

Appeal No. 00-2248

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARK PERKEL, PRO SE,
Plaintiff-Appellant

v.

CITY OF SPRINGFIELD, KEVIN A. HOLLIE,
KENT SHIPLEY, KEVIN ROUTH, ROBERT GREER,
LYNN ROWE, THOMAS FINNEY, LELAND GANNAWAY,
BOB VANAMAN, SHELIA WRIGHT, CONRAD GRIGGS,
RUSSELL RHODES, THOMAS J. CARLSON,
GARY GIBSON, TERI HACKER, BOB CHANCELLOR,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

BRIEF OF APPELLEES

Randy R. Cowherd #33796
Patricia A. Keck #42811
Newberry, Haden, Cowherd,
Bullock, Keck & McGinnis, L.L.C.
2135 East Sunshine, Suite 203
Springfield, MO 65804-1899
Phone: (417) 883-5535
Fax: (417) 883-5541
Attorneys For Defendants-Appellees
Holle And Shipley

Robert Sommers #23918
840 Boonville Avenue
Springfield, MO 65802
Phone: (417) 864-1645
Fax: (417) 864-1551
Attorneys for Defendants-Appellees
City of Springfield, Finnie, Gannaway,
Vanaman, Wright, Griggs, Rhodes,
Carlson, Gibson, Hacker and Chancellor

Jeffrey L. Groves #42156
Daniel, Clampett, Powell & Cunningham, LLC
PO Box 10306
Springfield, MO 65808
Phone: (417) 882-9600
Fax: (417) 882-7445
Attorneys for Defendants Greer, Routh, Rowe

TABLE OF CONTENTS

Table of Authorities 2

Jurisdictional Statement 4

Statement Of Issues Presented For Review 5

Statement Of The Case 6

Summary Of Argument 9

Argument 12

 Point I 12

 Point II 16

 Point III 21

 Point IV 23

 Point V 24

 Point VI 26

 Point VII 28

 Point VIII 29

 Point IX 30

Conclusion 31

Certificate Of Service 32

Certificate Of Compliance 32

Addendum 33

TABLE OF AUTHORITIES

- Abbott v. City of Crocker, MO*, 30 F.3d 994, 998 (8th Cir. 1994)
- Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)
- Bashara v. Black Hills Corp.*, 22 F.3d 820, 823 (8th Cir. 1994)
- Berryhill v. Schiro*, 137 F.3d 1073, 1076 (8th Cir. 1998)
- Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)
- City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197 (1989)
- Comstock v. Consumer Markets, Inc.*, 953 F.Supp. 1096, 1104 (W.D.Mo. 1996)
- Duncan v. Storie*, 869 F.2d 1100 (8th Cir. 1989)
- Giacalone v. Lucas*, 445 F.2d 1238 (6th Cir. 1971)
- Ingraham v. Wright*, 430 U.S. 651, 664, 97 S.Ct. 1401, 1408-09 (1977)
- Kennedy v. Jasper*, 928 S.W.2d 395, 400 (Mo.App. 1996)
- Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990)
- Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)
- Monell v. Dept. of Social Services of City of New York*, 436 U.S. 694, 98 S.Ct. 2018, 2037-38 (1978)
- New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990)
- Polk v. INROADS-St. Louis, Inc.*, 951 S.W.2d 646, 648 (Mo.App. 1997)
- Porterfield v. Burger King Corp.*, 540 F.2d 398 (8th Cir. 1976)
- Rice v. Hodapp*, 919 S.W.2d 240, 243 (Mo. banc 1996)
- Rogers v. Carter*, 133 F.3d 1114 (8th Cir. 1998)
- Sanders v. Daniel Int'l Corp.*, 682 S.W.2d 803, 807 (Mo. banc 1984)
- State v. Upshaw*, 619 S.W.2d 925 (Mo.App. 1981)
- United States v. Botero*, 589 F.2d 430 (9th Cir. 1978)

United States v. Johnson, 626 F.2d 753 (9th Cir. 1980)

United States v. McCraw, 920 F.2d 224 (4th Cir. 1990)

United States v. Morgan, 743 F.2d 1158 (6th Cir. 1984)

United States v. Santana, 417 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976)

United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976)

Vette Co. v. Aetna Cas. and Sur. Co., 612 F.2d 1076 (8th Cir. 1980)

Washington v. Crisman, 455 U.S. 1102 S.Ct. 812, 70 L.Ed.2d 778 (1982)

Fed.R.Civ.P. 56(c)

Fed.R.Civ.P. 56(e)

Rule 54, Federal Rules of Civil Procedure

Section 544.170, RSMo.

JURISDICTIONAL STATEMENT

Although plaintiff Perkel does not set forth in his brief a jurisdictional statement as required by Rule 28, defendants do not contest the jurisdiction of this Court to hear this appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was plaintiff's arrest on September 8, 1998 made in violation of the Fourth Amendment to the United States Constitution?
2. Was plaintiff's home illegally searched by the arresting officers after plaintiff was arrested and asked to retrieve his shoes from within his home and lock his home?
3. Did the District Court properly enter Summary Judgment in favor of defendants on plaintiff's claims for defamation, cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution, improper training, discipline and supervision under Section 42 USC Section 1983, malicious prosecution and false imprisonment?

STATEMENT OF THE CASE

Plaintiff filed his Complaint asserting claims for false arrest under the Fourth Amendment to the United States Constitution, cruel and unusual punishment under the Eighth Amendment to the United States Constitution, improper training, discipline and supervision under 42 USC Section 1983 and a variety of common law tort claims (defamation, intentional infliction of emotional distress, malicious prosecution and false imprisonment). The claims all arise from the plaintiff's arrest and detention on September 8, 1998. Plaintiff Perkel filed a Motion For Partial Summary Judgment on three of the claims: false arrest under the Fourth Amendment to the United States Constitution, illegal search and false imprisonment. The District Court denied plaintiff's motion on the claims of false arrest and illegal search, finding instead that the defendants were entitled to summary judgment on those issues. The Court also denied plaintiff's motion as to false imprisonment for failure of the plaintiff to provide any evidentiary support for his claims. Following discovery, the defendants filed a joint motion for summary judgment on all remaining claims of plaintiff's Complaint, which was granted by the District Court on February 23, 2000.

Statement Of Facts

On September 8, 1998 at approximately 10:30 p.m., plaintiff Mark Perkel was home watching television when Springfield police officers Holle and Shipley knocked on his door. (Deposition of plaintiff Mark Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 141, lines 7-8, 11.) Plaintiff came to the door, opening the interior door and partially opening the storm door. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 143, lines 3 -6; 144, lines 8 -13; page 155,

lines 10-12.) Plaintiff identified himself when he was asked for his identity by the police officers and was then told that he was under arrest for trespassing. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 143, lines 10-12.) At that time, plaintiff Perkel was standing in his doorway. He then voluntarily stepped outside onto his front porch and closed the door behind him. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 143, line 24– page 144, line 1.) At that point, plaintiff Perkel was arrested and handcuffed. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 144, lines 17-22.)

After the officers effected the arrest, plaintiff Perkel told them that he wanted to return to his home to get his shoes. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 157, lines 22-24.) The officers permitted plaintiff Perkel to return to his home to get his shoes, accompanying plaintiff into his home. Plaintiff Perkel did not ask the officers not to accompany him into the home. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 162, lines 7-11.) Once inside, plaintiff Perkel testified that he slipped on his shoes and the officers did a walkthrough of his home, telling him that they were doing so to make sure there was “nobody hiding or anything”. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 163, lines 3 -7; page 164, lines 9 -11; page 165, lines 3 -5.) No drawers were opened, no closets examined and nothing was seized from plaintiff's home.

Plaintiff Perkel was then transported to the Springfield City Detention Center. While there, Officer Holle showed plaintiff the summons upon which he was arrested for trespassing. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 174, lines 5 -7; Exhibit D attached to defendants' motion for summary judgment,

Affidavit of Officer Holle.) Although plaintiff claims he didn't have a meaningful time to view the summons, he could communicate with the officer and did not ask to see the summons longer. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 174, lines 14-19; Exhibit I to defendants' joint motion for summary judgment.)

Plaintiff Perkel spent ten hours in jail. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 175, lines 5-6.) During that time, nobody physically harmed him and he did not get physically ill. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 175, lines 20-25.) Plaintiff Perkel did testify that he was cold, but wasn't "real cold". (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 176, lines 3-7.)

Before Officer Holle left the jail, he informed Mr. Perkel twice that he could bond out. (Exhibit I of defendants' joint motion for summary judgment.) Plaintiff testified he asked to call a lawyer two or three times. (Exhibit C, page 177, lines 10-13.) At no time did the detention officer refuse to allow him to make a phone call. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 178, lines 12-14.) Plaintiff did not, during his incarceration ask to make bail. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 178, lines 23-24.) After several hours, a detention officer did come into the cell and asked "does anybody need to call a lawyer?" (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 179, line 22; page 180, lines 1-7.) Plaintiff then bailed out and left the jail. (Deposition of plaintiff Perkel, Exhibit C attached to defendants' joint motion for summary judgment, page 180, lines 8-11.)

SUMMARY OF ARGUMENT

I. False Arrest

The District Court correctly ruled that plaintiff was not arrested in violation of the Fourth Amendment to the United States Constitution because the arrest occurred in the doorway and on the porch of plaintiff's home without coercion or deception by the arresting officers and without entry into plaintiff's home.

II. Illegal Search

The District Court correctly ruled that officers Holle and Shipley were not in violation of the Fourth Amendment to the United States Constitution in entering the plaintiff's home following his arrest since the plaintiff was then in police custody, having been arrested outside of his home, and had been permitted at plaintiff's request to reenter the home to obtain his shoes and lock the door. The plaintiff did not request the officers to wait outside and admitted that the officers merely looked around to assure their own safety without searching any drawers or closets or seizing any property.

III. Defamation

The District Court correctly ruled that plaintiff could not make a claim for defamation because plaintiff presented no evidence of publication by defendants and because the alleged defamatory statements were admittedly true.

IV. Intentional Infliction Of Emotional Distress

The District Court correctly ruled that plaintiff failed to state a claim of intentional infliction of emotional distress as there was no allegation or proof that the emotional distress was medically diagnosable and of sufficient severity to be medically significant.

V. Cruel And Unusual Punishment

The District Court correctly held that plaintiff failed to state a claim under the Eighth Amendment to the United States Constitution since the plaintiff was not convicted at the time of the alleged punishment and because there were no allegations that the conditions of confinement to which the plaintiff was subjected would meet the “sufficiently serious” condition requirement for the deliberate indifference standard.

VI. Improper Training, Discipline and Supervision

The District Court correctly ruled that plaintiff failed to state a claim of negligent training, discipline and supervision because plaintiff offered no proof of a pre-existing pattern of illegal arrests and plaintiff was not subjected to a false arrest and therefore had no underlying substantive claim upon which to base his claims of improper training, discipline and supervision.

VII. Malicious Prosecution

The District Court correctly ruled that plaintiff failed to state a claim for malicious prosecution because the prosecution against the plaintiff was instigated by a third party and not by the defendants and because the existence of a citizen complaint is sufficient probable cause for the initiation of the prosecution of the plaintiff.

VIII. False Imprisonment

The District Court correctly ruled that plaintiff failed to state a claim for false imprisonment because Section 544.170, RSMo., provides that a person arrested can be confined for up to 20 hours following his or her arrest and the plaintiff was released within 10 hours of his arrest. In addition, the plaintiff was adequately advised of his rights and was advised twice by Officer Holle of his right to make bail shortly after his incarceration.

IX. Punitive Damages

The District Court correctly ruled that plaintiff's claims for punitive damages were moot in that plaintiff failed to state any claims against the defendants upon which a claim for punitive damages could be based.

ARGUMENT

STANDARD OF REVIEW

In reviewing the entry of summary judgment, the appellate court applies the same standard as the trial court. *Vette Co. v. Aetna Cas. and Sur. Co.*, 612 F.2d 1076 (8th Cir. 1980). A motion for summary judgment should be granted if, viewing the evidence in the light most favorable to the non-moving party, 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); *Bashara v. Black Hills Corp.*, 22 F.3d 820, 823 (8th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). A defendant who moves for summary judgment has the burden of showing that there is no genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). No genuine issue of fact exists if a reasonable jury could not find for the non-moving party. *Id.*, at 248. A plaintiff opposing a properly supported motion for summary judgment may not rest upon the allegations of his pleadings, “but must set forth specific facts showing there is a genuine issue for trial.” *Id.*, at 256 (citing Fed R.Civ.P. 56(e)).

I.

THE DISTRICT COURT DID NOT ERR IN FINDING THAT PLAINTIFF HAD NOT BEEN SUBJECTED TO AN ILLEGAL ARREST IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE PLAINTIFF DID NOT HAVE AN EXPECTATION OF PRIVACY AT THE TIME OF HIS ARREST IN THAT PLAINTIFF WAS ARRESTED AT THE DOORWAY AND PORCH OF HIS HOME WITHOUT COERCION OR DECEPTION BY THE ARRESTING OFFICERS AND WITHOUT ENTRY INTO PLAINTIFF’S HOME.

1. Warrantless Arrest Constitutional

In *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), the Supreme Court held that a warrantless arrest of an individual in a public place upon probable cause did not violate the Fourth Amendment.

In cases where officers do not have an arrest warrant, the individual may be properly arrested if he has left the confines of his home and entered into a public place. *United States v. Santana*, 417 U.S. 38, 96 S.Ct. 2406, 49 L.Ed. 2d 300 (1976). A person standing in the doorway of their home with their front door open is no longer protected from a warrantless arrest by the Fourth Amendment. *Id.*, at 42. In this case, plaintiff's arrest did not occur inside of his home, but rather at the doorway and front porch of his home where he had no expectation of privacy. Plaintiff does not plead or allege any coercion or deception by the arresting officers.

There is absolutely no evidence that the plaintiff was in any way coerced or duped into opening the doors to his home and presenting himself to the defendant officers or in stepping onto the front porch where he was arrested. Where there is no evidence of coercion or subterfuge in the arrestee's appearance at a doorway, there is no violation of the Fourth Amendment. *United States v. Botero*, 589 F.2d 430 (9th Cir. 1978). In *Botero*, the defendant asserted that his arrest was improper because made without a warrant in a private home. Botero opened the door to his home in response to the knock by the agent. He was then arrested. The arresting officers were not required to enter the apartment in order to place Botero under arrest. Relying on *United States v. Santana, supra*, the Court held that the issue of an improper arrest was not before them since the arrest had occurred at a public place, where the suspect had appeared without coercion. *Id.*, at 432.

2. Plaintiff's Authorities Distinguishable

Plaintiff first relies on *United States v. McCraw*, 920 F2d 224 (4th Cir. 1990). In *McCraw*, the suspect responded to the agents knock at his door, but there was no contention that he was on the threshold of the doorway, but rather the testimony indicated that the suspect opened the doorway only halfway to determine who was knocking and then attempted to close it only to have the agents force their way inside to make the arrest inside the suspect's home. The Court held that the suspect had not placed himself in a position of public area and did not consent to the officer's entry into his home. Those facts are substantially different than the admitted facts in this appeal. Here, plaintiff Perkel not only opened the interior door fully, but also cracked open the screen door and was standing at the threshold of the door when the officers asked for his identification. Then, once he was advised that he was under arrest, he voluntarily left the doorway and went out onto his porch where he was arrested and handcuffed. Had plaintiff Perkel closed the doors, retreated into his home and was thereafter arrested within his home after the officers forced their way in, the *McCraw* case might have application. However, those events did not occur and the reliance on *McCraw* is misplaced.

Next, plaintiff refers the Court to *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990). In *Harris*, the police officers appeared at the arrestee's apartment door with guns drawn and gained access into the suspect's home where he was questioned and then formally arrested after the questions resulted in an admission of guilt. The use of force by the police and its coercive affect upon the suspect in allowing the police to gain access into the suspect's home, caused the Supreme Court to determine that the arrest had occurred in violation of the suspect's Fourth Amendment rights. Again, plaintiff's reliance on *Harris* is misplaced given the difference in facts since there was no contention or evidence offered that the plaintiff

was in any way coerced into opening the doors to his home through any show of force by police officers Holle and Shipley. Also, the arrest in this case occurred outside of the plaintiff's home whereas the arrest in *Harris* occurred within the confines of the suspect's home.

United States v. Johnson, 626 F.2d 753 (9th Cir. 1980) is next relied upon by plaintiff. In *Johnson*, the federal agents misrepresented their identities, thereby tricking the suspect into opening the door to his dwelling. Thereafter, the suspect "invited" the agents into his dwelling after the agents brandished weapons at the doorway. Once again, in this case, there is no allegation or evidence by plaintiff Perkel of misrepresentations made by the police officers, any brandishing of weapons by the police officers to coerce any conduct by plaintiff Perkel and the arrest was made outside of plaintiff's home rather than inside as occurred in *Johnson*.

Plaintiff next relies upon *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984). *Morgan* is distinguishable in that the Court again found that the suspect was effectively coerced into leaving his home when a large number of police and patrol cars surrounded the home, blocking the suspect's vehicle and preventing any exit from the home, flooding the home with spotlights and demanding by bullhorn his departure from the home. Given this coercive conduct, the Court found that the suspect had effectively been arrested even before being called out of the home and that his departure from the home was not voluntary.

Rogers v. Carter, 133 F.3d 1114 (8th Cir. 1998) is likewise distinguishable. In *Rogers*, the police officer confronted the suspect outside of his sister's apartment, but did not identify himself or place the suspect under arrest. After an initial altercation, the suspect walked back into his apartment and locked the door. The officer then pulled his revolver and kicked the door open and arrested the suspect inside the apartment. Here, there was no such confrontation and the officers did not force their way into the home in order to make the arrest. Rather, the arrest

occurred on the plaintiff's front porch after the plaintiff voluntarily appeared at the doorway and exited the confines of his home.

Finally, plaintiff cites *Duncan v. Storie*, 869 F.2d 1100 (8th Cir. 1989), which is in fact supportive of the District Court's entry of summary judgment in favor of defendants herein. In discussing the legality of an arrest at home, the Court noted that if an individual voluntarily leaves the confines of his home, then the arrest is made in a public place wherein the individual has no expectations of privacy. *Id.*, at 1102. The doorway of an individual's home may be a public place for purposes of making a warrantless arrest if the individual has come to stand in the doorway voluntarily. *Id.* In *Duncan*, the parties disputed whether the arrest on the suspect's porch was the result of voluntary conduct by the suspect or the officer pulling him from his home onto the porch. No such dispute exists in this case.

II.

THE DISTRICT COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF'S CLAIM THAT THE DEFENDANT POLICE OFFICERS ILLEGALLY "SEARCHED" HIS HOME FOLLOWING HIS ARREST BECAUSE THE ENTRY INTO PLAINTIFF'S HOME WAS CONSENSUAL AND NOT FOR THE PURPOSE OF A SEARCH IN THAT PLAINTIFF WAS NOT WEARING SHOES AT THE TIME HE WAS PLACED INTO CUSTODY BUT HAD BEEN PERMITTED AT HIS REQUEST TO REENTER THE HOME TO OBTAIN HIS SHOES AND IT WAS REASONABLE FOR THE OFFICERS TO MAINTAIN CUSTODY OVER PLAINTIFF AND PROTECT THEIR SAFETY WHILE WITHIN THE UNFAMILIAR CONFINES OF PLAINTIFF'S HOME.

Initially, defendants remind the Court that this is not a case where any property was seized by the police during their “search” of plaintiff’s home following his arrest. As admitted to by plaintiff Perkel, the police officers merely did a short walk-through of his home and did not open any drawers or closets. Thus, this is not a case where there is some question about evidence seized while in a suspect’s home after an arrest, but rather whether police officers, for their own safety, can visually look within the home after the arrestee has requested to reenter the home following his arrest.

In *Washington v. Crisman*, 455 U.S. 1102 S.Ct. 812, 70 L.Ed.2d 778 (1982), the Supreme Court addressed the question of police entering the dwelling of an arrestee following an arrest. In *Washington*, the officer had observed the defendant, who was under the age of 21, leaving a student dormitory carrying alcohol. The officer stopped the defendant and asked for identification. The defendant told the officer that his identification was in his dormitory room and asked the officer if he would wait while the defendant went to retrieve. The officer responded that under the circumstances he would have to accompany the defendant, to which the defendant replied: “Okay”. Upon reaching the dormitory room, the officer remained in the open doorway, leaning against the door jam, but observing the defendant within his room. While standing in the doorway, he observed seeds that he believed were from marijuana and a pipe used to smoke marijuana. He then entered the room and examined the pipe and seeds to confirm his suspicions. He then advised the defendant and his roommate of their *Miranda* rights and, after obtaining consent, searched the remainder of the dorm room and located additional marijuana.

The Court first noted that the officer had placed the defendant under lawful arrest and then found that the officer was therefore authorized to accompany the defendant to his room for the purpose of obtaining identification. The Court further stated that the officer “had a right to remain literally at Overdahl’s elbow at all times, nothing in the Fourth Amendment is to the contrary”. *Id.*, at 816. The defendant argued that the officer was not entitled to accompany the defendant from the public corridor of the dormitory into his room, absent a showing of exigent circumstances. The Court disagreed, stating that this was a “novel reading” of the Fourth Amendment, and noted that the absence of an affirmative indication that an arrested person might have a weapon available or might attempt to escape does not diminish the arresting officer’s authority to maintain custody over the arrested person. *Id.*, at 816-817. “Every arrest must be presumed to present a risk of danger to the arresting officer (citation omitted). There is no way for an officer to predict reliably how a particular subject will react to arrest or to the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious.” *Id.*, at 817. The Court held that it was therefore not unreasonable under the Fourth Amendment for the police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer’s need to assure his own safety - as well as the integrity of the arrest - is compelling. Such surveillance is not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested. *Id.*

The same issue was presented in *Giacalone v. Lucas*, 445 F.2d 1238 (6th Cir. 1971). In *Giacalone*, several law enforcement officers arrived at the home of the defendant at 6:00 a.m. to execute an arrest warrant. The respondent met the officers at the front door, dressed only in a pair of “shorty pajamas”, bedroom slippers and a robe. After reading the defendant his rights,

the arresting officer suggested that the defendant should change from bed clothes to street clothes before leaving for the police station and his arraignment on the warrant before the Municipal Court. The defendant then went to his room, where the officer searched a chest of drawers from which the defendant indicated he would be retrieving his clothing. In doing so, the officer found a “blackjack” and two .38 caliber 6-shot revolvers, both loaded. In other drawers, he found other revolvers. The defendant challenged the search as being unreasonable under the Fourth Amendment.

In rejecting the defendant’s argument, the Court noted that the course of events from the arrival of the arresting party, to the defendant’s arrest, to the conversation about his appearance and the movement to the bedroom where the weapons were discovered formed “one single continuous flow of action which was the natural consequence of the arrest at 6:30 a.m. of a person at his home and in his bed clothes.” *Id.*, at 1245. Also, the Court noted that the defendant had willingly accepted the suggestion of the officer to change clothes and that the officer’s suggestion was made in good faith without the intention or purpose of enabling the police to search the bedroom or any other area. *Id.* Upholding the search, the Court noted that where immediately after a lawful arrest, the arrestee without coercion goes to his bedroom to change into more appropriate clothing, the arresting officers – incident to that arrest – may search the areas upon which the arrestee focuses his attention and are within his reach to gain access to a weapon or to destroy evidence. *Id.*, at 1247.

The Supreme Court has noted the unique dangers that face officers who enter into a suspect’s home. In comparing a limited “protective sweep” of an arrestee’s home to the *Terry* search of a suspect, the Court in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), pointed out that there is an “analogous interest of the officers in taking steps to

assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. A *Terry* or *Long* frisk occurs before a police-citizen confrontation has escalated to the point of an arrest. A protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at a disadvantage of being on the adversary's "turf". An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings. . . . We are quite sure, however, that the arresting officers are permitted in such circumstances to take reasonable steps to insure their safety after, and while making, the arrest. That interest is sufficient to outweigh the intrusion such procedures may entail." *Id.*, at 1097, 1098. The Court then held that as an incident to the arrest, officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.

In this case, the officers had arrested the plaintiff and indicated that he had become uncooperative. The plaintiff then suggested that he needed to reenter the home to obtain a pair of shoes and lock the door to the home before he left. At this point, the police-citizen confrontation had escalated to the point of an arrest and the defendant had become uncooperative with the officers. He also was requesting that they enter into his "turf", which certainly placed the officers at risk for their own safety. Upon entering, the officers merely looked about plaintiff's home to insure that they were not in any danger and did not conduct a full search of the premises,

not even opening a drawer or closet. The cursory viewing of the property was certainly not an unreasonable invasion of the privacy of plaintiff Perkel and was warranted to insure the protection of the arresting officers.

Plaintiff relies heavily on *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). *Michigan* is inapplicable to the issues in this case as it dealt with the legality of a *Terry* search of a suspect, not a search incidental to an arrest.

III.

THE DISTRICT COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF'S CLAIM FOR DEFAMATION BECAUSE PLAINTIFF COULD NOT STATE A CLAIM UPON WHICH RECOVERY COULD BE GRANTED IN THAT PLAINTIFF PRESENTED NO EVIDENCE OF PUBLICATION BY THE DEFENDANTS AND, IN ANY EVENT, THE ALLEGED DEFAMATORY STATEMENTS WERE ADMITTED TO BE TRUE.

Under Missouri law, in order to state a claim of defamation, the plaintiff must prove the following elements: (1) defendant published the defamatory statement; (2) defendant was at fault in publishing the statement; (3) the statement tended to expose plaintiff to hatred, content and ridicule; (4) the statement was read by others or by the public; and (5) plaintiff's reputation was thereby damaged. *Kennedy v. Jasper*, 928 S.W.2d 395, 400 (Mo.App. 1996), citing *MAI 23.06(1)[1980 New]*. In a defamation claim, truth is an absolute defense. *Rice v. Hodapp*, 919 S.W.2d 240, 243 (Mo. banc 1996).

1. No Publication

In his deposition, plaintiff Perkel acknowledged that he did not have any information that any of the named defendants had published the arrest report to any third person. (Exhibit C to defendants' joint motion for summary judgment, page 382, lines 10-25 and 383, lines 1-11.) Plaintiff obtained a copy of the report himself a few weeks after his arrest, which was the first time that he had seen the report and, at that time, had not been told that the report had been published by any of the defendants. (Exhibit C, page 383, lines 5-11.) The plaintiff then made the decision to publish the report himself by placing the report on the internet. (Exhibit C, page 381, lines 20-25, 382, lines 1-9.)

In response to defendants' Summary Judgment motion, plaintiff did not come forward with any affidavit of evidence of publication by any of the defendants. Rule 56(e) requires a party against whom a Summary Judgment motion is filed that is supported by affidavits and other evidence to respond with specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc., supra*. Plaintiff Perkel failed to do so and therefore the matters set forth in defendants' motion were deemed admitted. Without any evidence of publication to a third party, plaintiff's attempt to assert a defamation claim must necessarily fail.

2. Falsity

Even if plaintiff could prove publication, the truth of the alleged defamatory statement is an absolute defense. *Rice v. Hodapp, supra*. The District Court ruled that the plaintiff had admitted to the acts included in the alleged defamatory statements. In his Complaint, the plaintiff asserted that the report made by Officer Hollie contained statements about the plaintiff accusing him of acts of patronizing prostitutes, obsessed behavior, stalking, photographing sex

acts, women describing the plaintiff as “sick”, and the opinion of a prostitute who had never met the plaintiff describing why she wouldn’t want to have sex with him based on what she had heard.

In his deposition testimony, plaintiff Perkel testified that he had patronized the services of prostitutes, engaged in deviant sexual intercourse with escorts and photographed sexual acts. (Exhibit C to defendants’ motion for summary judgment, pages 390, lines 2 -23; page 343, lines 18-20.) More to the point, plaintiff made the following admissions:

(Deposition of plaintiff Perkel, page 393, lines 17-22)

Q. So your real complaint about the police report is not that the things in there contained are false, but the things that are contained in there in your opinion are unrelated to a trespass charge?

A. Yes.

By admitting the truth of the statements, plaintiff Perkel cannot then claim he was defamed by them.

IV.

THE DISTRICT COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF’S CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BECAUSE PLAINTIFF FAILED TO STATE A CLAIM UPON WHICH RECOVERY COULD BE MADE IN THAT PLAINTIFF DID NOT SUFFER A MEDICALLY DIAGNOSABLE AND MEDICALLY SIGNIFICANT EMOTIONAL INJURY.

To state a claim for intentional infliction of emotional distress, the plaintiff must plead and prove the following elements: (1) the defendant must act intentionally or recklessly; (2) the

defendant's conduct must be extreme and outrageous; and (3) the conduct must be the cause (for) of several emotional distress. *Polk v. INROADS-St. Louis, Inc.*, 951 S.W.2d 646, 648 (Mo.App. 1997); *Comstock v. Consumer Markets, Inc.*, 953 F.Sup. 1096, 1104 (W.D.Mo. 1996). For the claimed injury to be actionable, the emotional distress must be "medically diagnosable and . . . of sufficient severity so as to be medically significant." *Comstock v. Consumer Markets, Inc.*, *supra*, at 1105.

There is absolutely no evidence provided by the plaintiff that his "emotional distress" went anything beyond embarrassment (Exhibit C attached to defendants' joint motion for summary judgment, page 394, lines 15-17) and it is neither pled nor proven by plaintiff that his "embarrassment" was significant enough to require medical treatment. Without meeting all of the required elements to state a claim, the District Court correctly entered summary judgment against plaintiff on his claim for intentional infliction of emotional distress.

V.

THE DISTRICT COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE PLAINTIFF FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED IN THAT CLAIMS OF CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION ARE NOT ACTIONABLE UNLESS THE INDIVIDUAL HAS BEEN CONVICTED OF A CRIME AND, IN ANY EVENT, PLAINTIFF FAILED TO PLEAD OR PROVE THAT HIS CONDITIONS OF CONFINEMENT WERE "SUFFICIENTLY SERIOUS" TO INDICATE DELIBERATE INDIFFERENCE ON THE PART OF THE DEFENDANTS.

Following his arrest, plaintiff was detained in jail for 10 hours, during which time he did not allege that he was physically harmed or suffered any other injury. Plaintiff was not physically harmed while he was in the jail cell. (Exhibit C to defendants' joint motion for summary judgment, page 175, lines 20-22.) Plaintiff did not get physically ill from anything in the cell. (Exhibit C to defendants' joint motion for summary judgment, page 175, lines 23-25.) In addition, the officers insured that plaintiff had any medications he required before he was arrested. (Exhibit C to defendants' joint motion for summary judgment, page 176, lines 8-17.) In fact, plaintiff's only complaint about his incarceration was that he was "...cold, but I wasn't real cold". (Exhibit C to defendants' joint motion for summary judgment, page 176, lines 3-7.) Plaintiff does not assert that he had been convicted of a crime at the time of his incarceration.

In *Ingraham v. Wright*, 430 U.S. 651, 664, 97 S.Ct. 1401, 1408-09 (1977), the Supreme Court stated that "an examination of the history of the Amendment and the decisions of this Court construing the prescription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes". Since plaintiff had not been convicted at the point in time he makes his complaint, the Amendment is inapplicable and plaintiff fails to state a claim for violation thereof.

In addition, even if plaintiff could assert a claim under the Eighth Amendment, he would still have to meet the deliberate indifference standard, wherein he would have to demonstrate that the conditions were objectively sufficiently serious or caused an objectively sufficiently serious injury to the plaintiff and that the defendants were deliberately indifferent, or acted with reckless disregard, to his constitutional rights, health or safety. *Berryhill v. Schiro*, 137 F.3d 1073, 1076 (8th Cir. 1998).

Plaintiff does not make any allegations of sufficiently serious conditions that would give rise to a violation of the Eighth Amendment. Simply alleging that he was somewhat cold, without any other complaint about the conditions and without any resulting effect on his physical condition, simply does not meet the “sufficiently serious” condition requirement in order to sustain a claim.

VI.

THE DISTRICT COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF’S CLAIM OF IMPROPER TRAINING, DISCIPLINE AND SUPERVISION BECAUSE PLAINTIFF FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED IN THAT PLAINTIFF DID NOT ASSERT OR PRODUCE EVIDENCE THAT THE DEFENDANTS DISPLAYED DELIBERATE INDIFFERENCE TO THE RIGHTS OF ITS INHABITANTS THROUGH A PATTERN OF ILLEGAL ARRESTS OR THAT ILLEGAL ARRESTS WERE A PART OF THE EXECUTION OF DEFENDANTS’ POLICY OR CUSTOM AND, IN ANY EVENT, LIABILITY CANNOT ATTACH AS THE ARREST OF THE PLAINTIFF HERE WAS LEGALLY EFFECTED AS STATED IN POINT I HEREIN.

“. . . [A] local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government’s policy or custom, whether lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.” *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 694, 98 S.Ct. 2018,

2037-38 (1978). “. . . [T]he inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.” *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197 (1989). Only when a municipality displays deliberate indifference to the rights of its inhabitants can the indifference be considered a policy or custom of the municipality that is actionable under Section 1983. *Id.*, at 1205.

Plaintiff has admitted that his chief complaint against the City of Springfield, the City Manager, the Mayor and the members of the Council related to their alleged failure to “stop something that they had a duty to stop”. (Exhibit C to defendants’ joint motion for summary judgment, page 361, lines 6-22.) Plaintiff admitted that he did not believe that the aforementioned defendants were involved “in any way” before his arrest occurred. His complaints center around their failure to act after his arrest. (Exhibit C to defendants’ joint motion for summary judgment, page 360, lines 20-25, page 361, lines 1 -25, page 362, line 1.)

Plaintiff’s complaint is not with a pre-existing policy or custom of the City of Springfield, Mayor, Council or Springfield Police Department in making legal arrests. Rather his complaint was that his particular arrest was illegal and that the aforementioned defendants failed to effectively address his complaints with his arrest in a manner satisfactory to him. In addition, before the District Court was the affidavit of Springfield Police Department Major Stephen B. Ijames, attached as Exhibit F to the defendants’ joint motion for summary judgment, which affirmatively stated that there was no such policy or custom of the Springfield Police Department. The affidavit was not countered by the plaintiff and was therefore presumed to be admitted. **Rule 54**, Federal Rules of Civil Procedure.

In addition, absent liability of the officer on the underlying substantive claim, those allegedly responsible for his supervision or training cannot be found to be liable. *Abbott v. City of Crocker, MO*, 30 F.3d 994, 998 (8th Cir. 1994). For the reasons stated in Points I and II herein, plaintiff's claims of violations of the Fourth Amendment in connection with his arrest are unfounded, making the remaining defendants with supervisory capacity not liable under plaintiff's theory of recovery.

VII.

THE DISTRICT COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS ON PLAINTIFF'S CLAIM FOR MALICIOUS PROSECUTION BECAUSE PLAINTIFF FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED IN THAT THE PROSECUTION AGAINST PLAINTIFF WAS INSTIGATED BY A THIRD PARTY AND THE EXISTENCE OF A CITIZEN'S COMPLAINT IS SUFFICIENT PROBABLE CAUSE FOR THE INITIATION OF THE PROSECUTION OF PLAINTIFF.

To prove a claim for malicious prosecution, the plaintiff must plead and prove the following: (1) The commencement of a prosecution against the plaintiff; (2) the instigation of the prosecution by the defendant; (3) the termination of the proceeding in favor of the plaintiff; (4) the want of probable cause for the prosecution; (5) the defendant's conduct was actuated by malice; and, (6) the plaintiff was thereby damaged. *Sanders v. Daniel Int'l Corp.*, 682 S.W.2d 803, 807 (Mo. banc 1984).

In this case, it is clear that the charge of trespass filed against the plaintiff leading to his arrest was not instigated by any of the defendants, but rather by citizen Shirley Montgomery.

(Missouri Uniform Complaint and Summons, Exhibit H to defendants' joint motion for summary judgment.) Thus, plaintiff cannot meet the second element of a claim of malicious prosecution.

In addition, the arrest of the plaintiff was certainly based on probable cause given the complaint made by Ms. Montgomery that defendant had trespassed upon her property. It is clear that a citizen's complaint is sufficient probable cause for the initiation of the prosecution. *State v. Upshaw*, 619 S.W.2d 925 (Mo.App. 1981). As a result, plaintiff also cannot meet the fourth element of a claim for malicious prosecution.

VIII.

THE DISTRICT COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF'S CLAIM OF FALSE IMPRISONMENT BECAUSE PLAINTIFF FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED IN THAT PLAINTIFF'S IMPRISONMENT AND ARREST WERE MADE PURSUANT TO PROBABLE CAUSE ON THE CHARGE OF TRESPASSING AND PLAINTIFF WAS HELD FOR TEN HOURS BEFORE MAKING BAIL.

Plaintiff was arrested on probable cause pursuant to the complaint of citizen Shirley Montgomery. During the time he was incarcerated, he was adequately advised of his rights and advised twice by Officer Hollie of his right to make bail shortly after his incarceration. (Exhibit I to defendants' joint motion for summary judgment, Exhibit C to defendants' joint motion for summary judgment, page 178, lines 12-14 and 23-24; page 180, lines 8-11.)

As asserted in the preceding Points, the arrest of plaintiff in this case did not give rise to a violation of any of his constitutional rights and he was therefore being properly held on the complaint of trespassing.

Section 544.170, RSMo., provides in pertinent part as follows:

All persons arrested and confined in any jail . . .without warrant . . . for any alleged breach of the peace or other criminal offence, or on suspicion thereof, shall be discharged from said custody within 20 hours from the time of such arrest, . . .

By Missouri statute, arrestees are permitted to be confined for up to 20 hours from the time of arrest. Since plaintiff was only confined for approximately 10 hours, it cannot be asserted that defendants violated the provisions of the Statute and falsely imprisoned the plaintiff.

IX.

THE DISTRICT COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES BECAUSE PLAINTIFF'S CLAIMS WERE RENDERED MUTE IN THAT PLAINTIFF FAILED TO STATE ANY CLAIMS AGAINST THE DEFENDANTS UPON WHICH A CLAIM FOR PUNITIVE DAMAGES COULD BE BASED.

Before a claim for punitive damages can be asserted, there must be some actionable conduct upon which to base an underlying substantive claim. *Porterfield v. Burger King Corp.*, 540 F.2d 398 (8th Cir. 1976). Here, given the fact that plaintiff cannot state any claims against these defendants, there is no such claim upon which a punitive damage suit may be based.

Therefore, the District Court correctly ruled plaintiff's claims for punitive damages as being moot.

CONCLUSION

For all the reasons stated, herein, defendants/appellees respectfully request this Court to affirm the Judgment entered by the District Court in all respects.

NEWBERRY, HADEN COWHERD,
BULLOCK, KECK & MCGINNIS, L.L.C.

By _____
Randy R. Cowherd #33796
Patricia A. Keck #
2135 E. Sunshine, Suite 203
Springfield, MO 65804-1899
(417) 883-5535
Attorneys for Defendants Holle and Shipley

and

Robert Sommers #23918
840 Boonville Avenue
Springfield, MO 65802
(417) 864-1645
Attorney for Defendants City of Springfield,
Finnie, Gannaway, Vanaman, Wright, Griggs,
Rhodes, Carlson, Gibson, Hacker and Chancellor

and

Jeffrey L. Groves #42156
Daniel, Clampett, Powell & Cunningham, LLC
PO Box 10306
Springfield, MO 65808
(417) 882-9600
Attorneys for Defendants Greer, Routh, Rowe

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon Mr. Marc Perkel, 309 N. Jefferson, Suite 220, Springfield, MO 65806 by:

- Hand delivery
- United States mail
- Federal Express overnight mail
- Fax

Dated this 28th day of August, 2000.

Randy R. Cowherd

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the type-volume limitation of Rule 32(a)(7)(B) in that it contains 7,788 words and 758 lines of type. The brief was prepared using Microsoft Word 97.

The undersigned also certifies that the disk accompanying this brief has been scanned for viruses by the virus-scanning software available in his office and that the disk is virus-free.

Randy R. Cowherd

ADDENDUM