the circuits has led to and will continue to lead to confusion and unequal interpretations under the law for litigants.

Further the Petitioner is requesting that the court re-examine its holdings in *Monell* and *Iqbal* as being inconsistent with Constitutional guarantees made by and to the citizenry specifically as set forth in U.S. Constitution amend IV. *Monell v. Dep't of Soc. Servs*, 436 U.S. 685 (1978), Id. This inconsistency being the source of unrest, both past and present, from the citizenry being unable to seek full redress of violations of their U.S. Constitution amend IV rights by governmental actors through the courts.

I. Review is warranted to resolve a conflict concerning the application of pleading standards set forth in *Twombly* and *Ashcroft*.

Petitioner is an individual citizen who filed his complaint alleging that state actors had violated his U.S. Constitution amend IV rights to be free from prosecution absent probable cause. Petitioner alleged that certain policy makers, though he did not specifically name them, directed the action against him which would entitle him to a cause of action under 28 U.S.C. § 1983.

The heightened standard of pleading as required in the *Twombly* decision requires parties to plead a cause of action with more than a "formulaic recitation of "policy

makers" and "policy" does not provide sufficient factual allegation to state a plausible claim upon which relief can be granted as required by *Iqbal*. *Iqbal,* 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). However, in cases where the names and identities of those policymakers, and documentation supporting their actions against those similarly situated to the Petitioner cannot adequately identify all such actors with specify unless given the opportunity to conduct discovery. This heightened pleading standard serves to insulate such bad actors from prosecution so long as they don't voluntarily disclose their actions publically.

The Western District of North Carolina decided in its June 3, 2019 Order dismissing the Petitioner's causes of action that the Petitioner had failed to properly plead his cause of action because he did not specifically name the policy maker who created the policy to target the Petitioner. This imposes an impossible standard on a litigate, by requiring discovery to be completed by the litigate prior to filing. Mr. Mallatere pled that he was investigated by Boone, cleared by Boone and then after political pressure was placed upon Boone they re-opened the investigation which ultimately had him prosecuted and then ultimately exonerated. Mr. Mallatere, as an ordinary citizen, is not in a position to be in the back room of a small town police department or town council chamber to learn which policy maker pushed for the charges against him. The only way for Mr. Mallatere to obtain this knowledge is through the discovery process. In his allegations, if taken as true, it is clear that only a policy maker could order the Boone police department to change course after an individual had been cleared by that same department.

The Fourth Circuit, through this decision, has shown that unless the policy maker is specifically named then it is that Circuit's interpretation of the *Twombly* and *Iqbal* decisions that the Petitioner's causes of action must be dismissed due to the heightened pleading standard. This is in direct contradiction of the holding by the First Circuit Court of Appeals in *Peñalbert-Rosa v. Fortuño-Burset*, 621 F.3d 592 (1st Cir. 2011). In the *PeÑalbert-Rosa* case, the plaintiff had lost her job because of her political party identification when a new governor was elected. She was fired for that reason, though she didn't know exactly who ordered her firing. Id at 593, 594 The District Court initially dismissed her action but the First Circuit Court of Appeals reinstated her action against an unnamed John Doe until, through discovery, she could establish who wronged her. Id at 597. The court states in the *PeÑalbert-Rosa* opinion that "the complaint adequately alleges – based on the non-conclusory facts already listed – that someone fired PeÑalbert based upon party membership. Of course the factual allegations might be later undermined or countered by affirmative defenses; but at this stage the complaint adequately asserts a federal wrong by someone. So while the present complaint does not justify suit against the defendants actually named, an avenue for discovery may be open." Id. at 596. Petitioner in the case at bar named the actual entity he claims has wronged him but he is presently unable to name the individual policy maker. The Plaintiff in the *PeÑalbert-Rosa* was allowed to proceed with her allegations even without knowing the liable party.

It is clear that in the First Circuit Court of Appeals, the Petitioner's cause of action for violation of 28 U.S.C. § 1983 would have survived a Rule 12(b)(6) motion to

dismiss. However, Petitioner's cause of action did not survive the Fourth Circuit Court of Appeals. This split among the circuits must be rectified by the Honorable Supreme Court to give all litigants a level playing field.

II. The Court should re-examine their holding in *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) that municipalities can't be held liable for the violations of civil rights by their employees under the theory of *respondeat superior* no matter the policy or custom.

The constitution was created to set forth a government where the people would determine how they are governed and would further ensure that they forever held the ultimate control. The founders knew that power corrupts and some of the states refused to ratify the constitution until the bill of rights were included. Archives.gov/education/constitution-day/ratification.html. The purpose of the bill of rights was to constrain the federal government from seizing certain liberties from the citizens. Id. The fourth amendment, which is at issue here, states that "The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend IV. The plain reading of the amendment is that if no probable cause exists, no warrant can be issued. If a warrant is issued without probable cause, then an action should be allowed to be maintained against the government that sought and obtained the warrant by the aggrieved individual. Otherwise there exists no recourse

for damages that an individual suffers for the improper warrant other than a dismissal.

The bill of rights originally only constrained the federal government. However, with the passage of the 14th amendment and the incorporation doctrine, portions of the bill of rights, including the 4th amendment have been applied to the individual state governments along with their municipalities by this court. *Map v. Ohio*, 367 U.S. 643 (1961). This ensures that the people have recourse through the court system if state actors violate the freedoms guaranteed to them. By granting access through the court system, the people are given one of the two avenues that were originally guaranteed them, the ballot box and the courts, to protect their freedoms and to find recourse if said freedoms are violated. This is our common history and the foundations of our republic which have served us well for the last 231 years. The problems lie when the executive branch of the government overreaches and it's the court's duty to reign in the both the federal and state governments' executive branches when that occurs.

The United States Congress passed 42 U.S. Code § 1983 which codified a civil action for violations of constitutional rights. This court has adopted this statute as the doorway to all lawsuits for violations of various rights including the 4th amendment. 42 U.S. Code § 1983 is more restrictive than the 4th amendment to the United States Constitution. This statute requires that the government act under color of any statute, ordinance, regulation, custom, or usage to deprive a citizen of their constitutional right. Accordingly, this statute does not allow actions against the government if their employees violate a citizen's rights utilizing their governmental power and authority to violate a citizen's

rights unless it's a custom or an order of a policymaker for that governmental unit. *Monell.*

The Bill of Rights was adopted by the people along with the Constitution to form our government. They are the supreme law of the land, whereas statutes such as 42 U.S. Code § 1983 are laws passed by the people's representatives. Statutes passed by elected representatives should not be allowed to impose on or impede the people's ability to enforce their constitutional rights.

Our country is presently witnessing what happens when their ability to redress their rights in a court of law is restricted. The citizens still have the ability to elect their leaders who then make decisions on policing at a local level. This avenue only works for people who live in the voting district that controls the offending governmental unit. The mobility of our society and the numerous municipal police departments make it difficult for large numbers of people to rely on ballot box to effect change. For those people the only recourse is through the courts. However, since the *Monell* decision, the people have been cut off from seeking redress through the courts against the governments that employ people who violate rights under the color of governmental action. By restricting their ability to redress grievances through the courts, many people have taken to the street in massive protests which have also descended into riots and looting. If provided the ability to enforce their rights unimpeded through the court system, this would serve to quell the desires of the people to take to the streets in violent protests.

The courts have long held that employers are responsible for the actions of their employees while on the job. *The Philadelphia and Reading Railroad Company, Plaintiff in Error vs. Derby*, 55 U.S. 468, 14 How. 468, 14 I.Ed. 502 (1852). This standard has ensured that companies hire qualified individuals and actively monitor and manage those individuals. If the companies don't hire qualified individuals and actively monitor and manage these individuals then they are liable for and they pay a higher cost for such inaction then if they have would have ensured their employees performed their duties safely. Id at 479. This standard does not apply to government employees when it comes to violations of citizens' constitutional rights. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). A town is not responsible for the actions of its officers if said officers act on their own to violate a citizen's constitutional rights. Id. This failure to hold governments accountable allows them to commit violations of a citizen's constitutional rights with little to no recourse to the citizen. For if said citizen does not live in that jurisdiction, but merely works there, then he can't vote for the policymakers who ultimately hire and fire that officer. The citizen in this example has no recourse, either at the ballot box or in the court system, unless the town expressly codifies violating people's rights a custom or a policy.

Certiorari should be granted by the Supreme Court to reconsider its decision in *Monell*, *Iqbal* and its interpretation of 42 U.S. Code § 1983 to allow usage to include civil actions against state actors whose agents and/or employees violate a citizen's constitutional rights. The people never bargained for such a deal and the will of the people should be re-examined.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

NATHAN A. MILLER
Counsel of Record
MILLER & JOHNSON, PLLC
756 West King Street
Boone, NC 28607
(828) 264-1125
nathan@millerandjohnsonlaw.com

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JUNE 11, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1698

BARRY DAMON MALLATERE,

Plaintiff - Appellant,

v.

TOWN OF BOONE, A NORTH CAROLINA MUNICIPAL CORPORATION,

Defendant - Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. (5:18-cv-00006-GCM). Graham C. Mullen, Senior District Judge.

April 30, 2020, Submitted
June 11, 2020, Decided

Affirmed in part, vacated in part, and remanded by unpublished per curium opinion.

Before KENNAN, HARRIS and QUATTLEBAUM, Circuit Judges.

Appendix A

PER CURIAM:

Barry Damon Mallatere appeals the district court's order dismissing his amended complaint against the Town of Boone, a North Carolina municipal corporation, for failure to state a claim. We have reviewed the record and find no reversible error in the district court's dismissal of Mallatere's 42 U.S.C. § 1983 (2018) claim. We therefore affirm that portion of the order for the reasons stated by the district court. We conclude, however, that the district court erred by dismissing Mallatere's malicious prosecution claim on the basis of governmental immunity; accordingly, we vacate this portion of the district court's order and remand for further proceedings.

We review de novo a district court's dismissal for failure to state a claim. *Trejo v. Ryman Hosp. Props., Inc.*, 795 F.3d 442, 445-46 (4th Cir. 2015). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotation marks omitted). Although a pleading that offers only "a formulaic recitation of the elements of a cause of action will not do," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), we "draw[] all reasonable inferences in favor of the plaintiff," *Elyazidi v. SunTrust Bank*, 780 F.3d 227, 233 (4th Cir. 2015) (internal quotation marks omitted). A plaintiff plausibly suggests a claim is viable by pleading "enough fact to raise a reasonable expectation that discovery will reveal evidence" to support the claim at issue. *Twombly*, 550 U.S. at 556.

Appendix A

A municipality in North Carolina is immune from "the torts of its officers and employees if the torts are committed while they are performing a governmental function." *Strickland v. Hedrick*, 194 N.C. App. 1, 669 S.E.2d 61, 67 (N.C. Ct. App. 2008). However, municipalities can waive their immunity from suit by purchasing liability insurance. N.C. Gen. Stat. § 160A-485(a) (2018). To combat a governmental immunity defense, the complaint must specifically allege that the defendant has waived it. *Fullwood v. Barnes*, 250 N.C. App. 31, 792 S.E.2d 545, 550 (N.C. Ct. App. 2016).

In his amended complaint, Mallatere stated that "[u]pon information and belief," Boone purchased liability insurance and waived its immunity. When taking as true the allegation that Boone had liability insurance, it is reasonable to infer that Boone has waived its immunity from suit. *See Elyazidi*, 780 F.3d at 233. Therefore, we conclude that the district court erred by dismissing Mallatere's malicious prosecution claim as barred by Boone's governmental immunity.

We leave the issue of whether Mallatere adequately stated a claim for malicious prosecution for the district court to address on remand in the first instance. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 515 (4th Cir. 2015) ("The district court is in a better position to consider the parties' arguments in the first instance, which can be presented at length rather than being discussed in appellate briefs centered on the issues the district court did decide.").

Accordingly, we affirm the portion of the district court's order dismissing Mallatere's § 1983 claim, vacate the portion of the district court's order dismissing Mallatere's malicious prosecution claim based on governmental immunity, and remand for proceedings consistent with this opinion.[1] We express no opinion on the merits of Mallatere's malicious prosecution claim. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED IN PART,
VACATED IN PART, AND REMANDED

1. Mallatere's amended complaint also raised a freestanding constitutional claim as an alternative to his § 1983 claim. The district court dismissed that claim because § 1983 was the proper avenue to assert constitutional violations by municipalities; Mallatere does not appeal that dismissal.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, STATESVILLE DIVISION, DATED JUNE 3, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA, STATESVILLE DIVISION

CIVIL ACTION NO. 5:18-CV-00006-GCM

BARRY DAMON MALLATERE,

Plaintiff,

v.

TOWN OF BOONE,

Defendant.

ORDER

THIS MATTER COMES before this Court on Defendant Town of Boone's ("Defendant") Motion to Dismiss Plaintiff's Amended Complaint. (Doc. No. 13). Plaintiff Barry Mallatere ("Plaintiff") responded (Doc. No. 15) to which Defendant replied. (Doc. No. 16). As such, this matter is ripe for disposition.

I. FACTUAL BACKGROUND

Plaintiff at all times relevant to this case managed and operated several hotels in Boone, North Carolina.

(Compl. ¶ 5). In 2011, Plaintiff served as President of Appalachian Hospitality Management, Inc. ("Appalachian Hospitality"). (*Id.* ¶ 6). In 2011, the pool heater at one of the hotels operated by Appalachian Hospitality malfunctioned. (*Id.* ¶ 8). Without knowledge of Plaintiff, employees removed a pool heater from another of the Appalachian Hospitality properties and replaced the malfunctioned heater. (*Id.* ¶ 9, 10). The employees responsible for the change did not get the necessary permits for the installation of the new pool heater. (*Id.* ¶ 11).

In 2012, Appalachian Hospitality decided to convert its heaters and furnaces from propane to natural gas. (*Id.* ¶ 12). Appalachian Hospitality contracted with a third party to do the conversion. (*Id.* ¶ 13). The third party inspected the employee installed pool heater and determined the third party could safely convert the propane heater to natural gas. (*Id.* ¶ 15). The third party applied for and received the necessary permits to complete the conversion from the Defendant's Planning and Inspections Department. (*Id.* ¶ 16). After the conversion, Defendant's inspector confirmed the installation satisfied the local building code. (*Id.* ¶ 17).

In April of 2013, Daryl and Shirley Jenkins stayed in the hotel room directly above the converted pool heater. (*Id.* ¶ 18). The Jenkins passed away in the room that night. (*Id.* ¶ 19). Defendant's fire department inspected the room after the Jenkins' deaths and determined that nothing was wrong with the room itself. (*Id.* ¶ 21). Plaintiff instructed Appalachian Hospitality to not rent the room pending further tests. (*Id.* ¶ 23). An outside contractor tested the room and found no gas leaks present. (*Id.* ¶ 24).

In June of 2013, another couple stayed in the same room in which the Jenkins had died. (*Id.* ¶ 26). That couple did not report having any negative experiences. (*Id.*). The following week, Jeffrey and Jeanie Williams spent the night in the same room. (*Id.* ¶ 27). That night, exhaust from the pool heater entered the room and caused the Williams to suffer from carbon monoxide poisoning. (*Id.* ¶ 28). Jeffrey Williams died, and Jeanie Williams suffered serious injuries. (*Id.*).

Plaintiff did not have any knowledge that the room was susceptible to carbon monoxide poisoning prior to either the death of Jeffrey Williams or Daryl and Shirley Jenkins. (*Id.* ¶ 22, 24, 25, 30). However, Defendant launched an intensive investigation into the three deaths. (*Id.* ¶ 31, 32). The first investigation concluded that no crime had occurred. (*Id.* ¶ 33). Defendant, however, opened a second investigation into the incidents. (*Id.* ¶ 34). Plaintiff alleges in his Complaint that Defendant did not "have any probable cause of [a] crime being committed by Plaintiff." (*Id.* ¶ 35).

Defendant insisted the evidence from the second investigation be presented to the Grand Jury in hopes that an indictment would be issued against Plaintiff. (*Id.* ¶ 36). The Grand Jury indicted Plaintiff on three counts of involuntary manslaughter and one count of assault inflicting serious bodily injury. (*Id.*). Plaintiff alleged that in support of the indictment, Defendant required two of Defendant's employees to appear and testify in front of the Grand Jury. (*Id.* ¶ 37). Plaintiff further alleged that these two witnesses provided false testimony that served as

the basis for the indictment. (*Id.*). Ultimately, the District Attorney dropped all charges against Plaintiff. (*Id.* ¶ 39).

II. STANDARD OF REVIEW

When faced with a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must "accept as true all well-pleaded allegations and . . .view the complaint in a light most favorable to the plaintiff." *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). The Court "assume[s] the[] veracity" of these factual allegations, and "determine[s] whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). However, the court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs. LLP*, 213 F.3d 175, 180 (4th Cir. 2000). Thus, to survive a motion to dismiss, the plaintiff must include within his complaint "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

III. DISCUSSION

Plaintiff alleged three different causes of action against Defendant: (1) Violation of §1983; (2) Malicious Prosecution; and (3) Violation of Plaintiff's Fourth Amendment Rights pled in the alternative to the first two causes of action. Defendant moved to dismiss each of the claims. The Court will discuss each below.

Appendix B

a. Violation of §1983

Congress passed Section 1983 to provide redress to private parties for the deprivation of their constitutional rights under the color of state law. 42 U.S.C. § 1983. In *Monell v. Dep't of Soc. Servs.*[1], the Supreme Court held that Section 1983 applies to municipalities. However, municipalities cannot be held liable under the theory of *respondeat superior* for Section 1983 claims. *Monell*, 436 U.S. at 694. "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Board of Cty. Comm'rs v. Brown*, 520 U.S. 397, 405, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). Rather, for a municipality to be held liable under Section 1983, the plaintiff must show that the constitutional deprivation occurred as a result of the enforcement of a municipal policy or custom. *Id.*

Based on *Monell* and its progeny, the Court must first determine the alleged constitutional deprivation at issue. Plaintiff states quite clearly that the alleged deprivation was a seizure by the Defendant of the Plaintiff without probable cause in violation of Plaintiff's Fourth Amendment rights. (Compl. ¶ 45-46). Thus, the Court will discuss the Section 1983 claim only with respect to that alleged violation.

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1. 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

First, the Court notes that the Section 1983 claim cannot be based upon the testimony of the Defendant's employees to the Grand Jury. Allowing the testimony of the two employees to serve as the basis for liability for the municipality would give life to a *respondeat superior* theory that the Supreme Court has explicitly held not to apply to Section 1983. Plaintiff agrees that his claim is not based upon the allegedly false testimony of the two witnesses. (Doc. No. 15, p. 7) ("Plaintiff's claims are not based upon the improper or untruthful testimony of any grand jury witnesses, those allegations of their testimony are just smaller acts in the larger causes of action of Defendant improperly investigating and proceeding with charges against the Plaintiff when Defendant had no probable cause.")

Next, Plaintiff's Section 1983 claim cannot stand simply because the Defendant chose to reopen the investigation into Plaintiff. Plaintiff on several occasions in both the Complaint and brief noted that the original investigation determined that probable cause did not exist. Plaintiff went on to argue that the reopening of the investigation after an initial determination of no probable cause contributed to the violation of his Fourth Amendment rights. This argument has no merit. The Fourth Amendment does not require probable cause to investigate a potential crime. As a matter of fact, it is often the investigation of the crime that gives rise to the probable cause that justifies the prosecution. To the extent that Plaintiff claims the reopening of the investigation by Defendant caused a deprivation of his constitutional rights, the Court disagrees.

Rather than utilizing the above, a Section 1983 claim for municipality liability must be based upon an official policy or custom. *Monell*, 436 U.S. at 690-91. The Fourth Circuit identified four possible sources of official policy or custom that could give rise to municipal liability under Section 1983: (1) written ordinances and regulations; (2) affirmative decisions of individual policymaking officials; (3) omissions by policymaking officials that manifest deliberate indifference to the rights of the citizens; or (4) a practice so persistent and widespread and so permanent and well settled as to constitute a custom or usage with the force of law. *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999) (quotations and citations omitted).

Here, Plaintiff does not allege a written policy, omissions by policymaking officials, or a general practice. Rather, Plaintiff alleges that municipality liability should attach based upon the affirmative actions of individual policy makers. The Supreme Court has held that "not every decision by municipal officers automatically subjects the municipality to § 1983 liability." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-83, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). Rather, the policy maker must have "final authority to establish municipal policy with respect to the action ordered." *Id.*

In Plaintiff's complaint, Plaintiff makes many references to "policy makers" without providing specific job titles, roles, or authority to make final municipal policy. In Paragraph 43 of the complaint, Plaintiff lists the "Town Council, Town Manager, Police Chief, Director of Planning and Inspections and Fire Chief" as the policy

makers responsible for directing employees to seek criminal charges against Plaintiff. However, Plaintiff fails to properly plead the role of any of those alleged policy makers or their authority to set final municipal policy as it pertains to seeking criminal charges. Rather, Plaintiff in the next paragraph again refers generally to Defendant's "policy makers" by stating that it was their "decision to reopen the investigation, after it was closed by their lead detective upon his determination that no probable cause existed, and to seek indictments without probable cause [that] constitutes a policy of the Defendant." This formulaic recitation of "policy makers" and "policy" does not provide sufficient factual allegation to state a plausible claim upon which relief can be granted as require by *Iqbal*. *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

Plaintiff in his brief argued facts that are not found within the complaint. For instance, in his brief, Plaintiff states that it was the Police Chief who reopened the investigation into Plaintiff. (Doc. No. 15, p. 3). However, the complaint at the cited paragraph refers to a general policy maker. (Compl. ¶ 34). Additionally, Plaintiff states the Court can take judicial notice of the size of the Defendant's police department, and thus, make assumptions about the final decision-making authority of certain positions within that office. (Doc. No. 15, p. 3). However, each of these requests asks the Court to consider facts that are not contained within the complaint. The Court will not accept that invitation. *See Pirelli v. Walgreen Co.*, 631 F.3d 436, 448 (7th Cir. 2011) ("The effort founders, however, because of the axiomatic rule that a plaintiff may not

amend his complaint in his response brief.") (internal citations omitted). Thus, Defendant's Motion to Dismiss as it pertains to the Section 1983 claim is **GRANTED**.

b. Malicious Prosecution

The second cause of action is one for malicious prosecution. To state a claim for malicious prosecution, a plaintiff must allege: "(1) defendant initiated the earlier proceeding; (2) malice on the part of defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff." *Strickland v. Hedrick*, 194 N.C. App. 1, 17, 669 S.E.2d 61 (2008). Defendant moved to dismiss arguing that governmental immunity applied to this claim. The doctrine of governmental immunity holds that municipalities are immune from suit based upon the torts of its employees in the exercise of governmental functions absent waiver of immunity. *Herndon v. Barrett*, 101 N.C. App. 636, 640, 400 S.E.2d 767 (2004). The North Carolina Court of Appeals has held governmental immunity to apply to cases involving malicious prosecution. *See Strickland*, 194 N.C. App. at 16. "Governmental immunity is absolute unless the [municipality] has consented to [suit] or otherwise waived its right to immunity." *Fullwood v. Barnes*, 250 N.C. App. 31, 792 S.E.2d 545, 550 (N.C. Ct. App. 2016) (internal quotations omitted).

The Court agrees with Defendant that the doctrine of governmental immunity bars Plaintiff's claim. Here, Plaintiff alleged that Defendant authorized the investigation and prosecution of Plaintiff. These acts

constitute governmental functions for which Defendant is immune from suit. *Strickland*, 194 N.C. App. at 16. Additionally, Plaintiff did not allege that Defendant has waived its governmental immunity by purchasing liability insurance, for example. *See* N.C. Gen. Stat. §160A-485(a) ("Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance."). Thus, because Plaintiff's allegations only amount to governmental functions and because Defendant has not waived governmental immunity, Defendant's Motion to Dismiss the malicious prosecution claim must be **GRANTED**.

c. Fourth Amendment Violation

Finally, Plaintiff pled in the alternative a direct violation of his Fourth Amendment rights. However, Section 1983 is the appropriate avenue to sue municipality actors for constitutional violations. While the Supreme Court in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics* [2] held that the United States Constitution provides a direct cause of action against *federal* actors, to pursue a direct cause of action against municipality actors, the appropriate avenue remains Section 1983. Section 1983 is not a source of substantive rights; rather, it serves as an avenue for the vindication of constitutional deprivations against state actors. *Lambert v. Williams*, 223 F.3d 257, 260 (4th Cir. 2000) (citations omitted). Therefore, Plaintiff's claim is only cognizable via

2. 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

Section 1983, not as a direct claim.[3] As such, Defendant's Motion to Dismiss this claim is **GRANTED**.

IV. CONCLUSION

For the aforementioned reasons, Defendant's Motion to Dismiss is **GRANTED**. **SO ORDERED**.

Signed: June 3, 2019

/s/ Graham C. Mullen
Graham C. Mullen
United States District Judge

3. The Court has already dismissed Plaintiff's Section 1983 based on the discussion above.