

21-1711

Raymond Wilson, III
12 Martin Ave
Mattapoisett, MA 02739

United States Court of Appeals For the First Circuit

No. 21-1711

RAYMOND WILSON, III,

Plaintiff - Appellant,

v.

FAIRHAVEN POLICE DEPARTMENT; MICHAEL BOUVIER; ANDREW QUINTIN;
KEVIN KOBZA; MARCY HAALAND; WAYNE MELLO; THE STOP & SHOP
SUPERMARKET COMPANY, LLC; THE STOP & SHOP NEW ENGLAND; THE STOP &
SHOP STORE, NO. 427; MICHELLE LEE; NATHANIEL BOWDEN; MARILYN
EDWARDS,

Defendants - Appellees,

TOWN OF FAIRHAVEN; ROBERT ESPINDOLA; MICHAEL MYERS; MAUREEN BEST;
COMMONWEALTH OF MASSACHUSETTS; CONSUMER AFFAIRS/GIANT FOOD, LLC;
FAIRHAVEN FIRE DEPARTMENT/EMERGENCY MEDICAL SERVICE,

Defendants.

ORDER OF COURT

Entered: July 18, 2022

The request for transcripts at government expense is denied. Appellant shall make financial arrangements with the court reporter(s) for the preparation of transcripts and inform the court, in writing, that he has done so, or he shall advise the court, in writing, that transcripts are not necessary for this appeal. The failure to take either action by July 26, 2022, will lead to the case proceeding to briefing without transcripts.

By the Court:

Maria R. Hamilton, Clerk

cc:

Raymond Wilson III, Gareth W. Notis, Francesca L. Cone, Anna Esther Lumelsky, Adam Glen Cohen, Kelly Wallace Ianelli

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COMMONWEALTH OF MASSACHUSETTS; CONSUMER AFFAIRS/GIANT FOOD, LLC;
FAIRHAVEN FIRE DEPARTMENT/EMERGENCY MEDICAL SERVICE,

Defendants.

Before

Kayatta, Howard and Gelpí,
Circuit Judges.

JUDGMENT

Entered: September 13, 2023

Pro se plaintiff-appellant Raymond Wilson, III, appeals from the district court's disposition of the underlying civil case. As an initial matter, the court accepts for filing all briefs and related filings made by appellant and has considered any arguments developed therein. After a *de novo* review of the record and the submissions of the parties, we affirm. Díaz-Nieves v. United States, 858 F.3d 678, 683 (1st Cir. 2017) (standard of review).

As an initial matter, appellant's conclusory statements asserting error are devoid of legal analysis or factual development and do not rise to the level of appellate argument; as such,

appellant has waived any challenge to the substance of relevant rulings. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990). Further, arguments raised for the first time in appellant's reply brief also are waived. See Boston Exec. Helicopters, LLC v. Maguire, 45 F.4th 506, 514 (1st Cir. 2022) (argument not developed in opening brief is waived).

Even if not waived, the substantive arguments to which appellant vaguely alludes in briefing fail to convince. As set forth in the detailed reports and recommendations adopted by the district court, appellant failed to establish the existence of a genuine issue of material fact on several of the elements of his claims for malicious prosecution, including the probable cause and malice elements. See Acosta v. Ames Dep't Stores, Inc., 386 F.3d 5, 10 (1st Cir. 2004) ("The uncorroborated testimony of a victim or other percipient witness, standing alone, ordinarily can support a finding of probable cause."); see also Lozada-Manzano v. United States, 75 F.4th 31, 40 (1st Cir. 2023) (observing that summary judgment on the issue of malice may be appropriate where there is an "absence of evidence of personal animosity").

The judgment of the district court is affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc:

Raymond Wilson III
Gareth W. Notis
Francesca L. Cone
Anna Esther Lumelsky
Adam Glen Cohen
Kelly Wallace Ianelli

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FAIRHAVEN FIRE DEPARTMENT/EMERGENCY MEDICAL SERVICE,

Defendants.

Before

Kayatta, Howard and Gelpí,
Circuit Judges.

ORDER OF COURT

Entered: November 16, 2023

The petition for panel rehearing is denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Raymond Wilson III, Gareth W. Notis, Francesca L. Cone, Anna Esther Lumelsky, Adam Glen Cohen, Kelly Wallace Ianelli

Raymond Wilson, III
12 Martin Ave
Mattapoisett, MA 02739

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RAYMOND WILSON, III,
Plaintiff,

v.

CIVIL ACTION NO.
18-11099-PBS

TOWN OF FAIRHAVEN; FAIRHAVEN POLICE
DEPARTMENT; ROBERT ESPINDOLA, CHAIRMAN
FOR THE TOWN; MICHAEL MYERS, CHIEF OF
POLICE; MICHAEL BOUVIER, SERGEANT;
ANDREW QUINTIN, POLICE OFFICER; KEVIN
KOBZA, POLICE OFFICER; MARCY HAALAND,
POLICE OFFICER; WAYNE MELLO, POLICE
OFFICER; MAUREEN BEST, DISPATCHER;
COMMONWEALTH OF MASSACHUSETTS; CONSUMER
AFFAIRS/GIANT FOOD LLC; STOP & SHOP
SUPERMARKET COMPANY, LLC; THE STOP &
SHOP NEW ENGLAND; THE STOP & SHOP STORE,
NO. 427; MICHELLE LEE; NATHANIEL BOWDEN;
MARILYN EDWARDS; AND FAIRHAVEN FIRE
DEPARTMENT/EMERGENCY MEDICAL SERVICE,

Defendants.

**REPORT AND RECOMMENDATION RE:
DEFENDANT FAIRHAVEN POLICE DEPARTMENT'S
MOTION FOR SUMMARY JUDGMENT
(DOCKET ENTRY # 116)**

August 9, 2021

BOWLER, U.S.M.J.

Pending before this court is a summary judgment motion filed by defendant Fairhaven Police Department ("the FPD") seeking to dismiss a common law malicious prosecution claim. (Docket Entry # 116). In lieu of filing a response to the motion, plaintiff Raymond Wilson, III ("plaintiff") relies on a previously-filed

opposition. After conducting a telephonic hearing on May 12, 2021, this court took the motion (Docket Entry # 116) under advisement.

During the hearing, plaintiff represented he did not receive the summary judgment motion. As pointed out by this court, plaintiff received notice of the hearing because he joined the conference by telephone. The hearing notice identifies the summary judgment motion, which should have prompted an inquiry by plaintiff to obtain a copy of the motion. An internal court-only staff note reflects that court staff mailed a notice of the hearing to plaintiff on April 19, 2021. At the May 12, 2021 hearing, plaintiff stated he stood by the previously-filed opposition.

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). It is inappropriate "when the 'record is sufficiently open-ended to permit a rational factfinder to resolve a material factual dispute in favor of either side.'" Morales-Melecio v. United States, 890 F.3d 361, 368 (1st Cir. 2018) (citation omitted). "A dispute is 'genuine' if the evidence 'is such that a reasonable jury could resolve the point in the favor of the non-moving party . . .,' and a fact is 'material' if it 'has the

potential of affecting the outcome of the case.'" Taite v. Bridgewater State Univ., Bd. of Tr., 999 F.3d 86, 93 (1st Cir. 2021) (citations omitted).

BACKGROUND

This case arises out of plaintiff's September 3, 2014 arrest and a resulting application for a criminal complaint charging him with lewd, wanton, and lascivious conduct, disorderly conduct, and indecent exposure at a Stop and Shop store in Fairhaven, Massachusetts. (Docket Entry # 117-5) (Docket Entry # 117-7, pp. 2-3).¹ Defendant Andrew Quinton ("Quinton"), an FPD police officer, arrested plaintiff and completed the application for the criminal complaint based on sworn statements by three witnesses.² (Docket Entry # 117-8, 117-9, 117-10, 117-11, 117-15). Defendants Marcy Haaland, Michael Bouvier ("Bouvier"), and Wayne Mello ("Mello") of the FPD also responded to the scene. (Docket Entry # 117-7, pp. 3-4) (Docket Entry # 117-11).

On September 4, 2014, a Clerk Magistrate made a probable cause finding for all three charges and the criminal complaint issued. (Docket Entry # 117-15) (Docket Entry # 39-1, p. 27).³

¹ Page numbers refer to the page numbers in the upper, right-hand corner of docketed filings.

² The complaint describes the three witnesses as "liars" and "lying witnesses." (Docket Entry # 17, pp. 18, 35).

³ In adjudicating a summary judgment motion, the court "may consider other materials in the record" in addition to cited material. Fed. R. Civ. P. 56(c)(3); Berry v. Doss, 900 F.3d

Plaintiff's arraignment took place the same day, and plaintiff was released subject to certain restrictions. (Docket Entry # 117-16) (Docket Entry # 39-1, p. 11). The charges led to a bench trial and not guilty findings on all three charges in the Trial Court of the Massachusetts District Court Department (New Bedford Division). (Docket Entry # 117-21).

In March 2019, the court adopted a Report and Recommendation adjudicating seven motions to dismiss filed by various defendants. (Docket Entry ## 50, 56). In March 2021, the court adopted a second Report and Recommendation adjudicating two summary judgment motions. (Docket Entry ## 106, 111). As a result of these rulings, the common law malicious prosecution claim against the FPD is the only remaining claim. (Docket Entry # 50, pp. 49 n.26, 51-52) (Docket Entry # 106, p. 74).

DISCUSSION

The FPD moves for summary judgment on the claim because it "is immune from suit for the intentional tort of malicious prosecution" under the Massachusetts Tort Claims Act ("MTCA"), Mass. Gen. Laws ch. 258, § 10(c) ("section 10(c)"). The FPD is

1017, 1020, 1022 (8th Cir. 2018) (district court may rely on verified complaint not cited by parties on summary judgment pursuant to Fed. R. Civ. P. 56(c)(3)); Mills v. Turner, C. A. No. 15-13267-MLW, 2017 WL 3670967, at *4 (D. Mass. Aug. 25, 2017) (documents attached to "complaint are part of the summary judgment record" under Fed. R. Civ. P. 56(c)(3)).

correct.⁴

The MTCA "provide[s] 'a comprehensive and uniform regime of tort liability for public employers.'" Morrissey v. New England Deaconess Ass'n-Abundant Life Cmtys., Inc., 940 N.E.2d 391, 399 (Mass. 2010); Mass. Gen. Laws ch. 258, § 2. Whereas the statute waives the sovereign immunity of the Commonwealth and its municipalities by allowing suits against a public employer "based on the negligent or wrongful conduct of public employees," Martini v. City of Pittsfield, Civil Action No. 14-30152-MGM, 2015 WL 1476768, at *9 (D. Mass. Mar. 31, 2015), the statute excludes intentional torts from its reach. Mass. Gen. Laws ch. 258, § 10(c). Succinctly stated, "[t]he MTCA does not apply to intentional torts, and therefore there is no waiver of sovereign immunity as to those claims." Almeida v. Rose, Civil Action No. 12-11476-PBS, 2013 WL 6524652, at *8 (D. Mass. Dec. 9, 2013); accord Barrows v. Wareham Fire Dist., 976 N.E.2d 830, 835 (Mass. App. Ct. 2012) (MTCA "expressly exempts intentional torts from its provisions, and therefore a public employer cannot be sued for the intentionally tortious conduct of its employee").

The intentional torts exemption in section 10(c) thus preserves sovereign immunity for intentional torts against a "public employer." Mass. Gen. Laws ch. 258, §§ 2, 10(c). A

⁴ It is therefore not necessary to address the FPD's other arguments in support of summary judgment.

"public employer" includes "any county, city, town," and "any department" thereby encompassing the FPD as a public employer. Mass. Gen. Laws ch. 258, § 1; Damon v. Hukowicz, 964 F. Supp. 2d 120, 136 (D. Mass. 2013). ("Hadley Police Department falls within the definition of a 'public employer'"). The exemption from the waiver in section 10(c) for intentional torts expressly includes a "malicious prosecution" claim. Mass. Gen. Laws ch. 258, § 10(c). The common law malicious prosecution against the FPD is therefore subject to summary judgment.

CONCLUSION

In accordance with the foregoing discussion, this court **RECOMMENDS**⁵ that the FPD's motion for summary judgment (Docket Entry # 116) be **ALLOWED** and the common law malicious prosecution claim be dismissed.

/s/ Marianne B. Bowler
MARIANNE B. BOWLER
United States Magistrate Judge

⁵ Any objections to this Report and Recommendation must be filed with the Clerk of Court within 14 days of service of the Report and Recommendation to which objection is made and the basis for such objection. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). A party may respond to another party's objections within 14 days after being served with a copy of the objections. Fed. R. Civ. P. 72(b). Failure to comply with Fed. R. Civ. P. 72(b) will preclude further appellate review of the district court's order based on the Report and Recommendation. See Latin American Music Co. Inc. v. Media Power Group, Inc., 705 F.3d 34, 43 (1st Cir. 2013); Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 4 (1st Cir. 1999).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RAYMOND WILSON, III,)
Plaintiff,)
v.)
Fairhaven Police Department)
Defendant.)

)
)

Civil NO.
18-11099-PBS

JUDGMENT

SARIS, J.

In accordance with the Court's Order issued on August 19, 2021, adopting the report and recommendation, and granting the defendant's motion for summary judgment in the above-entitled action, it is hereby ORDERED:

With respect to the sole remaining common law malicious prosecution claim, judgment is entered for the defendant, Fairhaven Police Department.

SO ORDERED.


Patti B. Saris
United States District Judge

UNITED STATES DISTRICT COURT
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Plaintiff,

v.

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REPORT AND RECOMMENDATION RE:
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(DOCKET ENTRY # 116)

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CONCLUSION

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/s/ Marianne B. Bowler

MARIANNE B. BOWLER

United States Magistrate Judge

⁵ Any objections to this Report and Recommendation must be filed with the Clerk of Court within 14 days of service of the Report and Recommendation to which objection is made and the basis for such objection. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). A party may respond to another party's objections within 14 days after being served with a copy of the objections. Fed. R. Civ. P. 72(b). Failure to comply with Fed. R. Civ. P. 72(b) will preclude further appellate review of the district court's order based on the Report and Recommendation. See Latin American Music Co. Inc. v. Media Power Group, Inc., 705 F.3d 34, 43 (1st Cir. 2013); Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 4 (1st Cir. 1999).

**Additional material
from this filing is
available in the
Clerk's Office.**