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RECOMMENDED FOR PUBLICATION
PURSUANT TO SIXTH CIRCUIT I.O.P. 32.1(b)
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHASE HOWSE,
Plaintiff-Appellant,

No. 19-3418

v.

THOMAS HODOUS and BRIAN MIDDAUGH, individually and in their official capacities as employees of the City of Cleveland, Ohio; CITY OF CLEVELAND, OHIO,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 1:17-cv-01714—Donald C. Nugent, District Judge.

Argued: January 29, 2020

Decided and Filed: March 18, 2020

Before: COLE, Chief Judge; COOK and THAPAR, Circuit Judges.

COUNSEL

ARGUED: James L. Hardiman, Cleveland, Ohio, for Appellant. Elena N. Boop, CITY OF CLEVELAND, Cleveland, Ohio, for Appellees Hodous and Middaugh. Timothy J. Puin, CITY OF CLEVELAND, Cleveland, Ohio, for Appellee City of Cleveland. **ON BRIEF:** James L. Hardiman, Cleveland, Ohio, for Appellant. Elena N. Boop, Elizabeth M. Crook, CITY OF CLEVELAND, Cleveland, Ohio, for Appellees Hodous and Middaugh. Timothy J. Puin, CITY OF CLEVELAND, Cleveland, Ohio, for Appellee City of Cleveland.

THAPAR, J., delivered the opinion of the court in which COOK, J., joined, and COLE, C.J., joined in part. COLE, C.J. (pp. 13–21), delivered a separate opinion dissenting in part.

OPINION

THAPAR, Circuit Judge. Shase Howse sued several police officers and the City of Cleveland for alleged violations of the Fourth Amendment. The district court dismissed the suit, concluding that neither the officers nor the City did anything wrong. We affirm.

I.

One summer night in 2016, Howse was walking home from a convenience store. Along the way, Howse says an unidentified Cleveland Police officer approached and asked whether he had any weapons. Howse said no. The John Doe officer then patted him down and searched his pockets. After finding no contraband, the officer told Howse that he could leave.

When Howse got home, he began climbing the steps on his front porch. The parties dispute what happened next.

As Howse tells it, several men (two of whom he later identified as Officers Thomas Hodous and Brian Middaugh) pulled up in an unmarked vehicle. Middaugh asked Howse if he lived at the house. Howse replied that he did. Middaugh asked Howse if he was *sure* that he lived there. Howse said something like "yes, what the f---" in response. R. 33-1, Pg. ID 810. That prompted Middaugh to comment that Howse had a smart mouth and a bad attitude. Middaugh then got out of the car, walked toward the porch, and asked Howse (yet again) if he was sure that he lived there. Again, Howse responded yes.

Things escalated from there. Middaugh told Howse to put his hands behind his back and that he was going to jail. Howse disobeyed Middaugh's command to put his hands behind his back. Instead, Howse yelled that he hadn't done anything wrong and that he lived at the house. Middaugh ran onto the porch, grabbed Howse (who at that point was screaming at the top of his lungs), and threw him down. When Middaugh was on top of him, Howse realized that Middaugh was a police officer. Middaugh, with help from Hodous, then tried to handcuff Howse. But Howse, in his own words, was resisting arrest by screaming and "stiffening up" his body. R. 25-3, Pg. ID 414, 415. Howse says he never tried to hit, push, or fight with the officers. And he claims that he "didn't do anything that would be considered offensive" to the officers. *Id.* at 416.

At this point, Howse's mother (who owned the house) showed up. She had heard some commotion and rushed to the front porch. When she arrived, she saw a "chaotic" scene: a man in dark clothing straddled Howse and another man struck Howse with a closed fist, which caused Howse's head to strike the porch. R. 29-4, Pg. ID 735. She asked the men (who she later realized were police officers) to stop beating her son—she kept explaining that he lived at the house. After things settled down, the officers put Howse in a police car and took him to jail.

The officers tell a different story. That night, Hodous and Middaugh (along with another officer) were patrolling the area where Howse lived—an area known for violence, drugs, and gang activity. While driving in an unmarked vehicle, they saw Howse lingering suspiciously on the front porch of a house. Howse looked nervous when he saw the unmarked

vehicle. Middaugh thought the house was vacant because it appeared to be boarded up and there were bars on the doors.

Based on his training and experience, Middaugh suspected that Howse might be engaged in criminal activity. So Middaugh asked Howse whether he lived there. Howse said he did. Middaugh wanted to investigate more, so he got out of the car, walked toward Howse, and asked him if he was trying to break in. Middaugh doesn't remember exactly what Howse said in response, but he does remember that Howse said "f---" along with some other words. R. 25-1, Pg. ID 176. (Hodous, for what it's worth, recalls Howse saying "f--- you" and "leave me the f--- alone." R. 25-2, Pg. ID 303.)

When Middaugh reached the front porch, Howse clenched his fists and "squared up" into a fighting stance. R. 25-1, Pg. ID 177. Middaugh, afraid that Howse wanted to fight, told Howse to put his hands in the air. Howse ignored that instruction and instead motioned towards his pockets, which prompted Middaugh to grab Howse's arm. Hodous joined Middaugh and tried to restrain Howse, who was grabbing at the officers and flailing around. Howse struck Hodous in the chest. Howse also tried to rip off Middaugh's flashlight and handcuff case. So Middaugh used a leg sweep to take Howse to the ground. Even while on the ground, Howse resisted the officers by burying his hands underneath his chest. The officers eventually handcuffed him and put him in a police vehicle. It wasn't until Howse's mother showed up, the officers claim, that they found out that Howse did in fact live at the house.

(While the parties have offered two vastly different accounts of what happened, we must view

the facts in the light most favorable to Howse. *Bletz v. Gribble*, 641 F.3d 743, 757 (6th Cir. 2011). That means we ignore what the officers allege happened to the extent that it conflicts with what Howse alleges happened that night. So while we tell both sides for the sense of completeness, we accept the plaintiff's version when deciding whether the officers are entitled to qualified immunity.)

Keeping that principle in mind, we can continue with some undisputed facts. After Howse was booked into jail, Middaugh signed a complaint charging Howse with assaulting a police officer. Hodous and Middaugh then wrote up "Use of Force" reports detailing what happened on the front porch. These reports said that Howse resisted arrest and struck the officers. After a few days, Howse posted bond and was released. Later, a grand jury indicted him on two counts of assault along with one count of obstruction of official business. But the State eventually dismissed the charges.

Howse then sued Hodous and Middaugh under 42 U.S.C. § 1983 for violating his Fourth Amendment rights and for committing assault and battery under Ohio law. He also sued the City of Cleveland, claiming that the City was responsible for the Fourth Amendment violations. The district court granted summary judgment for the defendants. This appeal followed.

II.

Howse brought three claims against Hodous and Middaugh: (1) a claim for excessive force under the Fourth Amendment, (2) a claim for malicious prosecution under the Fourth Amendment, and (3) a claim for assault and battery under Ohio law. We address each claim in turn.

Fourth Amendment—Excessive Force. Howse first argues that Hodous and Middaugh violated the Fourth Amendment when they stopped him without reasonable suspicion and used excessive force during his arrest. In response, the officers ask for qualified immunity.

Qualified immunity shields law enforcement officers from civil liability unless the officers (1) violated a statutory or constitutional right and (2) the unlawfulness of their conduct was clearly established at the time. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). Howse must show that both prongs are met here. *Maben v. Thelen*, 887 F.3d 252, 269 (6th Cir. 2018).

We begin our analysis with the second prong—by asking whether the unlawfulness of the officers' conduct was clearly established at the time they approached and arrested Howse. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "Clearly established" means that the law is so clear at the time of the incident that every reasonable officer would understand the unlawfulness of his conduct. *Wesby*, 138 S. Ct. at 589. That's a deferential rule. And for good reason: officers often find themselves in positions where they must make split-second decisions in dangerous situations. In those crucial seconds, officers don't have the time to pull out law books and analyze the fine points of judicial precedent. To avoid "paralysis by analysis," qualified immunity protects all but plainly incompetent officers or those who knowingly violate the law. *Rudolph v. Babinec*, 939 F.3d 742, 756 (6th Cir. 2019) (Thapar, J., concurring in part and dissenting in part).

With all this in mind, we consider Howse's

claim. Howse argues that the officers violated his clearly established right to be free from "unreasonable government intrusions." Appellant Br. at 18. But that frames the "clearly established" test at too high a level of generality. The law must be specific enough to put a reasonable officer on clear notice that his conduct is unlawful. *See Wesby*, 138 S. Ct. at 590. The right to be free from "unreasonable government intrusions" is much too vague to do that.

Instead, we must examine the *particular* situation that Hodous and Middaugh confronted and ask whether the law clearly established that their conduct was unlawful. To answer this question, we must ask whether every reasonable officer would know that law enforcement cannot tackle someone who disobeyed an order and then use additional force if they resist being handcuffed. Importantly, this question asks about the lawfulness of conduct under the Fourth Amendment. And in that context, the Supreme Court has stressed "the need to identify a case where an officer acting under similar circumstances" was found "to have violated the Fourth Amendment." *Id.* (cleaned up). Without such a case, the plaintiff will almost always lose. *See id.*

Howse hasn't identified any case that addresses the conduct at issue here (and we aren't aware of any either). Instead, Howse cites a single case in support: *Terry v. Ohio*, 392 U.S. 1 (1968). But that case does him no good. *Terry* held that a search did *not* violate the Fourth Amendment because the law enforcement officer reasonably believed that the suspects were engaged in criminal activity and might be armed and dangerous. *Id.* at 30–31. The case has nothing to do with excessive force. So *Terry* doesn't clearly establish that law enforcement cannot tackle

a non-compliant suspect and use additional force against him if he resists arrest. *Cf. Rudlaff v. Gillispie*, 791 F.3d 638, 641–42 (6th Cir. 2015) (explaining that using a taser or a knee strike against someone who is actively resisting arrest does not qualify as excessive force).

Because the alleged unlawfulness of the officers' conduct wasn't clearly established, the officers are entitled to qualified immunity.[1]

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[1] The dissent concludes otherwise after it frames the question as follows: "whether it violates a clearly established constitutional right for an officer to throw a person to the ground in order to arrest that person without probable cause." Dissenting Op. at 16 (footnote omitted). Of course, it's true that an officer cannot *arrest* someone without probable cause. But it's also true that an officer doesn't need probable cause to *stop* someone—reasonable suspicion is enough. *Terry*, 392 U.S. at 30–31. Thus, the level of justification depends on whether the officer is carrying out a stop or an arrest. *See United States v. Martinez*, 808 F.3d 1050, 1053 (5th Cir. 1987).

The mere act of handcuffing someone doesn't transform a stop into an arrest. That's because an officer *may* temporarily handcuff someone during a *Terry* stop "so long as the circumstances warrant that precaution." *United States v. Foster*, 376 F.3d 577, 587 (6th Cir. 2004). So it isn't obvious that the officers were effectuating an arrest (rather than an investigatory stop) when they tackled and handcuffed Howse.

Acknowledging this point, the dissent cites *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 591 (6th Cir. 1994) to show that the officers arrested Howse when they initially threw him to the ground. But *Centanni* cuts *against* the dissent's conclusion. That's because *Centanni* says that an arrest generally doesn't occur until the officers physically remove the suspect from the scene. *See id.* Of course, the officers hadn't removed Howse from the scene when they initially threw him down. So that would mean the officers *didn't* need probable cause until they removed him from his home and took him to the station.

Fourth Amendment—Malicious Prosecution. Howse next argues that Hodous and Middaugh committed malicious prosecution when they helped prosecutors charge him with two counts of assault and one count of obstructing official business. To win on that claim, Howse must show (among other things) that the officers helped start a prosecution against him without probable cause. *King v. Harwood*, 852 F.3d 568, 580 (6th Cir. 2017). Probable cause exists when there are enough "facts and circumstances" to make a reasonable person believe that "the accused was guilty of the crime charged." *Webb v. United States*, 789 F.3d 647, 660 (6th Cir. 2015) (cleaned up).

To begin with, there's enough evidence for a reasonable person to believe that Howse obstructed official business. Someone obstructs official business when he acts with the purpose of obstructing or delaying an officer from performing a lawful duty and he actually hampers or impedes the officer. Ohio Rev. Code § 2921.31; *State v. Henry*, 110 N.E.3d 103, 116 (Ohio Ct. App. 2018). Ohio courts have interpreted this crime broadly. For example, someone may be convicted if they make it "more difficult" for law enforcement to gain control of a situation, *State v. Florence*, No. CA2013-08-148, 2014 WL 2526069, at *3 (Ohio Ct. App. June 2, 2014), or interfere with an officer's attempt to arrest someone, *State v. Overholt*, No. 2905-M, 1999 WL

Even if we assume the officers carried out an arrest unsupported by probable cause, that doesn't change the outcome here. Howse still needs a case putting the officers on clear notice that their use of force was excessive. And we still aren't aware of one.

635717, at *4 (Ohio Ct. App. Aug. 18, 1999). Here, Howse himself admitted that he tried to make it more difficult for the officers to arrest him by stiffening up his body and screaming at the top of his lungs. That's enough to provide probable cause for the obstructing-official-business charge.

And because there was probable cause for *that* charge, Howse cannot move forward with *any* of his malicious-prosecution claims. According to our circuit, malicious-prosecution claims are based on the Fourth Amendment. *Spurlock v. Satterfield*, 167 F.3d 995, 1006, 1006 n.19 (6th Cir. 1999).[2] Although we call it a claim for malicious prosecution, that's a bit of a misnomer. After all, our circuit doesn't even require a showing of malice to succeed on such a claim. *Sykes v. Anderson*, 625 F.3d 294, 310 (6th Cir. 2010). It's really a claim for an "unreasonable prosecutorial seizure" governed by Fourth Amendment principles. *Id.* (cleaned up); *see also Gregory v. City of Louisville*, 444 F.3d 725, 748–49

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[2] A majority of the Supreme Court has not yet decided whether there is a cognizable claim for malicious prosecution under the Fourth Amendment. Justice Alito, writing in dissent in *Manuel v. City of Joliet*, reasoned that malicious-prosecution claims do not arise under the Fourth Amendment. 137 S. Ct. 911, 923 (2017) (Alito, J., dissenting). If they are constitutionally cognizable at all, he said, they must arise under another constitutional provision—presumably the Due Process Clause. *Id.* But because our circuit has held that a federal malicious-prosecution claim does arise under the Fourth Amendment (and not the Due Process Clause), we are bound by that decision and must consider Fourth Amendment principles when defining the scope of the claim. *See, e.g.*, *Sykes v. Anderson*, 625 F.3d 294, 310 (6th Cir. 2010) (refusing to import the common-law malice requirement into a federal malicious-prosecution claim because that would conflict with Fourth Amendment principles).

(6th Cir. 2006).

Under the Fourth Amendment, an officer can seize someone so long as he has probable cause that the person has violated the law. For example, suppose a police officer clocks someone driving twenty miles per hour over the speed limit. The officer pulls over the driver and offers two reasons for the stop. The first is that he saw the driver speeding. The second is that he suspected that the driver might have illegal drugs. Even if there's nothing to support the officer's hunch about drugs, the officer still has probable cause to stop the car for speeding. *See Whren v. United States*, 517 U.S. 806, 811–13 (1996). So the seizure doesn't violate the Fourth Amendment even though one of the justifications for the stop was meritless.

That's why the constitutional tort claim of false arrest fails so long as there's just one valid reason for the arrest. A false arrest, as its name suggests, is simply an arrest which isn't supported by probable cause. *Webb*, 789 F.3d at 666. The Supreme Court has held that the reason the officer gives for an arrest need not be the reason which *actually* provides probable cause for the arrest. *Devenpeck v. Alford*, 543 U.S. 146, 153–55 (2004). If the facts known to the officers support probable cause in any form, then an individual may lawfully be arrested. *Id.* at 155. So it follows that when an officer arrests someone based on multiple charges, "it is not relevant whether probable cause existed with respect to each individual charge." *Jaegly v. Couch*, 439 F.3d 149, 154 (2d Cir. 2006) (Sotomayor, J.). What matters is the validity of the *arrest* (the seizure) and not the validity of every *charge* (the potential justifications for the seizure). *Id.* As long as the arrest is supported

by probable cause on one charge, then a false arrest claim cannot move forward. *See Alman v. Reed*, 703 F.3d 887, 900 n.3 (6th Cir. 2013); *see also Gill v. City of Milwaukee*, 850 F.3d 335, 342 (7th Cir. 2017); *Tatum v. City & Cty. of San Francisco*, 441 F.3d 1090, 1095 (9th Cir. 2006).

The same rules apply here. After all, claims for false arrest and malicious prosecution both arise under the Fourth Amendment. They both hinge on an alleged unreasonable seizure. And they both rise and fall on whether there was probable cause supporting the detention. Indeed, just like in the context of false arrests, a person is no more seized when he's detained to await prosecution for several charges than if he were seized for just one valid charge. In the end, there's no principled reason for treating a Fourth Amendment malicious-prosecution claim differently than a Fourth Amendment false-arrest claim.[3]

Because there was probable cause to prosecute Howse for obstructing official business, he cannot proceed on his other malicious-prosecution claims.

Ohio law—Assault & Battery. Howse also sued

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[3] The contrary conclusions of other circuits don't persuade us otherwise. The Second Circuit has held that each criminal charge must be supported by probable cause. *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991). Otherwise, the court reasoned, an officer might tack on many additional (meritless) charges. *Id.*; *cf. Holmes v. Village of Hoffman Estate*, 511 F.3d 673, 681–83 (7th Cir. 2007). Tacking on meritless charges, however, does not change the nature of the seizure. If hypothetically it were to change the length of detention, that would be a different issue. But the plaintiff has not presented any evidence that the additional assault charges caused Howse to suffer longer detention.

Hodous and Middaugh for assault and battery under Ohio law. For this claim, Howse must show (1) that the officers acted with an intent to cause harmful or offensive contact and (2) that such contact occurred (that's battery) or that he *thought* that such contact would occur (that's assault). *See Love v. City of Port Clinton*, 524 N.E.2d 166, 167 (Ohio 1988); *Smith v. John Deere Co.*, 614 N.E.2d 1148, 1154 (Ohio Ct. App. 1993).

The officers once again claim that they're immune from suit. This time, they point to an Ohio statutory provision which provides a general grant of immunity to government employees. Ohio Rev. Code § 2744.03(A)(6). That provision creates "a presumption of immunity" that can be overcome only in a handful of circumstances. *Hoffman v. Gallia Cty. Sheriff's Office*, 103 N.E.3d 1, 13 (Ohio Ct. App. 2017).

Howse can't proceed to trial on his assault-and-battery claim because he hasn't challenged the officers' statutory immunity. Indeed, "the burden necessary to deny immunity to [law enforcement] officers is onerous." *Argabrite v. Neer*, 75 N.E.3d 161, 169 (Ohio 2016). And Howse offers nothing to meet that burden. He hasn't argued that any exception to immunity applies here. Nor has he cited a single Ohio case to support such an argument. Because Howse makes no argument on the matter, we conclude that the officers are entitled to statutory immunity. *See Puckett v. Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590, 611 (6th Cir. 2016).

III.

Howse also brought a § 1983 claim against the City of Cleveland. He says that Cleveland is responsible for the alleged constitutional violations

by Hodous, Middaugh, and the John Doe officer.

Municipalities may be held liable under § 1983 for their own unlawful acts. *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). To be liable, though, it's not enough that a municipality's employees violated someone's constitutional rights. Instead, the plaintiff must show that the municipality *itself* caused the constitutional violation through one of its own customs or policies. *Id.* at 694. One way to prove liability is to show a municipal policy of inadequate training that led to the constitutional harm. *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005). Another way is to show a municipal custom of tolerating rights violations that led to that constitutional harm. *Id.*

Howse argues both theories on appeal. He claims that Cleveland inadequately trained its officers about how to use proper force. And he also claims that the City adopted a custom of tolerating constitutional violations.

To start, Howse faces an uphill battle in trying to prove that Cleveland's (alleged) inadequate training caused his (alleged) constitutional injuries. That's because he must show (1) the training program did not adequately prepare the officers for the tasks they must perform, (2) the inadequacy resulted from the municipality's deliberate indifference, and (3) the inadequacy either closely related to or caused Howse's injury. *Winkler v. Madison Cty.*, 893 F.3d 877, 902 (6th Cir. 2018).

Howse cannot show that these three elements are met here. Cleveland's training academy's standards exceed state requirements, and Cleveland's police force has explicit written policies instructing officers not to use excessive force. Howse

offers no evidence to the contrary—at least relevant to the claims here. On top of that, Howse hasn't shown how any inadequacy in the training program led to his constitutional injuries. This causation requirement is "rigorous." *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 415 (1997). And it's not met here because Howse hasn't offered any argument that links the legal harm he allegedly suffered back to Cleveland. *See Puckett*, 833 F.3d at 611.

Nor can Howse succeed under a custom-of-inaction theory. To win on this claim, Howse would need to show that Cleveland had notice (or constructive notice) of a "clear and persistent pattern" of unlawful activity. *Thomas*, 398 F.3d at 429 (cleaned up). Then he would need to show that Cleveland tacitly approved of that unlawful activity by doing nothing. *Id.* And *then* he would need to show that Cleveland's tacit approval was the moving force behind his constitutional violation. *Id.* Howse points to a Department of Justice memo as evidence of a pattern of unlawful activity. But even assuming that's enough (and we're not sure it is), Howse hasn't shown that Cleveland approved of that unlawful activity *or* that any such approval caused Howse to suffer a constitutional injury. Mere blanket assertions that Cleveland "tolerated" or "condoned" officer misconduct aren't enough. *Bickerstaff v. Lucarelli*, 830 F.3d 388, 402 (6th Cir. 2016) (cleaned up). On the contrary, Cleveland has taken affirmative steps to combat the unlawful use of excessive force. Those steps include a thorough use-of-force policy and active enforcement of that policy. Take this case. After Hodous and Middaugh filed their Use of Force reports, several other officers

reviewed those reports to make sure that the force used was reasonable.

In sum, Howse hasn't shown that Cleveland can be held responsible for any constitutional wrongs that Hodous, Middaugh, or the John Doe might have committed.

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We affirm.

DISSENTING IN PART

COLE, Chief Judge, dissenting in part. At this stage, we are required to view the facts in the light most favorable to Howse. *See, e.g.*, *Brown v. Lewis*, 779 F.3d 401, 411 (6th Cir. 2015). This proposition of law is not in dispute. The majority, like the district court before it, acknowledges that when the officers' version of events conflicts with Howse's, we must resolve that factual conflict in Howse's favor. (Maj. Op. at 4). Many of the majority's conclusions, however, are predicated on resolving key factual disputes in the officers' favor. Properly considering those factual disputes under the standard our precedent mandates compels a different conclusion than the majority's. Specifically, I find that the facts viewed in the light most favorable to Howse demonstrate that Middaugh executed an arrest unsupported by probable cause using excessive force, and then, along with Hodous, spurred a prosecution of Howse by making false statements about the incident. As such, although I agree with the majority's approach to Howse's municipal liability claims, I respectfully disagree with its disposition of Howse's excessive force, malicious prosecution, and state law claims.

I. The Facts Viewed in the Light Most Favorable to Howse

On July 28, 2016, Howse was on the porch of the home he shared with his mother, had his key in the gate, and was in the process of opening the gate

when Middaugh and Hodous, who were not in uniform, pulled up in an unmarked car. The officers asked Howse if he lived at the residence, and Howse responded that he did. The officers started to pull away but then pulled back and asked Howse if he was sure that he lived at the home. Howse, agitated, responded to this second inquiry, "Yes, this is my home. What the f—." (R. 25-3, Page ID 411.)

Once Howse used the expletive, Middaugh commented that Howse had a "smart mouth." (R. 25-3, Page ID 411.) At this point, Howse repeatedly stated, "I live here. I live here." (R. 25- 3, Page ID 411.) Middaugh then approached Howse on the porch and ordered Howse to put his hands behind his back, stating that Howse was "going to jail." As Howse continued to protest that he lived at the residence and was not doing anything wrong, Middaugh threw Howse to the ground and attempted to arrest him. As the commotion continued, Howse's mother emerged from the residence and protested that Middaugh was attempting to arrest her son. When Howse looked up to see his mother, Middaugh struck him twice in the back of the neck. During Middaugh's attempt to arrest him, Howse was screaming at the top of his lungs and stiffened his arms to make it difficult for Middaugh to place the handcuffs on Howse. Howse never attempted to hit or push Middaugh, remaining nonviolent throughout the entire incident. With regard to Hodous, Howse testified that Hodous "was just there." (R. 25-3, Page ID 418.) Howse explained that Middaugh made the arrest while Hodous and another officer were "standing there." (R. 25- 3, Page ID 419.)

Once Howse was placed in handcuffs, he was taken to jail, where he stayed for two nights and

three days. As the majority notes, Hodous and Middaugh prepared reports detailing the use of force, which included statements that Howse actively resisted arrest and struck the officers as they attempted to investigate the situation. Although a grand jury indicted Howse on two counts of assault and one count of obstructing official business, the state ultimately dismissed all charges against Howse.

II. Excessive Force Claim

First, it is important to identify the point in the timeline at which the allegedly unlawful conduct took place, as the Fourth Amendment analysis is different for an arrest than it is for an investigatory stop. Much of the majority's analysis treats the interaction between Howse and the officers as a *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1 (1968). It is true that there may have been a brief moment where Howse's interaction with the police may have qualified as an investigatory stop and required only reasonable suspicion under *Terry*, but Howse does not claim that Middaugh violated his rights during a *Terry* stop. Rather, he claims that the police used excessive force, and all parties agree that Middaugh deployed the force in question while executing an arrest. When an investigatory stop "ripens into an arrest," the arresting officer "must show probable cause." *Brown*, 779 F.3d at 412 (internal citation omitted).

Here, the officers lacked probable cause to arrest Howse. In justifying the encounter, the officers note that Howse was in a high-crime area and that their experience led them to believe that the vacant-

looking house could have been a drug house. Middaugh testified that Howse's behavior reminded him of another arrest where he "believed [the suspect] was tucking something in his waistband, a gun . . . made eye contact with the officer in an undercover car, touched his waistband, looked away, and went up on a porch that was not his." (R. 25-1, Page ID 160–61.) In the prior case, the individual, once confronted, had attempted to flee and disposed of a gun in the process.

Even if we assume that these factors could support an investigatory stop, as the majority does, they certainly do not support probable cause to make an arrest. "Probable cause to make an arrest exists if the facts and circumstances within the arresting officer's knowledge were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Arnold v. Wilder*, 657 F.3d 353, 363 (6th Cir. 2011) (internal citation and quotation marks omitted). It requires "less than *prima facie* proof but more than mere suspicion." *Hoover v. Walsh*, 682 F.3d 481, 499 (6th Cir. 2012) (internal citation and quotation marks omitted).

Crucially, unlike the individual in Middaugh's prior case, Howse never attempted to flee or revealed himself to be armed. Prior to Middaugh telling Howse he was going to jail and attempting to arrest him, Howse had done nothing illegal at all, and the officers do not allege otherwise. Instead, Howse had only repeatedly asserted the (true) fact that he lived at the residence and sworn at the plainclothes officers when they kept asking him the same question. In fact, as Middaugh attempted to arrest Howse, his *only* professed basis for doing so was

Howse's profanity.

There are many actions a person could take that would support a determination that an officer has probable cause to make an arrest, but responding to plainclothes officers who are asking the same question over and over with a "smart mouth" is not one of them. *See Wilson v. Martin*, 549 F. App'x 309, 311 (6th Cir. 2013) (finding that where a gesture was "crude, not criminal . . . officers were patently without probable cause to arrest [the person who made the gesture] for it"); *see also Cohen v. California*, 403 U.S. 15, 25 (1971) ("For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.")

For additional evidence that the officers lacked probable cause to arrest Howse, look no further than the crimes he was ultimately charged with: two counts of assault on a police officer and one count of obstructing official business. The record is completely devoid of any suggestion that Howse assaulted the officers or obstructed official business *before* he was arrested. Any factual allegation that would have supported those charges had to have arisen *after* the officers began the arrest. Thus, there was no probable cause at the point at which Middaugh endeavored to arrest Howse.

I turn next to the question of qualified immunity. I concur with the majority's conclusion that Hodous is entitled to qualified immunity. Howse

admits that Hodous did not physically participate in Howse's arrest and it was only Middaugh who threw Howse to the ground to effectuate the arrest. As for Middaugh, the majority correctly states that, in order to overcome an assertion of qualified immunity, Howse must show that the officers violated a clearly established constitutional right. *E.g., District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018). I also agree that a right is clearly established only when every reasonable officer would understand that what they are doing is unlawful. *Id.* My disagreement with the majority stems from its application of that standard to this record. The majority asks, "whether every reasonable officer would know that law enforcement cannot tackle someone who disobeyed an order and then use additional force if they resist being handcuffed." (Maj. Op. at 6.) We should instead be asking whether it violates a clearly established constitutional right for an officer to throw a person to the ground in order to arrest[1] that person without probable cause. I

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[1] The majority says "it isn't obvious that the officers were effectuating an arrest (rather than an investigatory stop) when they tackled and handcuffed Howse" because, in some cases, officers may be permitted to handcuff a person as part of an investigatory stop. (Maj. Op. at 8, fn. 1.) Contrary to the majority's suggestion, however, I do not reach the conclusion that Middaugh was arresting Howse because he handcuffed him, as I agree that our precedent allows for the use of handcuffs during some investigatory stops. Rather, I conclude that Middaugh was arresting Howse because of Middaugh's statement that Howse was "going to jail." (R. 25-3, Page ID 411.) We have previously held that "[T]he removal of a suspect from the scene of the stop generally marks the point at which the Fourth Amendment demands probable cause." *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 591 (6th Cir. 1994). Here,

conclude that the answer to that question is yes on the basis that follows below. Accordingly, I would deny Middaugh qualified immunity.

"The right to be free of excessive force, as a general matter, is clearly established." *Brown*, 779 F.3d at 419 (citing *Bletz v. Gribble*, 641 F.3d 743, 756 (6th Cir. 2011)). To determine whether force is excessive, we consider the "objective reasonableness" of the force "in light of the totality of the circumstances confronting the defendants[.]" *Brown*, 779 F.3d at 418 (citing *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013)). When we make this objective inquiry, we look at three issues: (1) the severity of the crime that prompted the officers to conduct the arrest; (2) the extent to which the suspect poses an immediate threat to the arresting officers; and (3) whether the suspect is either actively resisting arrest or attempting to evade arrest by fleeing. *Martin v. City of Broadview Heights*, 712 F.3d 951, 958 (6th Cir. 2013) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

And clearly established law on those factors compels the conclusion that the force used in throwing Howse to the ground was excessive. First, Howse did not commit (and Middaugh had no reason to believe he had committed) any crime. *See, e.g.*, *Patrizi v. Huff*, 690 F.3d 459, 464 (6th Cir. 2012) (noting Fourth Amendment right to be free from arrest without probable cause is clearly established). Second, Middaugh cannot point to evidence that

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Middaugh's intent to remove Howse from the scene, and specifically to take him to jail, demonstrates that Middaugh was attempting to effectuate an arrest.

Howse posed an immediate threat to the safety of any officer. *Griffith v. Coburn*, 473 F.3d 650, 659 (6th Cir. 2007) (observing that "the right of people who pose no safety risk to the police to be free from gratuitous violence during arrest" is clearly established). Third, Howse did not resist or attempt to evade arrest, as he was immediately thrown to the ground by Middaugh. Howse stiffening his arms to resist being handcuffed does not change the conclusion on this factor, as he did not do so until Middaugh had already used force to throw Howse to the ground. Based on this analysis, I would find that Middaugh violated Howse's clearly established Fourth Amendment right to be free from excessive force and deny qualified immunity to Middaugh on Howse's excessive force claim.

III. Malicious Prosecution Claim

The Supreme Court tells us that the tort of malicious prosecution is "entirely distinct" from the tort of false imprisonment, which includes false arrest, as the former remedies the wrongful institution of legal process and the latter remedies detention in the absence of legal process. *Wallace v. Kato*, 549 U.S. 384, 390 (2007) (internal citation and quotation marks omitted). Here, the majority determines that these "entirely distinct" claims must necessarily be analyzed in the exact same way, despite myriad reasons to follow the Supreme Court's direction and treat them differently. And it does so sua sponte, absent the urging of any party, and without the support of a single decision of this court or any other. I decline to join the majority in making this leap to new legal ground.

We have never indicated that a malicious prosecution claim fails so long as there is probable cause to prosecute on one of several charges. In every prior case where there were some valid charges on the indictment and we were tasked to consider a malicious prosecution claim on acquitted charges, we separately analyzed whether probable cause supported the charge that was the subject of the claim. In *Barnes v. Wright*, we addressed a case where the plaintiff was convicted on the other charges for which he was indicted but nonetheless brought a malicious prosecution claim concerning the charge on which he was acquitted. 449 F.3d 709, 713 (6th Cir. 2006). Rather than dismiss the matter immediately due to the existence of valid charges on the indictment, we undertook an analysis of whether probable cause supported the charge that was the subject of the malicious prosecution claim. *Id.* at 716–17. In *Cook v. McPherson*, we were similarly confronted with a case where the plaintiff had been convicted of all but one of the charges he faced in state court. 273 F. App'x 421, 422 (6th Cir. 2008). There, we affirmed the dismissal of the malicious prosecution claim because the plaintiff could not point to evidence that the indictment returned against him on the challenged charge had been obtained by fraud or other police misconduct, not because the plaintiff had been separately convicted on a different charge. *Id.* at 424.

Additionally, other circuit courts have explicitly rejected the majority's approach, and with good reason. The Second Circuit has concluded that a malicious prosecution claim can proceed even when a separate charge is supported by probable cause. *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991). That

court observed that the majority's approach would allow prosecutors to tack on additional meritless charges in any case where they had probable cause to prosecute for a single offense. *Id.* The Seventh Circuit held that "a malicious prosecution claim is treated differently from one for false arrest[.]" *Holmes v. Village of Hoffman Estate*, 511 F.3d 673, 682 (7th Cir. 2007). It aptly noted:

> An arrested individual is no more seized when he is arrested on three grounds rather than one; and so long as there is a reasonable basis for the arrest, the seizure is justified on that basis even if any other ground cited for the arrest was flawed. But when it comes to prosecution, the number and nature of the charges matters: the accused must investigate and prepare a defense to each charge, and as the list of charges lengthens (along with the sentence to which the accused is exposed), the cost and psychic toll of the prosecution on the accused increase.

Id. Other circuits have joined this conclusion. *See Johnson v. Knorr*, 477 F.3d 75, 83 (3d Cir. 2007) (declining to "establish legal precedent of such broad application that it would 'insulate' law enforcement officers from liability for malicious prosecution in all cases in which they had probable cause for the arrest of the plaintiff on any one charge"); *Uboh v. Reno*, 141 F.3d 1000, 1005 (11th Cir. 1998) (concluding that a malicious prosecution claim could proceed even when

the plaintiff had already been convicted of other charges included in the same indictment).

I join these circuits and dispute the majority's contention that "there's no principled reason for treating a Fourth Amendment malicious-prosecution claim differently than a Fourth Amendment false arrest claim." (Maj. Op. at 9–10.) As a practical matter, the precise nature of a prosecution matters a great deal to the defendant who must grapple with its consequences. And it is a reality that no two prosecutions share the exact same character. Some prosecutions are for one charge, others for several. Some prosecutions can result in incarceration, others only a fine. Some prosecutions are based on a straightforward set of facts, others are far more complicated. The addition of more charges than probable cause can support to a prosecution changes the nature of the case, doing so in a way that negatively impacts the defendant.

We can imagine, for example, that putting on a defense against multiple charges requires more resources than defending against a single one. We might also note that the severity of the crimes charged could have psychological impacts for the defendant, as well financial ones: it may impact the amount the defendant must post in bail in order to maintain his liberty. We ought further consider that a defendant facing a list of charges where only a single one is supported by probable cause would be in a much worse negotiating posture for plea bargaining than one who is only bargaining over the disposition of a single charge. It follows that the damages suffered by a defendant in an unlawful prosecution would depend largely, if not entirely, on which specific charges are at issue in that

prosecution. In stark contrast, a false arrest, as the Seventh Circuit observed, does not change in character simply because the officer making the arrest believed that she had probable cause to arrest for more charges then she did in reality. *See Holmes*, 511 F.3d at 682. I therefore believe that we must address the merits of Howse's claim that he was maliciously prosecuted for assaulting Hodous and Middaugh.

I further believe that when we reach this claim, summary judgment is inappropriate given this record. Perhaps the most ardently disputed fact in this case is whether Howse struck or attempted to strike the officers as they confronted him on his own porch; the officers say he did, while Howse says he did not. Given that we view disputed facts in the light most favorable to Howse, we proceed on the assumption that Howse did not strike either officer. A malicious prosecution claim survives where an officer knowingly or recklessly makes a false statement or falsifies or fabricates evidence. *King v. Harwood*, 852 F.3d 568, 587–88 (6th Cir. 2017). A natural corollary of our assumption that Howse's version of the events is the true one is that Hodous and Middaugh's statements that spurred the prosecution of Howse for assault are false. I would therefore hold that the malicious prosecution claim should proceed.

IV. State Law Assault and Battery Claim

The majority disposes of Howse's state law assault and battery claim on the basis that Howse has not challenged the officers' statutory immunity under Ohio law. Ohio Rev. Code 2744.03(A)(6). As

with the excessive force claim, I find that Howse has a plausible assault and battery claim against Middaugh, and I would allow that claim to proceed.

Ohio Rev. Code § 2744.03(A)(6)(b) provides that there is an exception to the general immunity the officers enjoy under state law when officers act "with a malicious purpose, in bad faith, or in a wanton or reckless manner." Again viewing the facts in the light most favorable to Howse, I believe that Howse has met his burden of overcoming the claim of immunity. By alleging that Middaugh threw him to the ground in order to effect an arrest made without probable cause that Howse was not resisting, Howse has created a genuine issue as to whether Middaugh acted "with malicious purpose, in bad faith, or in a wanton or reckless manner" and, thus, overcome his burden to show that Middaugh should be denied statutory immunity. We have previously observed that when there is a question as to whether an officer acted unreasonably under the Fourth Amendment, there is also a question as to whether he acted recklessly under Ohio Rev. Code § 2744.03(A)(6)(b). *See Burgess*, 735 F.3d at 480. As I find that Howse's excessive force claim should proceed, I find that this claim should as well.

I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

SHASE HOWSE, *Plaintiff*, v. THOMAS HODOUS, et al., *Defendants*.	CASE NO. 1:17CV1714 JUDGE DONALD C. NUGENT MEMORANDUM OPINION

This matter is before the Court on the Motions for Summary Judgment filed by Defendants, Thomas Hodous and Brian Middaugh (Docket #25) and Defendant, City of Cleveland (Docket #26).

I. Factual and Procedural Background.[1]

On July 28, 2016, at approximately 9:00 p.m., Plaintiff, Shase Howse, walked from his residence at 747 East 102nd Street, Cleveland, Ohio, to a nearby convenience store. (Affidavit of Shase Howse at Paragraph 4.) Mr. Howse alleges that during his walk to the store, he was unlawfully stopped and frisked by Cleveland Police Officers, who have never been identified, but was released without being charged with any crime. He then continued to the store and, following his purchase, walked back home. (Id. at Paragraphs 5-9.)

Around the same time, City of Cleveland Police Detectives Thomas Hodous and Brian Middaugh, members of the City of Cleveland Police Department Gang Impact Unit ("GIU"), were on patrol nearby in an unmarked car. (Deposition of Thomas Hodous ("Hodous Depo.") at p. 26.) Detective Middaugh was in the front passenger seat and Detective Hodous was in the back passenger seat. Detective Colin Ginley was

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[1] The facts as stated in this Memorandum Opinion and Order are taken from the Parties' submissions. Those material facts that are controverted and supported by deposition testimony, affidavit, or other evidence are stated in the light most favorable to the non-moving Party.

driving, but is not named as a Defendant in this lawsuit (Id. at pp. 26 and 101.) Defendants Hodous and Middaugh testified during deposition that this was a high crime area and that on the evening in question, they were patrolling an ongoing vigil where people routinely congregated and weapons and other contraband had been recovered in the past. Detective Hodous explained that a vigil is a memorial set up at the location of an earlier homicide and, that on this night, people were hanging around the memorial and loitering near the street. (Id. at p. 24.)

The Parties disagree as to whether the Detectives acted reasonably under the circumstances. However, as set forth below, the Parties' recitations of the facts in this case are nearly identical.

Relevant Facts as Recounted by Mr. Howse.

In his Affidavit, Mr. Howse states that as he was walking home from the convenience store, he started to look in his pocket for his door key. Mr. Howse was on the phone with his mother at the time and continued talking to her as he climbed the porch steps to his front door. (Howse Affidavit at Paragraphs 12-13.) Mr. Howse states that as he walked across the porch, a man in a car on E. 102nd (Detective Middaugh) said something like, "Is this your house?" and Mr. Howse "responded by saying like, 'Yes, this is my house, I live here.'" (Id. at Paragraphs 13-14.) He noticed the man in the car

who had questioned him say something to the driver and the car backed up. The man in the car again asked Mr. Howse if that was his house and he responded by saying something like "Yes, what the fuck?" or "yes. this is my home. What the fuck?" Mr. Howse states that the man in the car "responded by saying something about, 'You have a smart mouth and a bad attitude'" and he continued to make reference to Mr. Howse's "smart mouth." (Id. at Paragraphs 15-18.)

Mr. Howse testified during deposition that Detective Middaugh got out of the car and continued to ask if Mr. Howse lived there. Mr. Howse alleges that Detective Middaugh then told him to put his hands behind his back and that Mr. Howse was "going to jail," to which he responded "no, I live here. I am going home. I am not doing anything." (Howse Depo. at p. 50.) Mr. Howse testified during deposition that he refused to put his hands behind his back. (Id. at pp. 52-53.) Mr. Howse states in his Affidavit, "The men never identified themselves as police officers but ran up the steps to my porch, grabbed me and threw me to the porch floor while I kept yelling that, 'This is my house, I didn't do anything.'" (Howse Affidavit at Paragraphs 20- 21.) During his Deposition, Mr. Howse testified that another Police Officer (Detective Hodous) helped Detective Middaugh grab him and put him to the ground. (Howse Depo. at p. 51.)

Mr. Howse states he was "slammed to the floor of the porch and one of the men who I then realized was a police officer was on top of me yelling." (Howse Affidavit at Paragraph 22.) Mr.

Howse testified during deposition that when he was on the ground, he resisted the Detectives' efforts to handcuff him by "stiffening up" his body and that he kept trying to tell the Detectives that he lived there. (Howse Depo. at pp. 53-54.) Mr. Howse denies trying to hit or push the Detectives. Mr. Howse al1eges that his head was slammed down onto the porch when he tried to look up when he heard his mother's (Nicholasa Santari) voice, who he testified asked, "What are you all doing? That's my son." (Id. at p. 51.) Mr. Howse al1eges Detective Middaugh hit him twice on the neck with his forearm while he was on the ground. (Id.) In her Affidavit, Ms. Santari states, "I could see that one of the men struck my son with a closed fist while he was face down which forced his head to strike the porch. (Affidavit of Nicholasa Santari ("Santari Affidavit") at Paragraph 12.) Eventually, Mr. Howse was handcuffed, arrested and placed in the rear seat of the police car. He was extremely upset and his mother tried to calm him down. (Howse Affidavit at Paragraphs 24-26.) Mr. Howse testified during deposition that he had identification in his pocket which showed his address, but the Detectives never requested it and he never offered. (Howse Depo. at p. 52.)

Mr. Howse refused medical treatment at the scene. Mr. Howse was transported to the City of Cleveland Jail at the Justice Center, placed in a holding cell, and remained in jail over the weekend until his bond was posted. Mr. Howse did not receive any medical treatment as

a result of the events in question.

Relevant Facts as Recounted by Defendants.

As the Detectives drove past 747 East 102nd Street, Detective Middaugh noticed Mr. Howse on the front porch of a house, near the front door. Detective Ginley stopped the car and backed up. Mr. Howse was turned away from the police car. (Hodous Depo. at pp. 44.) Detective Hodous testified during deposition that Mr. Howse "appeared nervous when [their] presence became known to him;" that Mr. Howse "immediately turned away from [them], kind of glanced back and forth;" and, that Mr. Howse "started reaching in towards near the front of his body near the front door and Detective Hodous could not tell what Mr. Howse was doing." (Hodous Depo. at pp. 49-55.) At that time, the Detectives did not know Mr. Howse lived at 747 East 102nd Street. Detective Middaugh testified that believed the house to be vacant because the house was dark; there were bars on the door; and, a garbage can with two boards blocked the driveway. Detective Middaugh testified that in the dark it also looked as though the doors were boarded up, even though they actually were not. Detectives Hodous and Middaugh testified during deposition that Mr. Howse lingered on the front porch longer than normal without entering and glanced around nervously as they drove past. (Deposition of Brian Middaugh ("Middaugh Deposition") at p. 36;

Hodous Depo. at pp. 49-50.)

Detective Middaugh asked Mr. Howse if he lived at 747 East 102nd. Mr. Howse responded yes and turned back around. The Detectives got out of the car and walked up the steps onto the porch where Mr. Howse was standing to investigate further.[2] Detective Hodous testified that Detective Middaugh asked Mr. Howse if he was trying to break into the house and Mr. Howse turned and said something to the effect of "Yes, this is my home. What the fuck?" or "Fuck you. Leave me the fuck alone." (Hodous Depo. at p. 64.) Detective Middaugh testified during deposition that Mr. Howse turned around with clenched fists and Detective Middaugh told him to put his hands in the air, stating that the believed Mr. Howse wanted to fight him. (Middaugh Depo. at p. 53.) Mr. Howse did not comply. (Hodous Depo. at p. 71.) Detective Hodous testified that Mr. Howse "started motioning towards his pockets." (Id. at p. 80.)

After he refused orders to keep his hands up, Detective Middaugh grabbed Mr. Howse's left arm and Detective Hodous grabbed Mr. Howse's right arm. (Hodous Depo. at p. 82.) Detective Middaugh testified that Mr. Howse was "grabbing" at them and "ripping" on them and that they "just wanted him to calm down." Detective Hodous testified that when he grabbed Mr. Howse's right arm, Mr. Howse pulled his arm away and struck him in the

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[2] Other Officers were at the scene but, aside from Sergeant Matthew Putnam who assisted Detectives Hodous and Middaugh, the other officers were otherwise uninvolved.

chest with his right open hand. (Hodous Depo. at p. 80.) Detective Hodous "attempted to regain control of [Mr. Howse's] hands" as Mr. Howse broke Detective Hodous's "flashlight holder off of his vest trying to pull [Detective Hodous] to the ground." (Hodous Depo. at pp. 82-83.) Detective Hodous stated, "he pulled away from us and struck us both." (Hodous Depo. at p. 84.) Detective Hodous continued, "We were just going in circles trying to get his hands and he was just flailing his arms around. And then Detective Middaugh then took him to the ground. (Hodous Depo. at p. 83.)

Detective Middaugh testified, "I thought I could resolve it easier than that, but when he starts pulling my handcuff case off and my flashlight and he's flailing around, I had no choice at that point, I decided, 'Man, let's just do a leg sweep, take him to the ground, put him in handcuffs, and be done with it.'" (Middaugh Depo. at pp. 59-60.) He testified, "[W]e're literally holding him while he's flailing and pushing and jerking and screaming for I don't—I can't give you exact seconds, but I mean, we waited as long as I felt like we could before we had—personally, I did, I made that decision to sweep his leg, before we had to take him to the ground." (Id. at p. 99.) Detective Middaugh then did a "leg sweep" and Mr. Howse was taken to the ground and handcuffed. (Id. at pp. 54-60.) Detective Middaugh testified, "So I just feel like it's just really important that you know that we didn't just walk up there, grab this kid, and slam him on the ground. We waited as long as humanly possible before he went to the ground. We're

holding his arms and I feel like that delay is really important to just show that listen, I'm not trying to be a bad guy here, but I'm scared of guns. I want to go home." (Id. at p. 100.)

Detective Middaugh testified that they "were trying to use the absolute minimal amount of force to get this kid to just comply with we're doing. All we wanted to do is check and make sure he lives there and that he doesn't have a weapon." (Id. at p. 5.) Detective Hodous testified, "I do not recall if Middaugh was on top of him. I know that we were trying to free his arms from underneath his body. At that time, he had buried his hands underneath his chest and was kicking his feet not allowing us to place him in handcuffs. (Hodous Depo. at p. 85.) Mr. Howse's mother, Ms. Santari, arrived on the scene and asked, "What's going on here?" and confirmed that she and Mr. Howse lived in the house. (Middaugh Depo. at p. 60; Hodous Depo. at p. 86.) Detective Middaugh placed Mr. Howse in the police car. He was swearing and upset. He was ultimately transported to the police department and booked.

Use of Force Reports.

"Use of Force Reports" were completed by Detectives Hodous and Middaugh, as well as Sergeant Matthew Putnam, who was also on the scene and assisted handcuffing Mr. Howse. Sergeant Donald Robinson was assigned to investigate.

Detective Hodous stated as follows with regard

to the use of force against Mr. Howse:

> On July 28, 2016, at approximately 2155 hrs., and at the location of 747 E. 102 St., I assisted Detective Middaugh #2128, with confronting a male, later identified as Shase Howse, who was on the front porch of the above location. Howse became extremely irate and would not listen to verbal commands, as he motioned his hands towards his pockets. It was at this time I grabbed Howse's right arm, to keep him from going into his pocket. Howse then pulled his right arm away and attempted to push me backwards, striking me in the chest with an opened right hand. I then grabbed and attempted to control Howse's right arm as he attempted to strike me further. During the struggle, Howse grabbed and ripped the flashlight off of my tactical vest. Howse was then taken to the ground by Detective Middaugh, where I assisted in handcuffing him.

(Docket #37-2.) Reporting types of resistance used by Mr. Howse against him, Detective Hodous listed, "Push;" "Feet/Leg Kick/Knee;" "Open Hand Strike;' "'Pull;" and, "Resist Handcuffing." (Id.) Reporting the force used against Mr. Howse, Detective Hodous stated, "Control Hold-Restraint." (Id.)

Detective Middaugh stated as follows in his Use of Force Report:

> On July 27, 2016, at 2155 hrs., at 747 E. 102 while assigned to the Gang Impact Unit in company with Detective Hodous #2451, Detective Ginley #2222, Detective Mobley #47, Detective Skemivitz #2249, and under the direct supervision of Sgt. Putnam we had the occasion to arrest Shase Howse for Assault on a P.O. The following are the facts of the arrest.
>
> On this day detectives were assigned to the fifth district in connection with a recent uptick in felonious assault shootings. Detectives were patrolling the area of E. 102 just south of St. Clair where a visual was being held for someone who had been murdered. In the past GIU Detectives have patrolled visuals of murder victims because people are known to carry firearms at these visuals in connection with gang related shootings. GIU detectives have also investigated drive by shootings at visuals. As recently as yesterday GIU Detectives recovered an illegally possessed firearm from a visual.
>
> After passing the visual N/B we passed the address of 747 E. 102 and observed a male, (Shase Howse),

standing on the front porch. At this time I believed the house was vacant, the driveway had boards blocking it, and I believed the doors were boarded up. While passing, Howse looked towards our car and then looked away quickly as if we startled him. We then stopped and reversed and Howse began looking back and forth. Based on training and experience this is commonly what a person does right before he or she run from police. It appeared as though he was scanning the area for a exit route. Detective Hodous and I exited the Detective car and I asked Howse if he lived there. He responded that he did, and looked away back towards the door, he appeared to have his hands on the door but was not opening it. At this point I was in fear that Howse was either trying to break into this house, or conceal something in front of his person. I then asked him if he was breaking in and he stated "fuck", and then something else that I could not understand. As I approached I asked him what he said and he turned around and did not respond. He immediately took a fighting stance and clenched his fist. I then told him to put his hands up and he refused and motioned his hands down towards his

pockets. I then grabbed his left hand and Det. Hodous grabbed his right arm fearing he may be grabbing for a weapon. He then pushed Detective Hodous and I simultaneously, striking me with his left hand in the chest, and Det. Hodous with his right hand in the chest. Detective Hodous and I attempted to control Howse by holding his arms but he began grabbing our vests, and kicking his legs. Howse ripped my handcuff case off my vest and ripped my flashlight off my vest with his left hand while attempting to pull me down. He also pulled Det. Hodous' flashlight off his vest while he was trying attempting to pull Det. Hodous to the ground. At this point I performed a leg sweep on Howse and used balance displacement to take him to the ground. He then went to his stomach and continued kicking his legs and holding his arms under his chest. While giving repeated commands to put his arms behind his back and stop displacement to take him to the ground. He then went to his stomach and continued kicking his legs and holding his arms under his chest. While giving repeated commands to put his arms behind his back and stop kicking Howse refused and continued making growling noises. At this point

> Sgt. Putnam, Det. Hodous and I pulled Howse's arms behind his back and placed him in handcuffs. He was then escorted to the rear of the Detective car where Sgt. Putnam asked Howse if he was ok, or if he needed EMS. Howse responded he did not.
>
> While this was taking place Howse's mother, Nicholasa Santari, arrived on scene. She told us that Howse had just moved in with her at this address and she has had several problems with him and his temper issues. She stated that he was in several psychiatric programs in school growing up but has not been treated since he was 18 years of age because at that age it became optional and not mandatory. Santari could not remember what Howse had been diagnosed with.

(Docket# 37-4.) With regard to the type of resistance Mr. Howse used against him, Detective Middaugh listed, "Feet/Leg Kick/Knee;" "Bodyweight;" "Open Hand Strike;" "Punch/Elbow;" and, "Push." With regard to the type of force he used against Mr. Howse, Detective Middaugh listed, "Feet/Leg Sweep;" "Tackling/Takedown;" and, "Control Hold-Restraint." (Id.)

Sergeant Matthew Putnam stated as follows in his Use of Force Report:

> I assisted in the handcuffing of Shase Howse by pulling his right arm from underneath him and bringing it behind his back. The male was thrashing about, refusing multiple verbal commands to place his hands behind his back. The male was being detained by Det. Middaugh on suspicion of breaking and entering into an abandoned home. Howse kicked his legs and pinned his arms underneath his body to prevent cuffing.

(Docket #37-3.) With regard to type of resistance Mr. Howse used against him, Sergeant Putnam stated, "Resist Handcuffing." With the type of force used against Mr. Howse, Sergeant Putnam stated, "Pull." (Id.)

Regarding his investigation, Sergeant Donald Robinson stated, in relevant part, as follows:

> Detectives Middaugh #2128 and Hodous #2451 confronted a male on the porch who appeared to be breaking into a vacant house. As both detectives approached (Shase Howse), (Howse) became belligerent with detectives upon being questioned if he lived there. (Howse) took a fighting stance, began to growl and direct profanity toward detectives. Both detectives

> while attempting to control the situation, believing (Howse) may be concealing a weapon, took him to the ground and attempted to handcuff him while he was kicking and pinned his arms beneath him. Sgt. Putnam then assisted by pulling (Howse) right arm from under him, used joint manipulation and help handcuff (Howse). At this time, while utilizing my WCS, I interviewed (Howse) and asked him what happened. (Howse) stated he was approached by the detectives and questioned if he lived lived [sic] at above location. He further stated he was upset about being harassed and that's why he acted in the manner in which he did. (Howse) was not injured as a result of this incident. I observed no signs of injuries and EMS was refused. Taking all interviews and statements into account, [the Detectives'] actions were appropriate and well within divisional guidelines. I recommend no further action taken.

(Docket #s 37-2 to 37-4.) Each Use of Force Report was reviewed by a combination of several members of the Cleveland Police Department—including Lieutenant Patricia Murphy; Commander Dennis Hill; Deputy Chief Reviewing Sergeant Joseph Hageman; Chief Reviewing Sergeant Anthony

Gorsek; and, Deputy Chief Dornat Drummond—and all found the Detectives' uses of force to be reasonable, within divisional guidelines and recommended no further action. (Id.)

Mr. Howse argues that he and his mother should have been interviewed regarding the Detectives' use of force and that the City never investigated the earlier stop and frisk of Mr. Howse by unknown Cleveland police officers prior to the events involving Detectives Hodous and Middaugh.

Indictment; Citizen Complaint; Dismissal of Charges.

On July 28, 2016, Detective Middaugh signed a Complaint against Mr. Howse charging him with Assault on a Police Officer. (Docket #29-5) On September 7, 2016, Mr. Howse was indicted by a Cuyahoga County Grand Jury on two felony counts of Assault on a Police Officer in violation of Ohio Revised Code § 2903.13(A) and one count of Obstructing Official Business in violation of Ohio Revised Code § 2921.31(A). (Docket #25-4.)

On September 9, 2016, Mr. Howse filed a Citizen Complaint Form. (Docket #29-9.) Mr. Howse stated as follows:

> While standing on the porch of my home at 747 E. 102nd St., Cleveland Police came on to my property, threw me to the floor and commenced striking me. I repeatedly explained

> that this was my house but they ignored my explanations and arrested me for assault on a police officer and obstructing official business.

Mr. Howse indicated that he sought, "Dismissal of charges, training relative to racial profiling, public apology and payment of compensatory damages." (Id.) Mr. Howse alleges that the Office of Professional Standards has taken no action to investigate Mr. Howse's Citizen Complaint.

On October 4, 2016, all charges against Mr. Howse were dismissed by the Prosecutor at the recommendation of Detective Middaugh. Detective Middaugh testified during deposition that he spoke with Ms. Santari about Mr. Howse's mental health and understood "the fact that he may or may not have been stopped before" that same evening. Detective Middaugh stated, I just kind of felt like this was an opportunity to give this kid a second change and do something right. I don't want to mar his record with a felony." (Middaugh Depo. at p. 93.)

II. The Complaint.

On July 21, 2017, Mr. Howse filed his Complaint in the Cuyahoga County Court of Common Pleas. The case was removed to this Court on August 16, 2017. Mr. Howse alleges claims against all Defendants under 42 U.S.C. § 1983 for excessive force and malicious prosecution, and against Detectives Hodous and Middaugh under 42 U.S.C. § 1983 for assault and

battery.

Mr. Howse's Complaint includes statements regarding the City's alleged failures in training, investigation and discipline, and relates those to the Constitutional violations alleged by Mr. Howse. In his Brief in Opposition to the City's Motion for Summary Judgment, Mr. Howse states, "Also named is the City of Cleveland based on the City's utilizing a custom or practice of failing to properly investigate incidents involving the improper use of force by police officers employed by the City of Cleveland and to shield police officers from their unconstitutional behavior." "Basically, Plaintiff contends that the City's polices, although facially neutral, were utilized to deny him his constitutional rights which was well-documented in a 2014 investigation report issued by the U.S. Department of Justice." Mr. Howse alleges that the City's investigation into the Officers' use of force in this case was insufficient and that the City had a pattern or practice of inadequately investigating use of force claims in order to shield the Detectives from liability. (Docket #33 at pp. 9-12.)

III. Motions for Summary Judgment.

Defendants filed their Motions for Summary Judgment on November 20, 2018. (Docket #s 25 and 26.) Detectives Hodous and Middaugh argue that they are entitled to qualified and/or statutory immunity as to all of Mr. Howse's claims and that Mr. Howse has otherwise failed to present evidence

sufficient to withstand summary judgment. The City of Cleveland argues that Mr. Howse has failed to assert any valid claim against the City.

Mr. Howse filed Opposition Briefs on December 20, 2018 (Docket #29) and January 4, 2019 (Docket #33). Defendants filed Reply Briefs on January 17, 2019 (Docket #36) and January 18, 2019 (Docket #37). Defendants' Motions are fully briefed and ripe for review.

IV. Standard of Review.

Summary judgment is appropriate when the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(a). The burden of showing the absence of any such "genuine issue" rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.

Celotex v. Catrett, 477 U.S. 317, 323 (1986). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242,248 (1986). Determination of

whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574,587 (1986).

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of their case. *Tolton v. American Biodyne, Inc.,* 48 F.3d 937,941 (6th Cir. Ohio 1995) (citing *Celotex,* 477 U.S. at 322). Accordingly, "[t]he mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis,* 57 F.3d 476,479 (6th Cir. Mich. 1995) (citing *Anderson,* 477 U.S. at 252). Moreover, if the evidence presented is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson,* 477 U.S. at 249-50 (citations omitted).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party. The nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox v. Kentucky Dep't of Transp.,* 53 F.3d 146, 149 (6th Cir. Ky. 1995). FED. R. CIV. P. 56(e) states:

> When a motion for summary judgment is made and supported as

> provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The Federal Rules identify the penalty for the lack of such a response by the nonmoving party as an automatic grant of summary judgment, where otherwise appropriate. *Id.*

As a general matter, the district judge considering a motion for summary judgment is to examine "[o]nly disputes over facts that might affect the outcome of the suit under governing law." *Anderson,* 477 U.S. at 248. The court will not consider non-material facts, nor will it weigh material evidence to determine the truth of the matter. *Id.* at 249. The judge's sole function is to determine whether there is a genuine factual issue for trial; this does not exist unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.*

In sum, proper summary judgment analysis entails "the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson,* 477 U.S. at 250.

V. Discussion.

In order to prevail on a claim brought pursuant to § 1983, a plaintiff must establish by a preponderance of the evidence that a person acting under the color of law deprived him of a right secured by the United States Constitution or the laws of the United States. *Smoak v. Hall,* 460 F.3d 768, 777 (6th Cir. Tenn. 2006). A violation of§ 1983 must be intentional or knowingly committed in order to be compensable. A negligent or reckless deprivation is not sufficient. *Ahlers v. Schebil,* 188 F.3d 365, 373 (6th Cir. Mich. 1999). Further, an injury caused by mere negligence, that does not rise to the level of a constitutionally protected interest is not compensable under § 1983. *See Collins v. City of Shaker Heights,* 503 U.S. 115 (1992).

Government officials are protected from liability for civil damages, including those that arise under § 1983, "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan,* 555 U.S. 223, 231 (2009). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd,* 563 U.S. 731, 743 (2011).

To determine whether qualified immunity applies in a given case, we use a two-step analysis: (1) viewing the facts in the light most favorable to the plaintiff, we determine whether the allegations give rise to a constitutional violation; and (2) we assess whether the right was clearly established at the time of the incident. *Campbell v. City of Springboro. Ohio,*

700 F.3d 779, 786 (6th Cir. Ohio 2012); see also *Saucier v. Katz,* 533 U.S. 194,201 (2001). We can consider these steps in any order. *Pearson v. Callahan,* 555 U.S. 223,236 (2009).

Local governments may not be sued under 42 U.S.C. § 1983 for an injury inflicted solely by employees or agents under a respondeat superior theory of liability. *See Monell v. Dep't of Soc. Servs.,* 436 U.S. 658,691 (1978). "Instead, it is 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." *Id.* at 694. A municipality can, therefore, be held liable when it unconstitutionally "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690; see also *DePiero v. City of Macedonia,* 180 F.3d 770, 786 (6th Cir. Ohio 1999). A plaintiff must prove (1) the existence of a clear and persistent pattern of [illegal activity]; (2) notice or constructive notice on the part of the [defendant]; (3) the [defendant's] tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and (4) that the [defendant's] custom was the "moving force" or direct causal link in the constitutional deprivation. *Thomas v. City of Chattanooga,* 398 F.3d 426,429 (6th Cir. Tenn.

2005).

Employees of a political subdivision also enjoy immunity from certain claims pursuant to Ohio Rev. Code § 2744.03(A)(6). That section provides immunity to a city employee from "a civil action brought ... to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function," unless the employee acted outside the scope of his employment, acted "with malicious purpose, in bad faith, or in a wanton or reckless manner," or unless "liability is expressly imposed upon the employee by a section of the Revised Code." Ohio Rev. Code § 2744.03(A)(6)(a)-(c).

"Malicious purpose encompasses exercising 'malice,' which can be defined as the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified." *Caruso v. State,* 136 Ohio App.3d 616,620, 737 N.E.2d 563 (Ohio Ct. App. 2000) (citing *Jackson v. Butler Cty. Bd. Of Cty. Comm'rs.,* 76 Ohio App.3d 448, 453-454, 602 N.E.2d 363 (Ohio Ct. App. 1991)). An act is committed recklessly if it is done "with knowledge or reason to know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of physical harm and that such risk is greater than that necessary to make the conduct negligent." *Caruso,* 136 Ohio App. 3d at 621 (citing *Hackathorn v. Preisse,* 104 Ohio App.3d 768,771,663 N.E.2d 384 (Ohio Ct. App. 1995)).

A. Excessive Force.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The United States Supreme Court has held that an officer may conduct an investigatory stop without the probable cause needed for an arrest where the officer "'observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing might be armed and presently dangerous." *Terry v. Ohio,* 392 U.S. 1, 30 (1968). In addition, an investigatory stop, or Terry stop, is not unreasonable if the detention lasts no longer than necessary to effectuate the purpose of the seizure. *United States v. Perez,* 440 F.3d 363, 369-70 (6th Cir. Tenn. 2006).

Excessive force claims are analyzed under the Fourth Amendment's reasonableness standard. *See Graham v. Connor,* 490 U.S. 386, 395 (1989). This standard encompasses "a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Burchett v. Kiefer,* 310 F.3d 937, 944 (6th Cir. Ohio 2002) (citing *Graham,* 490 U.S. at 396). It "allow[s] 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. "An officer should be entitled to qualified

immunity if he made an objectively reasonable mistake as to the amount of force that was necessary under the circumstances with which he was faced." *Solomon v. Auburn Hills Police Dept.,* 389 F.3d 167, 175 (6th Cir. Mich. 2004) (citation omitted). The factors considered in assessing a constitutional excessive force claim include the particular facts and circumstances of each case, the severity of the crime, the threat posed by the suspect, and whether the suspect is "actively resisting arrest or attempting to evade arrest by flight." *Graham,* 490 U.S. at 396. "The 'reasonableness' of the particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham,* 490 U.S. at 396.

Mr. Howse argues that he was unlawfully detained by Detectives Hodous and Middaugh on the evening of July 28, 2016 and that the force used during his detention by Detectives Hodous and Middaugh was excessive. The facts relevant to this inquiry are not in dispute. The Detectives observed Mr. Howse on the front porch of what they mistakenly believed to be a vacant home in a high crime area. They stopped and questioned Mr. Howse, who failed to comply with Detectives' requests and actively resisted their attempts to secure him. The Detectives used force no greater than that necessary to control the situation. Considering the totality of the circumstances, the Detectives' conduct was objectively reasonable and Detectives Hodous and Middaugh are entitled to qualified immunity as to Mr. Howse's excessive

force claim.

B. Malicious Prosecution.

Mr. Howse alleges that Defendants violated his right to be free from malicious prosecution without reasonable suspicion or probable cause, in violation of the Fourth and Fourteenth Amendments and 42 U.S.C. § 1983. Mr. Howse argues that "Defendants initiated the criminal prosecution by initially assaulting, battering and arresting him without probable cause or reasonable suspicion and, thereafter, prepared a fictitious report in an attempt to justify their action which was just to obtain flawed indictments."

A malicious prosecution claim requires a plaintiff prove that: (1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiffs favor. *Gradisher* v. *City of Akron,* 794 F.3d 574 (6th Cir. Ohio 2015). Ordinarily, an officer cannot be held liable for malicious prosecution if he did not make the decision to prosecute. *Skousen v. Brighton High School,* 305 F.3d 520, 529 (6th Cir. Mich. 2002).

In most cases, "the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause." *Higgason v. Stephens,* 288 F.3d

868, 877 (6th Cir. Ky. 2002). But the Sixth Circuit has recognized an exception to this rule for cases where the defendant who set the plaintiffs prosecution in motion knowingly or recklessly made a false statement. The otherwise conclusive presumption becomes rebuttable when:

> (1) a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements (such as in affidavits or investigative reports) or falsifies or fabricates evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, are material to the ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions do not consist solely of grand-jury testimony or preparation for that testimony (where preparation has a meaning broad enough to encompass conspiring to commit perjury before the grand jury)[.]

King v. Harwood, 852 F.3d 568, 587-88 (6th Cir. Ky. 2017).

As stated above, the Court finds that the Detectives' conduct during the events in question was objectively reasonable and that the amount of

force used was not excessive. Mr. Howse resisted the Detectives' directives and their attempts to secure his arms; the Detectives had probable cause to arrest Mr. Howse; and, the undisputed facts were sufficient to support the charges filed against him. Mr. Howse was indicted by a properly constituted Grand Jury and there is no evidence that Detectives Hodous or Middaugh knowingly, recklessly or maliciously made false statements or fabricated evidence. Accordingly, Detectives Hodous and Middaugh are entitled to summary judgment as to Mr. Howse's malicious prosecution claim.

C. Assault and Battery.

"'If an officer uses more force than is necessary to make an arrest and protect himself from injury, he is liable for assault and battery . . .'" *D'Agostino v. City of Warren,* 75 Appx. 990,995 (61h Cir. Ohio 2003) (quoting *City of Cincinnati v. Nelson,* Case No. C-74321, 1975 Ohio App. LEXIS 7443, * 5 (May 5, 1975) (citing 5 O Jur (2d) ARREST§§ 50) (unpublished); see also *Schweder v. Baratko,* 103 Ohio App. 399,403, 143 N.E.2d 486 (1957) ("Force when used lawfully in making an arrest is in the exercise of a government function, and only in cases where excessive force is used, that is, force going clearly beyond that which is reasonably necessary to make the arrest, can such force be claimed an assault and battery by the person arrested."). As stated above, an officer, acting in his official capacity, is immune from liability for injury unless his actions were

"manifestly outside the scope" of his responsibilities, or the officer acted "with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code. § 2744.03(A)(6).

As set forth above, the force used to effectuate Mr. Howse's arrest when he failed to comply with the Detectives' directives and actively resisted their attempts to control him was not excessive and there is no evidence by which a jury could find the Detectives acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Accordingly, Detectives Hodous and Middaugh are entitled to summary judgment as to Mr. Howse's excessive force claim.

D. Defendant City of Cleveland.

Regarding municipal liability under§ 1983, the Supreme Court has held that if the officer inflicted no constitutional injury on a person, then it is "inconceivable" that the City could be liable to the person. *DeMerrell v. City of Cheboygan.* 206 Fed. Appx. 418, 429 (6th Cir. Mich. 2006) (citing *City of Los Angeles v. Heller,* 475 U.S. 796, 799 (l 986) (per curiam)). If "a person has suffered no constitutional injury at the hands of the individual police officer, the fact that department regulations might have authorized the use of constitutionally excessive force is quite beside the point." *City of Los Angeles v. Heller,* 475 U.S. 796, 799. The failure to establish a constitutional injury inflicted by Detective Hodous and Middaugh renders Mr. Howse's claims against the City meritless. Accordingly, the City is entitled to summary

judgment as a matter of law.[3]

VI. Conclusion.

For the foregoing reasons, the Mot ions for Summary Judgment filed by Defend ants, Thomas Hodo us and Brian Middaugh (Docket #25) and Defendant, City of Cleveland (Docket #26) are

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[3] Mr. Howse offers the expert opinion of Charles Stephenson, who concluded that the Cleveland Police Department's Gang Impact Unit selectively enforces loitering ordinances to aggressively approach individuals so that it may "sidestep probable cause guidelines to warrant aggressive stop and frisk activities," and that these actions are condoned, encouraged and rewarded by the Cleveland Police Department. Mr. Stephenson relies upon the December 4, 2014 Report by the U.S. Department of Justice on the use of force by the Cleveland Police Department, which followed an investigation by the DOJ and the Civil Rights Division of the U.S. Attorney's Office for the Northern District of Ohio in response to a series of prominent incidents involving the excessive use of force by the CPD. Mr. Howse cannot rely upon the DOJ Report and subsequent Consent Decree to establish his *Monell* claim. *Lopez v. City of Cleveland,* Case No. 1:13 CV 1930, 2016 U.S. Dist. LEXIS 26028 (N.D. Ohio March 1, 2016). Furthermore, while there was testimony regarding a vigil in the area earlier, the undisputed testimony reflects that Mr. Howse was questioned and approached by the Detectives based on their mistaken belief he was trying to enter a vacant home, not for loitering. As stated above, the Parties in this case agree on the facts relevant to the disposition of Mr. Howse's claims and there is no evidence of record to support Mr. Stephenson's opinion that the Detectives "made a conscious decision to create and fabricate a probable cause scenario in their Use of Force reports" or that official policy or custom existed within the City of Cleveland or its Police Department which resulted in any injury to Mr. Howse.

hereby GRANTED.

Each party shall be responsible for their own attorney fees and costs.

This case is hereby TERMINATED.

IT IS SO ORDERED.

Donald C. Nugent

DONALD C. NUGENT
Senior United States District Judge

April 5, 2019
DATED

APPENDIX C

RECOMMENDED FOR PUBLICATION
PURSUANT TO SIXTH CIRCUIT I.O.P. 32.1(b)
File Name: 20a0177p.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SHASE HOWSE,
Plaintiff-Appellant,

No. 19-3418

v.

THOMAS HODOUS and BRIAN MIDDAUGH, individually and in their official capacities as employees of the City of Cleveland, Ohio; CITY OF CLEVELAND, OHIO,
Defendants-Appellees.

On Petition for Rehearing En Banc
United States District Court for the Northern District of Ohio at Cleveland.
No. 1:17-cv-01714—Donald C. Nugent, District Judge.

Decided and Filed: June 8, 2020

COLE, Chief Judge; COOK and
THAPAR, Circuit Judges.

COUNSEL

ON PETITION FOR REHEARING EN BANC: Christopher Kemmitt, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., Washington, D.C., James L. Hardiman, Cleveland, Ohio, for Appellant. **ON RESPONSE:** Elena N. Boop, CITY OF CLEVELAND, Cleveland, Ohio, for Appellees Hodous and Middaugh. Timothy J. Puin, CITY OF CLEVELAND, Cleveland, Ohio, for Appellee City of Cleveland

The panel delivered an order. GIBBONS, J. (pg. 3), delivered a separate dissenting opinion in which COLE, C.J., and WHITE, J., joined

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition then was circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.
Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah L. Hunt, Clerk

DISSENT

GIBBONS, Circuit Judge, dissenting. I respectfully dissent from the court's denial of *en banc* rehearing. The panel's holding with respect to malicious prosecution claims, which adopts a one-size-fits-all approach to false arrest and malicious prosecution, is a precedent-setting error of exceptional public importance. It is at odds with Supreme Court precedent, *see Wallace v. Kato*, 549 U.S. 384, 390 (2007) (describing the claims as "entirely distinct"), and our precedents, *see, e.g.*, *Jacobs v. Alam*, 915 F.3d 1028, 1042–43 (6th Cir. 2019) (same). And it fails to engage with the many compelling reasons offered by our sister circuits for declining to adopt such an approach. *See, e.g.*, *Holmes v. Vill. of Hoffman Estate*, 511 F.3d 673, 682 (7th Cir. 2007).

But I dissent for a second reason. In qualified immunity cases, we have long held that a plaintiff's right must be defined with careful attention to the "specific factual circumstances" of the case. *Schulkers v. Kammer*, 955 F.3d 520, 533 (6th Cir. 2020). And yet, in framing Shase Howse's right in this case, the panel fails to account for his suspected criminality (none), location (home), or conduct (truthfully answering questions).

We are often confronted with troubling allegations of official misconduct that result in no liability because the plaintiff defines his perceived right too generally. While these difficult cases frequently raise grounds for reasonable disagreement—and rarely warrant *en banc*

rehearing—our cases are unanimous in holding that a plaintiff's right must be carefully defined. When we depart from this well-accepted requirement, we erode one of the greatest sources of confidence in the judiciary: the consistency of our jurisprudence.