No. 14-1722

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**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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***Henry Davis***

Appellant

v.

***Michael White, et al.***

Appellees

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Appeal From The United States District Court
For the Eastern District of Missouri, Eastern Division
Case No. 4:10-CV-1429 NAB
The Honorable Magistrate Nannette A. Baker

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# BRIEF OF APPELLANT, HENRY DAVIS

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## SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

This case is brought by Appellant Henry Davis under 42 U.S.C. §1983 claiming that his civil rights were violated. Appellant specifically claimed that Michael White, John Beaird and Kim Tihen used excessive force on Appellant by kicking him in the head and punching him, all while Appellant was handcuffed. Appellant suffered a concussion, headaches and severe bruising from the beating. Appellant also claimed that the City of Ferguson police department operated under customs and policies which showed deliberate indifference to the constitutional rights of Appellant and caused Appellant's injuries. The district court, in granting Appellees' motion for summary judgment, held that Appellant's injuries were *de minimis* and granted the officers' qualified immunity.

Appellant also claimed that Appellee John Beaird violated Appellant's due process rights to fair criminal proceedings by executing false, sworn affidavits in support of municipal charges against Appellant. After presenting evidence in support of this claim at trial, the district court granted Appellee Beaird's motion for judgment as a matter of law, holding that Appellee Beaird's actions did not shock the conscience. Appellant claims that the district court erred in granting the Appellees' Motion for Summary Judgment and Appellee John Beaird's Motion for Judgment as a Matter of Law after the close of Appellant's evidence at trial and requests 20 minutes for oral argument to demonstrate that he is entitled to relief.

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## JURISDICTIONAL STATEMENT

I. Statement concerning the District Court's jurisdiction.

This is an appeal from several orders, including summary judgment and judgment as a matter of law after the close of Appellant's evidence at trial, of the United States District Court for the Eastern District of Missouri, Eastern Division, the Honorable Magistrate Judge Nannette A. Baker, presiding upon full consent pursuant to 28 U.S.C. § 636(c)(1). On August 5, 2010, Appellant filed this civil rights action against Appellees for violation of his civil rights. On December 31, 2013, a judgment of dismissal on all but one count, was entered upon the Appellees' motion for summary judgment. On March 25, 2014, judgment was entered on the final count upon Appellee Beaird's motion for judgment as a matter of law at trial. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

II. Statement concerning appellate jurisdiction.

The notice of appeal in this case was timely filed on March 25, 2014. Jurisdiction is conferred on the United States Court of Appeals for the Eighth Circuit by 28 U.S.C. § 636(c)(3) and Federal Rule of Appellate Procedure 4(b). The United States Court of Appeals for the Eighth Circuit has jurisdiction pursuant to 28 U.S.C. § 41 as the United States District Court for the Eastern District of Missouri is located in the State of Missouri.

## STATEMENT OF THE ISSUES WITH MOST APPOSITE CASES

**I. WHETHER THE DISTRICT COURT ERRED IN GRANTING APPELLEES MICHAEL WHITE, JOHN BEAIRD AND KIM TIHEN QUALIFIED IMMUNITY IN RULING ON THEIR MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S CLAIM OF EXCESSIVE FORCE ON THE BASIS THAT THE FORCE USED CAUSED *DE MINIMIS* INJURIES TO APPELLANT AND A REASONABLE OFFICER COULD NOT HAVE BELIEVED THAT KICKING AND BEATING A COMPLIANT AND HANDCUFFED APPELLANT WOULD NOT VIOLATE THE CONSTITUTION.**

Agee v. Hickman, 490 F.2d 210 (8th Cir. 1974)

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**II. WHETHER THE DISTRICT COURT ERRED IN GRANTING THE APPELLEES MICHAEL WHITE, JOHN BEAIRD AND KIM TIHEN'S MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S MISSOURI STATE LAW CLAIMS OF ASSAULT AND BATTERY ON THE BASIS THAT APPELLEES MICHAEL WHITE, JOHN BEAIRD AND KIM TIHEN WERE ENTITLED TO OFFICIAL IMMUNITY BECAUSE THEY ACTED CONSTITUTIONALLY AND WITHIN THEIR DISCRETION.**

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**III. WHETHER THE DISTRICT COURT ERRED IN GRANTING APPELLEE CITY OF FERGUSON, MISSOURI'S MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S CLAIM OF MUNICIPAL LIABILITY BECAUSE THE CITY OF FERGUSON POLICE DEPARTMENT OPERATED UNDER CUSTOMS AND POLICIES WHICH SHOWED DELIBERATE INDIFFERENCE TO THE CONSTITUTIONAL RIGHTS OF CITIZENS, INCLUDING APPELLANT, IN THE LACK OF RECORD KEEPING ABOUT PARTICULAR OFFICERS' USE OF FORCE, COMPLETELY IGNORING USE OF FORCE REPORTS AND OFFICERS WHO MAY BE USING EXCESSIVE FORCE AND IGNORING OFFICERS WHO ARE SUBJECTED TO CITIZEN'S COMPLAINTS AND SUCH DELIBERATE INDIFFERENCE CAUSED APPELLANT'S INJURIES.**

Parrish v. Luckie, 963 F.2d 201 (8th Cir. 1992)

**IV. WHETHER THE DISTRICT COURT ERRED IN GRANTING APPELLEE JOHN BEAIRD'S MOTION FOR JUDGMENT AS A MATTER OF LAW AT THE CLOSE OF APPELLANT'S EVIDENCE AT TRIAL ON APPELLANT'S CLAIM OF DENIAL OF DUE PROCESS OF FAIR CRIMINAL PROCEEDINGS HOLDING THAT APPELLEE JOHN BEAIRD'S ACTIONS OF EXECUTING FALSE SWORN COMPLAINTS/INFORMATIONS DID NOT SHOCK THE CONSCIENCE.**

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**V. WHETHER THE DISTRICT COURT ERRED IN ALLOWING THE CASE TO PROCEED TO TRIAL ON APPELLEE MICHAEL WHITE'S MISSOURI STATE LAW COUNTERCLAIM FOR BATTERY AGAINST APPELLANT DESPITE APPELLEE MICHAEL WHITE'S FAILURE TO RE-PLEAD HIS MISSOURI STATE LAW COUNTERCLAIM FOR BATTERY AGAINST APPELLANT IN RESPONSE TO APPELLANT'S FIRST AMENDED COMPLAINT.**

Gen. Mills, Inc. v. Kraft Foods Global, Inc., 495 F.3d 1378 (Fed. Cir. 2007)

**VI. WHETHER THE DISTRICT COURT ERRED IN ASSERTING SUPPLEMENTAL JURISDICTION OVER APPELLEE MICHAEL WHITE'S MISSOURI STATE LAW COUNTERCLAIM FOR BATTERY AGAINST APPELLANT DESPITE APPELLANT'S CLAIMS OF EXCESSIVE FORCE AND MISSOURI STATE LAW CLAIMS OF ASSAULT AND BATTERY AGAINST APPELLEE MICHAEL WHITE HAVING BEEN DISMISSED ON APPELLEE MICHAEL WHITE'S MOTION FOR SUMMARY JUDGMENT.**

ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters, 645 F.3d 954 (8th Cir. 2011)

Highway Equipment Co., Inc. v. FECO, Ltd., 469 F.3d 1027 (Fed. Cir. 2006)

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**VII. WHETHER THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO BIFURCATE THE TRIAL AND PROCEEDING TO HAVE A SINGLE TRIAL ON APPELLANT'S CLAIM OF DENIAL OF DUE PROCESS IN FAIR CRIMINAL PROCEEDINGS AGAINST APPELLEE JOHN BEAIRD AND APPELLEE MICHAEL WHITE'S COUNTERCLAIM FOR MISSOURI STATE LAW OF BATTERY AGAINST APPELLANT.**

Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537 (8th Cir. 1977)

Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil, 704 F.2d. 1038 (8th Cir. 1983)

## STATEMENT OF THE CASE

In this instant case, Appellant Henry Davis (hereinafter "Appellant" or "Davis") filed this civil rights action against Appellees Michael White (hereinafter "Appellee White"), John Beaird (hereinafter "Appellee Beaird"), Kim Tihen (hereinafter "Appellee Tihen") and City of Ferguson, Missouri (hereinafter "Appellee City of Ferguson") claiming that excessive force was used on Appellant, claiming that the City of Ferguson was liable for the constitutional violations under *Monell*, claiming Missouri state law assault and battery and claiming that his substantive due process rights were violated in his underlying municipal criminal proceedings. App. 57-76. All of Appellant's claims were dismissed at the summary judgment stage of the proceedings, except his substantive due process violation claim. App. 945-70.

The case proceeded to a jury trial on Appellant's claim of substantive due process against Appellee John Beaird and Appellee Michael White's state law counterclaim of battery against Appellant. At the close of Appellant's evidence, Appellee Beaird moved for judgment as a matter of law. The district court granted Appellee Beaird's motion for judgment as a matter of law and declined supplemental jurisdiction of proceeding with the trial on Appellee White's state law counterclaim of battery against Appellant. App. 1030-33. This appeal ensues.

## Relevant Facts

### A. At the Ferguson Jail on September 20, 2009

(*The events of what occurred at the Ferguson Jail give rise to Appellant's claims for excessive force and state law assault and battery. The district court dismissed these claims based upon qualified immunity at the summary judgment stage. Although there were detailed facts on what occurred at the Ferguson Jail presented by testimony at the trial, a few months after the summary judgment rulings, Appellant will present the facts in the light most favorable to Appellant based upon the record that was presented at the summary judgment stage*.)

On September 20, 2009 at approximately 3:00 a.m., Appellee Beaird encountered Appellant in his vehicle parked on the side of the off ramp of the highway. App. 603. Appellee Beaird claims that Appellant and Appellant's vehicle smelled of alcohol, however, Appellant denies such claims. App. 565. Appellant was handcuffed by Appellee Beaird and placed in Appellee Beaird's patrol car. App. 603. Appellant's vehicle was towed and thereafter Appellee Beaird transported Appellant to the Ferguson jail. Id. When Appellee Beaird arrested Appellant, Appellee Beaird told Appellant he was being arrested because he had outstanding warrants. Add. B-6.

At the Ferguson jail, Appellant provided Booking Officer Christopher Pillarick (hereinafter "Officer Pillarick") his full name and social security number.

Id. Officer Pillarick told Appellant there was a problem because the Henry Davis that had warrants had a different social security number and was much taller than Appellant. Id. When Appellant was with Officer Pillarick to be booked, the handcuffs on Appellant were removed. App. 625-26.

After learning that Appellant did not match the Henry Davis that had warrants, Officer Pillarick and Appellee Beaird escorted Appellant to Cell #3 in the Ferguson Jail. Add. B-2. Each cell of the Ferguson Jail had only one bed with a mat on it. App. 632; App. Trial Ex. 16-1. There was already a person occupying Cell #3, so Appellant asked for a mat from the stack of mats he saw off to the side. App. 630. Appellant alternatively asked to be handcuffed to the bench located outside of the cells in the Ferguson Jail. Add. B-2.

Appellant was told that he was not getting a mat and one of the officers called for backup. Id. Appellee White, Appellee Tihen and Sergeant William Ballard (hereinafter "Sergeant Ballard") responded to the Ferguson Jail near Cell #3 in response to the call for backup. Add. B-2 – B-3. Appellee White rushed Appellant inside of Cell #3 and all the way to the back wall inside Cell #3. App. 634-35. At the time Appellee White rushed Appellant inside of Cell #3, Appellant put his arms up to cover up his head and ducked. Add. B-6 – B-7; App. 636. Appellant's back and the back of his head hit the back wall inside Cell #3. Add. B-6; App. 636. After Appellee White rushed Appellant inside of Cell #3, Appellee

White ran out of the cell. Add. B-7; App. 637.

Appellant walked towards the front of the cell telling the officers that he didn't do anything and asking the officers why they were doing this to him. Add. B-7; App. 638. The officers told Appellant to lie down and put his hands behind his back and Appellant complied by getting down on his stomach and putting his hands behind his back. Add. B-7; App. 638-39. Appellee Tihen then entered the cell, straddled Appellant's back and handcuffed Appellant's arms behind his back. Add. B-7; App. 639-40.

After being handcuffed, Appellee Tihen struck Appellant in his head with a closed fist and hit Appellant in the head with handcuffs. App. 641-42, 713-15. After being handcuffed, Appellee Beaird, delivered strikes to Appellant's body. App. 641-42, 789-90. After Appellee Tihen and Appellee Beaird finished giving strikes to Appellant, Appellee Tihen began to raise Appellant up off the floor from his stomach. Add. B-7; App. 643. As Appellant was still handcuffed and being raised up from the floor, Appellee White came in the cell towards Appellant and kicked Appellant in the forehead with the toe of his boot. Id. A booking photo was taken of Appellant later that shows an injury to the front of Appellant's head consistent with Appellant's testimony regarding the kick from Appellee White. Add. B-4, H-1. Appellee White suffered an injury to his nose, fracturing it, apparently when he rushed Appellant into Cell #3. Add. B-3. Appellee White

claims he was punched in the nose by Appellant and Appellant denies punching Appellee White. Id.

Appellant was subsequently looked at by paramedics in the Ferguson Jail and then taken to the Christian Hospital emergency room. Although it's not material, Appellant denies being "belligerent" towards the paramedics or the Christian Hospital personnel and the district court somehow found that, "the evidence of his behavior is so one-sided that the Court cannot credit his account."[1] Add. B-3 – B-4. Appellant testified that the paramedics looked at him in the Ferguson Jail and said there was too much blood, Appellant needed to go to the hospital. App. 645-46. Appellant testified that at Christian Hospital he demanded the hospital take pictures of him before treating him as evidence of what was done to him by the officers. App. 647-50. Because the hospital staff would not take

[1] The district court erroneously relied on Reed v. City of St. Charles, 561 F.3d 788, 790-91 (8th Cir. 2009). The district court gave no explanation as to why the evidence was so "one-sided". In fact, the district court erroneously relied on hearsay statements in the medical records. Further, it is Appellant's testimony against the paramedics/hospital staff. There is no video or any other evidence in the record that blatantly contradicts Appellant's version of the occurrence. *See* Scott v. Harris, 550 U.S. 372, 379-80, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). The district court apparently decided that because it was typed in the medical records, it must have been true. Being "belligerent" is not a medical diagnosis and just like Appellant disagrees with the officers' version of the events, he disagrees with the paramedics and emergency room version of his behavior being "belligerent". "Belligerent" behavior could be misconstrued as Appellant being very upset for being beat and kicked in the head while not resisting and being handcuffed. It should be no surprise that medical personnel would side with the police officers and not believe Appellant that he was beat and kicked.

pictures of Appellant, Appellant did not get treated at the hospital. Id.

**B. Appellant's injuries**

As a result of the force used on Appellant by Appellees White, Beaird and Tihen, Appellant sustained the following injuries:

- Laceration to the front of the head that bled excessively and left a permanent scar
- Concussion and headaches that Appellant still continues to suffer from
- Bruises all over his body that lasted for 30 days after the incident

Add. B-13 – B-14.

On September 22, 2009, after Appellant was released from the Ferguson Jail, he went to the emergency room of SSM St. Joseph Health Center. App. 658; 1,111-32. On September 22, 2009 at SSM St. Joseph Health Center, Appellant was diagnosed with a concussion and scalp laceration. App. 1,111-32. Appellant additionally sought treatment from Dr. Shobha L Dixit, MD with SSM Medical Group on September 29, 2009. App. 1,089-110.

**C. Appellant's subsequent municipal prosecution**

(*The events of what occurred with Appellant's subsequent municipal prosecution give rise to Appellant's claim of violation of substantive due process against Appellee Beaird. The district court denied Appellee Beaird motion for summary judgment and Appellant proceeded to jury trial on this claim only. Appellant will*

*present the facts based upon the record of the trial testimony*.)

Appellee Beaird executed four (4) complaint/informations that were sworn and under oath asserting that Appellant committed "Property Damage" in violation of Section 29.61 of the revised Code of the City of Ferguson, 1998 by transferring blood onto the uniforms of Officer Pillarick and Appellees White, Beaird and Tihen. Add. G-1 – G-4. Appellant was charged with violating Paragraph (a)(1) of Section 29.61 of the revised Code of the City of Ferguson, 1998, which provides that: "A person commits the offense of property damage if he: (1) Knowingly damages property of another." Add. F-1; Trial Tr. Vol. I, pp. 63-64.

In addition to the four charges of property damage, Appellant was charged with the following municipal violations: (1) Driving While Intoxicated; (2) Speeding; (3) Failure to Drive in a Single Lane; (4) No Proof of Insurance; (5) Failure to Obey Police Officer. Trial Tr. Vol. I, p. 121. Appellant hired attorney Michael Kielty to represent him in the municipal charges brought against him by the Appellee City of Ferguson. Trial Tr. Vol. I, pp. 120-21. Mr. Kielty requested disclosure in the Municipal Case and the four complaint/informations executed by Appellee Beaird were produced to Mr. Kielty. Trial Tr. Vol. I, pp. 121-22.

Mr. Kielty arranged a plea with the prosecutor of the Appellee City of Ferguson and all of the charges were disposed of at once. Trial Tr. Vol. I, pp. 122-24. Two of the property damage charges were dismissed and Appellant had to pay

fines and costs on the two property damages charges that were not dismissed. Trial Tr. Vol. I, pp. 123-24. Appellant's total in fines he had to pay was $3,000.00. Trial Tr. Vol. II, p. 40. In negotiating the plea deal, Mr. Kielty took into consideration and relied on the four complaint/informations executed by Appellee Beaird. Trial Tr. Vol. I, pp. 125-26. With regard to the four complaint/informations executed by Appellee Beaird, Mr. Kielty testified that: "I told Mr. Davis that a police officer, under the penalty of perjury, was swearing that he damaged city property." Despite maintaining his innocence on whether he committed destruction of property by bleeding on the Appellee officers and Officer Pillarick's uniforms, Appellant paid fines on two of the charges on advice from his attorney as part of the plea arrangement. Trial Tr. Vol. II, pp. 37, 67.

Despite affirmatively swearing under oath that Appellant committed "Property Damage" by transferring blood to the uniform of Appellee Tihen, Appellee Beaird admitted that he did not observe any blood on Appellee Tihen's uniform. Add. G-1; Trial Tr. Vol. I, p. 59. Despite affirmatively swearing under oath that Appellant committed "Property Damage" by transferring blood to the uniform of Officer Pillarick, Appellee Beaird admitted that he did not see Appellant transfer blood on Officer Pillarick's uniform. Add. G-2; Trial Tr. Vol. I, p. 60. Appellee White even admitted at trial that it was he who bled on Appellee Tihen's uniform. Trial Tr. Vol. II, p. 86.

When Appellee Beaird was asked what he based the statement on where he stated that Appellant transferred blood on to the uniform of Officer Pillarick and Appellee Beaird responded, "The direction provided by Sergeant Ballard." Appellee Beaird was guessing both that Officer Pillarick had blood on his uniform and it was the Appellant who got blood on Officer Pillarick's uniform. Trial Tr. Vol. I, p. 60. Additionally, when asked if he had blood on his uniform, Officer Pillarick tried to backtrack at trial and said, "I don't remember". Trial Tr. Vol. I, p. 109. However, when asked the same question at his deposition if he had blood on his uniform that night, Officer Pillarick unequivocally said "No". Id.

Sergeant Ballard also instructed Appellee Beaird to complete and sign the complaint/information that alleged that Appellant committed "Property Damage" by transferring blood to the uniform of Appellee White. Trial Tr. Vol. I, p. 61. As Appellee White and Appellant were both bleeding, Appellee Beaird admitted that he did not know if it was Appellant's blood on Appellee White's uniform. Trial Tr. Vol. I, p. 62. Appellee White even testified that Appellant did not get blood on his uniform. Trial Tr. Vol. II, p. 86. Appellee White even further testified that the blood on his uniform was his own from his nose that was bleeding. Id.

Appellee Beaird didn't know where on his uniform Appellant had transferred blood to. Trial Tr. Vol. I, p. 62. Appellee Beaird further testified that it was possible that Appellee White's blood was on his uniform. Id. Appellee Beaird

also testified that Sergeant Ballard instructed him to complete and sign the complaint/information that alleged that Appellant committed "Property Damage" by transferring blood to his own uniform. Id.

Appellee Beaird admitted that the four complaint/informations of property damage against Appellant were not completed and executed based upon personal knowledge, they were completed and executed because Sergeant Ballard told him to do so. Trial Tr. Vol. I, pp. 60-62. Appellant testified that he did not bleed on any of the Appellee officers and Officer Pillarick's uniforms on the night of the incident. Trial Tr. Vol. II, p. 37.

## Relevant Procedural History

On August 5, 2010, Appellant filed his original Complaint against Appellee White and Appellee City of Ferguson claiming excessive force and state law assault and battery against Appellee White and *Monell* liability against Appellee City of Ferguson. App. 29-39. On October 4, 2010, Appellees White and City of Ferguson filed their answer to Appellant's Complaint. App. 40-49. Also on October 4, 2010, Appellee White filed a Counterclaim for battery against Appellant. App. 50-53. On October 6, 2010, Appellant filed his answer to Appellee White's counterclaim for battery. App. 54-56. On February 15, 2011, the case was stayed because an underlying felony assault charge was filed in the state courts against Appellant. App. 5.

On January 16, 2013, Appellant filed a motion to re-open the case and set aside the stay based upon Nolle Prosequi of the underlying felony assault charge against Appellant. App. 6. On the same date, the case was reassigned from Judge Magistrate Judge Mary Ann L. Medler to Judge Magistrate Judge Nannette A. Baker. App. 7. On January 30, 2013, the case was re-opened. App. 7.

On February 26, 2013, Appellant filed his First Amended Complaint against Appellees White, Beaird, Tihen and City of Ferguson. App. 57-76. On March 7, 2013, against Appellees White, Beaird, Tihen and City of Ferguson filed their answer to Appellant's First Amended Complaint. App. 77-93. Appellee White did not file his state law counterclaim for battery Appellant in response to Appellant's First Amended Complaint. App. 7-8.

On September 20, 2013, Appellees White, Beaird, Tihen and City of Ferguson filed a Motion for Summary Judgment on all counts of Appellant's First Amended Complaint. App. 309-562. In Appellant's response to Appellees' motion for summary judgment, Appellant withdrew his claim of retaliatory prosecution in Count III of Appellant's First Amended Complaint against Appellee Beaird, Appellant withdrew his federal law claim of malicious prosecution in Count IV of Appellant's First Amended Complaint against Appellee Beaird and Appellant withdrew his state law claim of malicious prosecution in Count VIII of Appellant's First Amended Complaint against Appellee Beaird. Add. B-2.

On December 31, 2013, the district court granted Appellees' motion for summary judgment on all counts, with the exception of Count II of Appellant's First Amended Complaint, whereas the court denied Appellee Beaird's motion for summary judgment on Appellant's claim of substantive due process violation against Appellee Beaird for Appellee Beaird's executing sworn false affidavits in support of municipal charges of property damage against Appellant. Add. A-1, B-1 – B-25. At the close of the district court's memorandum granting in part Appellees' motion for summary judgment, the district court stated that, "The only remaining claims in this action are: (1) Count II of Mr. Davis' Amended Complaint alleging Officer Beaird violated Mr. Davis' substantive due process rights [Doc. 50] and (2) Officer White's Counterclaim against Mr. Davis for Battery [Doc. 7]." Add. B-24.

On January 4, 2014, Appellant filed a motion for a declaratory ruling that Appellee White's state law counterclaim for battery had been abandoned or was no longer pending. App. 971-74. On February 20, 2014, Appellant alternatively filed a motion to dismiss Appellee White's state law counterclaim for battery for lack of jurisdiction. App. 999-1,003. In the event the previous two mentioned motions were denied, on February 20, 2014, Appellant filed a motion to bifurcate the trial seeking Appellant's substantive due process violation claim against Appellee Beaird to be tried separately from Appellee White's state law counterclaim for

battery against Appellant. App. 1,004-07.

On March 10, 2014, the district court entered a memorandum and order denying Appellant's motion to deem abandoned, motion to dismiss and motion to bifurcate Appellee White's state law counterclaim for battery. Add. C-1 – C-12. The case proceeded to jury trial on March 24, 2014. On March 25, 2014, after the close of Appellant's evidence, the district court entered a memorandum, order and judgment granting Appellee Beaird's motion for judgment as a matter of law and dismissing Appellee White's state law counterclaim for battery against Appellant. Add. D-1, E-1 – E-3.

## Rulings Presented for Review

The district court's memorandum, order and judgment entered on December 31, 2013 granting Appellees' motion for summary judgment is presented for review. The district court's memorandum and order entered on March 10, 2014 denying Appellant's motion to deem abandoned, motion to dismiss and motion to bifurcate Appellee White's state law counterclaim for battery is presented for review. Lastly, the district court's memorandum, order and judgment entered on March 25, 2014 granting Appellee Beaird's motion for judgment as a matter of law at the close of Appellant's evidence is presented for review.

## SUMMARY OF ARGUMENT

Appellant argues that the district court erred in granting Appellees Michael White, John Beaird and Kim Tihen's motion for summary judgment on Appellant's claims of excessive force in violation of the Fourth Amendment because Appellant suffered non-*deminimis* injuries of a concussion, laceration to the forehead that bled excessively and bruising all over his body. Appellant argues that Appellees White, Beaird and Tihen were not entitled to qualified immunity because the force was used on Appellant when Appellant was handcuffed and not resisting.

Appellant argues that the district court erred in granting Appellees White, Beaird and Tihen's motion for summary judgment on Appellant's Missouri state law claims of assault and battery because the Appellees White, Beaird and Tihen's actions of force against were made in bad faith and with malice and they are not entitled to official immunity.

Appellant argues that the district court erred in granting Appellee City of Ferguson, Missouri's motion for summary judgment on Appellant's claim of municipal liability in violation of the Fourteenth Amendment because the City of Ferguson police department operated under customs and policies which showed deliberate indifference to the constitutional rights of citizens in the lack of record keeping about particular officers' use of force, completely ignoring use of force reports and officers who may be using excessive force and ignoring officers who are

subjected to citizen's complaints.

Appellant argues that the district court erred in granting Appellee Beaird's motion for judgment as a matter of law at the close of Appellant's evidence at the jury trial in this matter on Appellant's substantive due process claim because Appellee Beaird's executing and submitting false sworn complaints/informations that were used in Appellant's municipal prosecution shocks the conscience and violates Appellant's due process rights of a fair criminal proceeding under the Fourteenth Amendment.

Appellant argues that Appellee White was required, under Rule 13 and Rule 15 of the Federal Rules of Civil Procedure to file his counterclaim in response to Appellant's First Amended Complaint. Thus, the counterclaim Appellee White filed in response to Appellant's original Complaint was no longer pending.

Appellant argues that, after dismissing all of Appellant's claims except the substantive due process claim against Appellee Beaird, the district court did not have supplemental jurisdiction over Appellee White's counterclaim because all claims against Appellee White were dismissed and Appellee White's counterclaim was not then compulsory.

Appellant argues that the district court erred in denying Appellant's motion to bifurcate trial because Appellant's substantive due process claim against Appellee Beaird and Appellee White's counterclaim of battery against Appellant were clearly

separable and distinct.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN GRANTING APPELLEES MICHAEL WHITE, JOHN BEAIRD AND KIM TIHEN QUALIFIED IMMUNITY IN RULING ON THEIR MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S CLAIM OF EXCESSIVE FORCE ON THE BASIS THAT THE FORCE USED CAUSED NON-*DE MINIMIS* INJURIES TO APPELLANT AND EVEN IF THE INJURIES SUFFERED BY APPELLANT WERE *DE MINIMIS*, A REASONABLE OFFICER COULD NOT HAVE BELIEVED THAT KICKING AND BEATING A COMPLIANT AND HANDCUFFED APPELLANT WOULD NOT VIOLATE THE CONSTITUTION.

#### Standard of Review

The district court's grant of summary judgment is reviewed *de novo*, "viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." Montoya v. City of Flandreau, 669 F.3d 867, 870 (8th Cir. 2012) (*quoting* Chambers v. Pennycook, 641 F.3d 898, 904 (8th Cir. 2011)).

#### Argument

Appellant's claim of excessive force is evaluated under the reasonableness standard of the Fourth Amendment. McKenney v. Harrison, 635 F.3d 354, 359 (8th Cir. 2011). Summary judgment is proper if no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. Johnson v. Carroll, 658 F.3d 819, 825 (8th Cir. 2011); Fed.R.Civ.P. 56(a).

"Qualified immunity involves the following two-step inquiry: (1) whether the

facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct." Brown v. City of Golden Valley, 574 F.3d 491, 496 (8th Cir. 2009) (*citing* Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *see also* Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009) (holding that courts may exercise their discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first)).

Qualified immunity protects officers from liability in a section 1983 case "unless the official's conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known." Shekleton v. Eichenberger, 677 F.3d 361, 365 (8th Cir. 2012) (*citing* Brown, 574 F.3d at 495).

### A. IN RULING ON APPELLEES' MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S CLAIMS OF EXCESSIVE FORCE, THE DISTRICT COURT ERRED IN FAILING TO RESOLVE ALL DISPUTED FACTS AND FAILING TO DRAW ALL INFERENCES IN FAVOR OF APPELLANT.

The district granted Appellees White, Beaird and Tihen's motion for summary judgment based upon qualified immunity and dismissed Appellant's claim of excessive force in Count I of Appellant's First Amended Complaint. As an initial matter, the district court did not follow the established law by failing to resolve all disputed facts and failing to draw all inferences in favor of Appellant. In the district court's "Summary Judgment Standard of Review" and in the district court's portion

of her memorandum granting Appellees' qualified immunity on Appellant's excessive force claims, the district court completely failed to mention that all disputed facts and all reasonable inferences shall be drawn in favor of Appellant, the non-moving party. Add. B-9 – B-14.

The district court set forth a section she believed were "Undisputed Facts" and a section of "Disputed Facts." Although minor, a couple "Undisputed Facts" were in fact disputed and the court accepted the moving party's (officers') version of the events. The district court went on to basically state the differing version of events between Appellant and the Appellees.

However, in granting the Appellees qualified immunity, the district court focused only on the injuries of the Appellant, not the actions of force by each Appellee. The district court stated, "Viewed in the light most favorable to Mr. Davis, he sustained a scalp laceration for which he did not receive stitches, a concussion, and bruising all over his body." Add. B-13. Finally, in granting Appellees White, Beaird and Tihen's motion for summary judgment on Appellant's claims of excessive force, the district court held: "…as unreasonable as it may sound, a reasonable officer could have believed that beating a subdued and compliant Mr. Davis while causing only a concussion, scalp laceration, and bruising with almost no permanent damage did not violate the Constitution." Add. B-14. As unreasonable as the district court's holding sounds, the district court erred in granting qualified

immunity to Appellees White, Beaird and Tihen on Appellant's claims of excessive force. The district court failed to resolve all disputed facts and failed to draw all reasonable inferences favor of Appellant, the non-moving party, particularly as it related to individual acts of force taken by each Appellee.

The Supreme Court recently addressed and affirmed this long-standing principle of law in *Tolan v. Cotton*. *See* Tolan v. Cotton, 572 U.S. ___, 13-551 (U.S. May 5, 2014). *Tolan* is the case of the near-fatal 2008 shooting of Mr. Robert Tolan by Police Sergeant Jeffrey Cotton. Tolan sued Cotton under 42 U.S.C. § 1983 for unreasonable seizure by infliction of excessive force in violation of U.S. Const. amend. IV and XIV. The lower courts failed to view disputed, material facts at summary judgment in the light most favorable to nonmovant Tolan. Accordingly, the Court vacated and remanded the case for proper application of the clearly established summary judgment standard of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Tolan, 572 U.S. ___, ___, 13-551, p. 1 of 13 (U.S. May 5, 2014).

The *Tolan* Court summarized as follows:

> "By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.
> Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting…. We… vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably

drawn in his favor, Cotton's actions violated clearly established law." Tolan, 572 U.S. at ___, 13-551 pp. 10-11.

### B. APPELLANT'S INJURIES WERE NON-*DE MINIMIS*.

#### 1. Appellant's Concussion, Laceration to His Head and Permanent Scar

At the outset, this case presents an issue that has never been decided by this 8th Circuit Court of Appeals. The district court below, did not provide any discussion or analysis, but summarily held that all of Appellant's injuries, including his concussion, as *de minimis*. On July 9, 2013, the district court in Minnesota recognized that, "The Eighth Circuit has not addressed whether a concussion is more than de minimis…" B.J.R. ex rel. Garcia v. Golgart, 2013 WL 3455598, 8 (D.Minn. 2013) *citing e.g.* Johnson v. Jacobson, 3:06–CV–0766, 2008 WL 2038882, at *6 (N.D.Tex. April 28, 2008) ("According to ... [h]ospital [r]ecords, Plaintiff suffered a concussion, a serious injury."); *cf*. Foxworth v. Major, C/A No. 8:08–2795, 2009 WL 2368737, at *8 (D.S.C. July 30, 2009) ("[T]he plaintiff's medical records establish that the plaintiff suffered nothing more than a de minimis injury.... The plaintiff was diagnosed with a mild contus[ ]ion—not a concussion as the plaintiff alleges in his complaint."). In *B.J.R. ex rel. Garcia*, the defendants conceded, and the district court held, that B.J.R. suffered greater than a de minimis injury because B.J.R. was diagnosed with a concussion. B.J.R. ex rel. Garcia v. Golgart, 2013 WL 3455598, 8 (D. Minn. 2013).

Appellant claims excessive force was used on him by three individual officers, Appellees White, Beaird and Tihen. "'Liability for damages for a federal constitutional tort is personal, so each defendant's conduct must be independently assessed.' Section 1983 does not sanction tort by association." Heartland Acad. Cmty. Church v. Waddle, 595 F.3d 798, 805-06 (8th Cir. 2010)(*quoting* Wilson v. Northcutt, 441 F.3d 586, 591 (8th Cir. 2006)). "An officer may be held liable only for his or her own use of excessive force." Smith v. Kan. City, Mo. Police Dep't., 586 F.3d 576, 581 (8th Cir. 2009). Thus, the actions of the individual officers must be examined with respect to Appellant's injuries.

In viewing the facts in the light most favorable to Appellant[2], Appellant received blows to his head from Appellee White's kick and Appellee Tihen's hand strikes with a handcuff. Thus, there is sufficient evidence that the force used by Appellee White and Appellee Tihen to Appellant's head caused Appellant's concussion. There is no evidence that Appellee Beaird struck Appellant in his head. The evidence demonstrates that Appellant was kicked in the head by Appellee White while Appellant was handcuffed with his arms behind his back and being raised from the floor on his stomach by Appellee Tihen. The evidence also demonstrates that

[2] In the entire argument on this point, Appellant discusses the facts in the light most favorable to Appellant and will not repeat such phrase. As the Appellees' motion for summary judgment on Appellant's claims of excessive force was granted based upon qualified immunity, the law is well established that the facts should be viewed in such a manor.

Appellant was punched in the head by Appellee Tihen with her hand, holding a handcuff, while Appellant was handcuffed with his arms behind his back.

Appellant's concussion, laceration to his head and permanent scar from the laceration are not *de minimis* injuries. "De minimis" is defined as, "Trifling; minimal" and "(Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case." BLACK'S LAW DICTIONARY 390 (9th ed. 2009).

In an unpublished opinion in 1996, the Sixth Circuit stated in *Herring v. Lacy* that, "A **concussion** and a herniated disc are arguably **serious** injuries." (*emphasis added*); Herring v. Lacy, No. 95-3535, 1996 WL 109491, at *6 (6th Cir. 1996)[3]. In a recent unpublished opinion in 2013, the Tenth Circuit stated in *Thomas v. Adrahtas* that, "The record contains sworn statements and medical records to the effect that after Plaintiff was handcuffed, Defendant stepped on his back, rendering him unconscious, drop-kicked him, kicked him in the head and neck and repeatedly slammed the patrol car door on his leg, and that Plaintiff suffered **significant** injuries, including a **concussion**…" (*emphasis added*) Thomas v. Adrahtas, 530 Fed.Appx. 830 (10th Cir. 2013)." In an unpublished opinion in 2006, the Fourth Circuit stated in *Johnson v. Warner* that, "The assaults were invariably unprovoked and resulted in

[3] This 1996 unpublished opinion and a subsequent unpublished opinion issued before January 1, 2007 is cited in accordance with Local Rule 32.1A of the Local Rules of the United States Court of Appeals for the 8th Circuit in that "the opinion has persuasive value on a material issue and no published opinion of this court or another court would serve as well." Local Rule 32.1A.

**serious** injuries, including severe cuts, electrocution, and a **concussion**… both the force used and the injuries claimed to have been sustained were **more than de minimis**." (*emphasis added*); Johnson v. Warner, 200 Fed.Appx. 270, 271; 273 (4th Cir. 2006)."

Although not a civil rights case, the Fifth Circuit held a concussion to be a severe injury:

> "Hall presented uncontradicted evidence that she suffered **severe** physical injuries in the accident. These injuries included a **concussion**, a facial laceration that left a permanent scar on her forehead, and back and neck injuries." (*emphasis added*).

Hall v. Freese, 735 F.2d 956, 959 (5th Cir. 1984).

A concussion is not a *de minimis* injury as evidenced by the ongoing lawsuits by former National Football League ("NFL") players and their families that have been and continue to be filed. *See e.g.* Green v. Arizona Cardinals Football Club LLC, 2014 WL 1920468 (E.D.Mo. 2014)(suit filed in the same district as this case, Eastern District of Missouri, relating to a former player's concussions); In re: National Football League Players' Concussion Injury Litigation, 842 F.Supp.2d 1378 (U.S.Jud.Pan.Mult.Lit. 2012). Even our national pastime has recognized the severity of concussions when in 2011, Major League Baseball ("MLB") instituted a 7-Day Disabled List ("DL") for players who sustain a concussion. *See* ESPN, MLB institutes 7-day DL for concussions, Last Update: March 29, 2011, available at http://sports.espn.go.com/mlb/news/story?id=6270514 (last visited June 23, 2014).

This Court has not established a bright line rule or list of what injuries are *de minimis* and what injuries are non-*de minimis* as they relate to claims of excessive force. As a number of other circuits have already recognized, a concussion is clearly not a *de minimis* injury. Appellant testified that 4 years later, he still suffers from headaches and did not suffer from headaches prior to the incident in question in this case.

The district court, in just over 3 pages of analysis of Appellant's claims of excessive force, did not mention or even analyze the force used by each individual officer or the need for any force. Add. B-11 – B-14. In relying on this Court's holding in *Chambers v. Pennycock*, the district court simply held that, "as unreasonable as it may sound, a reasonable officer could have believed that beating a subdued and compliant Mr. Davis while causing only a concussion, scalp laceration, and bruising with almost no permanent damage did not violate the Constitution." Add. B-14. Prior to reaching this conclusion, the district court cited several cases, however, none of those cases held that a concussion is a *de minimis* injury. Even further, the district court did not cite to a single case holding that a laceration that bled excessively and left a permanent scar is a *de minimis* injury.

The district court's holding that Appellant's injuries of the concussion and head laceration that led to the bloody booking photo of Appellant that left a permanent scar as being *de minimis* completely contradicts and is at odds with this

Honorable Court's holding in *Small v. McCrystal*. *See* Small v. McCrystal, 708 F.3d 997, 1005-06 (8th Cir. 2013).

The deputy in *Small* made the same argument as the Appellees made below in relying on *Chambers v. Pennycook*. This Court rejected the argument and held that:

> "Viewing the facts most favorably to Small: McCrystal tackled him and his face landed on the gravel parking lot, resulting in three lacerations above his eye that covered his face with blood. Small was taken to the hospital in an ambulance, where the lacerations were treated without stitches. In this case, Small suffered more than a de minimis injury. See Copeland, 613 F.3d at 881 (holding that cuts, abrasions, and an injury to the knee support a finding of excessive force); Lambert v. City of Dumas, 187 F.3d 931, 936 (8th Cir. 1999) (holding that a single small cut on the eyelid and small scrapes of the knee and calf support a finding of excessive force); Dawkins v. Graham, 50 F.3d 532, 535 (8th Cir. 1995) (holding that bruises and a facial laceration support a finding of excessive force); cf. Wertish v. Krueger, 433 F.3d 1062, 1067 (8th Cir. 2006) (holding that "relatively minor scrapes and bruises and the less-than-permanent aggravation of a prior shoulder condition" were de minimis injuries)."

Id.

Just as the date subject to the incident in this appeal is before *Chambers v. Pennycook* was issued, September 20, 2009; the date of the incident subject to the *Small v. McCrystal* case is also before *Chambers v. Pennycook* was issued, October 5, 2008. Small was tackled and his face landed on a gravel parking lot resulting in 3 lacerations above his eye that did not need stitches but the bleeding covered his face in blood. Appellant had one laceration on his head from the kick of Appellee White's

boot, which also covered his head and face with blood. *See* Add. H-1. Both Small and Appellant went to the hospital for treatment of the laceration(s) and neither required stitches. Appellant did not have the laceration treated his first trip to the hospital because the hospital would not take pictures first of Appellant's injured and bloody head. Appellant's head injury was even more severe than Small's as Appellant, not only kicked in the head by Appellee White but punched in the head repeatedly by Appellee Tihen, was diagnosed with a concussion and has continued to suffer from headaches. This Court in *Small v. McCrystal* went on to hold that, "Small suffered more than a de minimis injury." Id. As Appellant suffered a similar, if not more severe, injury as Small, this Court must reverse the district court's ruling below and find that Appellant's concussion and laceration that bloodied Appellant's face and left a permanent scar is more than a *de minimis* injury as a matter of law.

As a result of the foregoing, this Honorable Court should reverse the district court's granting of qualified immunity to Appellee White on Appellant's claim of excessive force in violation of the Fourth Amendment to the Constitution in Count I of Appellant's First Amended Complaint. As Appellant was handcuffed with his arms behind his back, defenseless and being raised up by Appellee Tihen, it was objectively unreasonable for Appellee White to run up to Appellant and kick Appellant in the front of his head. The booking photo of Appellant, shows a significant injury to Appellant's head that is entirely consistent with his version of

how Appellee White kicked him and resulted in Appellant's entire face and head to be bloody. *See* Add. H-1.

This Honorable Court should also reverse the district court's granting of qualified immunity to Appellee Tihen on Appellant's claim of excessive force in violation of the Fourth Amendment to the Constitution in Count I of Appellant's First Amended Complaint. As Appellant was handcuffed with his arms behind his back and not offering any resistance, it was objectively unreasonable for Appellee Tihen to strike Appellant in his head with a handcuff in her hand several times. Appellee Tihen would only admit to striking Appellant in his head 3 or 4 times. However, Appellant testified that he was beat in his head. At the summary judgment stage, the facts are to be construed in the light most favorable to Appellant.

**2. Appellant's Body Injuries Resulting in Bruising**

As a result of Appellee Beaird's hand strikes to Appellant's body, Appellant had bruises all over his body. According to Appellant's testimony and viewing the facts in the light most favorable to Appellant, Appellant was face down, handcuffed and not resisting when he was beat by Appellee Beaird.

Appellant's bruises all over his body that were present for 30 days cannot be deemed *de minimis*. Appellant could not find a single 8th Circuit case supporting the district court's position that Appellant's bruises all over his body that were present for 30 days as being *de minimis*. Further, Appellant's bruising is an actual injury. It's

a soft tissue injury and the law was clearly established that Appellee Beaird's beating a handcuffed and non-resistant violated the 4th Amendment if he caused an actual injury. Dawkins v. Graham, 50 F.3d 532, 535 (8th Cir. 1995); *see also* Hanig v. Lee, 415 F.3d 822, 824 (8th Cir. 2005)**(***confirming actual injury requirement*).

This Honorable Court should reverse the district court's granting of qualified immunity to Appellee Beaird on Appellant's claim of excessive force in violation of the Fourth Amendment to the Constitution in Count I of Appellant's First Amended Complaint. As Appellant was handcuffed with his arms behind his back and not offering any resistance, it was objectively unreasonable for Appellee Beaird to strike Appellant all over his bod several times.

### C. REGARDLESS OF WHETHER APPELLANT'S INJURIES WERE *DE MINIMIS* OR NON-*DE MINIMIS*, APPELLEES MICHAEL WHITE, JOHN BEAIRD AND KIM TIHEN WERE NOT ENTITLED TO QUALIFIED IMMUNITY AS THEY KICKED AND BEAT APPELLANT WHO WAS COMPLIANT AND HANDCUFFED.

Even if Appellant's injuries are deemed *de minimis*, Appellees White, Beaird and Tihen are not entitled to qualified immunity because the law was clearly established on September 20, 2009 that any force used on someone who was not resisting, compliant and not provoking any force at all is excessive.

The Circuit has affirmatively held that force can only be used to overcome physical resistance or threatened force. Agee v. Hickman, 490 F.2d 210, 212 (8th Cir. 1974). *See also* Feemster v. Dehntjer, 661 F.2d 87, 89 (8th Cir. 1981)(*force may not*

*be used against a suspect who quietly submits*); *cf.* United States v. Harrison, 671 F.2d 1159 (8th Cir. 1982), *cert. denied*, 459 U.S. 847, 103 S.Ct. 104, 74 L.Ed.2d 94 (1982)(*lack of provocation or need to use force would make any use of force excessive*).

In 1982, in *United States v. Harrison*, this Court specifically stated that, "Even if Culpepper's injuries were minor, a lack of provocation or need to use force would make any use of force excessive." Harrison, 671 F.2d at 1162 (8th Cir. 1982); *see also* Agee v. Hickman, 490 F.2d 210, 212 (8th Cir. 1974); Feemster v. Dehntjer, 661 F.2d 87, 89 (8th Cir. 1981)(*force may not be used against a suspect who quietly submits*).

This Honorable Court should reverse the district court's granting of qualified immunity to Appellees White, Beaird and Tihen on Appellant's claim of excessive force in violation of the Fourth Amendment to the Constitution in Count I of Appellant's First Amended Complaint. As Appellant was handcuffed with his arms behind his back and not offering any resistance, it was objectively unreasonable for Appellees White, Beaird and Tihen to kick and strike Appellant in the head and punch Appellant all over his body several times and remand the case to the district court for further proceedings.

## II. THE DISTRICT COURT ERRED IN GRANTING APPELLEES MICHAEL WHITE, JOHN BEAIRD AND KIM TIHEN'S MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S CLAIMS OF ASSAULT AND BATTERY UNDER MISSOURI STATE LAW ON THE BASIS THAT THE OFFICERS WERE NOT ENTITLED TO OFFICIAL IMMUNITY AS THEIR ACTIONS WERE TAKEN IN BAD FAITH AND WITH MALICE.

### Standard of Review

The district court's grant of summary judgment on Appellant's state law claims of assault and battery is reviewed is *de novo*. Figg v. Russell, 433 F.3d 593, 597-600 (8th Cir. 2006).

### Argument

The district granted Appellees White, Beaird and Tihen's motion for summary judgment based upon official immunity and dismissed Appellant's state law claims of assault and battery in Count VII of Appellant's First Amended Complaint. The district court held that, "Defendants are entitled to official immunity on Mr. Davis' state law claims because they acted constitutionally and within their discretion." Add. B-15.

Under Missouri law "an assault is any unlawful offer or attempt to injure another with the apparent present ability to effectuate the attempt under circumstances creating a fear of imminent peril." Armoneit v. Ezell, 59 S.W.3d 628, 632 (Mo. Ct. App. 2001) (*quoted case omitted*). "A battery is the willful touching of the person of another, and has been said to be the consummation of the assault." Id.

(*quoted case omitted*).

The district court cited a handful of cases addressing Missouri law and official immunity regarding assault and battery claims. Add. B-15. However, the district court failed to recognize the Missouri case law cited by Appellant where official immunity is not warranted depending on the facts of the case, the actual use of force. The district held that because it did not find the law was clearly established that the officers' actions did not violate the 4th Amendment of Appellant's federal excessive force claims, then the officers were entitled to official immunity on Appellant's state law claims of battery.

The district court correctly recognized that under Missouri law, "Official immunity shields officials from liability for negligence in the performance of discretionary, as opposed to ministerial duties and Officers' actions in detaining someone who has been arrested are properly categorized as discretionary." Add. B-15 (*internal quotations omitted*); *see* DaVee v. Mathis, 812 S.W.2d 816, 827 (Mo. App. W.D. 1991)(*citing* Kanagawa v. State, 865 S.W.2d 831, 835 (Mo. banc 1985)).

However, the district court failed to recognize that official immunity does not apply to discretionary acts done in bad faith or with malice. Blue v. Harrah's North Kansas City, 170 S.W.3d 466, 479 (Mo. App. 2005). The Blue court, quoting *State ex rel. Twiehaus v. Adolf*, defined those terms as follows:

> "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and

> which he intends to be prejudicial or injurious to another. An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others...
>
> Bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another."

Id; *see also* State ex rel. Twiehaus v. Adolf, 706 S.W.2d 443, 447 (Mo. 1986).

The district court failed to address the issue of whether Appellees White, Beaird and Tihen's actions were done in bad faith or with malice. Official immunity of Missouri law is different than the federal law governing qualified immunity and excessive force claims. The district court's granting the officers' qualified immunity on Appellant's 4th Amendment excessive force claims does not create an automatic bar to Appellant's state law claims of assault and battery.

The acts done in bad or with malice exception to Missouri official immunity is a fact-sensitive inquiry. Appellees White, Beaird and Tihen's respective actions against Appellant at the Ferguson Jail of striking and kicking Appellant in the head after he was handcuffed and not resisting in any way, were intended to be prejudicial or injurious, had a dishonest purpose, showed moral obliquity, demonstrated conscious wrongdoing, and breached a known duty through an ulterior motive. Even if, *arguendo*, Appellant's injuries are deemed *de minimis*, Appellees White, Beaird and Tihen are not entitled to official immunity if their actions were done in bad faith or with malice. Using the district court's language, "beating a subdued and compliant

Mr. Davis" cannot be found to have been done in good faith or without malice. Add. B-14.

For the foregoing reasons, this Honorable Court should reverse the district court's granting of official immunity to Appellees White, Beaird and Tihen on Appellant's Missouri state law claims of assault and battery in Count VII of Appellant's First Amended Complaint and remand the case to the district court for further proceedings.

## III. THE DISTRICT COURT ERRED IN GRANTING APPELLEE CITY OF FERGUSON, MISSOURI'S MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S CLAIM OF MUNICIPAL LIABILITY ON THE BASIS THAT THE CITY OF FERGUSON POLICE DEPARTMENT OPERATED UNDER CUSTOMS AND POLICIES WHICH SHOWED DELIBERATE INDIFFERENCE TO THE CONSTITUTIONAL RIGHTS OF CITIZENS, INCLUDING APPELLANT, IN THE LACK OF RECORD KEEPING ABOUT PARTICULAR OFFICERS' USE OF FORCE, COMPLETELY IGNORING USE OF FORCE REPORTS AND OFFICERS WHO MAY BE USING EXCESSIVE FORCE AND IGNORING OFFICERS WHO ARE SUBJECTED TO CITIZEN'S COMPLAINTS AND SUCH DELIBERATE INDIFFERENCE CAUSED APPELLANT'S INJURIES.

### Standard of Review

The district court's grant of summary judgment is reviewed *de novo*, "viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." Montoya, 669 F.3d at 870 (*quoting* Chambers v. Pennycook, 641 F.3d 898, 904 (8th Cir. 2011)).

## Argument

First, Appellant set forth two (2) separate counts against the municipality, Appellee City of Ferguson; Count V set forth three different alternative bases for "*Monell*" liability and Count VI claimed liability of *respondeat superior* based upon the dissent of Justice Breyer in Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 416 (1997). App. 68-72. In dismissing Appellant's claims against Appellee City of Ferguson, the district court solely dismissed the claims because the court dismissed Appellant's excessive force claims: "In Counts V and VI of his Complaint, Mr. Davis alleges that the City of Ferguson is liable under § 1983 for the use of excessive force by Officers White, Beaird, and Tihen. Because the underlying excessive force claim has failed, the claims against the City of Ferguson fail as well." Add. B-17.

Appellee City of Ferguson moved to dismiss Appellant's claims against it at the summary judgment stage, however, it set forth absolutely no facts showing that it was entitled to summary judgment as a matter of law. Appellee City of Ferguson's Motion for Summary Judgment simply made conclusory statements:

> "…the City of Ferguson is entitled to summary judgment as a matter of law because Plaintiff failed to prove an underlying constitutional violation, therefore no municipal liability attaches under § 1983. There is no evidence the City of Ferguson failed to hire, train, supervise or control the Defendant Officers or that there is any history or pattern of unconstitutional acts. Further, there is no evidence that the City of Ferguson had any customs, practices or usages that were the cause of or the moving force behind any constitutional deprivation to Plaintiff."

App. 313 (*citations omitted*).

However, Appellee City of Ferguson did not set forth a single fact in its statement of facts in support of its conclusory statements that it was entitled to summary judgment. *See* App. 316-28. The initial burden is on the moving party to clearly establish the non-existence of any genuine issue of fact that is material to a judgment in its favor. *See* City of Mt. Pleasant, Iowa v. Associated Elec. Co-op, Inc., 838 F.2d 268, 273 (8th Cir. 1988). In this case, Appellee City of Ferguson completely failed to meet its initial burden clearly establishing the non-existence of any genuine issue of fact that is material to a judgment in its favor. If this Court reverses the trial court's granting of qualified immunity on Appellant's excessive force claims, this Court should reverse the district court's granting of summary judgment to Appellee City of Ferguson on his claims of municipal liability in Count V of Appellant's First Amended Complaint[4].

In addition and alternatively, Appellant set forth specific facts below establishing a prima facie case of *Monell* liability against Appellee City of Ferguson in that the City of Ferguson police department operated under customs and policies which showed deliberate indifference to the constitutional rights of citizens in the

[4] Appellant recognizes the majority opinion in Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397 (1997) and preserves his claim of 42 U.S.C. 1983 *respondeat superior* liability in Count VI of his First Amended Complaint based on the dissent of Justice Breyer.

lack of record keeping about particular officers' use of force, completely ignoring use of force reports and officers who may be using excessive force and ignoring officers who are subjected to citizen's complaints. App. 610-11.

Thomas Moonier (hereinafter "Chief Moonier") was the Chief of Police for the Ferguson Police Department from January of 1998 to December of 2009. App. 610. At the time of the incident subject to this case, if a non-lethal force report was completed, a copy of the report would be sent to Chief Moonier, who would read it and then Chief Moonier would place the report in his out basket so his secretary could take the report and put it with the case file. Id. If an officer used non-lethal force, their supervisor was required to complete the non-lethal force report. Id. However, if an officer used non-lethal force, the officer could complete the non-lethal force report and give it to their supervisor for approval. Id. Copies of non-lethal force reports were not kept in the personnel file of the officer who used non-lethal force warranting the report to be made. Id.

Chief Moonier didn't know what was maintained in his police officer's personnel files. App. 611. Chief Moonier didn't know who was in charge of maintaining officers' personnel files. Id. There was no way to identify any Ferguson police officers that were subject of one or more citizens' complaints. Id. There was no way to identify any Ferguson police officers who had completed several use of force reports. Id.

Appellant sent a standard discovery request seeking use of force reports on the use of force by Appellees White, Beaird and Tihen prior to the date of the incident subject to this case. Counsel for Appellee City of Ferguson claimed in open court at a hearing on discovery disputes that he could not comply with the request because, "use of force complaints were not – the documents related to those went to the reports and not to the officer's files or another way." App. 611, 837-38.

Appellant also sought citizen complaints and internal reports on the individual officers' use of force. In the Appellee officers' response, they said there are none regarding excessive force, however, Counsel for the Appellee officers' said that to produce such documents would require a, "report-by-report review which I'm telling you would be extremely burdensome to do…" App. 844. The district court at least stated, "I have some concerns about the recordkeeping, and that's the problem here." App. 850.

Appellant has established a prima facie case of *Monell* liability against Appellee City of Ferguson in that the City of Ferguson police department operated under customs and policies which showed deliberate indifference to the constitutional rights of citizens in the lack of record keeping about particular officers' use of force, completely ignoring use of force reports and officers who may be using excessive force and ignoring officers who are subjected to citizen's complaints. In order to prevail on a claim for municipal liability under 42 U.S.C. 1983, the plaintiff may

proceed under the standards set forth by the Supreme Court in Monell v. Department of Social Services, which establishes municipal liability based on policy statements, ordinances, regulations or decisions formally adopted and promulgated by government final policy makers or on custom or usage. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978).

The system employed here by Chief Moonier and the Appellee City of Ferguson Police Department at the time of the incident subject to this case, September 20, 2009, is nearly identical to situation and evidence adduced in *Parrish v. Luckie*[5]. *See* Parrish v. Luckie, 963 F.2d 201 (8th Cir. 1992). In *Parrish*, this Court held:

> "Chief Bruce created and maintained a use-of-force reporting system under which he would not be notified of physical force exerted by officers unless one of his lieutenants or sergeants determined the use of force was unwarranted. Chief Bruce testified that he developed this use-of-force reporting system because "I was getting reports of too much excessive force being used." Chief Bruce did not review use-of-force files that were not forwarded to him and his Department kept no log on the history of force used by particular officers.
>
> Reviewing the record, we find overwhelming evidence to support the jury's finding that North Little Rock police officers operated in a system where reports of physical or sexual assault by officers were discouraged, ignored, or covered up. Moreover, evidence revealed that officers operating under this system recognized they could act with impunity unless a citizen filed a written complaint. Clearly, the North

[5] At the summary judgment stage below, Appellant abandoned the 1st Alternative Basis of Municipal Liability and the 2nd Alternative Basis of Municipal Liability of Appellant's First Amended Complaint of delegation to the officers to make policy and failure to hire, supervise and train the officers. App. 68-70.

> Little Rock Police Department operated "inherently deficient ... police administrative procedures involving the discovery of police misconduct.""

Parrish, 963 F.2d at 205 (*citing* Brandon v. Holt, 469 U.S. 464, 467, 105 S.Ct. 873, 875, 83 L.Ed.2d 878 (1985)).

Chief Moonier implemented a policy of ignoring the use of force of Appellee City of Ferguson police officers and encouraging Appellee City of Ferguson police officers to use excessive force without fear of any consequences. On September 20, 2009, copies of non-lethal force reports were not kept in the personnel file of the officer who used non-lethal force warranting the report to be made. App. 610, 823. Chief Moonier didn't know what was maintained in his police officer's personnel files. App. 611, 823. On September 20, 2009, Chief Moonier didn't know who was in charge of maintaining officers' personnel files. App. 611, 823.

Chief Moonier's Department operated under customs and policies which showed deliberate indifference to the constitutional rights of citizens. On September 20, 2009, there was no way to identify any Appellee City of Ferguson police officers that were subject of one or more citizens' complaints. App. 611, 824-25. On September 20th, 2009, there was no way to identify any Appellee City of Ferguson officers who had completed several use of force reports. App. 611, 825.

Chief Moonier's customs and policies were the driving force behind the excessive force violations by Appellees White, Beaird and Tihen against Appellant.

This is evident by the fact that Appellee White and Appellee Tihen both admitted striking Appellant and using non-lethal force on Appellant, yet neither Appellee White nor Appellee Tihen even completed non-lethal use of force report regarding this incident subject to this case with Appellant.

Appellee City of Ferguson had a policy and custom for its officers to use excessive force at will. Under Chief Moonier's system, an officer could complete 100 non-lethal use of force report in a year and Chief Moonier or the officer's supervisor would not know the number because copies were not kept in the officer's personnel file. The same goes for citizen's complaints. The complete lack of record keeping showed a deliberate indifference and Appellant has present a *prima facie* case of municipal liability.

For the foregoing reasons, this Honorable Court should reverse the district court's granting of summary judgment to Appellee City of Ferguson on Appellant's claim of municipal liability in violation of the Fourteenth Amendment to the Constitution in Count V of Appellant's First Amended Complaint as Appellant has established a prima facie case of *Monell* liability against Appellee City of Ferguson in that the City of Ferguson police department operated under customs and policies which showed deliberate indifference to the constitutional rights of citizens in the lack of record keeping about particular officers' use of force, completely ignoring use of force reports and officers who may be using excessive force and ignoring officers

who are subjected to citizen's complaints and remand the case to the district court for further proceedings.

## IV. THE DISTRICT COURT ERRED IN GRANTING APPELLEE JOHN BEAIRD'S MOTION FOR JUDGMENT AS A MATTER OF LAW AT THE CLOSE OF APPELLANT'S EVIDENCE ON APPELLANT'S CLAIM OF DUE PROCESS VIOLATION BECAUSE APPELLEE JOHN BEAIRD'S EXECUTING FALSE AFFIDAVITS IN SUPPORT OF MUNICIPAL PROPERTY DAMAGE CHARGES AGAINST APPELLANT SHOCKS THE CONSCIENCE.

### Standard of Review

Review of a district court's grant of a motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure is *de novo*. Miller v. City of Springfield, 146 F.3d 612, 614 (8th Cir. 1998). When reviewing the district court's grant of judgment as a matter of law, we must (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn. Roberson v. AFC Enterprises, Inc., 602 F.3d 931, 933-34 (8th Cir. 2010); *citing* Larson ex rel. Larson v. Miller, 76 F.3d 1446, 1452 (8th Cir. 1996)(*quoting* Pumps & Power Co. v. S. States Indus., 787 F.2d 1252, 1258 (8th Cir.1986)).

### Argument

In Count II of Appellant's First Amended Complaint, Appellant claimed that

Appellee Beaird violated Appellant's substantive due process rights of a fair criminal proceeding by executing four (4) false sworn under oath complaint/informations that asserting that Appellant committed "Property Damage" in violation of Section 29.61 of the revised Code of the City of Ferguson, 1998 by transferring blood onto the uniforms of Appellee Tihen, Officer Pillarick, Appellee White, Appellee Beaird and Officer Pillarick. App. 64-65. Appellee Beaird moved for summary judgment on Count II of Appellant's First Amended Complaint, which was denied by the district court and the case proceeded to jury trial on Appellant's claim of substantive due process violation (and Appellee White's Missouri state law counterclaim of battery) court[6]. Add. B-16 – B-24.

The district court, in ruling on Appellee Beaird's motion for summary judgment stated, "To breach the shield of qualified immunity by establishing a violation of substantive due process rights, a plaintiff must show (1) that the official violated one or more fundamental constitutional rights, and (2) that the conduct of the official was shocking to the contemporary conscience." Add. B-18 (*quoting* Winslow v. Smith, 696 F.3d 716, 731 (8th Cir. 2012)). As to the first prong, the district court held that, "under the facts viewed in the light most favorable to Mr. Davis, Officer Beaird intentionally fabricated the four complaints and that fabricated evidence was

[6] Appellant also moved for summary judgment on Count II of Appellant's First Amended Complaint and the motion was denied by the district court. Add. B-16 – B-24.

then used to secure Mr. Davis' conviction on two counts of Destruction of City Property." Add. B-21 – B-22. As to the second prong, the district court discussed several cases on whether an officer's action(s) shocks the conscience and concluded, "when viewed in the light most favorable to Mr. Davis, the facts could support a reasonable inference that Officer Beaird violated Mr. Davis' substantive due process rights." B-22 – B-24.

On March 24, 2014, the case proceeded to jury trial. Appellant presented his case and rested after a half day of evidence on March 25, 2014. Counsel for Appellee Beaird made on oral motion for judgment as a matter of law stating that there was no evidence that Appellee Beaird prepared false evidence of false sworn complaints/affidavits against Appellant and that even if there was such evidence, it was not conscience shocking behavior. Trial Tr. Vol. II, pp. 109-13. Counsel for Appellee Beaird did admit that, "the evidence is conflicting." Trial Tr. Vol. II, p. 112.

Despite Appellant submitting even more evidence in his favor at trial than at the summary judgment stage, the district court did find that there was sufficient evidence for the case to go to the jury on the actual constitutional violation but made an unexplained reversal of her summary judgment holding and stated, "My problem here is the "shocks the conscience" standard…I cannot find that this shocks the conscience." Trial Tr. Vol. II, p. 117-18. The district subsequently issued a written memorandum and order that simply stated:

> "After hearing argument from both sides, the Court found that, based on the evidence adduced at trial, Officer Beaird's conduct did not rise to a conscience-shocking level. The Court therefore entered judgment as a matter of law in favor of Officer Beaird on Count II, Mr. Davis' substantive due process claim. Fed. R. Civ. P. 50(a)(1)."

Add. E-2.

The district court did not provide any rationale for the ruling. In reviewing the district court's summary judgment memorandum and order, it is apparent that the district court looked at the municipal charges being for "Destruction of City Property" instead of focusing on the actions of Appellee Beaird:

> "Mr. Davis' substantive due process claim is a far cry from *White* and *Winslow*, or even *Moran*. The plaintiffs in *White* and *Winslow* were falsely convicted of rape and murder based on a witch hunt that can only be described as the perfect storm of incompetence and corruption and exonerated years later through DNA evidence. By contrast, Mr. Davis alleges that he was forced to plead guilty to two counts of Destruction of City Property. This does not sound conscience-shocking by comparison."

Add. B-23.

The charges against Appellant are not at the center of the inquiry, it is the actions of Appellee Beaird that have to be conscience-shocking. "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." County of Sacramento v. Lewis, 523 U.S. 833, 848, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State ... shall ... deprive any person of life, liberty, or property, without due process of

law." U.S. Const. amend. XIV, § 1. "If officers use false evidence, including false testimony, to secure a conviction, the defendant's due process is violated." Wilson v. Lawrence County, 260 F.3d 946, 954-55 (8th Cir. 2001) (*citing* Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (noting that this principle is implicit in any concept of ordered liberty); *cf.* Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935) (stating that due process is "a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured")).

This Circuit in *Moran v. Clarke* recognized that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." Moran v. Clarke, 296 F.3d 638, 647 (8th Cir. 2002) (*quoting* County of Sacramento v. Lewis, 523 U.S. 833, 849, 118 S. Ct. 1708, 1718, 140 L. Ed. 2d 1043 (1998)). In stating there was sufficient evidence to support plaintiff's claim of a "conscience-shocking, reckless investigation and manufactured false evidence" this Court in *Winslow v. Smith* held that:

> ""Law enforcement officers ... have a responsibility to criminal defendants to conduct their investigations and prosecutions fairly...." Wilson, 260 F.3d at 957. "There is no countervailing equally important government interest that would excuse [officers] from fulfilling their responsibility" to conduct a fair investigation. Id."

Winslow, 696 F.3d at 736.

Appellee Beaird's knowingly executing false sworn complaints/informations in support of municipal charges and prosecution shocks the conscience. Appellee Beaird essentially "piled on" charges against Appellant. Appellant subsequently pled guilty to two of the four destruction of city property charges. He was deprived of a fair municipal criminal proceeding and subsequently deprived of a substantial amount of money, approximately $3,000 in fines stemming from Appellee Beaird's false sworn complaints/informations. Appellee Beaird abused his power as a police officer, knowing that the municipal criminal proceedings would follow against Appellant on the basis of the false informations. Appellee Beaird is a public official hired to enforce the laws, not break them in his position of authority. Society places trust in police officers to be truthful and to knowingly sign a false affidavit against a citizen shocks the conscience. False evidence, the sworn complaints/informations which are essentially false testimony, was used to secure convictions against Appellant and Appellant's due process is violated.

If the district court's ruling on Appellant's substantive due process claim is not reversed, it will send a message to Appellee Beaird and police officers that it is o.k. to fill out false, sworn affidavits in support of criminal prosecutions that leads to guilty pleas or convictions. This is a very chilling message.

For the foregoing reasons, this Honorable Court should reverse the district

court's granting of judgment as a matter of law to Appellee Beaird on Appellant's claim of substantive due process violation of the Fourteenth Amendment to the Constitution in Count II of Appellant's First Amended Complaint as Appellee Beaird's alleged conduct shocks the conscience as a matter of law and remand the case to the district court for further proceedings.

## V. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS APPELLEE MICHAEL WHITE'S COUNTERCLAIM FOR BATTERY UNDER MISSOURI STATE LAW ON THE BASIS THAT THE COUNTERCLAIM WAS ABANDONED OR NO LONGER PENDING BECAUSE APPELLEE MICHAEL WHITE FAILED TO PLEAD THE COUNTERCLAIM IN RESPONSE TO APPELLANT'S FIRST AMENDED COMPLAINT.

### Standard of Review

Review of a district court's interpretation of the Federal Rules of Civil Procedure is *de novo*. Kuelbs v. Hill, 615 F.3d 1037, 1041 (8th Cir. 2010).

### Argument

Appellant filed his original complaint against Appellees White and City of Ferguson on August 5, 2010. On October 4, 2010, Appellees White and City of Ferguson filed an Answer and Appellee White filed a counterclaim for Missouri state law battery. Appellee White's counterclaim did not make any allegations as to the jurisdiction of the court that was invoked. App. 50-53. Appellant filed his First Amended Complaint against Appellees White, Beaird, Tihen and City of Ferguson on February 26, 2013. Appellees White, Beaird, Tihen and City of Ferguson filed an

answer to Appellant's First Amended Complaint on March 7, 2013. It is undisputed that Appellee White did not file a counterclaim in response to Appellant's First Amended Complaint. After the district court stated in her summary judgment ruling that the case was going to proceed to trial on Appellee White's counterclaim of battery against Appellant, Appellant moved for a declaratory ruling that Appellee White's counterclaim was abandoned for failing to plead it in response to Appellant's First Amended Complaint. On March 10, 2014, just two weeks before the jury trial in this matter, the district court denied Appellant's motion holding:

> "Given the ambiguity in the Federal Rules of Civil Procedure with regard to whether a counterclaim must be replead, the Court declines a formalistic interpretation of Rule 15(a)(3) and finds that equitable considerations weigh in favor of allowing Officer White to proceed with his counterclaim."

Add. C-7 – C-8.

The district court noted that few district courts have addressed this issue, but the district courts are divided. Add. C-5 – C-7. Although cited by Appellant, the district court cited but did not discuss the one appellate opinion that has discussed and decided this issue. Contrary to the district court's assertion, there is no ambiguity in the Federal Rules of Civil Procedure, particularly with regard to Rules 13 and 15. The black letter of the rules require that a counterclaim be pled in response to an amended complaint, regardless of whether a counterclaim was pled in response to a previously filed complaint.

The leading district court case to decide the issue of whether, according to the Federal Rules of Civil Procedure, a counterclaim must be pled in response to an amended complaint; even if the counterclaim was pled in response to the original complaint, is Johnson v. Berry, 228 F.Supp.2d 1071 (E.D.Mo. 2002). In *Johnson v. Berry*, the Court held:

> "The last sentence of Fed.R.Civ.P. 15(a) requires a party to plead in response to an amended pleading. No option is given merely to stand on preexisting pleadings made in response to an earlier complaint. As the language of Rule 13(a) and (b) makes clear, a counterclaim is part of the responsive pleading. By failing to plead in response to the first amended complaint, and therein to replead his counterclaim, Berry abandoned his counterclaim, which effectively dropped from the case."

Johnson, 228 F.Supp.2d at 1079.

In addition to the above-cited district court cases, Appellate could find only one appellate decision on this this issue. The Federal Circuit in *General Mills, Inc. v. Kraft Foods Global, Inc.* cited and followed Judge Stohr's holding in *Johnson v. Berry*. *See* General Mills, Inc. v. Kraft Foods Global, Inc., 487 F.3d 1368 (Fed. Cir. 2007). The Federal Circuit in *General Mills, Inc. v. Kraft Foods Global, Inc.* amended and clarified its original opinion (General Mills, Inc. v. Kraft Foods Global, Inc., 487 F.3d 1368 (Fed. Cir. 2007)) that a counterclaim was not abandoned if not re-plead in response to an amended complaint, the prior counterclaim was simply no longer pending. General Mills, Inc., 495 F.3d 1378, 1381 (Fed. Cir. 2007).

Regarding a response to an amended pleading, Rule 15(a)(3) of the Federal

Rules of Civil Procedure sets forth:

> "Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later."

Fed.R.Civ.P. 15(a)(3).

Additionally, Rule 13(a) of the Federal Rules of Civil Procedure sets forth in pertinent part that:

> "A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party..."

Fed.R.Civ.P. 13(a).

Rules 15 and 13 of the Federal Rules of Civil Procedure require that any counterclaim must be plead in response to an amended complaint within 14 days after service and a counterclaim made in response to a complaint that is superseded by an amended complaint is no longer pending if it is not re-plead in response to the amended complaint.

The district courts that have reached an opposite result than the results reached in *General Mills* and *Johnson* miss the key words of Rule 13(a) of the Federal Rules of Civil Procedure, "at the time of service". *See* Fed.R.Civ.P. 13(a). *See e.g.* Ground Zero Museum Workshop v. Wilson, 813 F.Supp.2d 678, 706 (D.Md. 2011); Dunkin' Donuts, Inc. v. Romanias, 2002 WL 32955492, *1 (W.D.Pa. May 29, 2002). When an amended complaint is filed, it is served on the defendants and if it adds a new

party, a summons must issue or a request for waiver must be made. By the plain language of Rules 13(a) and 15(a)(3) of the Federal Rules of Civil Procedure, Appellee White's counterclaim was and is no longer pending because it was not pled in response to Appellant's First Amended Complaint.

For the foregoing reasons, this Honorable Court should reverse the district court's holding that Appellee White's counterclaim of Missouri state law battery was pending at the time of trial and remand the case to the district court for further proceedings.

## VI. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS APPELLEE MICHAEL WHITE'S COUNTERCLAIM FOR BATTERY UNDER MISSOURI STATE LAW ON THE BASIS THAT THE DISTRICT COURT LACKED JURISDICTION OVER APPELLEE MICHAEL WHITE'S COUNTERCLAIM AFTER THE DISTRICT COURT GRANTED THE APPELLEES' MOTION FOR SUMMARY JUDGMENT AND DISMISSED APPELLANT'S CLAIMS OF EXCESSIVE FORCE AND STATE LAW ASSAULT AND BATTERY AGAINST APPELLEE WHITE.

### Standard of Review

"The exercise of supplemental jurisdiction is reviewed for abuse of discretion." Brown v. Mortgage Electronic Registration Systems, Inc., 738 F.3d 926, 933 (8th Cir. 2013) (*citing* Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 640, 129 S.Ct. 1862, 173 L.Ed.2d 843 (2009)).

### Argument

First, Appellant recognizes that this Honorable Court's ruling on Appellant's

Point I on this appeal could make this point moot. If this Court reverses and remands on Point I, Appellant's federal claims of excessive force against Appellees White, Beaird and Tihen, Appellant concedes that the district court would have supplemental jurisdiction over Appellee White's Missouri state law counterclaim of battery under 28 U.S.C. § 1367.

In ruling on the Appellant and Appellees' respective motions for summary judgment, the district court dismissed all of Appellant's claims except Count II of Appellant's First Amended Complaint, which claims that his civil rights were violated by Appellee Beaird in creating false evidence, sworn informations/complaints, that were used in the subsequent municipal prosecution of Appellant. Despite dismissing Appellant's claim of excessive force against Appellee White, the district court stated in her summary judgment Memorandum and Order that the case would proceed to trial on Appellee White's counterclaim that claimed Missouri state law battery in response to Appellant's claim of excessive force against Appellee White. Add. B-24.

After the district court's summary judgment ruling, Appellant moved to dismiss Appellee White's counterclaim for state law battery for lack of jurisdiction. The motion was proper as "[a]ny party or the court may, at any time, raise the issue of subject matter jurisdiction." GMAC Commercial Credit LLC v. Dillard Dept. Stores, Inc., 357 F.3d 827, 828 (8th Cir. 2004). While the district court's power to

exercise jurisdiction under the "same case or controversy" requirement in 28 U.S.C. § 1367(a) is one ordinarily resolved on the pleadings, the court's decision to exercise that jurisdiction "is one which remains open throughout the litigation." Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284, 1287 (8th Cir. 1998) (*citing* United Mine Workers v. Gibbs, 383 U.S. 715, 727, 86 S.Ct. 1130, 1139–40, 16 L.Ed.2d 218 (1966) (discussion of pendent jurisdiction and discretionary power of federal trial court to refuse to hear state law claims, now codified by 28 U.S.C. § 1367)).

It is important to note that the only two claims against Appellee White in Appellant's First Amended Complaint was for excess force under the Fourth Amendment and Missouri state law battery and both of those claims were dismissed on summary judgment. Despite Appellee White being essentially dismissed from the case, the district court did not discuss its jurisdiction over Appellee White's counterclaim of Missouri state law battery and simply stated that the case was going to proceed to jury trial on his Appellee White's counterclaim, as well as Appellant's substantive due process violation claim against Appellee Beaird. Add. B-1 – B-25.

Whether the Court had subject matter jurisdiction over Defendant White's Counterclaim is governed by 28 U.S.C. § 1367(a), which sets forth the following:

> "Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to

> claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

*See* 28 U.S.C. § 1367(a).

Before the Court can exercise supplemental jurisdiction, it must have a claim before it that has original jurisdiction. Appellant's due process claim in Count II of Appellant's First Amended Complaint against Defendant John Beaird ("Defendant Beaird") that has survived summary judgment raises a federal question and confers upon this Court original jurisdiction.

"In order to exercise supplemental jurisdiction, a federal court must first have before it a claim sufficient to confer subject matter jurisdiction. Furthermore, the federal claim and state claim must stem from the same 'common nucleus of operative fact'; in other words, they must be such that the plaintiff 'would ordinarily be expected to try them all in one judicial proceeding.'" Montefiore Medical Center v. Teamsters Local 272, 642 F.3d 321, 332 (2d Cir. 2011), *quoting* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *see also* ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters, 645 F.3d 954, 963 (8th Cir. 2011). "Only compulsory counterclaims can rely upon supplemental jurisdiction; permissive counterclaims require their own jurisdictional basis." Lehman v. Revolution Portfolio L.L.C., 166 F.3d 389, 393 (1st Cir. 1999); *see also* Unique Concepts, Inc. v. Manuel, 930 F.2d 573, 574-75 (7th Cir. 1991); St. Jude Medical,

Inc. v. Lifecare Intern., Inc., 250 F.3d 587, 594 (8th Cir. 2001).

The federal claim that survived summary judgment was against Appellee Beaird for violation of Appellant's due process rights of a fair criminal proceeding in manufacturing false evidence by executing false sworn complaints/affidavits. Appellant claimed that Appellee Beaird executed false affidavits that were used in Appellant's municipal criminal proceedings whereas Appellee Beaird swore under oath that Appellant committed four violations of property damage by bleeding on the Appellee officers and Officer Pillarick's uniforms. It was the use of the complaints/affidavits in Appellant's municipal criminal proceedings that is the basis of Appellant's federal claim against Appellee Beaird. Appellee Beaird executed the complaints/affidavits on September 24, 2009 and Appellant pled guilty to the municipal charges months later. Appellee White's counterclaim for battery under Missouri law against Appellant alleges that Appellee White was punched by Appellant in the Ferguson jail on September 20, 2009, four (4) days before Appellee Beaird executed the complaints/affidavits and months before Appellant pled guilty to the municipal charges.

The district court lacked supplemental jurisdiction over Appellee White's counterclaim because Appellant's federal claim against Appellee Beaird for substantive due process violation and Appellee White's counterclaim against Appellant for state law battery do not stem from the same 'common nucleus of

operative fact'. The operative facts concerning each claim are completely different. The common nucleus concept covers cases that arise out of the same "transaction or occurrence". Appellant's federal claim against Appellee Beaird and Appellee White's counterclaim against Appellant are completely separate and distinct and are from different "occurrences". There are two separate "transactions" or "occurrences" with respect to those claims: Appellee White's counterclaim against Appellant stems from the incident and only the incident that occurred in the Ferguson jail on September 20, 2009. Appellant's substantive due process claim against Appellee Beaird stems from the subsequent prosecution of his municipal case that occurred months after September 20, 2009. The allegations of the sworn complaints/affidavits executed by Appellee Beaird that are at issue in Appellant's substantive due process claim against Appellee Beaird does not change this fact or make the claims from the same occurrence or transaction.

The difference of timing with respect to the operative facts to each claim was noted in *Highway Equipment Co., Inc. v. FECO, Ltd.*:

> "In the present case, the [state] count and the federal counts are not derived from a 'common nucleus of operative fact.' The facts alleged in the [state] count involved the alleged wrongful termination of a dealership agreement between the parties that designated FECO as a dealer for certain outdoor power equipment manufactured and supplied by Highway Equipment. That dealership agreement was terminated on September 16, 2002. The facts alleged in the federal counts involved not a contract, but a patent that issued on February 11, 2003, months after the dealership was terminated on September 16, 2002."

Highway Equipment Co., Inc. v. FECO, Ltd., 469 F.3d 1027, 1038-39 (Fed. Cir. 2006).

After the district court granted Appellee White's motion for summary judgment, there were no claims remaining against Appellee White and the district court did not have supplemental jurisdiction to hear the district court White's state law counterclaim for battery pursuant to 28 U.S.C. § 1367(a).

For the foregoing reasons, if this Honorable Court should reverse the district court's granting judgment as a matter of law on Appellant's substantive due process claim and affirm the district court's granting of summary judgment on Appellant's excessive force claims, then Appellant respect requests this Honorable Court to find that the district court does not have supplemental jurisdiction over Appellee White's Missouri state law counterclaim and remand the case to the district court for further proceedings.

## VII. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO BIFURCATE THE TRIAL OF APPELLEE MICHAEL WHITE'S COUNTERCLAIM FOR BATTERY UNDER MISSOURI STATE LAW FROM APPELLANT'S SUBSTANTIVE DUE PROCESS VIOLATION AGAINST APPELLEE JOHN BEAIRD IN THAT THE ISSUES WERE CLEARLY SEPARABLE AND HAVING ONE TRIAL WAS PREJUDICIAL TO APPELLANT.

### Standard of Review

"The denial of a motion to bifurcate under Fed.R.Civ.P. 42(b) is reviewed for abuse of discretion." Athey v. Farmers Ins. Exchange, 234 F.3d 357, 362 (8th Cir.

2000) (*citing* Equal Employment Opportunity Comm'n v. HBE Corp., 135 F.3d 543, 551 (8th Cir. 1998)).

## Argument

First, Appellant recognizes that this Honorable Court's ruling on Appellant's Point I on this appeal could make this point moot. If this Court reverses and remands on Point I, Appellant's federal claims of excessive force against Appellees White, Beaird and Tihen, Appellant concedes that there is no cause for bifurcation of Appellee White's counterclaim for battery and Appellant's federal claims of excessive force. Appellant further states that this point is moot if this Court does not reverse the district court's granting of Appellee Beaird's motion for judgment as a matter of law on Appellant's claim of substantive due process violation against Appellee Beaird.

Rule 42(b) of the Federal Rules of Civil Procedure provides that:

> "For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial."

Fed.R.Civ.P. 42(b).

"District courts possess broad discretion to bifurcate issues for purposes of trial under Fed.R.Civ.P. 42(b)." O'Dell v. Hercules, Inc., 904 F.2d 1194, 1201-02 (8th Cir. 1990); *see also* Athey, 234 F.3d at 362. "The court's determination should include consideration of the preservation of constitutional rights, clarity, judicial economy,

the likelihood of inconsistent results, and the possibility of confusion." Spurlock v. Nordyne, Inc., 91-1336C(5), 1992 WL 330206 (E.D.Mo. Jan. 29, 1992) *citing* O'Dell 904 F.2d at 1202; *see also* Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil, 704 F.2d. 1038, 1042 (8th Cir. 1983).

This Circuit has held that where the issues in a case are clearly separable, bifurcation is not an abuse of discretion. Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537 (8th Cir. 1977)(separate trial solely on the issue of whether the product was manufactured by the defendant). Appellant concedes that he, the party moving for bifurcation, bears the burden of proving that bifurcation is appropriate. Athey, 234 F.3d at 362.

The district court briefly addressed Appellant's motion to bifurcate trial and held:

> "However, as discussed above, Mr. Davis' due process claim depends on the fact issue of whether Mr. Davis resisted commands, including by punching Officer White. Therefore, Mr. Davis is not prejudiced by having a single trial. Furthermore, it would be waste of judicial resources to try separately claims that share common questions of fact."

Add. C-10.

After the district court's summary judgment rulings, the remaining claims were clearly separable and bifurcation was appropriate. Appellant's claim alleged in his substantive due process claim that his civil rights were violated by Appellee Beaird in creating false evidence, sworn informations/complaints, that were used in

the subsequent municipal prosecution of Appellant. Appellant's excessive force claims were dismissed on summary judgment. Appellee White's counterclaim alleged Missouri state law battery in response to Appellant's claim of excessive force. The issues of each separate claim do not overlap and the claims involved separate parties – Appellant vs. Appellee Beaird and Appellee White vs. Appellant. Whether or not Appellant punched or committed battery against Appellee has absolute no relation with and is entirely separable from Appellant's claim of substantive due process violation against Appellee Beaird. Even the substance of Appellee Beaird's sworn informations/complaints alleged that Appellant bled on the officers and Officer Pillarick's uniforms, not Appellee White. Whether or not Appellant punched Appellee White has no relation to the Appellant bleeding, or bleeding on the officers and Officer Pillarick's uniforms.

Allowing Appellee White to try his counterclaim and inject into the trial that Appellant punched Appellee White severely prejudices Appellant in his claim against Appellee Beaird and confuses the jury as to the presence of Appellee White's counterclaim and the lack of claim (for excessive force) by Appellant, which was dismissed on summary judgment. Appellant allegedly punching Appellee White is irrelevant and immaterial to Appellant's claim of substantive due process violation against Appellee Beaird and allows Appellee Beaird (who is represented by same counsel of Appellee White) to circumvent the Federal Rules of Evidence. *See*

Fed.R.Evid. 401, 403.

Additionally, in trying both claims together, there is a high probability that the jury will be confused. A counterclaim is just that, a counter, or responsive claim to an initial claim. The initial claim (Appellant's excessive force claim) was dismissed and the remaining claim was not against Appellee White, it is against a separate person, Appellee Beaird. There would be much less of a chance for confusion with the jury if Appellant's claim for due process violation against Appellee Beaird is tried by itself, separate from and Appellee White's counterclaim for Missouri state law battery against Appellant.

For the foregoing reasons, if this Honorable Court should reverse the district court's granting of summary judgment on Appellant's substantive due process claim and not Appellant's excessive force claims, this Honorable Court should reverse the district court's denial of Appellant's motion to bifurcate trial and order that Appellant's claim for due process violation against Appellee Beaird be tried separately from Appellee White's counterclaim for Missouri state law battery against Appellant and remand the case to the district court for further proceedings.

## CONCLUSION

For the foregoing reasons, Appellant presented a submissible case of excessive force and Missouri state law assault and battery and respectfully requests this Honorable Court to reverse the district court's judgment of dismissal of

Appellant's excessive force and Missouri state law assault and battery claims against Appellees Michael White, John Beaird and Kim Tihen; Appellant presented a submissible case of municipal liability and requests this Honorable Court to reverse the district court's judgment of dismissal of Appellant's municipal liability claim against Appellee City of Ferguson, Missouri; Appellant presented a submissible case of substantive due process violation and requests this Honorable Court to reverse the district court's judgment of dismissal of Appellant's substantive due process claim against Appellee John Beaird; Appellee Michael White filed to file his counterclaim in response to Appellant's First Amended Complaint as required by Rule 13(a) of the Federal Rules of Civil Procedure and Appellant requests this Honorable Court to reverse the district court's holding that Appellee Michael White's counterclaim of Missouri state law battery was pending at the time of trial.

If this Honorable Court should reverse the district court's granting judgment as a matter of law on Appellant's substantive due process claim and affirm the district court's granting of summary judgment on Appellant's excessive force claims, then the district court does not have supplemental jurisdiction over Appellee Missouri White's Missouri state law counterclaim.

If this Honorable Court should reverse the district court's granting of summary judgment on Appellant's substantive due process claim and not

Appellant's excessive force claims, this Honorable Court should reverse the district court's denial of Appellant's motion to bifurcate trial and order that Appellant's claim for due process violation against Appellee Beaird be tried separately from Appellee White's counterclaim for Missouri state law battery against Appellant because the claims are clearly separable.

Upon reversal, Appellant requests that this case be remanded to the district court for proceedings consistent with this Court's findings.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

1. This brief exceeds the type-volume limitation of F.R.A.P. 32(a)(7)(B) and because:

this brief contains 16,035 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii).

However, leave has been granted to file this brief in excess of length limitation of F.R.A.P. 32(a)(7)(B).

2. This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style of F.R.A.P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point, Times New Roman.

Dated: July 8, 2014.

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## VERIFICATION OF VIRUS-FREE ELECTRONIC FILES

The undersigned hereby certifies that the electronic files presented to the Clerk of this Court containing a copy of the Appellant's brief and the addendum have been scanned for viruses and are virus free.

Dated: July 8, 2014.

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## CERTIFICATE OF FILING AND SERVICE

The undersigned counsel for the Appellant, Henry Davis, hereby certifies that on July 8, 2014, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that, within 5 days of receipt of the notice that the brief has been filed, I will transmit 10 paper copies of the brief to the Clerk of Court and 1 paper copy to the counsel of record for the Appellee as noted below.

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