IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEROME BARTEE, JR., *Plaintiff* v. HARRIS COUNTY; AND ANDREW ROWELL, JEREMY RINGLE AND SALVADOR GARIBAY IN THEIR INDIVIDUAL CAPACITIES, ONLY *Defendants*	§ § § § § § § § § § § §	C.A. No: 4:16-cv-02944

DEFENDANT HARRIS COUNTY'S MOTION TO DISMISS

TO THE HONORABLE JUDGE VANESSA D. GILMORE:

Defendant Harris County moves to be dismissed from the Plaintiff's Second Amended Complaint [Doc. 54] under Federal Rule of Civil Procedure 12(b)(6). Bartee has not pled facts as required by 8a.

Summary of the Argument

Pursuant to 42 U.S.C. § 1983, Plaintiff complains that Defendants allegedly used excessive force and deprived him of his Fourteenth Amendment right to due process as a pretrial detainee. Plaintiff has failed to state a claim against Defendant Harris County indicating a persistent pattern and practice of using objectively unreasonable excessive use of force against pre-trial detainees. To the contrary, Harris County has a written policy expressly prohibiting excessive use of force. Plaintiff has not pled facts that support the elements of municipal liability, as required by Federal Rule of Civil Procedure

8(a), *Twombly*,[1] and *Iqbal*. *Twombly* was decided May 21, 2007, and essentially eliminated "boilerplate" assertions that merely recite the elements of a cause of action.

Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). In dismissing the claim in *Iqbal*, the Court stated, "It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." 556 U.S. at 681, 129 S.Ct. 1937.

Federal Civil Rights Claims

42 U.S.C. § 1983 provides a private right of action for the deprivation of rights, privileges, and immunities secured by the Constitution or laws of the United States. Section 1983 state:

> 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 ...42 U.S.C. § 1983.

For a section 1983 claim, the elements of municipal liability are: (1) a policymaker; (2) an official policy; and (3) a violation of constitutional rights whose "moving force" is

[1] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

the policy or custom. *See Monell*, 436 U.S. at 694, 98 S.Ct. 2018; *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

"[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham v. Conner*, 109 S. Ct. 1865, 1870 (1989) (quoting *Baker v. McCollan*, 99 S. Ct. 2689, 2694 n. 3 (1979)). To establish §1983 liability, plaintiffs must prove that they suffered "(1) a deprivation of a right secured by federal law (2) that occurred under color of state law, and (3) was caused by a state actor." *Victoria W. v. Larpenter*, 369 F.3d 475, 482 (5th Cir. 2004). Plaintiffs must also show that the constitutional deprivation they suffered was intentional or due to deliberate indifference and not the result of mere negligence. *Id*.

"The first inquiry in any § 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged." *Graham*, 109 S. Ct. at 1870. "The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right." *Id*. at 1871. Plaintiffs' allegations that defendants' actions deprived them of liberty without due process of law by violating their right to be free from excessive use of force is a claim analyzed under the Fourth Amendment. *Id.* at 1871–73 (citing *Tennessee v. Garner*, 105 S. Ct. 1694, 1699–1707 (1985)).

Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416 (2015):

> . . . objective reasonableness turns on the "facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight. See *ibid*. A court must also account for the "legitimate interests that stem from [the

> government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 540, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

In *Kingsley*, the Supreme Court, decided that use-of-force against pre-trial detainees would be decided under an objective reasonableness analysis.[2] Justice Scalia famously complained that the majority attempted to "tortify"[3] due process analysis by substituting "objective reasonableness" for subjective "punishment" in a detention setting.

Excessive Force and Policy

To establish an excessive use of force claim, a plaintiff must demonstrate "(1) an injury (2) which resulted directly and only from the use of force that was excessive to the need and (3) the force used was objectively unreasonable." *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir.2001). Further, the "injury must be more than a de minimis injury and must be evaluated in the context in which the force was deployed." *Id.*

In this case, Mr. Bartee's facial injuries are significant. And, in the words of Sheriff Hickman, "unnecessary." But not every involved individual defendant could have caused

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[2] *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2476, 192 L. Ed. 2d 416 (2015) "We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners."

[3] "Today's majority overlooks this in its tender-hearted desire to **tortify** the Fourteenth Amendment." *Id.* at 2479.

this facial injury. And the proof is in the video. The individual deputy defendants are capably represented by counsel, but two factors go to the County's defense. First, the existence of the video evidences a policy of deterrence – not causation. Second, the video identifies the individuals most likely to cause the facial injury. Other claims such as kicking or holding the legs caused only de minimus injury, if any.

The Plaintiff tacitly concedes that the Sheriff's written use-of-force policy is constitutional and uncontested. (Doc. 54, ¶ 55 & 56).

Alternatively, a plaintiff can offer evidence of a "persistent widespread practice of [county] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 169 (5th Cir. 2010) (quoting *Webster v. City of Hous.*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc)); *see also Id.* ("A customary policy consists of actions that have occurred for so long and with such frequency that the course of conduct demonstrates the governing body's knowledge and acceptance of the disputed conduct."). Such "[a] pattern is tantamount to official policy." *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (5th Cir. 2009). Mr. Bartee relies on this second method.

> *Fuentes v. Nueces Cty., Texas*, No. 16-41471, 2017 WL 1520998, at *2 (5th Cir. Apr. 27, 2017):
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> When a plaintiff relies on prior incidents to prove a county policy, the prior incidents "must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of [county] employees." *Peterson*, 588 F.3d at 850 (quoting *Webster*, 735 F.2d at 842).

> In other words, "a plaintiff must demonstrate 'a pattern of abuses that transcends the error made in a single case.' " *Id.* at 850–51 (quoting *Piotrowski*, 237 F.3d at 582 (citations omitted)). "A pattern requires **similarity and specificity**; '[p]rior indications cannot simply be for any and all bad or unwise acts, but rather must point to the specific violation in question.' " *Id.* at 851 (alteration in original) (quoting *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005)). In addition to similarity and specificity, a pattern must be comprised of "sufficiently numerous prior incidents" rather than merely "isolated instances." *McConney v. City of Hous.*, 863 F.2d 1180, 1184 (5th Cir. 1989).

On the other hand, "[i]solated violations are not the persistent, often repeated, constant violations that constitute custom and policy." *Bennett v. City of Slidell*, 728 F.2d 762, 768 n. 3 (5th Cir.1984) (en banc). The "moving force" inquiry requires a plaintiff to make two showings: causation and culpability. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). A plaintiff must show a "direct causal connection ... between the policy and the alleged constitutional deprivation." *Fraire v. City of Arlington*, 957 F.2d 1268, 1281 (5th Cir.1992).

The "moving force" inquiry imposes a causation standard higher than "but for" causation. *Id.* Under the culpability requirement, if the policy is facially lawful, a plaintiff must also show that the municipality "promulgated [the policy] with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result." *Piotrowski v. City of Hous.*, 237 F.3d 567, 579 (quoting *Brown*, 520 U.S. at 407, 117 S.Ct. 1382). Even a showing of heightened negligence is insufficient to show the deliberate indifference needed to prove municipal liability. *Id.* (quoting *Brown*, 520 U.S. at 407, 117 S.Ct. 1382).

"To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* liability rejected in *Monell*." *Oklahoma City v. Tuttle,* 471 U.S. 808, 831, 105 S.Ct. 2427, 2440, 85 L.Ed.2d 791 (1985) (BRENNAN, J., concurring in part and concurring in judgment). "A policy or custom giving rise to § 1983 liability will not, however, 'be inferred merely from municipal inaction in the face of isolated constitutional deprivations by municipal employees.'" *Newhard v. Borders*, 649 F.Supp.2d 440, 446 (W.D. Va. 2009) (quoting *Milligan v. Newport News*, 743 F.2d 227, 230 (4th Cir.1984)).

In sum, in *Monell* the Court held that "a municipality cannot be held liable" solely for the acts of others, *e.g.*, "*solely* because it employs a tortfeasor." 436 U.S., at 691, 98 S.Ct. 2018. But the municipality may be held liable "when execution of a government's *policy or custom* ... inflicts the injury." *Id.*, at 694, 98 S.Ct. 2018. *Los Angeles County, Cal. v. Humphries*, 562 U.S. 29, 36, 131 S. Ct. 447, 452, 178 L. Ed. 2d 460 (2010) (emphasis added).

The plaintiff's allegations at ¶ 49 merely report that some force was used in 64 instances, which, in a 10,000-population jail, during a 365-day span, is expected. The Plaintiff **implies** that these are examples of "excessive" force. But he cites no report of injury in any of these cases. So, these allegations are not substantially similar to this case.

Also, the Department of Justice's 18-year-old, 2009 initial findings are no evidence of **ongoing** practices in this case. Besides, that report dealt more with conditions of confinement, specifically, overcrowding, which has no bearing on pretrial detainee use-of-

force cases. And, the law changed in 2015, with the *Kingsley* opinion. Finally, the DOJ has never filed an enforcement action, because Harris County cooperated and complied.

Plaintiffs' allegation that the custom or policy "is established by other complaints of police misconduct and lawsuits" is conclusory. Plaintiffs' Amended Complaint fails to factually identify another incident of excessive force against a pretrial detainee. The repeated use of the word "culture" is a made-up, non-legal element.

Finally, use-of-force to maintain or restore order in any confinement setting remains constitutionally permissible. It is unreasonable force that is excessive.

Failure to Supervise

"Failure to supervise" is founded in negligence. There is no respondeat superior cause of action under *Monell* entity liability. In a § 1983 case-where the master does not answer for the torts of his servants-the term "supervisor liability" is a misnomer. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Each government official is only liable for his or her own misconduct, absent vicarious liability. *Id.* Since vicarious liability is inapplicable to § 1983 suits, a plaintiff must plead that each government official defendant, through his or her own individual actions, violated the plaintiff's constitutional rights. *Id*. at 1948.

Training

Plaintiff has the defendants' TCOLE training records. But he does not allege any facts that show what training the officers have received and how that training is insufficient. A mere allegation that a custom or policy exists, without any factual assertions to support

such a claim, is no more than a formulaic recitation of the elements of a §1983 claim and is insufficient to state a claim for relief.

Conclusion

Undoubtedly, Plaintiff suffered a significant injury at the hand of one or more Harris County Jail employees. The use-of-force in this case was excessive. Sheriff Hickman publicly acknowledged this fact, suspended the responsible employees, opened a pending criminal investigation, and referred the case(s) to the Harris County District Attorney's Office. This isolated incident, however, is no proof of an unconstitutional policy cognizable under 42 U.S.C. § 1983.

The plaintiff attempts to treat *Monell* liability like a negligence case. That is not the law. And Harris County has no persistent, on-going pattern or practice of using objectively unreasonable ***excessive*** force against pre-trial detainees. It would be big news if it did.

Prayer

The plaintiff's third pleading attempt fares no better than the first. For this reason, Harris County respectfully asks the Court to dismiss all claims against it for failure to state a claim, and for all other relief to which it may be entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon all counsel of record via the CM/ECF system and/or by email on July 20, 2017:

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