IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WILLIAM PRENTICE McNABB and DIANNA McNABB,	)	
Plaintiffs,	)	
v.	)	**No. 03-2334 Ml/P**
CITY OF MEMPHIS, et al.,	)	
Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART OFFICERS RICHARDSON'S AND NORMAN'S MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT
AND
ORDER GRANTING MOTION TO STRIKE

This case is before the Court on the Motion of Defendants Richardson and Norman to Dismiss or, in the Alternative, for Summary Judgment and Memorandum in Support Thereof, filed June 10, 2003. Plaintiff responded in opposition on August 8, 2003. Plaintiff filed his Amended Complaint on June 23, 2003 and his Second Amended Complaint on September 5, 2003, in which Dianna McNabb was added as a plaintiff. The officers subsequently filed the Motion of Defendants Richardson and Norman to Dismiss the Amended Complaint or, in the Alternative, for Summary Judgment and Memorandum in Support Thereof on September 15, 2003. Plaintiffs responded on November 19, 2003. The officers moved to strike exhibits B and C to Plaintiffs' response on November 21,

2003. For the following reasons, the Court GRANTS the officers' motion to strike and GRANTS in part and DENIES in part the officers' motions to dismiss or for summary judgment.

I. Background

In this case, Plaintiff alleges that during his arrest for driving under the influence, reckless driving, public intoxication, refusal to submit to a Blood Alcohol Concentration test, and violations of the Tennessee open container law, Officers Eric Richardson and Dennis Normal physically and verbally abused him. In particular, Plaintiff alleges that the officers handcuffed him "to the point where [he] experienced great pain in his wrists and hands." He complains that the officers refused to loosen the handcuffs when he requested that they do so. Plaintiff also claims that because the handcuffs were too tight and because Officer Richardson repeatedly jerked his handcuffed wrists, he "sustained deep gouges, scars, and nerve damages to both of his wrists." He further asserts that Officer Richardson struck him in the right temple and "attempted to close the door of the police car on [his] legs and feet."

Plaintiff claims that other officers at the jail refused to conduct intake procedures when he arrived because he needed medical treatment.[1] Plaintiff was then transported to the

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[1] Although Plaintiff's Second Amended Complaint makes reference to arriving at the police station, it is clear from his affidavit and the affidavits of the officers, that they were at

hospital where Officer Richardson allegedly pulled him from the police car by his handcuffed wrists. Once in the emergency room, Plaintiff claims that Officer Richardson released one of his wrists, spun him around and "us[ed] the freed handcuff to shackle [him] to the right of the hospital bed." Officer Richardson also allegedly used a leg iron to secure him to the hospital bed. While at the hospital, both officers allegedly continued to verbally abuse Plaintiff.

Along with their motion to dismiss or for summary judgment, the officers have submitted their own affidavits. The officers contend that Plaintiff was belligerent and uncooperative during his arrest, threatening to harm Officer Richardson and refusing to provide any personal information. Officer Richardson claims he placed the handcuffs on Plaintiff's wrists and double-locked them. He also claims he loosened them when Plaintiff complained that they were too tight. Officer Richardson avers that he observed Plaintiff moving around in the back seat of the squad car, which he believes was an attempt by Plaintiff to injure his own wrists. Officer Richardson also contends that when they arrived at the MED, he removed Plaintiff's handcuffs and released him to an officer assigned to the MED, who then secured Plaintiff to a bed by a handcuff and leg shackle. He denies placing the handcuffs on Plaintiffs wrists with an intent to injure him and

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intake at the jail.

further denies striking Plaintiff in the head.

Officer Norman contends that he had no physical contact with Plaintiff because he arrived on the scene after Officer Richardson had already handcuffed Plaintiff and placed him in the squad car.

Plaintiff ultimately plead guilty to driving while impaired and refusing to submit to a Blood Alcohol Concentration test.

The Second Amended Complaint asserts state law causes of action against Officers Richardson and Norman for assault, battery, negligence, gross negligence, and recklessness, and a 42 U.S.C. § 1983 claim for use of excessive force in violation of the Fourth Amendment. The Second Amended Complaint also asserts a state law claim for negligence against the City of Memphis as well as 42 U.S.C. § 1983 claims for unreasonable search and seizure and excessive force in violation of the Fourth Amendment. Plaintiff's Second Amended Complaint further adds a claim for loss of consortium on behalf of Dianna McNabb.

II. Standards of Review

A. Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss the plaintiff's complaint "for failure to state a claim upon which relief can be granted." When considering a 12(b)(6) motion to dismiss, a court must treat all of the well-pleaded allegations of the complaint as true, Saylor

v. Parker Seal Co., 975 F.2d 252, 254 (6th Cir. 1992), and must construe all of the allegations in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

B. Motion for Summary Judgment

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The Supreme Court has explained that the standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1989).

So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," Celotex, 477 U.S. at 323, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989). In

considering a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. Analysis

Officers Richardson and Norman move to dismiss or for summary judgment as to the state law claims for assault, battery, negligence, and the § 1983 claim for excessive force under the Fourth Amendment. They also request that the Court dismiss Dianna McNabb's claim for loss of consortium pursuant to § 1983. They have not moved for summary judgment as to the gross negligence and recklessness claims.

A. Motion to Strike

The officers move to strike exhibits 2 and 3 attached to Plaintiff's Response to Defendants' Motion to Dismiss Plaintiff's Amended Complaint. The officers assert that exhibit 2 is the police department's investigation of the incident, which contains summaries of statements and other inadmissible material. They assert that exhibit 3 contains summaries of complaints against Officer Richardson and their dispositions. The officers argue that these exhibits contain inadmissible statements and hearsay, that they contain "scandalous matter" that can be stricken

pursuant to Fed. R. Civ. P. 12(f), and that neither document has been properly authenticated. Plaintiff did not respond to the motion to strike and the time for response elapsed several months ago. Pursuant to Local Rule 7.2(a)(2), the Court may grant any non-dispositive motion based on the failure of a party to respond to that motion. Accordingly, the Court GRANTS the motion to strike exhibits 2 and 3 from Plaintiff's response.

B. Assault and Battery

The officers move to dismiss the assault and battery claims on the theory that they are immune from suit because the City has waived its own immunity with respect to these claims. Pursuant to the Tennessee Code, claims against employees are restricted as follows:

> No claim may be brought against an employee or judgment entered against an employee for damages for which immunity of the governmental entity is removed by this chapter unless the claim is one for medical malpractice brought against a health care practitioner.

Tenn. Code Ann. § 29-20-310(b).

The Tennessee Governmental Tort Liability Act provides for waiver of governmental immunity in the following circumstance:

> Immunity from suit of all governmental entities is removed for injury proximately caused by a *negligent act or omission* of any employee within the scope of his employment except if the injury arises out of:
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> * * *
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> (2) false imprisonment pursuant to a mittimus

> from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;

Tenn. Code Ann. § 29-20-205(2) (emphasis added).

In short, § 29-20-205 allows a governmental entity to be sued for injuries proximately caused by the negligent acts or omissions of its employees. Subsection 2 preserves governmental immunity for negligent acts that lead to injuries as a result of certain intentional torts. The Tennessee Supreme Court recently held that § 29-20-205(2) is limited to the intentional torts listed therein and does not include the torts of assault and battery. Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 84 (Tenn. 2001).

The officers seem to assert that the Limbaugh decision completely removed governmental immunity for the torts of assault and battery. This interpretation is a misreading of the statute and the decision, which only removes governmental immunity for injuries proximately caused by a "negligent act or omission". Tenn. Code Ann. 29-20-205.

The Tennessee Supreme Court's decision in Limbaugh allowed Coffee Medical Center to be sued because it negligently failed to supervise one of its nursing assistants who assaulted a patient. Coffee Medical Center had prior notice of the nursing assistant's aggressive tendencies and had not disciplined her. Id. at 80.

The court stated, "[W]e conclude that the medical center is not immune from tort liability where the injuries at issue were proximately caused by its negligence in failing to exercise reasonable care to protect a resident from the foreseeable risk of an employee's intentional assault and battery." Id. at 76.

The decision in Limbaugh does not allow a governmental entity to be sued directly for the intentional torts of assault and battery; it merely removed governmental immunity for these intentional torts that are caused by a negligent act or omission of the governmental entity. Thus, in Limbaugh, Coffee Medical Center was not directly liable for the assault and battery committed by the nursing assistant. Instead, Coffee Medical Center was held liable because it negligently failed to protect the plaintiff from the foreseeable risk that she would be harmed by the aggressive nursing assistant. Under Limbaugh, the City of Memphis does not enjoy immunity from liability for negligently allowing an employee to cause a plaintiff's injuries.

Despite the error in their legal argument, the officers may still be entitled to immunity from suit because Plaintiff alleges that negligence on the part of the City led to his injuries. Mr. McNabb alleges that the City's negligent failure to properly train its officers resulted in the conduct at issue and led to Plaintiff's injuries. If the City has waived its immunity for this negligence claim, then the officers will be immune from suit

for assault and battery.

The City, however, claims that it is immune from suit for this type of negligence under Tennessee Code Annotated § 29-20-205(1) because its training policies are the subject of discretionary functions. This claim of immunity is discussed in further detail in the Order that denies the City's motion to dismiss. Whether the officers receive immunity for the assault and battery claims will depend on the Court's determination as to the City's claim for immunity from the negligent training claim. The Court has determined in its Order regarding the City's motion to dismiss, that the City's claim of immunity can not be resolved at the present time. Therefore, the officers' claim of immunity for the assault and battery claims also can not be resolved at the present time. The Court DENIES the motion to dismiss the assault and battery claims on the basis of immunity under § 29-20-310(b) without prejudice to its resubmission at a later time.

C. Negligence

Plaintiff's negligence claim alleges that the officers breached a duty of care to exercise ordinary care and diligence in the performance of their duties as police officers. The officers claim that they are entitled to immunity from this claim.

Pursuant to Tennessee Code Annotated § 29-20-310(b), a plaintiff may not bring a claim against an employee where the

governmental entity has waived its immunity from suit. Under Tennessee Code Annotated § 29-20-205, the City of Memphis agreed to waive its immunity from suit for the negligent acts of its employees. Accordingly, the Court DISMISSES the negligence claim against Officers Richardson and Norman .[2]

D. Fourth Amendment Excessive Force Claim/Qualified Immunity

An arrestee has a constitutional right to be free from the use of excessive force during an arrest. Holt v. Artis, 843 F.2d 242, 246 (6th Cir. 1988). Excessive force claims are analyzed under the Fourth Amendment's "objective reasonableness" test. Saucier v. Katz, 533 U.S. 194, 201-02 (2001). Overly tight handcuffing can constitute excessive force depending upon the circumstances. Martin v. Heideman, 106 F.3d 1308, 1312-13 (6th Cir. 1997).

Officers Richardson and Norman acknowledge in their own

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[2] The Court would like to clarify what may at first blush seem to be a contradiction between this Order and the Court's Order denying the City's motion to dismiss as they pertain to the City's waiver of immunity for negligence under Tennessee Code Annotated § 29-20-205. The Court's variant holdings arise from the fact that Plaintiff brings different negligence claims against the officers and the City. Plaintiff's negligence claim against the officers arises from their actions during Plaintiff's arrest. As noted above, the statute clearly waives the City's immunity from suit for the negligence of its employees. However, Plaintiff's negligence claim against the City relates to the City's failure to properly train the officers. As noted in the Court's Order regarding the City's motion to dismiss, the Court can not determine at the present time whether the City has waived its immunity from suit for the negligent training claim.

motion for summary judgment that "the Plaintiff's wrist injuries, which he alleges were caused by the handcuffs, could rise to the level of a constitutional violation." (Mot. of Def.'s Richardson & Norman to Dism. or for Summ. J. at 11.) However, the officers argue that Plaintiff's allegations are insufficient to show excessive force in violation of the Fourth Amendment because they believe Plaintiff's own conduct caused his injuries. This is clearly a question of fact not appropriate for disposition on summary judgment. The motion for summary judgment is DENIED on this basis.

The officers also claim the defense of qualified immunity and request summary judgment on this basis. "Government officials performing discretionary functions are afforded qualified immunity, shielding them from civil damages, as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Poe v. Haydon, 853 F.2d 418, 423 (6th Cir. 1988). See also Vaughn v. United States Small Bus. Admin., 65 F.3d 1322, 1326 (6th Cir. 1995) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1992)). Therefore, in order to defeat Defendant's claims of qualified immunity, Plaintiff must show: (1) that a clearly established right has been violated; and (2) the official would have known that their conduct violates that right.

The right to be free from the use of excessively tight handcuffs is clearly established within the Sixth Circuit and a

reasonable official would know that employing handcuffs in such a manner violates an arrestee's rights. Burchett v. Kiefer, 310 F.3d 937, 944-45 (6th Cir. 2002); Martin, 106 F.3d at 1312-13. In Martin, the Sixth Circuit reversed the district court's grant of summary judgment on the basis of qualified immunity, where the plaintiff's excessive force claim involved the overly tight use of handcuffs. 106 F.3d at 1312-13. The district court had previously determined that the right to be free from excessively forceful handcuffing was not clearly established at the time the officers handcuffed the plaintiff. The Sixth Circuit held that the right to be free from the use of excessive force was clearly established under its prior decisions and because the record created a factual dispute as to whether excessive force had been used with respect to the handcuffing, the qualified immunity defense should not have been upheld at the summary judgment stage. Id. (citing Walton v. City of Southfield, 995 F.2d 1331, 1342 (6th Cir. 1993)).

Similarly here, Plaintiff's allegations create a question as to whether the officers used excessive force. Plaintiff's Second Amended Complaint and affidavit state, among other things, that Officer Richardson "tightened [the handcuffs] to the point that I screamed in pain." (McNabb Aff. ¶ 5.) He further claims the officers refused to loosen the handcuffs when informed that they were cutting off Plaintiff's circulation. Upon arrival at the

jail, he claims that his wrists were swollen and bleeding and that as a result he has experienced severe nerve damage in both of his wrists. (Id. ¶¶ 12, 15.) The officers concur that they saw blood on one of his wrists upon his arrival at the jail. (Richardson Aff. ¶ 3; Norman Aff. ¶ 3.) If Plaintiff can prove these allegations, he can show that the officers violated his rights under the Fourth Amendment. Furthermore, a reasonable police officer would know that such actions violate an arrestee's Fourth Amendment rights. The Court DENIES summary judgment on the basis of qualified immunity as to the Fourth Amendment claim.

E. Officer Norman

Officer Norman asks that he be granted summary judgment as to the claims against him because he had no physical contact with Plaintiff. In response, Plaintiff argues that although Officer Norman did not have any contact with him, he refused repeated requests to loosen Plaintiff's handcuffs because they were causing pain and swelling. Plaintiff cites to Burchett, in which the Sixth Circuit found that "[o]ur precedents allow the plaintiff to get to a jury upon a showing that officers handcuffed the plaintiff excessively and unnecessarily tightly and *ignored the plaintiff's pleas that the handcuffs were too tight*." 310 F.3d at 944-45 (emphasis added.) Plaintiff alleges that he asked both Officer Richardson and Officer Norman to loosen the handcuffs on several occasions. (McNabb Aff. ¶¶ 8-9.)

Based on relevant precedent and the allegations in Plaintiff's affidavit, the Court DENIES Officer Norman's motion for summary judgment based on his lack of physical contact with Plaintiff.

F. Fourteenth Amendment

The officers also moved to dismiss Plaintiff's Fourteenth Amendment claim. Plaintiff did not respond to this argument. However, he removed this claim from his Second Amended Complaint. Accordingly, the officers' motion as to the Fourteenth Amendment claim is DENIED as moot.

G. Loss of Consortium

Officers Richardson and Norman also move to dismiss the loss of consortium claim as to relates to the 42 U.S.C. § 1983 claim because a § 1983 is personal to the individual claiming injury. Plaintiffs concede that Dianna McNabb may not recover for loss of consortium pursuant to § 1983. Accordingly, the Court DISMISSES this claim. Ms. McNabb's state law loss of consortium claim has not been dismissed.

IV. Conclusion

For the foregoing reasons, the Court GRANTS the officers' motion to strike. The Court DISMISSES Plaintiff's negligence claim against the officers. The Court also DISMISSES Dianna McNabb's claim for loss of consortium pursuant to 42 U.S.C. § 1983. The Court DENIES the motion to dismiss the Fourteenth Amendment claim as moot. The Court DENIES the motion to dismiss

the assault and battery claims without prejudice. The Court DENIES the motion for summary judgment as to the Fourth Amendment excessive force claim and DENIES Officer Norman's motion for summary judgment based on lack of physical contact with Plaintiff. Plaintiff has created a genuine issue of material fact on the question of liability for these claims.

So ORDERED this ___ day of March, 2004.

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JON P. McCALLA
UNITED STATES DISTRICT JUDGE