APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

App. 1

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1621

YASMANI GURRI RUBIO,

Plaintiff - Appellant,

v.

THE CITY OF ALEXANDRIA, VIRGINIA; JUSTIN M. WILSON, Mayor in his individual capacity; ADP CODY SAVAGE, in his individual capacity; ADP MICHAEL ROCHE, in his individual capacity; ADP ROBERT POND, in his individual capacity; ADP JAMIE BRIDGEMAN, in his individual capacity; CHIEF OF ALEXANDRIA POLICE, in his individual capacity,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. David J. Novak, District Judge. (3:24-cv-00193-DJN)

Submitted: December 13, 2024 Decided: April 14, 2025

Before AGEE and BENJAMIN, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Yasmani Gurri Rubio, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Appellant Yasmani Gurri Rubio appeals the district court's order denying relief on his 42 U.S.C. § 1983 complaint. We have reviewed the record and find no reversible error. Accordingly, although we grant Appellant's motion to file a supplemental brief, we deny as moot his motions to expedite and accelerate case processing, deny his remaining motions—including his motion to dismiss the appeal for failure to prosecute—and affirm the district court's order. *Rubio v. City of Alexandria*, No. 3:24-cv-00193-DJN (E.D. Va. June 17, 2024). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

App. 2

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

YASMANI GURRI RUBIO,
Plaintiff,

v. Civil No. 3:24cv193 (DJN)

CITY OF ALEXANDRIA, *et al.*,
Defendants.

FINAL ORDER
(Dismissing Complaint; Denying Motion for Retention of Court Jurisdiction; Denying Motion for Leave to File Amended Complaint)

This matter comes before the Court on three motions. First, the City of Alexandria, Justin M. Wilson, Cody Savage, Michael Roche, Robert Pond, Jamie Bridgeman and the Chief of Alexandria Police (collectively, "Defendants") filed a Motion to Dismiss (ECF No. 7), moving to dismiss all claims against Defendants for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3) and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Second, Yasmani Gurri Rubio ("Plaintiff"), proceeding *pro se*, filed a Motion for Retention of Court Jurisdiction (ECF No. 14), which "requests this Honorable Court to exercise its discretion to retain the jurisdiction over this case." Lastly, Plaintiff filed a Motion for Leave to File an Amended Complaint (ECF No. 19 ("Motion to Amend")), which purportedly presents "new facts and new evidence."

For the reasons stated below, the Court hereby GRANTS Defendants' Motion to Dismiss (ECF No. 7) and DISMISSES WITH PREJUDICE Plaintiff's Complaint, as "amendment would be futile in light of the fundamental deficiencies in [Plaintiff's] theory of liability." *Cozzarelli v. Inspire Pharms., Inc.*, 549 F.3d 618, 630 (4th Cir. 2008). In addition, the Court DENIES

Plaintiff's Motion for Retention of Court Jurisdiction (ECF No. 14), as Plaintiff does not provide any legal authority in support of his motion and merely regurgitates arguments made in his opposition briefs (ECF Nos. 9–10). Lastly, the Court DENIES Plaintiff's Motion to Amend (ECF No. 19), because the proposed amended complaint suffers from the same fundamental deficiencies as the Complaint and amendment would be futile.

I. BACKGROUND

Plaintiff alleges that on October 15, 2022, he was physically and verbally attacked while driving for Lyft in the City of Alexandria. (ECF No. 3 ("Complaint") ¶¶ 12–13). Plaintiff further indicates that he reported this incident to the Alexandria Police Department (the "APD") that same evening, but the APD allegedly failed to investigate appropriately. (*See generally id.*)

On March 18, 2024, Plaintiff filed his Complaint, asserting twenty-one counts against Defendants. While the Complaint establishes that Plaintiff resides in the City of Richmond, it does not establish where any Defendant resides. (*Compare id.* ¶ 5 (stating Plaintiff's residency), *with id.* ¶¶ 6–11 (failing to establish Defendants' residency).) Instead, Plaintiff alleges that each Defendant is employed in Alexandria. (*Id.* ¶¶ 6–11.) Moreover, the Complaint expressly states that "all events or omissions giving rise to the claims occurred in the city of Alexandria in the Eastern District of Virginia." (*Id.* ¶ 4.)

On April 5, 2024, Defendants filed their Motion to Dismiss (ECF No. 7), which argues that venue in the Richmond District is improper and that transferring this case would not be in the interest of justice. (ECF No. 8 at 3–4.) Defendants also argue that the Complaint should be dismissed in its entirety for failure to state a claim. On April 8, 2024, Plaintiff filed his Opposition to Defendants' Motion to Dismiss (ECF Nos. 9–10). Defendants elected not to file a Reply, and the time to do so has elapsed, rendering the Motion to Dismiss ripe for resolution.

Before the Court issued a ruling on the Motion to Dismiss, Plaintiff filed two additional motions. On May 14, 2024, Plaintiff filed a Motion for Retention of Court Jurisdiction (ECF No. 14), which rehashes arguments made in his opposition briefs (ECF Nos. 9–10). On May 15, 2024, Plaintiff also filed a Motion to Amend (ECF No. 19). Defendants filed an Opposition to each of Plaintiff's Motions. (ECF Nos. 21, 22.) Plaintiff elected not to file a Reply as to the Motion for Retention of Court Jurisdiction, and the time to do so has elapsed. On June 3, 2024, Plaintiff filed a Reply as to the Motion to Amend, rendering Plaintiff's Motions (ECF Nos. 14, 19) ripe for resolution.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of a complaint; it does not serve as the means by which a court will resolve factual contests, determine the merits of a claim or address potential defenses. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). In considering a motion to dismiss, the Court accepts the well-pleaded allegations in the complaint as true and views the facts in the light most favorable to the plaintiff. *Mylan Lab'ys, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Under Federal Rule of Civil Procedure 8(a), a complaint must state facts sufficient to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). As the Supreme Court opined in *Twombly*, a complaint must state "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action," though the law does not require "detailed factual allegations." *Id.* (citations omitted). Ultimately, the "[f]actual

allegations must be enough to raise a right to relief above the speculative level," rendering the right "plausible on its face" rather than merely "conceivable." *Id.* at 555, 570. Thus, a complaint must assert facts that are more than "merely consistent with" the other party's liability. *Id.* at 557. The facts alleged must be sufficient to "state all the elements of [any] claim[s]." *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003).

In addition, it is well established that district courts must liberally construe a *pro se* litigant's complaint. *Laber v. Harvey*, 438 F.3d 404, 413 n.3 (4th Cir. 2006). However, courts need not attempt "to discern the unexpressed intent of the plaintiff." *Id.* As the Fourth Circuit explained, "[t]hough [*pro* se] litigants cannot, of course, be expected to frame legal issues with the clarity and precision ideally evident in the work of those trained in law, neither can district courts be required to conjure up and decide issues never fairly presented to them." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1276 (4th Cir. 1985).

III. ANALYSIS

The Court begins by analyzing the merits of the Rule 12(b)(6) arguments.[1] Next, the Court turns to the issue of whether amendment would be futile.

A. Failure to State a Claim

Plaintiff asserts twenty-one counts against Defendants based on their alleged failure to investigate or prosecute a third party. The Court begins by addressing Plaintiff's claims under 42 U.S.C. § 1983 (Counts One through Twelve, Nineteen and Twenty). Next, the Court assesses whether Plaintiff states a claim for intentional infliction of emotional distress (Counts Thirteen

[1] Defendants also argue that this action should be dismissed, because venue does not properly lay within the Richmond Division. While this case should have been brought in the Alexandria Division, the undersigned maintains an active docket in both the Richmond and Alexandria Divisions. Accordingly, the Court DENIES AS MOOT Defendant's motion to dismiss this action due to improper venue, and the Court addresses the merits of the Rule 12(b)(6) arguments.

and Fourteen). Lastly, the Court considers the negligence claims (Counts Seventeen, Eighteen and Twenty-One). Because Plaintiff fails to state a claim against Defendants, the Court DISMISSES Plaintiff's Complaint in its entirety.[2]

1. Claims Under 42 U.S.C. § 1983

Section 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Therefore, the first step in addressing a § 1983 claim is "to identify the specific constitutional right allegedly infringed." *Id.* at 271.

Here, Plaintiff alleges that Defendants "obstruct[ed] justice" by improperly investigating his reported crime, which "deprive[d] the plaintiff of his clearly established rights under the Fourth, Fifth and Fourteenth Amendments." (Compl. ¶ 57.) Plaintiff also seeks to hold the Chief of Police and the City of Alexandria liable for their failure to "intervene to stop the violation." Plaintiff asserts that such "unreasonable use of power abuse and misconduct by the APD public officials" deprived him of his right to equal protection and his ability to seek justice. (*Id.* ¶¶ 95–96.) In sum, Counts One through Twelve, Nineteen and Twenty appear to be premised on an alleged failure to investigate or prosecute a third party.

However, the Fourth Circuit has recognized that private citizens have "no right to a criminal investigation or criminal prosecution of another." *Smith v. McCarthy*, 349 F. App'x 851, 859 (4th Cir. 2009); *see also Williams v. Berger*, 2022 WL 2718554, at *2 (E.D. Va. June

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[2] Plaintiff also asserts claims for "Omission" in Counts Fifteen and Sixteen. While it remains unclear what legal theory Plaintiff attempts to pursue, Counts Fifteen and Sixteen appear to be premised on the same facts as the other nineteen counts in the Complaint. That is, Plaintiff pursues these claims for the APD's failure to investigate a reported crime or prosecute a third party. Accordingly, for the same reasons discussed in this Order, Counts Fifteen and Sixteen are meritless.

14, 2022), *aff'd*, 2022 WL 17103785 (4th Cir. Nov. 22, 2022) ("Because the defendants' failure to investigate the facts of the plaintiff's accident do not implicate a constitutional right, her § 1983 claims must fail."). Because Plaintiff has not alleged facts sufficient to demonstrate that he suffered a deprivation of any constitutional rights, Plaintiff fails to state a claim under § 1983. Accordingly, the Court DISMISSES Counts One through Twelve, Nineteen and Twenty.

2. Intentional Infliction of Emotional Distress Claim

To state a claim for intentional infliction of emotional distress under Virginia law, the plaintiff must show that the defendant intentionally or recklessly engaged in outrageous or intolerable conduct that resulted in severe emotional distress. *Almy v. Grisham*, 639 S.E.2d 182, 186 (Va. 2007). In evaluating the defendant's conduct, courts have found liability for such a claim "only where the conduct has been 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." *Russo v. White*, 400 S.E.2d 160, 162 (Va. 1991).

Here, Plaintiff fails to plausibly establish the elements of a claim for intentional infliction of emotional distress. Plaintiff alleges no facts in the Complaint that rise to the level of outrageous or intolerable conduct. *See id.* (stating that the defendant's conduct must "go beyond all possible bounds of decency" and be regarded as "utterly intolerable in a civilized community"). At most, the facts, which must be construed in the light most favorable to Plaintiff, demonstrate that Defendant Savage did not conduct his investigation to Plaintiff's liking. In addition, Plaintiff has not plausibly alleged that Defendant Savage acted with the intent to inflict emotional distress on him or that Defendant Savage was substantially certain that his conduct would have that result. *Almy*, 639 S.E.2d at 187. Accordingly, the Court DISMISSES Counts Thirteen and Fourteen.

3. Negligence Claims

Plaintiff also fails to state a claim for "gross, intentional, reckless, and wanton negligence." According to the Complaint, Defendants either negligently conducted their criminal investigation to "cover[] up for criminals" or "failed to intervene to prevent Savage's abuse of power against Gurri." (Compl. ¶ 192.) However, Virginia law does not recognize a cause of action against police officers for negligent investigations. *See e.g.*, *Boyce v. Bennett*, 2015 WL 6873547, at *8 (E.D. Va. Nov. 9, 2015) (noting the lack of a viable state-law "gross negligence" cause of action against a city police officer for negligent investigation and/or negligent production of investigative materials); *Lewis v. McDorman*, 820 F.Supp. 1001, 1008 (W.D. Va. 1992) (dismissing a "willful and wanton negligence" claim, because the plaintiff had "cited no authority for the existence, under Virginia law, of a duty upon police officers to exercise reasonable care in conducting investigations"); *Durham v. Horner*, 759 F. Supp. 2d 810, 815 (W.D. Va. 2010) ("Virginia law recognizes no [gross negligence] cause of action against police officers for conducting investigations."). Because Defendant's purported failure to investigate properly does not create a viable cause of action, the Court DISMISSES Counts Seventeen, Eighteen and Twenty-One.

B. Amendment Would be Futile

Pursuant to Federal Rule of Civil Procedure 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The Fourth Circuit has instructed that a request to amend should be granted unless "the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or amendment would be futile." *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 379 (4th Cir.

2012). An amendment proves futile "if the proposed amended complaint fails to state a claim under the applicable rules and accompanying standards." *Katyle v. Penn Nat. Gaming, Inc.*, 637 F.3d 462, 471 (4th Cir. 2011); *see also Davison v. Randall*, 912 F.3d 666, 690 (4th Cir. 2019) (explaining that a proposed amendment would qualify as futile if the new claim would not survive a motion to dismiss).

Plaintiff filed a proposed amended complaint (ECF No. 20-1), which further details steps taken by the APD to investigate the crime perpetrated against Plaintiff. While the proposed amended complaint proves as incoherent as the original complaint, at bottom, Plaintiff asserts fourteen counts against Defendants for the way in which they conducted their investigation. Plaintiff contends that such "police misconduct" amounts to a "use of excessive force and authority" and violates his constitutional rights. (*E.g.*, Compl. ¶ 74.) Much like the original complaint, the proposed amended complaint asserts claims under 42 U.S.C. § 1983, as well as for the intentional infliction of emotional distress, "omission/mistergiversation" and "gross, reckless, and outrageous negligence."

Although the Court recognizes Plaintiff's *pro se* status, the Court will not allow Plaintiff an opportunity to amend his complaint, because any such amendment would be futile. Plaintiff's proposed amended complaint suffers from fundamental deficiencies — the same deficiencies discussed in this Order — and wholly fails to state a claim upon which the Court could grant relief. "Allowing [Plaintiff] to file an amended complaint where he so clearly cannot state a claim would be wasteful and unduly burdensome on the Defendants." *Williams v. Berger*, 2022 WL 2718554, at *2 (E.D. Va. June 14, 2022), *aff'd*, 2022 WL 17103785 (4th Cir. Nov. 22, 2022) (cleaned up). Accordingly, the Court DENIES Plaintiff's Motion to Amend (ECF No. 19).

IV. CONCLUSION

For the reasons stated below, the Court hereby GRANTS Defendants' Motion to Dismiss (ECF No. 7) and DISMISSES WITH PREJUDICE Plaintiff's Complaint, as "amendment would be futile in light of the fundamental deficiencies in [Plaintiff's] theory of liability." *Cozzarelli*, 549 F.3d at 630. In addition, the Court DENIES Plaintiff's Motion for Retention of Court Jurisdiction (ECF No. 14) and Motion to Amend (ECF No. 19).

The Court DIRECTS the Clerk to close the case.

Should Plaintiff wish to appeal this Order, he must file a written notice of appeal with the Clerk of Court within thirty (30) days of the date of entry. Failure to file a notice of appeal within that period may result in the loss of the right to appeal. Fed. R. App. P. 4.

Let the Clerk file a copy of this Order electronically and notify all counsel of record and *pro se* Plaintiff.

It is so ORDERED.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Dated: June 17, 2024

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

App. 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

YASMANI GURRI RUBIO, **Plaintiff,** **v.** **THE CITY OF ALEXANDRIA, et al.,** **Defendants.**	**Civil Action No. 3:24 cv 193**

DEFENDANTS' MOTIONS TO DISMISS FOR IMPROPER VENUE AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendants, the City of Alexandria, Justin M. Wilson, Cody Savage, Michael Roche, Robert Pond, Jamie Bridgeman, and the Chief of Alexandria Police, by and through their undersigned counsel, and pursuant to *Fed. R. Civ. P.* 12(b)(3) and *Fed. R. Civ. P.* 12(b)(6), hereby respectfully moves this Court for the dismissal, in their entirety and with prejudice, of the claims asserted against them by Yasmani Gurri Rubio. A Memorandum in Support of Defendants' "Motions to Dismiss for Improper Venue and for Failure to State a Claim Upon which Relief can be Granted" will be filed contemporaneously with this Motion.

Accordingly, Defendants respectfully request that the Court dismiss Plaintiff's Complaint with prejudice, and that it grant Defendants all other relief that it deems just and proper.

Respectfully submitted,

The City of Alexandria,
Justin M. Wilson, Cody Savage,
Michael Roche, Robert Pond,
Jamie Bridgeman, and
the Alexandria Chief of Police

By: /s/

Travis S. MacRae (Va. Bar No. 78771)
Senior Assistant City Attorney
City of Alexandria
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Alexandria, Virginia 22314
Tel: (703) 746-3750
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ROSEBORO v. GARRISON WARNING

Consistent with the requirements of *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the defendant advises the *pro se* plaintiff, Yasmani Gurri Rubio, that:

(1) You are entitled to file a response opposing the motion and that any such response must be filed within twenty-one (21) days of the date on which the Motion to Dismiss was filed; and

(2) The Court could dismiss your action on the basis of the Defendants' motions and briefs in support if you do not file a response; and

(3) You must identify all facts stated by the Defendants with which you disagree and must set forth your version of the facts by offering affidavits (written statements signed before a notary public and under oath) or by filing sworn statements (bearing a certificate that is signed under penalty of perjury); and

(4) You are entitled to file a legal brief in opposition to the one filed by the Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2024, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the Plaintiff. I will also mail a copy to:

Yasmani Gurri Rubio
5709 Eunice Ct.
Richmond, Virginia 23228

/s/
Travis S. MacRae (Va. Bar No. 78771)
Senior Assistant City Attorney
City of Alexandria
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Travis.MacRae@alexandriava.gov

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

App. 4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

YASMANI GURRI RUBIO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 3:24 cv 193**
	)	
THE CITY OF ALEXANDRIA, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTIONS TO DISMISS FOR IMPROPER VENUE AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

In response to the Complaint filed by Yasmani Gurri Rubio (the "Plaintiff"), Defendants, the City of Alexandria, Justin M. Wilson, Cody Savage, Michael Roche, Robert Pond, Jamie Bridgeman, and the Alexandria Chief of Police, by and through their undersigned counsel, hereby submit this memorandum in support of their motions to dismiss for improper venue and for failure to state a claim upon which relief can be granted.

I. FACTUAL BACKGROUND

Plaintiff alleges that on October 15, 2022, he was physically and verbally attacked while driving for the rideshare company Lyft in the City of Alexandria. (Complaint, ¶ 12 – 13). Plaintiff further states that he reported this incident to the Alexandria Police Department (the "APD") the same evening. (Complaint, ¶ 14 – 16). According to the Complaint, the APD's ensuing investigation somehow violated his "Fourth, Fifth and Fourteenth Amendment rights". (Complaint, page 2). The investigation also supposedly constituted "negligent supervision", "omission", "intentional infliction of emotional distress", "gross negligence", "fraud", "extreme

and outrageous conduct", "negligence associated with legal and statutory duties," "harmful falsehood," and "concealment." (Complaint, page 2). Defendants disagree.

II. ARGUMENT

A. The Complaint must be dismissed because venue in this Court is improper.

Pursuant to 28 U.S.C. § 1391(b), a civil action may be brought in (1) "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located", (2) "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated", or (3) "if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." If a filing meets one of these three criteria, venue within a judicial district is said to be proper.

In the Eastern District of Virginia, however, venue must also be proper within the *division* of filing. *Multiscaff Limited v. APTIM Federal Services, LLC*, 2023 WL 6541846, *2 (E.D.Va. 2023) (Young, J.) (citing to *E.D. Va. Loc. Civ. R. 7(J)*). To determine the propriety of division-level venue, the same standards set by 28 U.S.C. § 1391(b) are used, albeit with the substation of the word "division" for "district" in venue options (1) – (3). *Multiscaff Limited*, 2023 WL 6541846 at *2.

As here, when a defendant moves to dismiss under Fed. R. Civ. P. 12(b)(3), it is the plaintiff that bears the burden of proving that venue is proper. *Wood v. Barnett, Inc.*, 648 F.Supp. 936, 938 (E.D.Va. 1986) (Merhige, J.) (citations omitted). When a plaintiff files suit in the wrong district or division, the district court shall either dismiss the action, or, if it is in the

interest of justice, transfer it to any district or division in which it could have been filed. *Multiscaff Limited*, 2023 WL 6541846 at *2.

Turning to the case at bar, pursuant to 28 U.S.C. § 1391(b), as modified by *E.D. Va. Loc. Civ. R. 7(J)*, Plaintiff could first establish that venue is proper in the Richmond Division by demonstrating that a Defendant resides therein. Plaintiff does not do so. Instead, the only information provided about any of the Defendants is that they work in Alexandria. This is critical, of course, because the City of Alexandria lies in the Alexandria Division of the Eastern District of Virginia, not the Richmond Division.

Next, Plaintiff could establish that venue before this Honorable Court is proper by demonstrating that "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated". He cannot do so. In fact, he concedes that "all events or omissions giving rise to the claims occurred *in the city of Alexandria* in the Eastern District of Virginia." (Complaint, ¶ 4). (Emphasis added). A review of all two hundred and thirty-one paragraphs of the Complaint supports this statement. The only mention of any of the areas comprising the Richmond Division of the Eastern District of Virginia occurs when Plaintiff states that he is a resident of the City of Richmond. (Complaint, ¶ 5). Plaintiff's residency alone cannot establish proper venue before this Court.

Finally, Plaintiff could possibly prove proper venue in the Richmond Division by demonstrating that "any defendant is subject to the court's personal jurisdiction with respect to [the] action". With respect, there is not a single act or omission described in the Complaint that would subject any one Defendant to this Court's personal jurisdiction.

Because venue is improper before this Court pursuant to 28 U.S.C. § 1391(b), as modified by *E.D. Va. Loc. Civ. R. 7(J)*, and pursuant to *Fed. R. Civ. P.* 12(b)(3), Defendants humbly request

that this matter be dismissed with prejudice. As will be demonstrated below, Defendants contend that a transfer of the case would not be in the interests of justice because the claims contained therein are patently without merit.

B. Plaintiff's 42 U.S.C. § 1983 claims must fail as a matter of law because there is no statutory or constitutional right to the investigation or prosecution of another person.

Any plaintiff seeking relief pursuant to 42 U.S.C. § 1983 must demonstrate that (1) a person (2) acting under color of state law (3) *deprived him of a federal statutory or constitutional right. See Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003). At the risk of stating the obvious, it follows that if no federal statutory or constitutional right is implicated, a 42 U.S.C. § 1983 must fail as a matter of law.

Many courts of this Circuit have held that there is no federal statutory or constitutional right to the investigation or prosecution of another. *See Smith v. McCarthy*, 349 F. App'x 851, 859 (4th Cir. 2009) ("In this case, because the Smiths had no right to a criminal investigation or criminal prosecution of another...the district court properly determined that they failed to allege the violation of a clearly established statutory or constitutional right"); *Johnson v. Baltimore Police Dep't*, 2022 WL 9976525, at *59 (D.Md. 2022) ("[I[n general, there is no independent constitutional right to investigation of a third party").

This Honorable Court is no stranger to such holdings. In 2022, for instance, Judge John A. Gibney, Jr., rendered an opinion in the matter of *Williams v. Berger*, 2022 WL 2718554 (E.D.Va. 2022) (Gibney, J.). There, a plaintiff had sued multiple police officers on the basis that they had allegedly "improperly investigat[ed] a hit [and] run accident which left her seriously injured in June 2020." *Id.* at * 2 (internal quotation marks omitted). According to the plaintiff, this failure constituted a violation of her constitutional rights, and they could be enforced pursuant to 42 U.S.C. § 1983. This Court disagreed and summarily dismissed the case. In doing so, the

Court noted that "[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another". *Id.* at * 2 (citing to *Lopez v. Robinson*, 914 F.2d 486, 494 (4th Cir. 1990)). From there, the Court held that, "[b]ecause the [police officers'] failure to investigate the facts of the plaintiff's accident do not implicate a constitutional right, her § 1983 claims must fail." *Williams*, 2022 WL 2718554 at *2.

The case at bar is no different than *Williams*. Each of the twenty-one counts contained in the Complaint stems from Plaintiff's allegation that the Alexandria Police Department failed to properly investigate his alleged assault. Counts 1 – 12 and Counts 19 – 20 expressly seek relief for this perceived failure pursuant to 42 U.S.C. § 1983. Because it is well established that there is no federal statutory or constitutional right to an investigation, or to the prosecution of another person, Plaintiff, as a matter of law, cannot demonstrate that he has been deprived of a federal statutory or constitutional right. Consequently, Counts 1 – 12 and Counts 19 – 20 must be dismissed with prejudice pursuant to *Fed. R. Civ. P.* 12(b)(6).

C. Plaintiff's negligence claims must fail as a matter of law because the Commonwealth of Virginia does not recognize a cause of action for negligent investigation.

In 2019, in the matter of *Small v. C.M. Tate, et al.*, Civil No. CL18-4051 (Cir. Ct. Norfolk, June 18, 2019), the Honorable Judge Junius P. Fulton III ruled that a cause of action for negligent investigation does not exist within this Commonwealth.[1] Judge Fulton's holding was based upon a comprehensive examination of Virginia case law regarding this issue. Some of the cases relied upon included *Durham v. Horner*, 759 F.Supp.2d 810, 815 (W.D. Va. 2010) ("Virginia law recognizes no [gross negligence] cause of action against police officers for conducting investigations."), *Boyce v. Bennett*, No. 2:14cv249, 2015 WL 6873547, at *8 (E.D. Va. Nov. 9, 2015) (dismissing a plaintiff's claim that a police officer was grossly negligent in an investigation

[1] A copy of *Small v. C.M. Tate, et al.* has been attached for the Court's convenience.

because under Virginia law, there was no viable state-law 'gross negligence' cause of action against a city police officer for negligent investigation and/or negligent production of investigative material"), *Lewis v. McDorman*, 820 F.Supp. 1001, 1008 (W.D. Va. 1992) (dismissing a "willful and wanton negligence" claim because the plaintiff had "cited no authority for the existence, under Virginia law, of a duty upon police officers to exercise reasonable care in conducting investigations"); *West v. Wall*, 2007 WL 853826, *2 (E.D. Va. 2007) (dismissing "Plaintiff's claims that Defendant was grossly negligent in handling the investigation of Plaintiff's son's death by not properly following certain leads."), *Davis v. Mounger*, Case No. CL1401698F-15 (Cir. Ct. Newport News, May 19, 2016) ("Virginia does not recognize a cause of action for the negligent investigation or incorrect initiation of criminal process."), and *Fletcher v. Commonwealth Attorney's Office, Suffolk, Virginia, et al.*, Case No. CL08-0801 (Cir. Ct. Suffolk, February 2, 2009) ("demurrer as to the negligent investigation claim is sustained. The Court is aware of no cause of action of negligent investigation recognized in Virginia.") While the holding of *Small* is certainly not binding upon this Court, the support underpinning it cannot be ignored. There is simply not a cause of action for negligent investigation in Virginia.[2]

Virginia is not unique in this regard. Many other states have similarly disallowed such a tort. Examples include Idaho, Washington, Iowa, New York, California, Colorado, Florida, Wisconsin, South Carolina, Alaska, Michigan, and Connecticut. *See Small*, Civil No. CL18-4051 (Cir. Ct. Norfolk, June 18, 2019) (citing to *Wilmer v. State of Idaho*, 841 P.2d 453, 455 (1992), *Wesley v. Campbell,* 779 F.3d 421 (6th Cir. 2015), and *Goldyn v. Clark Cty. Nevada*, 346 F. App'x 153 (9th Cir. 2009)).

[2] As recently as April 18, 2023, the this very Court held that "no cause of action exists in Virginia for negligence in police investigations." *Plantan v. Smith*, 2023 WL 2992175 (E.D.Va. 2023) (Lauck, J.).

Three of the Counts presented in the Complaint before this Court allege that Defendants are liable to Plaintiff because they were negligent in conducting their investigations (or perceived lack thereof). Specifically, Count 17 accuses Defendants of "Gross, Intentional, Reckless and Wanton Negligence"; Count 18 alleges that Defendants committed "Gross, Irregular, Reckless, and [Wanton Negligence]"; and Count 21 asserts that Defendants engaged in "Gross, Willful, Wanton, Imprudent, and Outrageous Negligence". Because the Commonwealth of Virginia does not recognize a cause of action for negligence in investigations, these three Counts must be dismissed with prejudice pursuant to *Fed. R. Civ. P.* 12(b)(6).

D. Plaintiff fails to state a claim for intentional infliction of emotional distress.

In *Suggs v. M & T Bank*, 230 F.Supp.3d 458 (E.D.Va. 2017) (Gibney, J.), this Court detailed what must be plead in order to make out a claim for the intentional infliction of emotional distress. The burden is very high. To begin, a plaintiff must show that the defendant intentionally or recklessly engaged in outrageous conduct that resulted in severe emotional distress. *Id.* at 464 (citation omitted). In other words, an intentional infliction of emotional distress claim requires the extremes—*outrageous* conduct and *severe* distress. Liability has been imposed "only where the conduct has been 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.* (citation and internal quotation marks omitted).

Nothing pled in the Complaint at bar even approaches the high standard of pleading required for showing a *prima facie* case for intentional infliction of emotional distress. The Defendants, either through their alleged direct actions or their omissions, are not accused of having done anything outrageous or extreme that goes beyond all possible bounds of decency. While

Defendants' investigation might not have been to Plaintiff's liking, such is not a legitimate basis for asserting a claim for intentional infliction of emotional distress.

Finally, intentional infliction of emotional distress is a tort in Virginia. The Defendants, as agents of the City of Alexandria, are cloaked with qualified immunity against it.[3]

E. Omission is not a recognized cause of action.

Finally, Counts 15 and 16 of the Complaint assign liability to Defendants for "omission". Because "omission" is not a recognized cause of action in the Commonwealth of Virginia, these Counts must be dismissed with prejudice.

CONCLUSION

For the reasons stated above, Defendants respectfully request that their Motions to Dismiss be granted, that the Complaint be dismissed with prejudice, and that such other relief be granted as the Court deems just and appropriate.

Respectfully submitted,

The City of Alexandria,
Justin M. Wilson, Cody Savage,
Michael Roche, Robert Pond,
Jamie Bridgeman, and
the Alexandria Chief of Police

By: /s/

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[3] Defendants request the right to more-fully brief the qualified immunity issue, should this matter survive this motion to dismiss.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2024, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the Plaintiff. I will also mail a copy to:

Yasmani Gurri Rubio
5709 Eunice Ct.
Richmond, Virginia 23228

/s/
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