APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDERS

APPENDIX TABLE OF CONTENTS (Cont.)

STATUTORY PROVISIONS

OPINION, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (JULY 29, 2024)

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARC M. SUSSELMAN,

Plaintiff-Appellant,

v.

WASHTENAW COUNTY SHERIFF'S OFFICE; JONATHAN KING; WASHTENAW COUNTY, MICHIGAN; SUPERIOR TOWNSHIP, MICHIGAN,

Defendants-Appellees.

File Name: 24a0158p.06

No. 23-1486

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:20-cv-12278—Bernard A. Friedman, District Judge.

Before: GIBBONS, BUSH, and MURPHY, Circuit Judges.

OPINION

JOHN K. BUSH, Circuit Judge.

Marc Susselman made a federal case out of a traffic ticket. In February 2020, he drove around a police cruiser parked across the eastbound lane of traffic with its lights flashing. A Washtenaw County Sheriff's deputy issued him a ticket for failing to yield. That ticket was dropped and, soon after, Susselman received another citation arising from the same incident for failing to obey a police officer directing traffic. The Michigan circuit court ultimately dismissed the second traffic ticket. In federal court, Susselman asserted constitutional and state law claims against Washtenaw County, the Washtenaw County Sheriff's Office, the sheriff's deputy, and Superior Township, Michigan. The district court granted the defendants' motions to dismiss all claims against them. We affirm.

I.

On February 1, 2020, Susselman drove eastbound on Plymouth Road in Superior Township, Michigan. As he approached the intersection at Cherry Hill Road, he came upon a Washtenaw County Sheriff's patrol car, lights flashing and parked horizontally across the eastbound lane. Susselman did not observe any barricades or see any officers directing traffic. Nor did he see the fatal accident further down the road. After checking for oncoming vehicles, Susselman pulled into the unobstructed westbound lane and drove past the cruiser.

Immediately, Deputy Sheriff Jonathan King ran towards Susselman's vehicle waving his arms. He informed Susselman that he had just entered the

scene of a fatal accident and would receive a ticket. Another officer, Deputy Brian Webb, approached and repeated that Susselman had entered the scene of an accident. He asked for Susselman's license and returned to his patrol car to issue the citation. Susselman then began to yell at Deputy King for failing to block the entire road. Webb returned and handed Susselman a ticket for $400, citing him under M.C.L. § 257.602 for disobeying a police officer directing traffic flow.

Susselman pleaded not guilty and received a notice to appear at a formal hearing on March 17, 2020. For unknown reasons, the notice recorded a different charge than the one that appeared on Susselman's ticket—instead of citing him for disobeying an officer, it stated that he failed to yield under M.C.L. § 257.649. Susselman emailed the prosecuting attorney, Jameel Williams, requesting that he drop the case. He explained the events preceding the ticket and why he did not think he was guilty of violating M.C.L. § 257. 649. He added that he could not be punished for arguing with King because that conduct was protected by the First Amendment. Williams agreed to dismiss the ticket for failing to yield.

Soon after, however, Susselman received a new ticket in the mail—again for disobeying a police officer directing traffic. As it turns out, Williams had emailed Deputy King after receiving Susselman's email. Williams agreed that Susselman was not guilty of failing to yield and suggested King issue a new ticket for disobeying a police officer—the charge that King initially told Susselman he would receive but that inexplicably did not appear on the notice. Williams wrote, "[p]rocedurally, I assume we would agree to dismiss the original charge (make him think he is a

badass and won something) and then issue the new ticket under MCL 257.602." R.33, PageID 679. King replied, "I think that is a great plan!" *Id.* at 678.

Susselman pleaded not guilty to the second ticket. After Williams declined to drop the charge, Susselman asked the state court to dismiss the ticket. He argued that there was no probable cause under M.C.L. § 257.602 because no officer was near the patrol car directing traffic. The court denied the motion to dismiss and Susselman appealed. Because the prosecuting attorney's office failed to file a response, the Michigan circuit court reversed and dismissed the ticket.

Susselman sued Washtenaw County, the Washtenaw County Sheriff's Office, Superior Township, and King under 42 U.S.C. § 1983 and Michigan state law. His federal claims are essentially twofold: First Amendment retaliation and Fourteenth Amendment malicious prosecution. In Counts I and II, he claims that King issued the second ticket in retaliation for their argument and for his letter to Williams, violating his rights to speech and petition. In Counts IV and VI, he claims that King and Superior Township (through Williams) maliciously prosecuted him, violating his substantive due process rights.[1] The remaining federal claims derive from the First and Fourteenth Amendment violations. He claims that Washtenaw County and the Sheriff's Office are liable for King's actions under *Monell v. Department of Social Services*,

---

[1] Susselman also brought claims against King and Superior Township for violating his procedural due process rights (Counts III and V) but conceded before the district court that those claims were not viable. He does not attempt to revive them on appeal.

436 U.S. 658 (1978) (Count VII) and that King and Superior Township civilly conspired to deprive him of his constitutional rights (Count VIII). Finally, he brings two state-law claims against King and Superior Township for malicious prosecution and intentional infliction of emotional distress (Counts IX and X). The defendants moved to dismiss the claims against them. The district court granted their motions in full and Susselman timely appealed.

Before we consider Susselman's arguments on appeal, we address some preliminary matters. First, he waived his state-law malicious prosecution and intentional infliction of emotional distress claims as to Superior Township by expressly disavowing them in his reply brief. *See Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1011 (6th Cir. 2022). Second, although Susselman includes the Washtenaw County Sheriff's Office as a defendant on appeal, the district court held that 42 U.S.C. § 1983 does not recognize that office as a "person" capable of being sued. He does not dispute that and has therefore forfeited the issue. *Bannister*, 49 F.4th at 1011–12. Lastly, although the district court failed to address whether it retained supplemental jurisdiction over Susselman's state-law claims after it dismissed his federal claims, no party raises the issue on appeal, so it is also forfeited. *See Gucwa v. Lawley*, 731 F. App'x 408, 416 (6th Cir. 2018).

II.

This court reviews the district court's decision to grant a motion to dismiss de novo. *Kovalchuk v. City of Decherd, Tennessee*, 95 F.4th 1035, 1037 (6th Cir. 2024). The complaint should be construed in the light most favorable to the plaintiff, its allegations accepted

as true, and all reasonable inferences drawn in the plaintiff's favor. *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 562 (6th Cir. 2013) (en banc). "Against that backdrop, we ask whether the complaint contains sufficient factual matter to state a claim to relief that is plausible on its face." *Royal Truck & Trailer Sales & Serv., Inc. v. Kraft*, 974 F.3d 756, 758 (6th Cir. 2020) (cleaned up). "Although a complaint is to be liberally construed, it is still necessary that the complaint contain more than bare assertions or legal conclusions." *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008). And the court need not accept unwarranted factual inferences. *Id.*

III.

A. Claims against Deputy King

1. Substantive Due Process Claim

Susselman asserts a 42 U.S.C. § 1983 claim against King under the Fourteenth Amendment, contending that King violated his right to substantive due process when he maliciously prosecuted him by issuing the second ticket. The viability of such a claim is unclear, but assuming Susselman can bring the claim, he still fails to plausibly allege a constitutional violation or behavior by King to support it.

Section 1 of the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983, created a cause of action allowing individuals to vindicate violations of their constitutional rights. To succeed on a § 1983 claim, a plaintiff must first identify a constitutional right, then show that a person acting under the color of state law

deprived him of that right. *Troutman v. Louisville Metro Dep't of Corr.*, 979 F.3d 472, 482 (6th Cir. 2020). An initial hurdle for Susselman's substantive due process claim is whether the Fourteenth Amendment provides a right to be free from malicious prosecution.

At one time, this circuit recognized such a claim when a malicious prosecution "shocks the conscience." *See, e.g.*, *Henry v. Metro. Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990); *Cale v. Johnson*, 861 F.2d 943, 949–50 (6th Cir. 1988). But in *Albright v. Oliver*, the Supreme Court held that a constitutional malicious prosecution claim cannot lie under the Fourteenth Amendment in the context of an unreasonable seizure. 510 U.S. 266, 274–75 (1994) (plurality opinion). A plurality rejected the plaintiff's § 1983 claim, holding that, because his claim was based on a seizure, it must be brought under the Fourth Amendment, not the Fourteenth. *Id.* at 271. In *Thompson v. Clark*, the Court confirmed that a malicious prosecution claim may be brought under the Fourth Amendment. 596 U.S. 36, 42 (2022). The claim "requires the plaintiff to show a favorable termination of the underlying criminal case against him," and the wrongful initiation of charges without probable cause resulting in a seizure. *Id.* at 43–44; *see Chiaverini v. City of Napoleon*, 144 S. Ct. 1745, 1750–51 (2024).

Despite the clarification the Court has provided for malicious prosecution claims under the Fourth Amendment, the question remains: may a plaintiff bring a malicious prosecution claim under the Fourteenth Amendment? In *Thompson*, the Court mused that "[i]t has been argued that the Due Process Clause could be an appropriate analytical home for a malicious prosecution claim under § 1983. If so, the plaintiff

presumably would not have to prove that he was seized as a result of the malicious prosecution." 596 U.S. at 43 n.2 (citation omitted). Though far from a full-throated confirmation of a substantive due process right to be free from malicious prosecution, this dictum leaves open the possibility that such a right exists.

Assuming that Susselman has a substantive due process right to be free from malicious prosecution, he still fails to plausibly allege a claim. To do so, a plaintiff must identify either "a violation of an explicit constitutional guarantee (*e.g.*, a fourth amendment illegal seizure violation)" or a "behavior by a state actor that shocks the conscience." *Braley v. City of Pontiac*, 906 F.2d 220, 225 (6th Cir. 1990). Susselman does not base his malicious prosecution claim on a violation of any constitutional guarantee, so his claim requires that he plausibly allege that King's conduct shocks the conscience. He has not done so. Although the standard is vague, we have found police conduct to shock the conscience in cases involving excessive force. *Id.* at 226 (citing *Wilson v. Beebe*, 770 F.2d 578 (6th Cir. 1985)). Susselman contends that King's conduct shocks the conscience because he lacked probable cause to issue the second ticket and therefore acted "arbitrarily and capriciously." Apt. Br. 32. But this court has already held that issuing a ticket without probable cause does not shock the conscience. *Vasquez v. City of Hamtramck*, 757 F.2d 771, 773 (6th Cir. 1985) (per curiam). Because he cannot point to conduct by King that shocks the conscience, Susselman's substantive due process claim fails.

2. First Amendment Retaliation

Susselman next asserts a § 1983 claim against King under the First Amendment. He contends that King's issuance of the second ticket was retaliation for his exercise of his First Amendment rights: first, for yelling at King during their encounter, an exercise of his right to free speech, and second, for asking Williams to dismiss the first ticket, an exercise of his right to petition.

A First Amendment retaliation claim has three elements. *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). A plaintiff must plausibly show (1) that he was "engaged in protected conduct," (2) that the defendant took adverse action against him "that would deter a person of ordinary firmness from continuing to engage in that conduct," and (3) that the protected conduct caused the adverse action, at least in part. *Id.*

We consider the last prong first. To show causation, a plaintiff must plausibly allege that the defendant would not have taken the adverse action "absent the retaliatory motive." *Nieves v. Bartlett*, 587 U.S. 391, 398–99 (2019). In other words, that retaliation was the but-for cause of the action. *Id.* at 399. If the defendant decides to take the adverse action before the plaintiff engaged in the protected conduct, but-for causation does not exist. *Id.* at 398 (explaining that there must be "a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's '*subsequent* injury'" (emphasis added) (citation omitted)); *cf. Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272–73 (2001) (Title VII retaliation); *Natofsky v. City of New York*, 921 F.3d 337, 354 (2d Cir. 2019) (same); *see Mickey v. Zeidler Tool & Die Co.,* 516 F.3d

516, 529 (6th Cir. 2008) (Batchelder, J., concurring) ("One cannot [retaliate] for something that has not yet happened.").

Susselman has not plausibly alleged that King's issuance of the second ticket was caused by First Amendment protected conduct. His complaint states that, immediately after approaching Susselman's vehicle, King informed him that he would receive a ticket "for avoiding an emergency vehicle with its lights on and entering a crime scene." R.33, PageID 598. Only later did Susselman yell at King and, much later, send the letter to Williams. *Id.* at 598, 600. Thus, by Susselman's own account, his conduct cannot have been the but-for cause of the second ticket because King had already decided to issue him a citation for failing to comply with an officer's direction of traffic when it occurred. *See Nieves*, 587 U.S. at 398; *cf. Breeden*, 532 U.S. at 272. Susselman offers nothing more than speculation to support that the second ticket was issued in retaliation. Because Susselman cannot establish causation, we need not address the other First Amendment retaliation factors.

3. Civil Conspiracy

Susselman's third and final § 1983 claim against King is civil conspiracy. He contends that King, with Superior Township, conspired to deprive him of his First and Fourteenth Amendment rights. A civil conspiracy is "an agreement between two or more persons to injure another by unlawful action." *Revis v. Meldrum*, 489 F.3d 273, 290 (6th Cir. 2007). As noted, however, Susselman has not plausibly alleged that receiving the second ticket deprived him of his constitutional rights. Thus, any "plan" between King and

Williams to issue that ticket cannot establish an agreement to engage in unconstitutional conduct.

4. State-Law Claims

Susselman brings two state-law tort claims against King for malicious prosecution and intentional infliction of emotional distress. They fail as well.

To state a claim for malicious prosecution under Michigan law, a plaintiff must plausibly show that (1) the defendant "initiated a criminal prosecution against him," (2) "the criminal proceedings terminated in his favor," (3) the defendant "lacked probable cause for his actions," and (4) "the action was undertaken with malice or a purpose . . . other than bringing the offender to justice." *Alman v. Reed*, 703 F.3d 887, 902 (6th Cir. 2013) (quoting *Matthews v. Blue Cross & Blue Shield of Mich.*, 572 N.W.2d 603, 609–10 (Mich. 1998)). The fourth prong sets a high bar, and the plaintiff must demonstrate that the defendant took actions that are "willful, wanton, or reckless, or against the accuser's sense of duty." *Sottile v. DeNike*, 174 N.W.2d 148, 150 (Mich. Ct. App. 1969). He can do so by providing proof of "bad blood, ill will or retribution." *Id.* A lack of probable cause does not alone suffice. *Alman*, 703 F.3d at 902. When a malicious prosecution claim is brought against a police officer, he may avoid liability by showing that he made a "full and fair disclosure of the material facts" to the prosecutor. *Matthews*, 572 N.W.2d at 610.

Susselman has not plausibly alleged a malicious prosecution claim against King. Specifically, he does not point to any evidence that establishes malice. By Susselman's own account, King immediately informed him that he would be issuing him a ticket for driving

around an emergency vehicle. Only later did Susselman yell at King. That sequence forecloses the possibility that King had any improper motive in issuing Susselman a ticket for failing to obey a police officer directing traffic. Susselman points to the fact that King signed the second ticket, which included an incorrect date and time, and to Williams's "bad-ass" comment. But a minor timestamp error on a computer-generated ticket does plausibly push King into the realm of malicious intent. Nor does a comment made by another party.

To the extent Michigan recognizes a claim for intentional infliction of emotional distress, the tort requires evidence of (1) "extreme and outrageous conduct," (2) "intent or recklessness," (3) causation, and (4) "severe emotional distress." *Lucas v. Awaad*, 830 N.W. 2d 141, 150 (Mich. Ct. App. 2013) (quoting *Dalley v. Dykema Gossett PLLC*, 788 N.W.2d 679, 694 (Mich. Ct. App. 2010)). The defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* (quoting *Doe v. Mills*, 536 N.W.2d 824, 833 (Mich. Ct. App. 1995)).

King's conduct plainly falls short of that high bar. A police officer does not commit extreme and outrageous conduct by issuing a traffic ticket. *Cebulski v. City of Belleville*, 401 N.W.2d 616, 618 (Mich. Ct. App. 1986). Nor does he do so by enforcing the law, even if it causes a plaintiff to experience emotional distress. *Stobbe v. Parrinello*, 1998 WL 1988741, at *2 (Mich. Ct. App. Nov. 24, 1998). Here, King issued Susselman a traffic ticket and, when the prosecuting attorney informed him that the ticket listed the wrong charge, King issued

a corrected ticket. Susselman insists that, unlike the officers in *Cebulski* and *Stobbe*, King intended to cause him emotional distress by issuing a ticket. But regardless of King's intent, Susselman has not plausibly alleged that his conduct was extreme.

B. *Monell* Claims Against Washtenaw County and Superior Township

Finally, Susselman asserts various municipal liability claims against Washtenaw County and Superior Township. Because he fails to identify any constitutional violation or municipal policy or custom resulting in a constitutional violation, these claims also fail.

A plaintiff can hold a municipality liable under § 1983 for constitutional injuries perpetrated by its agents. *Monell*, 436 U.S. at 694. To do so, he must allege that the municipality's official policy or custom "was 'the moving force behind the constitutional violation.'" *Nugent v. Spectrum Juv. J. Servs.*, 72 F.4th 135, 138 (6th Cir. 2023) (quoting *City of Canton v. Harris*, 489 U.S. 378, 389 (1989)). A plaintiff can prove that a municipality has a custom or policy that led to his constitutional injury in multiple ways, including by showing that the injury was caused by the decision of an official with final authority to establish municipal policy respecting such activity. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 481–84 (1986) (plurality opinion).

Susselman has not plausibly alleged any claim against Washtenaw County or Superior Township. Foremost, Susselman has not plausibly alleged any underlying constitutional violation. *Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014). Next, he has not

alleged that either Washtenaw County or Superior Township has a pattern of committing constitutional violations like those he alleges. Finally, he has not alleged that King or Williams has final, unreviewable decision-making authority for Washtenaw County or Superior Township, respectively. Susselman insists that King had final authority over ticketing decisions for Washtenaw County, and Williams had final authority for prosecutorial decisions for Superior Township. But discretion to issue a ticket or pursue a prosecution is not the same as the authority to make final municipal policy. Susselman's claims against Washtenaw County and Superior Township therefore were properly dismissed.

IV.

For the foregoing reasons, we AFFIRM the district court's order.

JUDGMENT, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (JULY 29, 2024)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARC M. SUSSELMAN,

Plaintiff-Appellant,

v.

WASHTENAW COUNTY SHERIFF'S OFFICE; JONATHAN KING; WASHTENAW COUNTY, MICHIGAN; SUPERIOR TOWNSHIP, MICHIGAN,

Defendants-Appellees.

No. 23-1486

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

Before: GIBBONS, BUSH, and MURPHY, Circuit Judges.

JUDGMENT

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Clerk

OPINION AND ORDER GRANTING SUPERIOR TOWNSHIP'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT AND GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY (MAY 4, 2023)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARC M. SUSSELMAN,

Plaintiff,

v.

WASHTENAW COUNTY SHERIFF'S OFFICE, ET AL.,

Defendants.

Civil Action No. 20-cv-12278

Before: Hon. Bernard A. FRIEDMAN,
Senior United States District Judge.

OPINION AND ORDER GRANTING SUPERIOR TOWNSHIP'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT AND GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY

I. Introduction

Attorney Marc M. Susselman commenced this 42 U.S.C. § 1983 action against, among others, Superior Township alleging that it violated his federal constitutional rights during state court proceedings initiated against him for disobeying a deputy sheriff's traffic instructions.

Before the Court is the Township's motion to dismiss the second amended complaint ("SAC"). (ECF No. 53). Susselman responded. (ECF No. 57). The Township filed a reply. (ECF No. 58). Susselman then filed a motion for leave to file a sur-reply. (ECF No. 59). The Court will decide the motions without oral argument pursuant to E.D. Mich. LR 7.1(f)(2). For the following reasons, the Court shall (1) grant the Township's motion to dismiss the SAC, and (2) grant Susselman's motion for leave to file a sur-reply.

II. Background

A. Factual History

Assuming the parties' familiarity with the facts alleged in the SAC, the Court incorporates by reference the factual history summarized in its June 21, 2022 opinion and order. (ECF No. 49, PageID.1161-64). The claims against the Township exclusively stem from Township prosecuting attorney Jameel Williams's decision to charge Susselman with an amended traffic citation. *See* Mich. Comp. Laws § 257.602. Susselman contends that the charge lacked probable cause and that Williams instituted state court proceedings against him because of personal animus.

B. Procedural History

Susselman filed this lawsuit against the Township (and others) but declined to sue Williams. (ECF No. 33). The SAC asserts that the Township violated his Fourteenth Amendment rights to procedural and substantive due process (Counts III & IV),[1] as well as state law claims for malicious prosecution (Count IX) and intentional infliction of emotional distress (Count X). The SAC further alleges that Washtenaw County Deputy Sheriff Jonathan King conspired with the Township to violate Susselman's federal constitutional rights (Count VIII).[2] The Township now moves to dismiss all the above claims. (ECF No. 40).

III. Legal Standards

When reviewing a motion to dismiss the complaint for failing to state a claim, the Court must "construe the complaint in the light most favorable to the plaintiff and accept all factual allegations as true." *Daunt v. Benson*, 999 F.3d 299, 308 (6th Cir. 2021) (cleaned up); *see also* Fed. R. Civ. P. 12(b)(6). "The factual allegations in the complaint need to be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead sufficient factual matter to render the legal claim plausible." *Fritz v.*

---

[1] Because Susselman waives the procedural due process claim against the Township (Count III) that cause of action is dismissed. (ECF No. 57, PageID.1427).

[2] The SAC asserts causes of action against Washtenaw County, the Washtenaw County Sheriff's Office, and Deputy Sheriff Jonathan King. (ECF No. 33, PageID.608-10, 612-16, ¶¶ 58-66, 74-92). The Court dismissed those claims in its June 21, 2022 opinion and order. (ECF No. 49, PageID.1176-77).

Charter Twp. of Comstock, 592 F.3d 718, 722 (6th Cir. 2010) (quotation omitted). The Court may consider "exhibits attached to the complaint" to decide the motion. *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001).

IV. Analysis

A. Violation of Substantive Due Process (Count IV)

Susselman alleges that the Township deprived him of substantive due process when Williams (1) encouraged Deputy King to issue an amended traffic ticket, and then (2) refused to dismiss the citation for lack of probable cause. (ECF No. 33, PageID.611, ¶¶ 71-73). This claim fails for the same reasons the Court previously dismissed the analogous count against Deputy King (Count VI). (ECF No. 49, PageID.1168-70).

To begin with, the United States Supreme Court declined to recognize this exact cause of action over 25 years ago in *Albright v. Oliver*, 510 U.S. 266 (1994). There, the Court concluded that the Fourteenth Amendment's Due Process Clause does not create a substantive right "to be free from criminal prosecution except upon probable cause." *Id.* at 268; *see also Lester v. Roberts*, 986 F.3d 599, 606 (6th Cir. 2021) (noting that *Albright* overturned earlier Sixth Circuit precedents suggesting that "defendants had a substantive-due-process right under the Fourteenth Amendment to be free from malicious prosecutions that 'shock the conscience.'"). The SAC advances the same outmoded theory that *Albright* repudiated.

Nor would Susselman prevail if he instead designated this cause of action a Fourth Amendment

malicious prosecution claim. At the pleading stage, malicious prosecution requires plausible allegations that (1) the defendant "made, influenced, or participated in the decision to prosecute," (2) the government lacked probable cause, (3) the proceeding caused the plaintiff to suffer a deprivation of liberty, and (4) the prosecution terminated in the plaintiff's favor. *Jones v. Clark County*, 959 F.3d 748, 756 (6th Cir. 2020).

The SAC omits any allegations that the state court proceedings against Susselman deprived him of his liberty, *i.e.*, the third prong. He was "never arrested or incarcerated, required to post bail or bond, or subjected to any travel restrictions." *Noonan v. Cty. of Oakland*, 683 F. App'x 455, 463 (6th Cir. 2017). And "despite the aggravation, financial cost, and personal humiliation" that Susselman may attribute to defending against the amended traffic ticket, none of these factors constitute "a deprivation of liberty" under the Fourth Amendment. *Id.*

Since the substantive due process claim finds no support in either the Supreme Court's or the Sixth Circuit's jurisprudence it must be dismissed.[3]

B. Civil Conspiracy (Count VIII)

Section 1983 civil conspiracy claims require plausible allegations of "a single plan, where each

---

[3] Susselman maintains that the Supreme Court retreated from *Albright* because it recently speculated about the elements that would be necessary to establish a malicious prosecution claim under the Due Process Clause. (ECF No. 57, PageID.1429-31). *See Thompson v. Clark*, 142 S. Ct. 1332, 1337 n.2 (2022). Because the Supreme Court ultimately concluded that "we have no occasion to consider such an argument here," *Thompson* never displaced *Albright* as binding precedent. *Id.*

alleged coconspirator shares in the general conspiratorial objective, and an overt act committed in furtherance of the conspiracy that causes injury to the plaintiff." *Marvaso v. Sanchez*, 971 F.3d 599, 614 (6th Cir. 2020). The plaintiff's injuries must stem from a violation of federal law when section 1983 is implicated. *Id.*

The SAC posits that Deputy King and Williams "acted in concert to violate Plaintiff's 1st Amendment and 14th Amendment procedural and substantive due process rights." (ECF No, 33, PageID.614, ¶ 84). But Susselman already waived his procedural due process claim, and since he fails to plausibly assert that the Township otherwise violated his constitutional rights, the section 1983 conspiracy claim does not state a cause of action upon which the Court may grant relief. *See Stricker v. Twp. of Cambridge*, 710 F.3d 350, 365 (6th Cir. 2013) (affirming the dismissal of a section 1983 conspiracy claim because the plaintiff failed to plausibly allege an underlying constitutional harm).

C. Malicious Prosecution (Count IX) & Intentional Infliction of Emotional Distress (Count X)

Finally, Susselman seeks to impute liability to the Township for malicious prosecution and intentional infliction of emotional distress on the ground that Williams prosecuted him without probable cause. (ECF No. 33, PageID.615, ¶¶ 85-89).

Since Michigan law views both causes of action as intentional torts, the Township is "entitled to immunity because it cannot be held liable for the intentional torts of its employees." *Payton v. City of Detroit*, 211 Mich. App. 375, 393 (1995); *Alexander v.*

Riccinto, 192 Mich. App. 65, 71-72 (1991); *see also Bradley v. Detroit Pub. Schools*, No. 292749, 2011 Mich. App. LEXIS 199, at *13 (Mich. Ct. App. Jan. 27, 2011) (noting that claims for malicious prosecution and intentional infliction of emotional distress are intentional torts). Neither state law claim can, therefore, withstand the Township's motion to dismiss the SAC. Accordingly,

IT IS ORDERED that the Township's motion to dismiss the SAC (ECF No. 53) is granted.

IT IS FURTHER ORDERED that Susselman's motion for leave to file a sur-reply (ECF No. 59) is granted.

IT IS FURTHER ORDERED that this opinion and order disposes of all the claims remaining in this case.

SO ORDERED.

/s/ Hon. Bernard A. Friedman
Senior United States District Judge

Dated: May 4, 2023
Detroit, Michigan

OPINION AND ORDER GRANTING THE WASHTENAW DEFENDANTS' CORRECTED MOTION TO DISMISS THE COMPLAINT AND GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY (JUNE 21, 2022)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARC M. SUSSELMAN,

Plaintiff,

v.

WASHTENAW COUNTY SHERIFF'S OFFICE, ET AL.,

Defendants.

Civil Action No. 20-cv-12278

Before: Hon. Bernard A. FRIEDMAN,
Senior United States District Judge.

OPINION AND ORDER GRANTING THE WASHTENAW DEFENDANTS' CORRECTED MOTION TO DISMISS THE COMPLAINT AND GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY

I. Introduction

Attorney Marc M. Susselman commenced this 42 U.S.C. § 1983 action against Washtenaw County, the Washtenaw County Sheriff's Office, and Deputy Sheriff Jonathan King (collectively, the "Washtenaw Defendants") alleging they violated his federal constitutional rights during a state court criminal proceeding initiated against him for disobeying Deputy King's traffic instructions.

Before the Court is the Washtenaw Defendants' corrected motion to dismiss the complaint. (ECF No. 40). Susselman responded. (ECF No. 43). The Washenaw Defendants filed a reply. (ECF No. 45). Susselman then filed a motion for leave to file a sur-reply. (ECF No. 46). The Court will decide the motions without oral argument pursuant to E.D. Mich. LR 7.1(f)(2). For the following reasons, the Court shall (1) grant the Washtenaw Defendants' corrected motion to dismiss the complaint, and (2) grant Susselman's motion for leave to file a sur-reply.

II. Background

A. Factual History

Susselman was driving eastbound on Ann Arbor Road on the afternoon of February 1, 2020, when he saw a Washtenaw County Sheriff's patrol car "parked horizontally across the eastbound lane, with its lights flashing." (ECF No. 33, PageID.597, ¶¶ 9-10, 12). The cruiser blocked the entire eastbound lane while the westbound lane remained open. (*Id.*). Susselman did not observe "any flares, traffic cones, or barricades of any kind in the vicinity of the patrol car." (*Id.*). There

did not appear to be an officer directing traffic. (*Id.*, ¶ 13).

After checking for oncoming vehicles, Susselman pulled into the westbound lane and drove past the cruiser. (*Id.*, ¶ 14). He then noticed Deputy King running towards his car in the westbound lane, waving his arms. (*Id.*, ¶ 15). The officer approached the driver's side window, informed Susselman that "he had entered the scene of a fatal accident," and said that he was issuing Susselman a ticket for avoiding an emergency vehicle with its lights flashing, as well as entering a crime scene.[1] (*Id.*, ¶ 16).

Although Susselman claims that he initially spoke with Deputy King "in a civil tone," he began arguing with the officer, "yelling at him that he had been negligent for failing to block the entire road with his vehicle and failing to put down any barricades to alert motorists" of the accident ahead. (*Id.*, ¶¶ 16, 18-19). Deputy King eventually permitted Susselman to take pictures of the officer's cruiser, its proximity to Susselman's car, and the surrounding roadway. (*Id.*, ¶ 20). When he finished, King's partner, Deputy Briant Webb, handed Susselman a ticket for disobeying a police officer while directing the flow of traffic and instructed "him to leave." (*Id.*, ¶¶ 20-21; PageID.620).

Susselman pled not guilty to the charge and requested a formal hearing in state district court. (*Id.*,

---

[1] There are countless reasons why an unattended emergency vehicle, with flashing lights, would block a roadway in the manner Susselman describes. An approaching motorist should exercise the utmost caution–along with a healthy dose of common sense–and refrain from venturing past the emergency vehicle into unknown and potentially dangerous circumstances.

¶ 23). He drafted a letter to Superior Township prosecuting attorney, Jameel Williams, explaining what had happened and requesting that Williams move to dismiss the ticket. (*Id.*, ¶ 27; PageID.629-31). Williams agreed to dismiss the charge "without costs on the People's motion" and informed Susselman that an impending hearing on the ticket "will be cancelled." (*Id.*, ¶¶ 28, 30-31; PageID.633, 637). The saga could very well have ended when the state district court dismissed the ticket on August 4, 2020–unfortunately, it didn't. (*Id.*, PageID.504, ¶ 42; PageID.657).

Prior to the ticket's dismissal, Williams emailed Deputy King on July 29, 2020, expressing his concern that "Susselman makes some valid points [in his defense], and I'm afraid he may be correct with regards to the Failed Yield charge." Williams suggested that:

> it appears the appropriate charge for Mr. Susselman would be M.C.L. 257.602 Failure to Comply with Orders or Directions of Police Officers, . . . [p]rocedurally, I assume we would agree to dismiss the original charge (make him think he is a badass and won something) and then issue the new ticket under MCL 257.602. . . . I want to make sure that we have done everything correct within our control to get the outcome that we deserve. Does that make sense to you?

(ECF No. 33, PageID.679). Deputy King agreed to the plan and confirmed in a July 31, 2020 email that "[t]he new citation will be sent [to Susselman] via certified mail this morning." (*Id.*, PageID.677-78).

Susselman received the second ticket through certified mail on August 6, 2020. (*Id.*, ¶ 32; PageID.

640). Like the previous one, the second ticket charged him with disobeying a police officer while directing the flow of traffic. Except this time the ticket misstated the date and time the incident occurred, creating a discrepancy of nearly six months. (*Id.*, PageID.602, ¶¶ 35-37). Deputy King wrote in the ticket's "remarks" that the "vehicle went around patrol vehicle parked in the middle of the road with its lights on during a[n] injury accident investigation. Ticket was rewritten per PAO [prosecuting attorney's office] then mailed to subject." (*Id.*, PageID.640). Susselman again pled not guilty, requested a formal hearing, and moved to dismiss the ticket for lack of probable cause. (*Id.*, PageID.603-04, ¶¶ 40, 47; PageID.650, 652).

At the motion hearing, the state district court permitted Williams to "amend the ticket back to the date and time of the original ticket" after concluding that the information on the second ticket "had been automatically generated by the court's computer system." (*Id.*, PageID.605, ¶ 49). And at a subsequent hearing, the court ultimately denied Sussleman's motion to dismiss, concluding that sufficient probable cause existed to support the charge. (*Id.*, PageID.605-06, ¶ 50; PageID.664-74). Susselman appealed the decision to the Washtenaw County Circuit Court without opposition. (*Id.*, PageID.605-07, ¶¶ 50, 54).

On August 20, 2021, the circuit court issued an opinion and order reversing the state district court, granting Susselman's motion, and dismissing the second ticket. (*Id.*, PageID.607, ¶ 54; PageID.681-82). The prosecuting attorney's office declined to appeal. (*Id.*, PageID.607, ¶ 54).

B. Procedural History

Susselman filed this lawsuit on August 21, 2020. (ECF No. 1). The second amended complaint ("SAC") asserts that Deputy King violated his First Amendment rights to free speech (Count I) and to petition the government (Count II), his Fourteenth Amendment rights to procedural and substantive due process (Counts V & VI),[2] as well as state law claims for malicious prosecution (Count IX) and intentional infliction of emotional distress (Count X). The SAC further alleges that Deputy King conspired with Superior Township to violate Sussleman's constitutional rights and it includes a municipal liability claim against the Washtenaw County Sheriff's Office and Washtenaw County.[3] The Washtenaw Defendants now move to dismiss the claims leveled against them. (ECF No. 40).

III. Legal Standards

When reviewing a motion to dismiss the complaint for failing to state a claim, the Court must "construe the complaint in the light most favorable to the plaintiff and accept all factual allegations as true." *Daunt v. Benson*, 999 F.3d 299, 308 (6th Cir. 2021) (cleaned up); *see also* Fed. R. Civ. P. 12(b)(6). "The factual

---

[2] Because Susselman waived the procedural due process claim against Deputy King (Count V) that cause of action is dismissed. (ECF No. 43, PageID.1014 n.7).

[3] The SAC asserts several claims against Superior Township, seeking to hold it responsible for Williams's actions as the Township's prosecuting attorney. The Washtenaw Defendants' motion does not address the Township's liability. So neither will this opinion and order.

allegations in the complaint need to be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead sufficient factual matter to render the legal claim plausible." *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (quotation omitted). The Court may consider "exhibits attached to the complaint" to decide the motion. *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001).

IV. Analysis

A. Violation of the First Amendment's Free Speech Clause (Count I)

The SAC's first cause of action–the First Amendment free speech retaliation claim–alleges that Deputy King issued the second ticket because Susselman "shouted at" him during their February 1, 2020 altercation. (ECF No. 33, PageID.608-09, ¶ 62).

To plead this claim, Susselman must plausibly show (1) that the First Amendment protects his speech, (2) that he suffered an injury that would deter a person of "ordinary firmness" from continuing to speak out, and (3) that Deputy King's actions were motivated at least in part by Susselman's speech. *Kesterson v. Kent State Univ.*, 967 F.3d 519, 525 (6th Cir. 2020).

Assuming the SAC plausibly establishes the first two elements, Susselman's own allegations demonstrate that Deputy King issued the second ticket solely at *Williams's* behest, not because of any personal animus towards Susselman.

According to their July 29, 2020 email, Williams asked Deputy King to issue the second ticket because

"it appears the appropriate charge for Mr. Susselman would be M.C.L. 257.602 Failure to Comply with Orders or Directions of Police Officers." (ECF No. 33, PageID.678-79). Williams then proposed that "[p]rocedurally, I assume we would agree to dismiss the original charge [failure to yield] . . . and then issue the new ticket under MCL 257.602 [because] I want to make sure that we have done everything correct within our control to get the outcome that we deserve." (*Id.*, PageID.679).

Two days later, Deputy King confirmed that "the new citation will be sent via certified mail [to Susselman] this morning." (*Id.*, PageID.677). And he specifically indicated on the second ticket that it "was *rewritten per PAO* [prosecuting attorney's office] then mailed to subject." (*Id.*, PageID.640) (emphasis added).

Viewing the documentary evidence in Susselman's favor, none of the SAC's factual allegations suggest that Deputy King issued the second ticket to retaliate against Susselman for yelling at him during their February 1, 2020 encounter. Consequently, the SAC falls short of plausibly demonstrating that Deputy King's actions were motivated at least in part by Susselman's speech. *Kesterson*, 967 F.3d at 525.

B. Violation of the First Amendment's Petition Clause (Count II)

Susselman alleges in a similar vein that Deputy King violated his First Amendment right to petition the government because the officer issued the second ticket in retaliation for Susselman's successful defense against the first citation. (ECF No. 33, PageID.609, ¶ 66). The First Amendment forbids state actors from

"abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. Today, the Petition Clause encompasses "the submission of complaints and criticisms to nonlegislative and nonjudicial public agencies like a police department." *Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir. 2000).

Susselman presupposes that mounting his criminal defense against the first citation is a form of petitioning the government. (ECF No. 33, PageID.609, ¶ 65). The Sixth Circuit Court of Appeals expressly rejected this view in *Peffer v. Thompson*, 754 F. App'x 316, 319 (6th Cir. 2018). In that case, the Sixth Circuit found no authorities holding "that the right to access courts under the Petition Clause of the First Amendment extends to a defendant's actions in a criminal proceeding." *Id.* And like the defendants in *Peffer*, Susselman failed to locate any himself. The right to petition claim, therefore, cannot withstand Rule 12(b)(6) dismissal.

C. Violation of Substantive Due Process (Count VI)

Susselman next asserts that Deputy King deprived him of substantive due process when the officer issued the second ticket without probable cause. (ECF No. 33, PageID.613, ¶¶ 78-79). This claim faces two insurmountable obstacles.

To begin with, the United States Supreme Court declined to recognize this exact cause of action over 25 years ago in *Albright v. Oliver*, 510 U.S. 266 (1994). There, the Court concluded that the Fourteenth Amendment's Due Process Clause does not create a substantive right "to be free from criminal prosecution except upon probable cause." *Id.* at 268; *see also Lester*

v. Roberts, 986 F.3d 599, 606 (6th Cir. 2021) (noting that *Albright* overturned earlier Sixth Circuit precedents suggesting that "defendants had a substantive-due-process right under the Fourteenth Amendment to be free from malicious prosecutions that 'shock the conscience.'"). The SAC advances the same outmoded theory that *Albright* repudiated.

Nor would Susselman prevail if he instead labeled the substantive due process claim as a Fourth Amendment malicious prosecution claim. At the pleading stage, malicious prosecution requires plausible allegations that (1) the defendant "made, influenced, or participated in the decision to prosecute," (2) the government lacked probable cause, (3) the proceeding caused the plaintiff to suffer a deprivation of liberty, and (4) the prosecution terminated in the plaintiff's favor. *Jones v. Clark County*, 959 F.3d 748, 756 (6th Cir. 2020).

The SAC omits any allegations that the state court proceedings against Susselman deprived him of his liberty, *i.e.*, the third prong. He was "never arrested or incarcerated, required to post bail or bond, or subjected to any travel restrictions." *Noonan v. Cty. of Oakland*, 683 F. App'x 455, 463 (6th Cir. 2017). And "despite the aggravation, financial cost, and personal humiliation" that Susselman may attribute to defending against the second ticket, none of these factors constitute "a deprivation of liberty" under the Fourth Amendment. *Id.*

Since the substantive due process claim finds no support in either the Supreme Court's or the Sixth Circuit's jurisprudence it must be dismissed.

D. Civil Conspiracy (Count VIII)

Section 1983 civil conspiracy claims require plausible allegations of "a single plan, where each alleged coconspirator shares in the general conspiratorial objective, and an overt act committed in furtherance of the conspiracy that causes injury to the plaintiff." *Marvaso v. Sanchez*, 971 F.3d 599, 614 (6th Cir. 2020). The plaintiff's injuries must stem from a violation of federal law when section 1983 is implicated. *Id.*

The SAC posits that Deputy King and Williams "acted in concert to violate Plaintiff's 1st Amendment and 14th Amendment procedural and substantive due process rights." (ECF No, 33, PageID.614, ¶ 84). But Susselman already waived his procedural due process claim, and since he fails to plausibly assert that Deputy King otherwise violated his constitutional rights, the section 1983 conspiracy claim does not state a claim upon which the Court may grant relief. *See Stricker v. Twp. of Cambridge*, 710 F.3d 350, 365 (6th Cir. 2013) (affirming the dismissal of a section 1983 conspiracy claim because the plaintiff failed to plausibly allege an underlying constitutional harm).

E. Municipal Liability (Count VII)

Susselman attributes Deputy King's alleged constitutional violations to the Washtenaw County Sheriff's Office and Washtenaw County through the doctrine of municipal liability. (ECF No. 33, PageID.613-14, ¶ 82).

Municipalities may be held accountable under section 1983 only where their policies or customs cause the alleged constitutional violation. *Monell v. Dep't of*

Soc. Servs., 436 U.S. 658, 694 (1978). "Municipal liability may attach for policies promulgated by the official vested with final policymaking authority for the municipality." *Miller v. Calhoun County*, 408 F.3d 803, 813 (6th Cir. 2005).

For his part, Susselman neglects to pinpoint the policies, customs, or established practices that violated his constitutional rights. *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 557 (6th Cir. 2003) (affirming the dismissal of a municipal liability claim where the plaintiff failed to "allege any facts linking the conduct of individual officers to a policy of the City of Richmond or its police department."). The SAC fails to identify the final policymaker(s) who purportedly authorized Deputy King to include "fabricated and perjured statements" in the second ticket. (ECF No. 33, PageID.613-14, ¶ 82); *Mills v. County of Lapeer*, 498 F. App'x 507, 513 (6th Cir. 2012) (upholding the dismissal of a municipal liability claim where the plaintiff could not identify the final policymaker). And the Court already concluded that none of Deputy King's individual actions ran afoul of the federal constitution. *Wilson v. Morgan*, 477 F.3d 326, 340 (6th Cir. 2007) ("There can be no *Monell* municipal liability under § 1983 unless there is an underlying unconstitutional act."). For all these reasons, Susselman cannot proceed with his municipal liability claim against the Washtenaw County Sheriff's Office and Washtenaw County.[4]

---

[4] The Washtenaw Defendants overlooked yet another reason why the municipal liability claim against the Washtenaw County Sheriff's Office lacks merit. "In Michigan, county sheriff's departments . . . are not legal entities capable of being sued." *Desandre v. Cty. of Oscoda*, No. 20-12209, 2021 U.S. Dist. LEXIS

F. Malicious Prosecution (Count IX)

To state a plausible claim for malicious prosecution under Michigan law, the plaintiff must allege that (1) the defendant initiated a criminal prosecution against him, (2) the criminal proceedings terminated in his favor, (3) the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. *Walsh v. Taylor*, 263 Mich. App. 618, 632-33 (2004).

Any police officer, though, "who makes a full and fair disclosure to the prosecutor is not subject to an action for malicious prosecution." *Payton v. City of Detroit*, 211 Mich. App. 375, 395 (1995). Police officers may be held liable for malicious prosecution "only" where they "knowingly swear to false facts in a complaint, without which there is no probable cause." *Id.* (cleaned up).

Susselman points to two "fabrications" in the second ticket from which he asks the Court to infer that Deputy King issued the citation with malice: (1) the incorrect date and time of the incident, and (2) Deputy King's statement that his cruiser was parked "in the middle of the road," which purportedly conflicts

---

162432, at *18 (E.D. Mich. Aug. 27, 2021) (cleaned up); *see also Rhodes v. McDannel*, 945 F.2d 117, 120 (6th Cir. 1991) (holding that "the Sheriff's Department is not a legal entity subject to suit"); *Hughson v. County of Antrim*, 707 F. Supp. 304, 306 (W.D. Mich. 1988) (same). The appropriate municipal party is Washtenaw County itself. *Nallani v. Wayne County*, 665 F. App'x 498, 512 (6th Cir. 2016) (holding that "a suit against a county sheriff in his or her official capacity is nothing more than a suit against the county itself") (internal quotation marks omitted).

with Susselman's photograph depicting the vehicle "parked in the middle of the eastbound lane" with "the westbound lane entirely open." (ECF No. 33, PageID. 602, ¶ 34; PageID.618). Neither of these inaccuracies plausibly demonstrate that Deputy King lied about the circumstances of his February 1, 2020 encounter with Susselman.

Regarding the mistaken timeframe, the state district court permitted Williams to orally amend the second ticket after finding that the date and time "had been automatically generated by the court's computer system and therefore Deputy King had not committed perjury." (ECF No. 33, PageID.605, ¶ 49). And because the state district court already decided this question, the Court lacks the authority to disturb its determination. *See Hancock v. Miller*, 852 F. App'x 914, 920 (6th Cir. 2021) (stating that the *Rooker-Feldman* doctrine precludes "a lower federal court" from reviewing "a state court order").

More importantly, due to the six-month disparity between February 1 (the actual date of Susselman's altercation with Deputy King) and July 31 (the second ticket's incorrect date), it is implausible that Deputy King would perjure himself, and jeopardize his law enforcement career, by subscribing to the patent falsehood that Susselman was somehow involved in two identical incidents, with the same officers, at the same location, only months apart. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that the plaintiff fails to state a claim "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct").

Even Susselman himself acknowledged in an August 27, 2020 letter to Williams:

> Deputy King has falsely alleged that the events which are the basis of the new ticket occurred on July 31, 2020, at 6:58 A.M. Deputy King has thus claimed that I committed the same traffic violation on two different days, at two different times, six months apart, and that he was present on both occasions investigating the same traffic accident. The probability of such a coincidence happening in this universe, rather than in a parallel universe, is infinitesimal.

(ECF No. 33, PageID.661).

Sussleman's belief that Deputy King committed perjury by conjuring up such a far-fetched, demonstrably false narrative is just as unlikely. *See Illumina, Inc. v. BGI Genomics Co.*, No. 19-03770, 2020 U.S. Dist. LEXIS 19216, at *16-17 (N.D. Cal. Feb. 5, 2020) (holding that the defendant's assertion that the plaintiff's "attorneys and their expert would knowingly make patently false statements about prior art that were contradicted by materials they cited and that could be readily exposed by the opposing party" was "implausible").

As for the second "fabrication," whether Deputy King actually parked his cruiser "in the middle of the road" amounts to a quibble over semantics. Susselman's photograph shows the patrol vehicle located perpendicular to the flow of traffic, entirely blocking the eastbound lane of Ann Arbor Road, with a portion of the westbound lane left open. (ECF No. 33, PageID.618). Although the cruiser is not precisely centered, Deputy King's colloquial use of the phrase "in the middle of the road" is accurate enough that it cannot plausibly

be construed as untrue, let alone knowingly false. *Payton*, 211 Mich. App. at 395.

Because Susselman does not allege that Deputy King lied about any other aspect of their encounter, he cannot plausibly establish that the officer failed to make a "full and fair disclosure" on the second ticket. *Id.* As a result, the malicious prosecution claim is dismissed.

G. Intentional Infliction of Emotional Distress (Count X)

To state a plausible claim for intentional infliction of emotional distress under Michigan law, the plaintiff must allege "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Hayley v. Allstate Ins. Co.*, 262 Mich. App. 571, 577 (2004). The purported conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Graham v. Ford*, 237 Mich. App. 670, 674 (1999).

Susselman maintains that Deputy King's issuance of the second ticket reaches this high threshold because the officer resorted to "perjured testimony in order to charge" him "with a criminal offense." (ECF NO. 33, PageID.615). Because the Court already concluded, however, that Deputy King fully and fairly disclosed his interactions with Susselman, and since the SAC relies exclusively upon threadbare conclusions that Deputy King issued the second ticket intending to cause Susselman severe emotional distress, the intentional infliction of emotion distress claim lacks the requisite plausibility to survive a

motion dismiss. *See Cebulski v. Belleville*, 156 Mich. App. 190, 195 (1986) (affirming the dismissal of an intentional infliction of emotional distress claim where the complaint failed to allege that "the officer stopped and detained plaintiff for the purposes of inflicting severe emotional distress."); *Stobbe v. Parrinello*, No. 201237, 1998 Mich. App. LEXIS 825, at *7 (Mich. Ct. App. Nov. 24, 1998) (same). Accordingly,

IT IS ORDERED that the Washtenaw Defendants' corrected motion to dismiss the complaint (ECF No. 40) is granted.

IT IS FURTHER ORDERED that Deputy King, the Washtenaw County Sheriff's Office, and Washtenaw County are dismissed from this case with prejudice.

IT IS FURTHER ORDERED that Susselman's motion for leave to file a sur-reply (ECF No. 46) is granted.

/s/ Hon. Bernard A. Friedman
Senior United States District Judge

Dated: June 21, 2022
Detroit, Michigan

ORDER DENYING PETITION FOR REHEARING EN BANC, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (SEPTEMBER 5, 2024)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARC M. SUSSELMAN,

Plaintiff-Appellant,

v.

WASHTENAW COUNTY SHERIFF'S OFFICE; JONATHAN KING; WASHTENAW COUNTY, MICHIGAN; SUPERIOR TOWNSHIP, MICHIGAN,

Defendants-Appellees.

No. 23-1486

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

Before: GIBBONS, BUSH, and MURPHY, Circuit Judges.

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 of the case. The petition then

was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Clerk

* Judge Davis recused herself from participation in this ruling.

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION, U.S. DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION (JULY 6, 2022)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARC M. SUSSELMAN,

Plaintiff,

v.

WASHTENAW COUNTY SHERIFF'S OFFICE, ET AL.,

Defendants.

Civil Action No. 20-cv-12278

Before: Hon. Bernard A. FRIEDMAN, Senior United States District Judge.

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

I. Introduction

Attorney Marc M. Susselman commenced this 42 U.S.C. § 1983 action against Washtenaw County,

the Washtenaw County Sheriff's Office, and Deputy Sheriff Jonathan King (collectively, the "Washtenaw Defendants") alleging they violated his federal constitutional rights during a state court criminal proceeding initiated against him for disobeying Deputy King's traffic instructions.

Before the Court is Susselman's motion for reconsideration of the Court's June 21, 2022 opinion and order granting the Washtenaw Defendants' corrected motion to dismiss the complaint. (ECF No. 50). The Court will decide the motion without oral argument pursuant to E.D. Mich. LR 7.1(h)(3). For the following reasons, the Court shall deny the motion.

II. Background

The Court assumes the parties' familiarity with the allegations in the second amended complaint ("SAC"). (ECF No. 33).

Susselman filed this lawsuit on August 21, 2020. (ECF No. 1). The SAC asserts that Deputy King violated his First Amendment rights to free speech (Count I) and to petition the government (Count II), his Fourteenth Amendment rights to procedural and substantive due process (Counts V & VI), as well as state law claims for malicious prosecution (Count IX) and intentional infliction of emotional distress (Count X). The SAC further alleges that Deputy King conspired with Superior Township to violate Sussleman's constitutional rights and it includes a municipal liability claim against the Washtenaw County Sheriff's Office and Washtenaw County.

The Washtenaw Defendants moved to dismiss the claims leveled against them. (ECF No. 40). In its

June 21, 2022 opinion and order, the Court granted the Washtenaw Defendants' motion and dismissed Deputy King, the Washtenaw County Sheriff's Office, and Washtenaw County with prejudice. (ECF No. 49). Susselman now moves for reconsideration of that decision. (ECF No. 50).

III. Legal Standards

A party may move for reconsideration of a non-final order under E.D. Mich. LR 7.1(h)(2). Because they are "disfavored," such motions may be brought exclusively upon the following grounds:

> (A) The court made a mistake, correcting the mistake changes the outcome of the prior decision, and the mistake was based on the record and law before the court at the time of its prior decision;
>
> (B) An intervening change in controlling law warrants a different outcome; or
>
> (C) New facts warrant a different outcome and the new facts could not have been discovered with reasonable diligence before the prior decision.

Id.

IV. Analysis

Reconsideration motions are not vehicles for presenting arguments that could have been raised before the Court decided the original motion. *See Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 395 (6th Cir. 2007); *DiPonio Const. Co. v. Int'l Union of Bricklayers & Allied Craftworkers*, 739 F. Supp. 2d 986, 1004 (E.D. Mich. 2010).

Nor is it appropriate on a reconsideration motion to reiterate the same arguments the Court previously rejected. *See Fischer v. United States*, No. 19-13020, 2022 U.S. Dist. LEXIS 10234, at *2 (E.D. Mich. Jan. 19, 2022) ("A motion for reconsideration that merely reasserts the same facts and legal arguments previously asserted is not proper. . . . ") (collecting cases); *Saltmarshall v. VHS Children's Hosp. of Mich., Inc.*, 402 F. Supp. 3d 389, 393 (E.D. Mich. 2019) ("A motion for reconsideration is not intended as a means to allow a losing party simply to rehash rejected arguments or to introduce new arguments [that the party could have raised previously].").

Susselman's reconsideration motion falls far short of the necessary showing under Local Rule 7.1(h)(2). Since his main theories primarily comprise those arguments he already raised, and as well as those he neglected to raise initially, none of them justify reconsidering the June 21, 2022 opinion and order. Accordingly,

IT IS ORDERED that Susselman's motion for reconsideration (ECF No. 50) is denied.

/s/ Hon. Bernard A. Friedman
Senior United States District Judge

Dated: July 6, 2022
Detroit, Michigan

CONSTIUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. XIV 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other

proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

M.C.L. 257.602.
Compliance with order or direction of police officer.

A person shall not refuse to comply with a lawful order or direction of a police officer when that officer, for public interest and safety, is guiding, directing, controlling, or regulating traffic on the highways of this state.

M.C.L. 750.167
Disorderly person

(1) A person is a disorderly person if the person is any of the following:

(a) A person of sufficient ability who refuses or neglects to support his or her family.

(b) A common prostitute.

(c) A window peeper.

(d) A person who engages in an illegal occupation or business.

(e) A person who is intoxicated in a public place and who is either endangering directly the safety of another person or of property or is

acting in a manner that causes a public disturbance.

(f) A person who is engaged in indecent or obscene conduct in a public place.

(g) A vagrant.

(h) A person found begging in a public place.

(i) A person found loitering in a house of ill fame or prostitution or place where prostitution or lewdness is practiced, encouraged, or allowed.

(j) A person who knowingly loiters in or about a place where an illegal occupation or business is being conducted.

(k) A person who loiters in or about a police station, police headquarters building, county jail, hospital, court building, or other public building or place for the purpose of soliciting employment of legal services or the services of sureties upon criminal recognizances.

(1) A person who is found jostling or roughly crowding people unnecessarily in a public place.

(2) If a person who has been convicted of refusing or neglecting to support his or her family under this section is charged with subsequent violations within a period of 2 years, that person shall be prosecuted as a second offender or third and subsequent offender as provided in section 168, if the family of that person is then receiving public relief or support.

(3) A mother's breastfeeding of a child or expressing breast milk does not constitute indecent or obscene conduct under subsection (1) regardless of whether or not her areola or nipple is visible during or incidental to the breastfeeding or expressing of breast milk.