IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

RICHARD KLINE,

Plaintiff,

vs.

Civil Action File
No. 2004A-10602-6

KDB, INC. d/b/a DOC'S FOOD & SPIRITS,
MICHAEL CONNOR, JR.,
MICHAEL CONNOR, SR.,
CITY OF SMYRNA,
GUY CALDWELL and
CHONDRA FREEMAN,

Defendants.

ORDER

This case is before the court on the following motions which were heard August 20, 2007: (1) "City of Smyrna's Motion to Exclude Testimony of Plaintiff's Expert Fred G. Robinette;" (2) "City of Smyrna's Motion for Summary Judgment;" (3) "Defendant Officer Chondra Freeman's Motion for Summary Judgment;" and (4) "KDB, Inc. d/b/a Doc's Food & Spirits Motion for Summary Judgment." Upon consideration of the motions, responses, arguments of counsel and all matter filed of record, the court enters this order as follows.

1.
City of Smyrna's Motion to Exclude Testimony of Plaintiff's Expert Fred G. Robinette, III

Upon review of the affidavit and deposition testimony of plaintiff's expert Fred G. Robinette, III, in connection with the issues and evidence in this case, the court finds in terms of O.C.G.A. § 24-9-67.1 (b) that, with the exception stated below, his testimony

is not the product of reliable principles and methods.[1] The court further finds in terms of the Daubert[2] analysis that despite Mr. Robinette's extensive background, training and experience in law enforcement, at least at the federal level, his testimony will not assist the trier of fact. The jury does not need the assistance of Mr. Robinette in analyzing the evidence in light of the issues which will be presented to them in this case.[3]

Accordingly, the motion is granted, and Mr. Robinette's testimony is excluded subject to the exception stated.

2.
City of Smyrna's Motion for Summary Judgment

"To prevail at summary judgment under O.C.G.A. § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56 (c). A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case. If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards. All of the other disputes of fact are rendered immaterial . . . A defendant who will not bear the burden of proof at trial need not affirmatively disprove the nonmoving party's case; instead, the burden on the moving party may be discharged by pointing out by reference

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[1] With respect to the reliability requirement of the statute, Mr. Robinette's testimony is essentially based upon the principle of *ipse dixit* (it is so because I say it is so).
[2] Daubert .v Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
[3] Although Mr. Robinette's testimony concerning the mechanical aspects of handcuffing, including double locking and the physical effects of same, would constitute an exception to this ruling, as the result of the rulings set out below, such evidence will not be in issue in the case.

to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the nonmoving party's case. If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue. O.C.G.A. § 9-11-56 (e)." (Citation omitted). Lau's Corp. v. Haskins, 261 Ga. 491 (1991).

To the extent that plaintiff's pleadings could be construed to assert state law claims of false arrest, false imprisonment or malicious prosecution against the City of Smyrna, the city cannot be held vicariously liable for the acts attributed to its police officers. "A municipal corporation shall not be liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law." O.C.G.A. § 36-33-3. In Reese v. City of Atlanta, 261 Ga. App. 761 (2003), the Court of Appeals held that this statute provided immunity to the city with respect to plaintiff's claims of false arrest, false imprisonment, and malicious prosecution in connection with the city police officer's arrest of plaintiff. The Court of Appeals also held that the statute provided immunity with respect to plaintiff's claims of negligent hiring and negligent retention of the officer, and affirmed the grant of summary judgment in favor of the city on all the claims asserted.[4]

Moreover, it is undisputed in the record that plaintiff agreed to pay court costs in exchange for the entry of a nolle prossequi of the disorderly conduct charges that formed the basis of plaintiff's arrest by Smyrna police officers. See affidavit of John William Morse. Accordingly, plaintiff's subsequent prosecution did not terminate in his favor. Garner v. Heilig-Meyers Furniture Co., 240 Ga. App. 780, 782 (2) (1999). Termination

[4] The Court of Appeals also held that there was no evidence that the city had waived its immunity by the purchase of insurance under O.C.G.A. § 36-33-1.

of the prosecution in his favor is an essential element of any state law tort claim for false arrest or malicious prosecution. Id.

Plaintiff also asserts claims against the City of Smyrna under 42 U.S.C. § 1983. His claims in this regard are based upon the alleged use of excessive force by the arresting officer, Chondra Freeman, in effecting his arrest. This claim involves the arresting officer's intentional failure to double lock the handcuffs which resulted in injury to his wrists. He seeks to predicate liability upon the city's alleged inadequate training, supervision, discipline and remedial action regarding the arresting officer as well as negligent hiring and retention of the officer.

Although there is evidence in the record that Officer Freeman received training at POST concerning double locking of handcuffs and that she was made aware of Smyrna's policy that handcuffs are to be double locked except in cases where officer safety is involved, plaintiff contends that the evidence would authorize a jury to find that the city failed to train Officer Freeman on the double locking requirement or to inform her of this policy. Plaintiff contends that the evidence also shows that Officer Freeman's training officer, Mitch Plumb, told her that double locking was optional [Freeman Dep. 21-23]; that during her interview concerning this incident with Lt. Baker, the officer in charge of internal affairs, he told her that "back in his day they" did not double lock either [Freeman Dep. 36], although there is no evidence that Lt. Baker was a field officer after double locking became policy; and that Officer Freeman testified that she was never trained on the requirement to double lock [Freeman Dep. 21].

A key decision concerning claims under 42 U.S.C. § 1983 in the 11th Circuit is Gilmere v. City of Atlanta, 737 F.2d 894 (1984), which explained in detail the

implications of the Supreme Court's opinion in Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed2d 611 (1978), in the context of claims against a city for allegedly deploying untrained police officers and the use of excessive force by those officers. The 11th Circuit Court of Appeals held as follows:

> Monell v. Department of Social Services holds that a municipality can be sued for damages under 42 U.S.C. 1983 (1982) when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or is "visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision making channels" . . . Thus, Monell imposes liability on municipalities for deprivations of constitutional rights visited pursuant to municipal policy, whether that policy is officially promulgated or authorized by custom. The official policy or custom "must be 'the moving force of the constitutional violation' in order to establish liability of a government body under § 1983. . ."
>
> Monell limits what may constitute "custom." Custom consists of those practices of city officials that are "so permanent and well settled" as to have the "force of law". . . In defining custom in this fashion the Monell Court borrowed language from Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68, 90 S.Ct. 1598, 1613-14, 26 L.Ed.2d 142 (1970), which defines the term "custom" as "persistent and widespread . . . practices" or practices that are "permanent and well settled" or "deeply embedded traditional ways of carrying out . . . policy" . . . Monell additionally teaches that the city custom which may serve as the basis for liability may only be created by city "lawmakers or those whose edicts or acts may fairly be said to represent official policy" . . . .
>
> Finally, Monell makes clear that a city may not be held liable simply because its agent causes an injury, even a constitutional injury. As the Court cautioned, a municipality may not be held liable "solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." (Citations and footnotes omitted.)

Id. at 901-902.

In the present case there is no evidence of any other incident involving a Smyrna police officer in which failure to double lock caused injury of any kind. There is no evidence that the city policymakers intentionally failed to train or inform her regarding

the double lock policy. There is no evidence that any person, other than Officer Freeman, had knowledge of her practice never to double lock. Also, even assuming that Officer Plumb told Officer Freeman that double locking was optional,[5] it does not indicate that that the city policymakers shared any such view or that they even knew about it. There is no evidence that the city knowingly adopted a policy or acquiesced in a custom which they knew would result in injuries of the kind involved in this case.

The court concludes that the evidence cited by plaintiff fails to create a genuine issue of material fact to the effect that there exists on the City of Smyrna's behalf any persistent and widespread practice to injure arrestees through the failure to double lock or the failure to train on double locking, or that there exist any "permanent and well settled" or "deeply embedded traditional ways of carrying out" any such policies or practices in terms of the decisions in Monell and Gilmere.

The decision in Gold v. City of Miami, 151 F.3d 1346 (11th Cir. 1998), is instructive. In that case plaintiff brought an action under 42 U.S.C. § 1983 for injuries he sustained as a consequence of the arresting officer's failure to double lock handcuffs. The Court of Appeals noted that there was no evidence of any prior incidents of injuries caused by improper handcuffing. The court held that there are only "'limited circumstances' in which an allegation of failure to train or supervise can be the basis for liability under § 1983," citing City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Gold at 1350. "'Municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers. Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality – a 'policy' as defined by our prior

[5] Officer Plumb's testimony strongly disputes this assertion.

cases – can a city be liable for such a failure under § 1983.' City of Canton, 489 U.S. at 388-89, 109 S.Ct. 1197 (internal citations omitted)." Gold at 1350. The Court of Appeals held further that "[t]his high standard of proof is *intentionally onerous for plaintiffs*; imposing liability on a municipality without proof that a specific policy caused a particular violation would equate to subjecting the municipality to respondeat superior liability – a result never intended by section 1983." Gold at 1351 (emphasis added).

Accordingly, defendant City of Smyrna's motion for summary judgment is granted, and plaintiff's complaint is hereby dismissed as to said defendant.

3.
Chondra Freeman's
Motion for Summary Judgment

The complaint asserts various state law claims for relief against defendant Chondra Freeman individually, including false arrest, false imprisonment, assault and battery, and intentional infliction of emotional distress. Plaintiff also asserts a federal civil rights claim against Officer Freeman.

(a)
State Law Claims

As set out above, the evidence establishes that Officer Freeman had probable cause to detain and arrest plaintiff for disorderly conduct. This furnishes a complete defense to Officer Freeman on plaintiff's claims for false arrest, false imprisonment and assault and battery. As to plaintiff's claim of intentional infliction of emotional distress, there may be liability only if the defendant's conduct is extreme and outrageous, that is, the conduct must be "'so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

community.' (Cits.)." Turnbull v. Northside Hospital, Inc., 220 Ga. App. 883, 884 (2) (1996) (affirming summary judgment in favor of defendant). "Whether conduct rises to the level set forth above is question of law for the trial court." Id. at 884. The court finds that, considering the evidence of record most favorably to plaintiff, the conduct complained of, including the failure to double lock the handcuffs, simply does not rise to an actionable level of extreme and outrageous behavior.

Accordingly, Officer Freeman's motion for summary judgment as to the state law claims asserted by plaintiff is hereby granted, and said claims are hereby dismissed.

(b)

Federal Law Claims

Plaintiff has also asserted a federal claim under 42 U.S.C. § 1983 based upon Officer Freeman's failure to double lock plaintiff's handcuffs. Assuming that the failure to double lock the handcuffs was the cause of physical injury to plaintiff, the question is whether such failure is actionable under the evidence in this case.

The court is not aware of any authority which holds that failure to double lock handcuffs, standing alone, constitutes excessive force in terms of the Fourth Amendment as a matter of law. However, as the cases below indicate, injuries caused by handcuffing may be actionable under certain circumstances where injury is the result of handcuffs that are too tight, whether the tightness is the result of failure to double lock or some other cause.

Officer Freeman testified in her deposition that plaintiff never complained that the handcuffs were too tight [Freeman Dep. 160], and plaintiff acknowledged that he did not complain to her that the handcuffs were too tight [Kline Dep. 214]. Nevertheless,

plaintiff's companion, Katie Ledford, testified that plaintiff did in fact complain that the handcuffs were too tight [Ledford Dep. 55], and for purposes of the motion for summary judgment, construing the evidence most favorably toward plaintiff as nonmovant, the court will treat Ms. Ledford's testimony in this regard as true. However, there is no evidence that plaintiff complained of significant pain or injury or that Officer Freeman was aware that the tightness of the handcuffs was causing him any such pain or injury.

The issue before the court, therefore, is whether a jury issue exists as to the claim of excessive force where plaintiff complained to Officer Freeman that the handcuffs were too tight, but where there is no evidence that plaintiff complained to Officer Freeman that the tightness of the handcuffs was causing him any significant pain or injury and there is no evidence that he exhibited to Officer Freeman any signs of same as a result of the tightness of the handcuffs.

Plaintiff cites several cases in which the courts held that jury issues existed as to the claims of excessive use of force; however, in the pertinent cases cited, there was evidence that the arresting officer was aware that the tightness of the handcuffs was causing significant pain or injury. See Kopec v. Tate, 361 F.3d 772 (3d Cir. 2004) (plaintiff complained to officer that handcuffs were excessively tight, made repeated requests that they be loosened, begged that they be loosened, and fell to ground as he nearly fainted, but officer refused to loosen them for ten minutes); Meredith v. Erath, 342 F.3d 1057 (9th Cir. 2003) (plaintiff complained several times that the handcuffs were too tight and were causing her pain, but for 30 minutes they were left as they were); Palmer v. Sanderson, 9 F.3d 1433 (9th Cir. 1993) (officer refused to loosen handcuffs after plaintiff complained of pain); Genia v. New York State Troopers, No. 03-CV-0870, 2007

U.S. Dist. LEXIS 19700 (E.D.N.Y. 2007) (the officer twisted plaintiff Genia's handcuffs, wrenched her wrists and jabbed them into her back, causing her to complain of pain); Rosado v. Williams, No. 3:04-CV-369, 2006 U.S. Dist. LEXIS 24840 (D.Conn. 2006) (where plaintiff had advised the arresting officer that her shoulder had recently been dislocated and the officers at the holding cell declined to remove the handcuffs despite her complaints of pain); Ramusack v. Swanson, No. 2:04-CV-226, 2005 U.S. Dist. LEXIS 34299 (N.D. Ind. 2005) (upon being placed in the patrol car plaintiff began crying, complained about the tight handcuffs and asked the officer to loosen them); Patrick v. Vrablic, No. 04-CV-73720-DT, 2005 U.S. Dist. LEXIS 30275 (E.D. Mich. 2005) (plaintiff complained to officer that "these handcuffs are killing me"); Threlkeld v. White Castle Systems, Inc., 201 F.Supp.2d 834 (N.D. Ill. 2002) (handcuffs were so tight that they cut into plaintiff's skin and officers did not respond to her requests that they be loosened); McPherson v. Auger, 842 F.Supp. 25, 30 (D. Me. 1994) (officer handcuffed plaintiff too tightly and "then refused to loosen the handcuffs despite verbal complaints and crying").

The material facts of the present case are similar to those in Gilles v. Davis, 427 F.3d 197 (3rd Cir. 2005), and in Bak v. Township of Brick, No. 91-3385, 1992 U.S. Dist. LEXIS 14321 (D.N.J. 1992), where the courts granted summary judgment to the arresting officers on 42 U.S.C. § 1983 claims of excessive force under summary judgment standards similar to those in this State under O.C.G.A. § 9-11-56. In Bak v. Township of Brick, supra, the district court held that

> [the officer's] use of force in arresting plaintiff was objectively reasonable. Viewing the facts in the light most favorable to plaintiff, the submissions before the court indicate merely that [the officer] "really squeezed down on the cuffs," that plaintiff "asked him" to "loosen it up a

> little bit," which [the officer] refused to do, and that as he was being placed in the squad car, plaintiff "twisted to go down hurting even more." . . . Although the severity of the crime at issue was not great and there was no evidence that plaintiff posed an immediate threat to [the officer] or others, or that plaintiff was resisting arrest, it was objectively reasonable for [the officer] to handcuff plaintiff. Also, it was objectively reasonable for [the officer] to refuse to loosen the handcuffs. *The submissions before this court do not indicate that [the officer] had any reason to believe that plaintiff was experiencing anything other than mild discomfort.* Plaintiff merely "asked" [the officer] to loosen the handcuffs "a little bit." There is no evidence that plaintiff renewed his request after being placed in the squad car, although he had the opportunity to do so during the course of his conversation with [the officer] as the two drove [sic] the police station. As a result, summary judgment in defendant [officer's] favor is appropriate on plaintiff's excessive force claim.

Id. (emphasis added). In Gilles v. Davis, supra, the Third Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the arresting officer, holding that

> [u]nlike Kopec [supra], where the plaintiff fell to the ground and fainted with pain, obvious visible indicators of [plaintiff's] pain were absent (other than his alleged complaint that the handcuffs were too tight).

Id. at 208. See also Mladek v. Day, 320 F.Supp.2d 1373 (M.D.Ga. 2004).

The court finds that in the absence of any evidence which would indicate that Officer Freeman knew or should have known that the handcuffs, though tight, were causing significant pain or injury, the excessive force claim must fail. Officer Freeman's motion for summary judgment as to plaintiff's federal claim of excessive force is therefore granted, and said claim is hereby dismissed.

4.
Defendant KDB, Inc., d/b/a Doc's Food & Spirits
Motion for Summary Judgment

Construing the evidence in favor of plaintiff, the court finds that jury issues exist as to whether defendant KDB, Inc., breached its duty in keeping the premises safe in

connection with the physical altercation involving plaintiff and the Connor group, including any claims of assault or battery. There is some evidence from which a jury might infer that the KDB, Inc., manager encouraged the Connor group and failed to take action to address its conduct and prevent aggression on its part against plaintiff. See, e.g., Kline dep. pp. 69-70.

However, there is an absence of evidence that defendant KDB, Inc., its agents or employees, proximately caused or contributed in proximately causing any of plaintiff's wrist injuries. It has been established in the record as a matter of law that probable cause did in fact exist for Officer Freeman to arrest plaintiff for the offense of disorderly conduct as the result of plaintiff's own conduct. Probable cause as to plaintiff's own criminality, as well as the arresting officer's use of handcuffs while plaintiff was in police custody, were independent, intervening causes of plaintiff's wrist injuries as a matter of law.

> Although under Georgia law questions of negligence and proximate cause are ordinarily for the jury, plain and indisputable cases may be decided by the court as a matter of law. Hercules, Inc. v. Lewis, supra [168 Ga. App. 688 (1983)]; Williams v. Kennedy, 240 Ga. 163 (240 S.E.2d 51) (1977); Bussey v. Dawson, 224 Ga. 191 (160 S.E.2d 834) (1968). In such plain cases "[t]he inquiry is not whether the defendant's conduct constituted a cause in fact of the injury, but rather whether the causal connection between that conduct and the injury is too remote for the law to countenance a recovery." Hercules, Inc. v. Lewis, supra at 689; McAuley v. Wills, 251 Ga. 3 (303 S.E.2d 258) (1983); Henderson v. Dade Coal Co., supra [100 Ga. 568 (1897)].

Collie v. Hutson, 175 Ga. App. 672, 673 (2) (1985). See also Cantrell v. Thurman, 231 Ga. App. 510 (7) (1998); Olympia Services, Inc. v. Sherwin Williams Co., 224 Ga. App. 437 (1) (1997).

The court concludes that there is no evidence in the record which would create a genuine issue of material fact that either (1) such conduct on the part of plaintiff or (2) handcuffing injuries occurring while plaintiff was in police custody were foreseeable results of any breach of duty on the part of KDB, Inc.

Accordingly, the court grants partial summary judgment to KDB, Inc., with respect to any claims relating to plaintiff's arrest and with respect to any claims relating to plaintiff's wrist or other physical, emotional or psychological injuries and damages resulting from or relating to his arrest or to the use of handcuffs, which claims as to KDB, Inc., are hereby dismissed.

So ordered, this 23rd day of October, 2007.

Toby Prodgers, Judge
State Court of Cobb County

CERTIFICATE OF SERVICE

This is to certify that I have this date served copies of the within and foregoing Order by mailing same (through the Cobb County Mail System) to the parties in this case as follows:

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This 23rd day of October, 2007.

John E. Alday
Judicial Clerk to Judge Toby Prodgers
State Court of Cobb County
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