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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Derek Duane Higgins,
Plaintiff,
v.
Robert Laterza, et al.,
Defendants.

No. CV 16-03943-PHX-SPL (CDB)

ORDER

Plaintiff Derek Duane Higgins, who is represented by counsel, brought this case pursuant to 42 U.S.C. § 1983 and Arizona state law. (Doc. 1.) Pending before the Court are Defendant Laterza's Motion for Summary Judgment (Doc. 113), which Higgins opposes (Doc. 120), and Defendants Main Event Entertainment, LP ("Main Event") and Josh Bynum's Motion for Summary Judgment (Doc. 115), which Higgins also opposes (Doc. 124).

The Court will grant the Motions in part and deny them in part.

I. Background

In his Complaint, Higgins names as Defendants Maricopa County Sheriff's Office (MCSO) Deputy Robert Laterza, in his individual and official capacity, Main Event, Main Event Manager Josh Bynum, and Does 1 through 10.[1] (Doc. 1 at 3-4.) Higgins seeks damages, costs and attorney's fees. (*Id.* at 19-20.)

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[1] The Doe Defendants were dismissed by Order dated August 7, 2018. (Doc. 112.)

Higgins alleges that after he played games of laser tag at the Main Event in Tempe, Arizona, MCSO Deputy Laterza, who was providing security for Main Event, grabbed Higgins and violently threw him to the floor, causing serious injuries. (*Id*. at 5-6.) Higgins alleges that Main Event Manager Bynum was present when this happened and that Bynum and Laterza decided to confront Higgins after a report that Higgins allegedly caused a disturbance during a laser tag game. (*Id*. at 6-7.)

Higgins asserts claims under 42 U.S.C. § 1983 against all Defendants for violations of his Fourth and Fourteenth Amendment rights based on Defendants' alleged use of excessive force (Count One), false imprisonment and unlawful detention (Count Two), and malicious prosecution (Count Three). (Doc. 1 at 10-12.) Higgins asserts a *Monell* claim against Main Event for its policies, practices and customs that led to a violation of Plaintiff's constitutional rights (Count Four). (*Id*. at 12-13.) Higgins also asserts Arizona state law claims against all Defendants for negligence (Count Five) and intentional infliction of emotional distress (IIED) (Count Ten); against Laterza and Main Event for assault (Count Six), battery (Count Seven), and excessive force (Count Eight); and against Main Event for negligent hiring, retention, and supervision (Count Nine). (*Id*. at 13-19.)

II. Summary Judgment Standard

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the movant fails to carry its initial burden of production, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that the fact in contention is material, *i.e.*, a fact that might affect the outcome of the suit under the

governing law, and that the dispute is genuine, *i.e.*, the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however, it must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court must believe the nonmovant's evidence and draw all inferences in the nonmovant's favor. *Id.* at 255. The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

III. Defendant Laterza's Motion for Summary Judgment

A. Relevant Facts

On November 14, 2014, Defendant Laterza was working off-duty as security at Main Event in Tempe, Arizona. (Doc. 114 (Laterza's Statement of Facts) ¶ 1.) Laterza was wearing his MCSO uniform, duty belt, and MCSO radio. (*Id.* ¶ 2.) Laterza had worked private security at Main Event for approximately two years, reported to Main Event managing staff while he worked there, and was paid by Main Event for those private security services. (Doc. 120-1 at 25 ¶ 94 (Higgins' Additional Statement of Facts).)

Higgins and three friends consumed alcohol and played pool and several rounds of laser tag that day at Main Event. (Doc. 114 ¶¶ 4-5.) During the group's last round of laser tag, another laser tag participant, Kari Sedlak, reported to a Main Event employee that a man had pinned her against the wall using a laser tag gun. (*Id.* ¶ 6.) Sedlak testified at her deposition that during the game, Higgins "took his gun and he like pinned me up against the wall like under my, under my chin and my neck and like — I hit my head on the back, and I was like what are you doing, we're playing laser tag, you know. And he like pinned

me up against the wall and was all sketchy and bug-eyed . . . ." (Doc. 114-1 at 108 (Sedlak Dep. at 14:20-25).) Higgins does not dispute this is what Sedlak testified, but he disputes that this is what occurred and asserts that he may have briefly and inadvertently bumped into Sedlak during the game. (Doc. 120-1 at 3 (Higgins' Controverting Statement of Disputed Facts) ¶ 6.) The Main Event employee radioed for security and a manager, and Laterza and Main Event Managers Bynum and Casey St. Pierre responded to the laser tag area. (Doc. 114 ¶¶ 7-8.) Laterza spoke with Sedlak, who told him that a tall male wearing a hat pushed her against a wall and put a laser tag gun up to her mouth; she pushed the man off, left the game, and reported the incident. (*Id.* ¶¶ 9-10.) Sedlak identified Higgins as the person who pushed her against the wall, and Main Event managers asked Laterza to "escort Higgins outside."[2] (*Id.* ¶ 12.) The parties dispute what happened next.

According to Laterza's version, after Higgins was identified, Main Event Manager St. Pierre approached Higgins and asked him to leave. (*Id.* ¶ 44.) Higgins appeared incoherent to St. Pierre and "seemed to be under the influence of some type of drugs." (*Id.* ¶ 45.) St. Pierre asked Laterza to walk Higgins out the side door so that Higgins would not have to walk by Main Event guests. (*Id.* ¶¶ 47-48.)

Laterza then approached Higgins, tapped him on the shoulder and told Higgins he needed to speak with him. (*Id.* ¶ 13.) Higgins looked at Laterza, but did not respond, and Laterza tapped Higgins on the shoulder again, identifying himself as a deputy, and stating that he wanted to speak to Higgins about an incident; Laterza's intent was to investigate Sedlak's assault allegations. (*Id.* ¶¶ 14-16.) Defendant Bynum could smell alcohol, and Higgins appeared intoxicated; as Higgins started to follow Laterza, he "continued to yell, curse, and act belligerently. (*Id.* ¶¶ 54-55.) A witness, Dominic Pochiro, heard Higgins ask Laterza, "[w]ho the fuck are you?" and "[w]hat is going on?" (*Id.* ¶ 73.)

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[2] Higgins denies that Bynum used the word "escort" and claims Bynum ordered Laterza to "trespass" Higgins from the property, but the declaration testimony Higgins cites does not support that Bynum used the word "trespass." (Doc. 120-1 at 12, citing Laterza Dep. at 81:16-18 and Bynum Dep. at 82:10-13, 15-16.)

Higgins appeared intoxicated, confused and hesitant to Laterza, so Laterza put his hand on Higgins' waist to guide him toward the exit. (*Id.* ¶ 17.) After the two had moved about five feet, Higgins stopped and put his left hand on Laterza's shoulder and then slid his hand down Laterza's back toward his duty belt and pushed him. (*Id.* ¶¶ 19-20.) Laterza then stepped away and grabbed Higgins' right hand and tried to put Higgins in an "arm bar" to put Higgins' arm behind his back. (*Id.* ¶¶ 21-22.) Higgins pulled away and Laterza pulled Higgins toward him; Higgins put his elbow up and hit Laterza in the chest. (*Id.* ¶¶ 24-25.) Higgins pulled away a second time and Laterza told him he was under arrest. (*Id.* ¶ 26.) Laterza "performed a takedown maneuver by putting his foot in front of Higgins and pulled him to the ground so that he could control Higgins." (*Id.* ¶ 27.) Pochiro testified that before Laterza took Higgins down, he saw Higgins pull his arm away from Laterza. (*Id.* ¶ 78.) Laterza tried to control Higgins' descent during the takedown maneuver, but Higgins' head struck the floor. (*Id.* ¶ 28.) Laterza handcuffed Higgins once he was on the ground and Laterza noticed that Higgins' head was bleeding. (*Id.* ¶ 29.) Laterza picked Higgins up and walked him outside. (*Id.* ¶ 30.) Laterza testified that while he was interacting with Higgins, he was unsure whether Higgins would assault him, was upset, or "something else was at play." (*Id.* ¶ 31.) Higgins testified that "the first few moments" before and after he was taken to the ground "are pretty hazy." (*Id.* ¶ 36.)

According to Higgins' version of events, he was not intoxicated, did not smell like alcohol, and never cursed at Laterza. (Doc. 120-1 at 14 ¶¶ 54-55.) Manager St. Pierre never approached or spoke to Higgins. (*Id.* at 11 ¶ 44.) "At no time did [Higgins] follow Laterza"; rather, Laterza approached Higgins from behind, "grabbed his shoulder, put his arm behind his back and roughly forced Higgins forward without saying anything." (*Id*. at 4-5 ¶ 13 and at 14 ¶ 54.) Higgins tried to see who it was, but could not get a good look and did not see Laterza's uniform until he was outside and in handcuffs. (*Id*. at 5 ¶ 14.) Laterza did not ask Higgins about Sedlak's allegations. (*Id.* ¶ 16.) Higgins may have attempted to ask, "who are you?" "what's going on?" and "what's this all about?," but he did not yell, curse or act belligerently. (*Id*. at 14 ¶ 54.) Higgins did not make any contact

with Laterza, did not push Laterza, did not slide his hand down toward Laterza's duty belt, and did not pull away from Laterza at any time; Higgins' only movement was to partially turn to see who had grabbed him. (*Id.* at 6-8 ¶¶ 19-20, 26.) Bynum ordered Laterza "to trespass Higgins" and Higgins was "almost immediately thrown to the ground 'with an MMA sort of hip check.'" (*Id.* at 5 ¶ 17.) Higgins disputes that Laterza attempted to control his descent or "intended to do anything but slam his head violently to the ground" and when he hit the ground, it "sounded like a watermelon smacking the ground, onto which a pool of blood quickly formed." (*Id.* at 9 ¶ 28.) After taking Higgins to the ground, Laterza put his weight on Higgins' neck and back. (*Id.* at 25 ¶ 95.) Higgins was not moving and Laterza dragged him out of the building. (*Id.* at 9 ¶ 30.)

Higgins was treated at Tempe St. Luke's Medical Center and diagnosed with a facial contusion, facial laceration, nasal bone fractures, and closed head injury. (Doc. 114 ¶ 91.) Higgins also suffered ankle and foot injuries, an exacerbation of a back condition, and mental and emotional suffering, including stress, panic attacks and depression. (Doc. 120-1 at 25 ¶ 91.)

Laterza prepared an MCSO Incident Report and an MCSO Use of Force Report regarding the November 14, 2014 incident with Higgins. (Doc. 114 ¶ 88.) The Incident Reports state that on November 14, 2014 around 10:24 p.m., "Derek Higgins (S 1) Assaulted Kari Se[d]lak (V 1) and was also found to be Disorderly In his Conduct while at the Main Event Family restaurant located at 8545 South Emerald Drive Tempe, Arizona." (Doc. 114-1 at 45.) Laterza listed the offense as "Disorderly Conduct" under Arizona Revised statues § 13-2904A1. (*Id.*) Laterza wrote that Tempe Fire Department treated Higgins at the scene and he refused transport to the hospital; after that, Tempe Police officers transported Higgins to their facility and booked him "for the Aggravated Assault on [Laterza]." (*Id.* at 48.) Laterza noted that Sedlak "declined prosecution for the assault but said something has to be done." (*Id.*) Laterza wrote that due to Higgins' behavior he was not able to issue a citation to Higgins and he asked that the Maricopa County Attorney's Office (MCAO) review the Incident Report and prosecute Higgins for

disorderly conduct. (Doc. 114 ¶ 89.) Higgins does not dispute that Laterza requested he be prosecuted, but he disputes the statement to the extent it "implies Higgins was ever arrested for or charged with disorderly conduct or on any other charge related to his interactions with Sedlak in the laser tag arena." (Doc. 120-1 at 24 ¶ 89.)

Tempe Police Department (TPD) officers responded to the scene and interviewed Laterza and Main Event customers Brenna Callaway, Chase Callaway, and Dominic Pochiro. (Doc. 114 ¶¶ 79, 81, 84.) TPD Detective Lopez reviewed the officers' reports and submitted the case to the MCAO seeking a charge of one count of aggravated assault under Arizona Revised Statutes § 13-1204(A)(8)(A).[3] (*Id.* ¶ 86.) Higgins was charged with one count of aggravated assault on a police officer and the charge was subsequently dismissed. (*Id.* ¶ 87.)

B. Discussion

Higgins asserts in his Response that he "intentionally addresses" only his § 1983 claims in Count One (excessive force) and Count Three (malicious prosecution) and his state law tort claims in Count Six (assault), Count Seven (battery), and Count Ten (IIED). (Doc. 120 at 1.) Plaintiff states that only his claim against Laterza in his individual capacity should proceed and that he "concedes all other counts against Deputy Laterza." (*Id.*) Based on this averment, it appears that Plaintiff has abandoned his claims against Laterza in Count Two (false imprisonment/unlawful detention), Count Five (negligence), and Count Eight (excessive force under Arizona state law). Therefore, the Court will dismiss the official capacity claim against Laterza and the claims against Laterza in Counts Two, Five and Eight pursuant to Federal Rule of Civil Procedure 41(a)(2). The Court will also dismiss Plaintiff's Fourteenth Amendment claim against Laterza in Count One because it is duplicative of his Fourth Amendment claim. *See Graham v. Connor*, 490 U.S. 386, 395 (1989) ("[b]ecause the Fourth Amendment provides an explicit textual source of

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[3] Arizona Revised Statutes § 13-1204(A)(8)(A) provides that "[a] person commits aggravated assault knowing or having reason to know that the victim is . . . . [a] peace officer or a person summoned and directed by the officer."

constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims" of excessive force).

1. Count One (Excessive Force Under 42 U.S.C. § 1983)

A claim that law enforcement officers used excessive force in the course of an arrest is analyzed under the Fourth Amendment and its "reasonableness" standard. *Graham*, 490 U.S. at 395. This inquiry requires a "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interest against the countervailing governmental interests." *Id.*

To determine whether a Fourth Amendment violation has occurred, the court conducts a three-step analysis assessing: (1) the nature of force inflicted; (2) the governmental interests at stake, which involve factors such as the severity of the crime, the threat posed by the suspect, and whether the suspect is resisting arrest (the "*Graham* factors"); and (3) whether the force used was necessary. *Espinosa v. City & Cnty. of San Fran.*, 598 F.3d 528, 537 (9th Cir. 2010) (citing *Graham*, 490 U.S. at 396-97 and *Miller v. Clark Cnty.*, 340 F.3d 959, 964 (9th Cir. 2003)).

"The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)). At the summary judgment stage, once the court has "determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record," the question of whether or not an officer's actions were objectively reasonable under the Fourth Amendment is a "pure question of law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007). But an officer is not entitled to summary judgment if the evidence, viewed in the nonmovant's favor, could support a finding of excessive force. *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005). Because the excessive force balancing test is "inherently fact specific, the determination whether the force used to effect an arrest was reasonable under the Fourth Amendment should only be taken from the jury in rare cases."

Green v. City and Cnty. of San Fran., 751 F.3d 1039, 1049 (9th Cir. 2014) (internal quotation marks omitted); *see Smith*, 394 F.3d at 701 (excessive force cases often turn on credibility determinations, and the excessive force inquiry "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom").

The record shows that as a result of Laterza's actions during Higgins' arrest, Higgins sustained facial lacerations, nasal bone fractures, closed head injury, ankle and foot injuries, exacerbated back conditions, and mental and emotional suffering. (Doc. 114 ¶ 91; Doc. 120-1 at 25 ¶ 91.) Based on this record, a significant amount of force was used during Higgins' arrest, which must be justified by a similar level of "government interest [that] compels the employment of such force." *See Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001).

In evaluating the government's interest in the use of force, the Court considers the severity of the crime, the threat posed by the suspect, and whether the suspect resisted arrest or attempted to flee. *Miller*, 340 F.3d at 964. Laterza argues that "Sedlak's report of being pinned against the wall by Higgins could lead a reasonable officer to believe that Higgins might be violent." (Doc. 113 at 11-12.) Laterza also cites to witness statements that described Higgins as intoxicated or "seem[ing] to be under the influence of drugs," "overreacting," "belligerent," and "bizarre" and that Plaintiff was verbally and physically noncompliant. (*Id.*, citing Doc. 114 ¶¶ 17, 45, 54, 58, 70, 76-77.) Finally, Laterza asserts that he "was not sure if Higgins would assault him, whether Higgins was upset, or whether something else was at issue." (*Id.*, citing Doc. 114 ¶ 31.)

Plaintiff disputes that he was intoxicated and responds that he was not threatening anyone, no one was trying to get away from him, and he was not armed. (Doc. 120 at 7, citing Doc. 120-1 ¶ 34.) He contends that Sedlak was not injured by the "alleged misdemeanor assault" and Sedlak thought that pressing charges would be "ridiculous." (*Id.* at 7-8, citing Doc. 120-1 ¶¶ 89, 97.)

It is undisputed that Higgins was never charged with assault on Sedlak or disorderly conduct and the charge of aggravated assault on an officer was dismissed. However,

Higgins does not dispute that Sedlak told Laterza that a tall man wearing a hat pushed her against a wall and put a laser tag gun up to her mouth. (Doc. 114 ¶¶ 9-10.) the alleged assault, which Laterza asserts is a misdemeanor, weighs in favor of finding the severity of the crime was somewhat significant. Moreover, Laterza presents evidence that he perceived that Higgins was intoxicated, was unsure whether Higgins was upset or would assault him, and after he put Higgins in an arm bar, Higgins put up his elbow and struck Laterza in the chest. (*Id.* ¶¶ 17, 21-22, 24-25, 31.) After that, Laterza told Higgins he was under arrest and performed a takedown maneuver. (*Id.* ¶¶ 26-27.) These facts weigh in favor of finding that Higgins did pose some threat to Laterza, and that Higgins was resisting Laterza.

Higgins, though, contends that he posed no threat to Laterza and did not know who grabbed him from behind, that Laterza did not say anything to him, that he did not try to pull away or run his hand down Laterza's back toward his duty belt, and he did nothing more than try to turn to see who grabbed him before he was "almost immediately thrown to the ground 'with an MMA sort of hip check.'" (Doc. 120-1 ¶¶ 13-14, 17, 19-20, 26, 54.) Construing this evidence in the light most favorable to Higgins, Higgins did not know Laterza was a law enforcement officer, did not pose a threat to Laterza, resist arrest, or attempt to flee. This record, then, contains insufficient evidence to show that Laterza had a compelling need to use force prior to Higgins being thrown to the ground and handcuffed. A reasonable jury could choose to credit Higgins' version of events over Laterza's version. Accordingly, Higgins has created a genuine issue of fact as to whether he posed any threat to Laterza or bystanders and whether he was resisting arrest or attempting to flee.

Finally, the Court must balance the force used against the need for such force to determine whether the force used was "greater than reasonable under the circumstances." *Espinosa*, 598 F.3d at 537 (quoting *Santos v. Gates*, 287 F.3d 846, 854 (9th Cir. 2002)). According to Higgins, he was taken to the ground almost immediately after Laterza grabbed him from behind and Higgins' only movement was to try to turn around to see who had grabbed him. Again, given the conflicting accounts, there is a question of fact as

to whether Laterza's use of force by taking Higgins to the ground was greater than reasonable under the circumstances.

After considering the *Graham* factors, Higgins has created a triable issue as to whether Laterza used excessive force against him in violation of the Fourth Amendment.

2. Qualified Immunity

Laterza argues that even if he violated Higgins' Fourth Amendment rights by using excessive force, he is entitled to qualified immunity. (Doc. 113 at 13.) Higgins responds that Laterza is not entitled to qualified immunity because "off-duty officers working private security are not entitled to qualified immunity." (Doc. 120 at 9.)

When an officer seeks qualified immunity, the court must answer two questions: (1) "'whether qualified immunity is categorically available' to the type of officer at issue," and, if so, (2) whether the officer is entitled to qualified immunity in the particular case. *Bracken v. Okura*, 869 F.3d 771, 776 (9th Cir. 2017) (quoting *Jensen v. Lane Cnty*., 222 F.3d 570, 576 (9th Cir. 2000)). In *Bracken*, the Ninth Circuit determined that the defendant, an off-duty police officer hired and paid by a hotel to provide "special duty" security at a private event, and who was wearing his police uniform, acted under color of state law for § 1983 purposes because he prevented the plaintiff from leaving the scene by "invok[ing] the authority conveyed by his police uniform and badge." *Id*. The court, though, observed that "[s]tate action for § 1983 purposes is not necessarily co-extensive with state action for which qualified immunity is available." *Id*. (finding that the purpose of § 1983 "is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights" whereas qualified immunity "acts to safeguard government, and thereby to protect the public at large, not to benefit its agents") (quoting *Wyatt v. Cole*, 504 U.S. 158, 161, 167 (1992)).

The *Bracken* court noted that neither the Ninth Circuit nor the Supreme Court "has addressed the general availability of qualified immunity to off-duty police officers acting as private security guards," and so analyzed whether there was (1) a firmly rooted tradition of immunity for off-duty or special duty officers acting as private security guards and

(2) whether the off-duty officer had shown that the policies underpinning qualified immunity warranted invoking the doctrine. *Id*. at 777-78. The court determined first that there was no firmly rooted tradition of immunity for off-duty police officers and second that the defendant off-duty officer had not acted "in performance of public duties" or to "carry[] out the work of government" by, for example, preventing the plaintiff from committing a crime. *Id*. Rather, the Court held that the defendant off-duty police officer was acting on behalf of the hotel, at the hotel's direction, was being paid by the hotel, and was aiding the hotel "in realizing its goal of issuing [the plaintiff] a[n internal trespass] warning" for entering a New Year's Eve party without permission. *Id*.

Here, Laterza invoked the authority conveyed by his MCSO uniform in detaining and using force on Higgins thus leading to the conclusion that Laterza acted under color of state law. As to the first of the *Bracken* factors in determining whether Laterza can invoke qualified immunity, Laterza has not shown that there is a firmly rooted tradition of immunity for off-duty officers acting as private security guards. As Higgins correctly points out, the cases cited by Laterza in his Motion involved on-duty police officers, not off-duty officers working private security, and Laterza does not cite any relevant cases in his Reply showing a firmly rooted tradition of immunity for off-duty officers acting as private security guards.

As to the second *Bracken* factor, the Court must determine whether Laterza used his badge of authority "in service of a private non-governmental goal" or, instead, in performance of his public duties. *Bracken*, 869 F.3d at 776 (citing *Richardson v. McKnight*, 521 U.S. 399, 404-12 (1997)). Laterza argues that the only thing Main Event asked him to do was to get Higgins outside through a side door, but after that, "it is clear that Deputy Laterza stepped back into his duties as a sheriff's deputy" of "preserv[ing] the peace and arrest[ing] those who commit public offenses." (Doc. 123 at 3-4, citing Ariz. Rev. Stat. § 11-441(A)(1) and (2).) Laterza contends that "[i]nvestigating crime, detaining criminal suspects, and arresting suspects are all traditional governmental functions" and "it is clear that [he] is entitled to qualified immunity because he was performing his official

duties as a sheriff's deputy when Higgins's alleged injuries occurred." (*Id.*) Laterza cites to the fact that he interviewed Sedlak about the alleged assault, was preparing to interview Higgins, but ended up arresting Higgins, prepared an MCSO Incident Report, and asked Sedlak if she wanted to aid in prosecution. (*Id.* at 4, citing Doc. 114 ¶¶ 9-11, 16, 26, 88-89 and Doc. 121 ¶ 97.) These facts are decidedly closer to carrying out the work of government than in *Bracken*, which weighs in favor of allowing Laterza to assert the defense of qualified immunity.

Government officials are entitled to qualified immunity from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In deciding if qualified immunity applies, a court must determine: (1) whether the facts alleged show the defendant's conduct violated a constitutional right; and (2) whether that right was clearly established at the time of the violation. *Pearson v. Callahan*, 555 U.S. 223, 230-32, 235–36 (2009). Courts have discretion in deciding which of these two prongs to address first depending on the circumstances. *Id.* For a right to be clearly established there does not have to be a case directly on point; however, "existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, ___ U.S. ____, 137 S. Ct. 548, 551 (2017) (quoting *Mullenix v. Luna*, 577 U.S. ____, 136 S. Ct. 305, 308 (2017)).

Here, the Court has already determined that a question of fact exists regarding whether Laterza violated Higgins' Fourth Amendment rights. Therefore, the qualified immunity analysis turns on whether the right was clearly established at the time of Laterza's takedown of Higgins.

Laterza argues that even if Higgins was not resisting at all "it was not clearly established that a takedown of an unresisting arrestee violated the Fourth Amendment." (Doc. 113 at 15.) Laterza cites three district court cases in support of this argument. *See Huber v. Coulter*, No. CV 12-3293-GHK (JEM), 2015 WL 13173223, at *13 (C.D. Cal. Feb. 10, 2015) ("It cannot be said that every reasonable officer at the time would have

known—beyond debate—that he was violating plaintiff's Fourth Amendment rights" when he "used unnecessary but relatively minor force against an arrestee who had previously demonstrated a readiness to resist the police but was compliant and nonresisting at the time of arrest"); *Johnson v. City of Atwater*, No. 1:16-CV-1636 AWI SAB, 2018 WL 534038, at *6 (E.D. Cal. Jan. 24, 2018) ("it would not have been clear to a reasonable officer that the application of handcuffs and takedown of an initially-hostile-but-subsequently-unresisting arrestee would violate the Fourth Amendment—as defined by existing 9th Circuit precedent"); *Weddle v. Nutzman,* 2:15-cv-02041-RCJ-NJK, 2017 WL 58568, at *3 (D. Nev. Jan. 4, 2017) ("the quick takedown was reasonably necessary to ensure the safety of the arresting officer facing a very large, unrestrained man who had just exited a stolen vehicle").

On the other hand, the Ninth Circuit has denied qualified immunity in cases where officers tackled suspects. *See, e.g.*, *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 (9th Cir. 2007) (holding that the law was clearly established that "[g]ang-tackling without first attempting a less violent means of arresting a relatively calm trespass suspect—especially one who had been cooperative in the past and was at the moment not actively resisting arrest—was a violation of that person's Fourth Amendment rights"); *see also Santos v. Gates*, 287 F.3d 846, 853-54 (9th Cir. 2002) (holding that officers used excessive force where a takedown resulted in a broken back, the crime was public intoxication and the suspect neither fled nor resisted arrest).

Here, Laterza was investigating an assault claim, which was a more serious crime than the trespass and public intoxication violations in *Blankenhorn* and *Santos*. However, accepting Plaintiff's facts as true, it was clearly established that immediately taking to the ground and seriously injuring a suspect who was not resisting or posing a threat, without warning, and without first attempting a less violent means violated clearly established Fourth Amendment rights. Accordingly, the Court will deny summary judgment to Laterza on the basis of qualified immunity.

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3. Count Three (Malicious Prosecution Under 42 U.S.C. § 1983)

To prevail on a malicious prosecution claim under § 1983, "a plaintiff 'must show that the defendants prosecuted [him] with malice and without probable cause, and that they did so for the purpose of denying [him] equal protection or another specific constitutional right.'" *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004) (quoting *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir.1995)). "Malicious prosecution actions are not limited to suits against prosecutors but may be brought . . . against other persons who have wrongfully caused the charges to be filed." *Awabdy*, 368 F.3d at 1066 (citation omitted). The decision by a prosecutor to file a criminal complaint is presumed to result from an independent determination by the prosecutor and, therefore, shields from liablity those who participated in the investigation or filed a report resulting in the initiation of proceedings. *Id*. at 1067; *see also Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981). However, this presumption can be rebutted if a plaintiff can show that investigators improperly exerted pressure on the prosecutor, knowingly provided misinformation, concealed exculpatory evidence, or "otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiations of legal proceedings." *Awabdy*, 368 F.3d at 1067.

Laterza argues that Higgins' § 1983 malicious prosecution claim fails because there "was probable cause to support Detective Lopez's request to charge Higgins for aggravated assault independent of Deputy Laterza's statements." (Doc. 113 at 10.) Laterza cites to witness statements in the TPD police reports to argue that Higgins knew Laterza was a peace officer based on Brenna Callaway's statement to Officer Angel that she saw Higgins and Laterza talking and that it looked like Laterza was trying to get Higgins to leave and go outside and Chase Callaway's statement to Officer Allen that he saw Laterza approach Higgins and say he needed to speak with Higgins. (*Id*., citing Doc. 114 ¶¶ 2, 82-83.) Laterza also cites to Brenna Callaway's statement to Officer Angel that she saw Higgins push Laterza. (*Id*., citing Doc. 114 ¶ 82.) Laterza argues that based on these statements by persons other than Laterza "a reasonably prudent person could conclude that Higgins

intentionally pushed Deputy Laterza knowing or having reason to know that he was a peace officer, and as such, committed aggravated assault." (*Id.*)

Higgins responds that these witness statements in police reports "present multiple layers of hearsay and should be excluded from consideration." (Doc. 120 at 12-13, citing Fed. R. Civ. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.").) Higgins argues that the deposition testimony of those witnesses taken later do not support Laterza's position and so Laterza "is forced to rely on hearsay statements contained in police reports." (*Id.*) For example, Higgins contends that Brenna Callaway's report of seeing Higgins push Laterza "is disputed according to multiple witnesses, including by Brenna herself." (*Id.* at 14.) Higgins also argues that none of the statements Laterza relies on "allege that Higgins ever turned and saw Deputy Laterza" making the fact that Laterza was wearing his MCSO uniform "inconsequential." (*Id.* at 13.)

The witness statements Laterza relies on are not being offered for their truth, but to show their impact on the determination whether probable cause existed to charge Higgins with aggravated assault on an officer. Those witness statements, even if they were later denied or contradicted, were sufficient to provide "a reasonable ground of suspicion" that Higgins was guilty of the offense of aggravated assault on an officer. *See Gonzales v. City of Phoenix*, 52 P.3d 184, 187 (Ariz. 2002) ("probable cause is defined as a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the accused is guilty of the offense") (citation and quotation omitted). Even if the Court were to exclude the witness statements and find probable cause lacking, Higgins has not pointed to any evidence of malice or that Laterza's actions were for the purpose of denying Higgins equal protection or any other constitutional right. Therefore, based on this record, this is no triable issue of fact regarding Higgins' malicious prosecution claim, and the Court will grant summary judgment to Laterza on Higgins' malicious prosecution claim in Count Three.

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4. State Law Claims (Count Six (Assault), Count Seven (Battery), and Count Ten (IIED)

Laterza argues that Higgins' state law claims against him are barred because Higgins failed to file a notice of claim as required by Arizona Revised Statutes § 12-821.01(A) for claims against a public employee. (Doc. 113 at 15.)

Arizona Revised Statutes § 12-821.01(A) provides that a plaintiff bringing a claim against a public entity or public employee must provide a notice that "contain[s] facts sufficient to permit the public entity, . . . or public employee to understand the basis on which liability is claimed." Subject to certain exceptions not applicable here, the statute has five general requirements: (1) the notice of claim has to be filed within 180 days after the incident that gives rise to the claim; (2) the notice has to be filed with the proper entity or persons authorized to accept service for the public entity or public employee as delineated in the Arizona Rules of Civil Procedure; (3) the notice must contain facts which permit the public entity or public employee to understand the basis of the claimed liability; (4) the notice must contain an amount for which the claim may be settled; and (5) the notice must have facts supporting the requested settlement amount. Ariz. Rev. Stat. § 12-821.01(A). Further, the law requires that service be made on public employees, in addition to the entities that employ them, as a prerequisite to any lawsuit against such employees. *See Johnson v. Superior Court*, 763 P.2d 1382, 1384 (Ariz. Ct. App. 1988). "Compliance with the notice provision of § 12-821.01(A) is a "mandatory and essential prerequisite . . . and a plaintiff's failure to comply bars *any* claim." *Salerno v. Espinoza*, 115 P.3d 626, 628 (Ariz. Ct. App. 2005) (internal citations and quotation marks omitted) (emphasis in original). Arizona courts have held that plaintiffs who do not strictly comply with § 12-821.01(A) are barred from bringing suit. *Deer Valley Unified Sch. Dist. v. Houser*, 152 P.3d 490, 493 (Ariz. 2007); *Salerno*, 115 P.3d at 628; *Harris v. Cochise Health Sys.*, 160 P.3d 223, 230 (Ariz. Ct. App. 2007).

"An assertion that the plaintiff has not complied with the notice of claim statute is an affirmative defense to a complaint," *City of Phoenix v. Fields*, 201 P.3d 529, 535 (Ariz. 2009), and generally presents a question of fact for the jury. *Lee v. State*, 242 P.3d 175,

178 (Ariz. Ct. App. 2010). However, when "there is no genuine issue of material fact for a jury to consider, the issue may appropriately be disposed of by summary judgment." *Lee*, 242 P.3d at 179.

Higgins argues that Laterza's reliance on the statutory notice requirement is misplaced because the statute "applies only to claims against public employees that arise from conduct within the scope of their public employment." (Doc. 120 at 14, quoting *Villasenor v. Evans*, 386 P.3d 1273, 1276 (Ariz. Ct. App. 2016) (holding that a city council member and vice mayor was a public employee when she sent an allegedly defamatory email to a newspaper about the plaintiff's development project.) Because Laterza was providing security services to Main Event, and not Maricopa County, Higgins contends that Laterza was not acting within the scope of his employment with MCSO and Higgins was not required to file a notice of claim.[4] (*Id.*)

Laterza replies that he was engaged in his official duties because he was investigating a reported assault and he wanted to interview Higgins about what happened because he believed that an assault (a public offense) had possibly occurred. (Doc. 123 at 5, citing *State v. Fontes*, 986 P.2d 897 (Ariz. Ct. App. 1998).) In *Fontes*, the Arizona appellate court found that "[a] sheriff's deputy has a duty to preserve the peace and to arrest 'all persons who attempt to commit or [who] have committed a public offense . . . . even when the officer is 'off-duty.'" 986 P.2d at 899 (citing Ariz. Rev. Stat. § 11-441(A)(1) and (2)). Thus, "[a]n off-duty officer can be executing official duties or serving a private employer." *Id.* (citing *State v. Kurtz*, 278 P.2d 406 (Ariz. 1954)). The question is whether the off-duty officer "was acting in vindication of public right and justice or . . . merely performing acts of service to [a] private employer." *Id.* (internal citation and quotation omitted). The *Fontes* court held that the defendant, an off-duty sheriff's deputy who was employed as a plainclothes security officer by a supermarket, was a peace officer engaged in the execution of his official duties when he observed the plaintiff commit theft, verbally

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[4] Neither party argues the merits of Higgins' state law claims, but only whether Higgins was required to file a notice of claim.

identified himself as a deputy, showed official identification, and attempted to execute his statutory duties by arresting the plaintiff. *Id*. Moreover, a state employee who "exercises his official responsibilities in an off-duty encounter, typically acts under color of state law" when the employee (1) "purport[s] to or pretend[s] to act under color of law," (2) his "pretense of acting in the performance of his duties . . . had the purpose and effect of influencing the behavior of others," and (3) the harm inflicted on the plaintiff "related in some meaningful way either to the officer's governmental status or to the performance of his duties." *Naffe v. Frey*, 789 F.3d 1030, 1036 (9th Cir. 2015) (citations and internal quotations omitted).

Just as the off-duty sheriff's duty was executing his official duties in *Fontes*, Laterza was acting in vindication of a public right. Although Laterza was employed by Main Event, he was dressed in his MCSO uniform, he was investigating an alleged assault, and he executed his statutory duties by arresting and handcuffing Higgins. Laterza filed an MCSO Incident Report and an MCSO Use of Force Report regarding the incident with Higgins. Likewise, Laterza was acting under color of state law because, by wearing his MCSO uniform, he purported to act under color of law, his performance of his duties had the purpose and effect of influencing the behavior of others, and the harm inflicted on Higgins was related to Laterza's performance of his duties of investigating the alleged assault against Sedlak. Laterza was therefore acting within the scope of his public employment because he was executing his official duties, and Higgins was required to file a notice of claim.

There is no dispute that Plaintiff did not file a notice of claim against Laterza or MCSO as required by Arizona Revised Statutes § 12-821.01(A). Accordingly, the Court will grant summary judgment to Laterza on Higgins' state law claims in Counts Six, Seven and Ten.

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IV. Defendants Main Event and Bynum's Motion for Summary Judgment

A. Relevant Facts

Main Event hired sworn MCSO officers to conduct security on Friday and Saturday nights. (Doc. 116 (Defs.' Statement of Facts) ¶ 1.)[5] Main Event relied on MCSO to provide qualified individuals to perform these services and did not train the officers, direct how they handled their duties, and did not oversee the services they performed. (*Id.* ¶¶ 2-3.) Main Event relied upon the sworn MCSO officers to use their professional judgment and expertise in handling a patron. (*Id.* ¶ 4.) Main Event manager St. Pierre testified that when Main Event needs a patron to be escorted out of the building, "we call the cops." (*Id.* ¶ 21.)

Higgins does not dispute that Main Event did not train the officers, but he disputes that Main Event did not direct or oversee the officers. (Doc. 125 (Higgins' Controverting Statement of Disputed Facts) ¶ 3.) Higgins cites to Laterza's deposition testimony as showing that Main Event managers told Laterza what to do to secure the premises or when a fight broke out, that Laterza was instructed by managers that they wanted situations handled outside, that managers would direct Laterza to handle customers who had too much to drink, and that Laterza "would not ask anybody, including intoxicated persons, to leave the premises without checking with management." (*Id.*) Also, MCSO required third-party employers to provide workers' compensation coverage for its deputies working off-duty security. (*Id.* ¶ 49.)

From July 4, 2014 through January 1, 2015, Laterza provided security for Main Event pursuant to an Outside Work Permit approved by MCSO. (*Id.* ¶ 51.) During his time working security for Main Event, Laterza made arrests on approximately four occasions for conduct that included disorderly conduct, fighting and assault. (*Id.* ¶ 42.)

On November 14, 2015, Defendant Bynum and Casey St. Pierre were working as Operations Managers for Main Event; Defendant Laterza was also providing security that day at Main Event, dressed in his MCSO uniform and wearing his duty belt with his duty

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[5] For purposes of Main Event and Bynum's Motion for Summary Judgment, the Court will refer to these two Defendants collectively as "Defendants."

weapon and Taser. (Doc. 116 ¶¶ 5-6.) Kari Sedlak was at Main Event with her husband and children and encountered Higgins during a game of laser tag. (*Id.* ¶¶ 7-8.) As noted earlier, the parties dispute what happened during Higgins' encounter with Sedlak. After Sedlak's encounter with Higgins, Sedlak told Main Event employees what had happened, gave them a description of Higgins, and pointed him out. (*Id.* ¶ 15.) A laser tag attendant called on the radio that there was a guest being "overly aggressive" towards another guest, and St. Pierre responded to the area.[6] (*Id.* ¶ 17.) St. Pierre had safety concerns for the children in the area and either he or another employee called over the radio for Laterza to respond to the laser tag area. (*Id.* ¶¶ 19-20.) The attendant pointed out Higgins to St. Pierre and St. Pierre approached Higgins and told him "it was time to take off." (*Id.* ¶ 18.) Laterza and Bynum, who also heard the radio transmission, walked to the laser tag area. (*Id.* ¶ 23.) Sedlak told Laterza her account of what had happened and pointed out Higgins. (*Id.* ¶ 24.) At that point, Laterza believed that an assault had occurred. (*Id.* ¶ 25.) "Because [Higgins] would not leave upon request," St. Pierre and Bynum "asked Deputy Laterza to escort [Higgins] out the side door of the building." (*Id.* ¶ 26.)

Higgins disputes several of Defendants' facts. Higgins disputes that St. Pierre ever approached him, spoke to him, or told him to take off. (Doc. 125 ¶ 18.) Higgins asserts that his "only contact after leaving the laser tag area until he was thrown to the ground was with Deputy Laterza" and that he was not approached or spoken to by St. Pierre. (*Id.*) Higgins also disputes that Laterza believed an assault had occurred because, he argues, if that was Laterza's belief, he would have arrested Higgins for it, but he did not. (*Id.* ¶ 25.) Higgins contends that Laterza was instead ordered by Bynum to "trespass" or "get Higgins out of the property" and Laterza "then initiated the removal of Higgins without placing him under arrest for the assault." (*Id.*)

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[6] Higgins does not dispute that this is what the cited testimony says, but he disputes the suggestion that he was being "overly aggressive toward another guest" and asserts that he may have "briefly and inadvertently bumped into Ms. Sedlak." (Doc. 125 ¶ 17.)

Higgins testified that "as he left the laser tag area, his arm was grabbed from behind, he was pushed forward to the leave the area, and then he was thrown to the ground." (Doc. 116 ¶ 27.) Higgins' perception was that only one person was handling him. (*Id.* ¶ 28.) Laterza testified that he was not being supervised by Bynum, that Bynum was not directing his actions, that "he independently chose to use force against [Higgins]," and that "his actions were taken pursuant to his training and policy of MCSO." (*Id.* ¶¶ 33-35.)

As a result of Laterza's use of force against Higgins, Higgins suffered nasal bone fractures; a closed head injury; facial lacerations requiring 20 stitches and that left a disfiguring scar; ankle, foot and back injuries; mental and emotional stress, panic attacks, and depression; and neuro-cognitive disorders. (Doc. 125 ¶ 53.)

According to Higgins, Main Event "had no procedure in place to report a use of force incident involving its hired security or employees," "had no written rules, policies or procedures for handling or reporting security-related or use of force incidents," and did not perform background checks on the MCSO deputies it hired including "whether the deputies had a history of using excessive force, other police misconduct and past or pending Internal Affairs investigations." (*Id.* ¶¶ 44-46.) Higgins asserts that prior to the November 14, 2014 incident, Laterza "had been involved in a lawsuit arising out of the use of excessive force against an arrestee." (*Id.* ¶ 47.) Higgins further asserts that Laterza had a history of drug addiction to prescription narcotics, was "charged with the crime of possessing prescription narcotics that did not belong to him and was the subject of an Internal Affairs Investigation into his possession and use of prescription narcotics that were not prescribed to him." (*Id.* ¶ 48.)

Defendants object to Higgins' facts about Main Event's policies, Laterza's alleged involvement in an excessive force incident, and Laterza's addiction to prescription narcotics as either misstating the evidence and/or as irrelevant. (Doc. 128 at 2.) Defendants assert that Main Event "hired a POST-certified law enforcement officer to provide security at its venue" and "it did not need to train or supervise him in performing his official duties." (*Id.*, citing Ex. 9 at 14:3-13 (Laterza Dep.).) Defendants also assert that Laterza had never

previously been accused of using excessive force and that over 10 years ago, he was present when another deputy used excessive force while making an arrest, and Laterza intervened. (*Id*. at 3, citing Ex. A at 14:20-23, 15:11-16.) As to the prescription medication issue, Defendants present evidence that Laterza was caring for his wife after an accident and he inadvertently put her pill bottle in his pants pocket and went to work, but that an Internal Affairs investigation found that any charges were "unfounded." (*Id*., citing Ex. 9 at 21:11-15, 22:7-12, 22:24-23:13; Ex. 10.)

B. Discussion

In his Response, Plaintiff states that he "concedes that three federal claims should be dismissed" and that the remaining claims are his § 1983 *Monell* claim against Main Event in Count Four; his negligence claim against Main Event and Bynum in Count Five; his vicarious liability claims against Main Event in Counts Six, Seven and Ten; and his negligent hiring, training, and supervision claim against Main Event in Count Nine. (Doc. 128 at 1.) Because Plaintiff appears to have abandoned his § 1983 claims in Counts One (excessive force), Two (false imprisonment/unlawful detention) and Three (malicious prosecution), the Court will dismiss Counts One, Two and Three as to Defendants Main Event and Bynum pursuant to Federal Rule of Civil Procedure 41(a)(2). Plaintiff also appears to have abandoned his state law assault and IIED claims against Bynum in Counts Six and Ten, and the Court will dismiss Counts Six and Ten as to Bynum.

1. Count Four (*Monell* Claim Against Main Event)

To establish § 1983 liability against a private entity under *Monell*, a plaintiff must show (1) that the entity acted under color of state law, and (2) "if a constitutional violation occurred, the violation was caused by an official policy or custom of" the private entity. *Tsao v. Desert Palace, Inc*., 698 F.3d 1128, 1139 (9th Cir. 2012) (citation omitted) (noting that under *Monell*, § 1983 does not impose liability for constitutional violations committed by its employees under the theory of respondeat superior). Moreover, "[l]iability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct

has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (citations omitted).

A private entity can be considered to be acting under the color of state law through four tests: "(1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." *Tsao*, 698 F.3d at 1140. The private entity's actions must be "fairly attributable to government." *Id.* at 1139 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

Higgins argues that Main Event was acting under color of state law through the joint action test articulated in *Tsao*. (Doc. 124 at 6.) "The joint action test asks whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Tsao*, 698 F.3d at 1140 (internal citations and quotations omitted). Joint action may be proven either by showing the existence of a conspiracy "or by showing that the private party was a willful participant in joint action with the State or its agents." *Id.* "Ultimately, joint action exists when the state has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." *Id.* (alteration in original).

In *Tsao*, the court found that the actions of Desert Palace, a private casino, qualified as state action under the joint action test "thanks to its system of cooperation and interdependence with the LVMPD [Las Vegas Metropolitan Police Department]." *Id.* As evidence of this joint action, the court noted that the LVMPD provided a training course to the casino's private security guards allowing them to issue a citation to appear in court for the crime of misdemeanor trespassing (referred to by its acronym "SILA"), which a LVMPD officer explained helped "'alleviate some of the manpower concerns of the police'" by "relieving them from responding to every claim of trespassing that arises at a casino." *Id.* The security guards also routinely called the LVMPD's records department to get information concerning warrants. *Id.* Therefore, the court found that the casino and the state were joint participants in the SILA program "which produced benefits that accrue to both Desert Palace and the LVMPD." *Id.* ("By training Desert Palace security guards,

providing information from the records department, and delegating the authority to issue citations, the State has so far insinuated itself into a position of interdependence with [Desert Palace] that it must be recognized as a joint participant in the challenged activity.") (internal citation and quotation omitted).

Higgins argues that the joint action reasoning in *Tsao* "is even stronger and more applicable to the present action" because the security guard in *Tsao* was not a police officer, unlike Laterza, who was a sworn MCSO officer and was wearing his MCSO uniform, duty belt, and weapons. (Doc. 124 at 7.) Higgins further contends that Laterza's authority was not limited to misdemeanor trespassing citations and that he had made arrests at Main Event on other occasions for disorderly conduct, fighting and assault. (*Id*.) Higgins argues that this authority benefitted both Main Event and MCSO, "which did not have to expend manpower to handle security-related incidents at Main Event." (*Id*.)

In this case, Plaintiff has not presented sufficient evidence to establish joint action between Main Event and MCSO. There is nothing akin to the SILA authority at issue in *Tsao*, no evidence showing that MCSO trained Laterza or Main Event's security guards on how to carry out their duties at Main Event, no evidence that MCSO had delegated authority to issue citations, or provided information to Main Event's security guards about outstanding warrants on Main Events guests such that the court could conclude that the state had insinuated itself into a position of interdependence with Main Event as a joint participant. Accordingly, based on this record, the Court concludes that Main Event was not acting under color of state law such that it is subject to *Monell* liability, and the Court will grant summary judgment to Main Event as to Count Four.

2. Count Five (Negligence Claim Against Bynum and Main Event)

"To recover on a negligence claim, a plaintiff must prove a duty requiring the defendant to conform to a standard of care, breach of that duty, a causal connection between breach and injury, and resulting damages." *Ryan v. Napier*, 425 P.3d 230, 235 (Ariz. 2018). "A negligence claim focuses on the defendant's conduct; intent is immaterial." *Id.* By contrast, "a battery claim requires proof that the defendant intended to cause harmful or

offensive contact with the plaintiff." *Id.* (holding that the negligent use of intentionally inflicted force is not a cognizable claim).

Defendants argue that Higgins' claim lacks factual support or foundation as Higgins does not deny "maybe bumping into a woman" during the laser tag game. (Doc. 115 at 11.) Defendants argue that Sedlak's report and identification of Higgins to Main Event employees "clearly had merit" and that Higgins has not disclosed any evidence as to the applicable standard of care for how a manager at an entertainment facility (or any facility) is to investigate a patron's complaint. (*Id.*) Defendants contend that Higgins' allegations that they were negligent "are based upon sheer speculation, not evidence." (*Id.*)

Higgins responds that Bynum had a duty "to act reasonably in his handling of the situation" and had a duty of reasonable care "to ensure that patrons of Main Event, including Higgins, were not harmed by his actions and inaction while at the restaurant." (Doc. 124 at 17.) Higgins argues that Bynum "breached this duty owed to Higgins by failing to investigate Sedlak's allegations and, instead, hastily ordering that Laterza remove Higgins from the restaurant." (*Id.*)

The record reflects that Bynum heard the radio transmission from the laser tag attendant about an "overly aggressive" guest and that Bynum went to the laser tag area. (Doc. 116 ¶¶ 22-23.) After Sedlak pointed out Higgins, Bynum ordered Laterza to either "trespass" or "get Higgins out of the property." (Doc. 125 ¶ 25.) Without more, Higgins has not shown that Bynum acted unreasonably. For example, there is no evidence that Bynum ordered Laterza to use force and Higgins has not cited any authority showing that Bynum had a duty to further investigate Sedlak's claim before ordering Higgins removed from the property. Absent this showing of a duty to conform to a particular standard of care and breach of that duty, Higgins' claim of negligence against Bynum fails and the Court will grant summary judgment to Bynum as to Count Five.

Higgins makes no argument regarding his negligence claim against Main Event. Absent a showing of a duty for Main Event to conform to a particular standard of care and

breach of that duty, Higgins' negligence claim against Main Event fails and the Court will grant summary judgment to Main Event as to Count Five.

3. Counts Six (Assault), Seven (Battery), and Ten (IIED) (Vicarious Liability Claims Against Main Event)

Higgins alleges in Counts Six, Seven and Ten that Main Event "is vicariously liable for the actions of Deputy Laterza as he was employed by Main Event and an authorized agent of Main Event and at all times mentioned was acting within the purpose and scope of such agency and employment." (Doc. 1 at 15, 17, 19.)

"An employer is vicariously liable for the negligent or tortious acts of its employee acting within the scope and course of employment." *See Baker ex rel. Hall Brake Supply v. Stewart Title & Trust of Phoenix, Inc.*, 5 P.3d 249, 254 (Ariz. Ct. App. 2001); *Smith v. Am. Exp. Travel Related Servs. Co*., 876 P.2d 1166, 1171 (Ariz. Ct. App. 1994) (finding that a private employee's tortious acts committed within the "scope of his employment" permits the employer to be held vicariously liable for those acts under a theory of respondeat superior).

Defendants argue that an employer is not vicariously liable for the negligence of an independent contractor and that "general supervisory control . . . is insufficient to subject [an employer] to liability" for the acts of an independent contractor. (Doc. 115 at 9-10.) Defendants contend that Laterza relied upon his MCSO training and its policies concerning the use of force and that Main Events managers did not direct or supervise Laterza on how to remove Higgins or whether to use physical force. (*Id*. at 10-11.)

Higgins responds that Laterza was not an independent contractor, but rather that Main Event had a "master-servant" relationship with Laterza and is vicariously liable for Laterza's actions. (Doc. 124 at 10.) Both parties cite to *Simon v. Safeway, Inc.*, 173 P.3d 1031 (Ariz. Ct. App. 2007), a case in which the Arizona Court of Appeals considered whether a grocery store was vicariously liable for the conduct of a security guard provided by a third-party security service. The Arizona court found first that Arizona cases "distinguish . . . a servant from an independent contractor primarily based on the employer's right to control how the work is performed." *Id*. at 1035. As evidence tending

to support that a master-servant relationship existed between the store and employees of the security service, the *Simon* court pointed to the contract between the store and the security service requiring the security service's employees to abide by the stores "policies and practices," that the store's shoplifting policy provided specific directives about how suspected incidents of shoplifting should be handled, and that the security guard trespassed the shoplifting suspect from the store" "[a]s per manager Jesse Blanco . . . ." *Id.* (remanding to permit additional discovery on whether a master-servant relationship existed between the store and the security guard). As an alternate basis for vicarious liability, the *Simon* court also determined that when Safeway chose to provide security services on its premises, it voluntarily assumed a nondelegable duty to protect its business invitees "from the intentionally tortious conduct of those with whom it had contracted to maintain a presence and provide security on its premises." *Id.* at 1040.

Higgins argues that the same factors present in *Simon* are present in this case, including that manager Bynum instructed Laterza to trespass Higgins from the venue, that a Main Event employee alerted Laterza to the incident, and Main Event managers played a role in Laterza's decision to detain Higgins. (Doc. 124 at 11.) Higgins also cites to evidence that Laterza was not to ask anyone to leave the premises without first checking with management, that Laterza was directed when to break up fights or ask people to leave, and that Main Event managers dealt with intoxicated persons and only when the managers were given a hard time was it Laterza's duty to deal with the situation. (*Id.*)

Based on this record, there is a question of fact whether a master-servant relationship existed between Main Event and Laterza, making Main Event vicariously liable for Laterza's conduct. There is also a question of fact whether Main Event had a non-delegable duty to protect its business invitees "from the intentionally tortious conduct of those with whom it had contracted to maintain a presence and provide security on its premises." *Simon*, 173 P.3d at 1040. Accordingly, the Court will deny summary judgment to Main Event as to Higgins' vicarious liability claims in Counts Six, Seven and Ten.

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4. Count Six (Assault) and Count Seven (Battery) (Against Main Event)

Aside from arguing that Main Event is not vicariously liable, Defendants have not presented any argument as to the merits of Higgins' assault and battery claims in Counts Six and Seven. Accordingly, Higgins need not show anything, and the Court will deny summary judgment to Main Event as to Counts Six (Assault) and Seven (Battery).

5. Count Ten (IIED Claim Against Main Event)

To prevail on an IIED claim, a plaintiff must present facts showing that: (1) the conduct by the defendant is "extreme" and "outrageous"; (2) the defendant either intended to cause emotional distress or recklessly disregarded the near certainty that such distress would result from his conduct; and (3) severe emotional distress occurred as a result of the defendant's conduct. *Citizen Publishing Co. v. Miller*, 115 P.3d 107, 110 (Ariz. 2005). To meet the "extreme and outrageous" standard, a plaintiff must show that "the defendant's acts were so outrageous in character and 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." *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 905 P.2d 550, 554 (Ariz. Ct. App. 1995) (internal quotation omitted). As to the third element, the emotional distress suffered must be severe. *Midas Muffler Ship v. Ellison*, 650 P.2d 496, 501 (Ariz. Ct. App. 1982). Because "severe emotional distress" is not readily capable of precise legal definition, Arizona courts apply a case-by-case analysis with respect to these determinations. *See id.* (citing cases); *see also Lucchesi v. Frederic N. Stimmell, M.D., Ltd.*, 716 P.2d 1013, 1016 (Ariz. 1986). "Only when reasonable minds could differ in determining whether conduct is sufficiently extreme or outrageous does the issue go to the jury." *Mintz*, 905 P.2d at 554.

Defendants argue that, even accepting Higgins' version of events of true, his IIED claim fails because Laterza's alleged conduct cannot be considered outrageous, extreme, and beyond all possible bounds of decency. (Doc. 115 at 15.) Nor is there any evidence that Laterza "used excessive force against Plaintiff with the intent to or in reckless disregard of the near certainty that emotional distress would result." (*Id.*) Defendants argue that Higgins' claim is that Laterza, "in employing normal arrest and takedown

maneuvers, used excessive physical force and injured him," but that there is no evidence that Laterza "acted with the intent of inflicting emotional distress." (*Id.*)

Higgins responds that reasonable minds could view Laterza's conduct as extreme and outrageous where Higgins was being taken out of a restaurant "for allegations that he was playing laser tag improperly," he had not committed any crime, and there was no threat to Laterza. (Doc. 124 at 16.) Higgins also argues that at the very least, Laterza "recklessly disregarded that emotional distress would follow from slamming Higgins's face and skull to the ground." (*Id.*) Finally, Higgins cites the mental and emotional stress, panic attacks, and depression he says he suffered from this incident. (*Id.* at 17, citing Doc. 125 ¶ 53.)

Even accepting Higgins' version of events as true, Higgins has presented no evidence that Laterza either intended to cause emotional distress or recklessly disregarded the near certainty that such distress would result from his conduct. Accordingly, the Court will grant summary judgment to Main Event as to Count Ten.

6. Count Nine (Negligent Hiring, Training, and Supervision Claim Against Main Event)

"An employer is liable for the tortious conduct of its employee if the employer was negligent or reckless in hiring, supervising, or otherwise training the employee." *Joseph v. Dillard's, Inc.*, No. CV-08-1478-PHX-NVW, 2009 WL 5185393, at *18 (D. Ariz. Dec. 24, 2009) (noting that Arizona follows the Restatement (Second) Agency) with regard to negligent hiring and supervision). "In Arizona, '[f]or an employer to be liable for negligent hiring, retention, or supervision of an employee, a court must first find that the employee committed a tort.'" *Id.* (quoting *Kuehn v. Stanley*, 208 Ariz. 124, 130 (Ct. App. 2004)).

Defendants argue that Main Event "hired sworn MCSO officers to provide on-site security on Friday and Saturday nights, and relied upon MCSO to provide qualified officers." (Doc. 115 at 13.) Defendants argue that Higgins' allegations of negligence "are merely speculation—without any foundation as to the industry standard of care for reasonably prudent entertainment venue in arranging for on-site security or supervising sworn law enforcement officers." (*Id.*)

Higgins responds that Laterza's responsibilities included breaking up fights and dealing with people who were giving managers a hard time and, in doing so, Laterza was armed with a Taser and his duty weapon. (Doc. 124 at 15.) Therefore, Higgins argues, Main Event "had a special duty to investigate and train Deputy Laterza," but it failed in those duties by not performing a background check on Laterza, by not training Laterza, for example, that "a detention may not be made based solely on information from another patron," and by not having a policy on the use of force. (*Id.*) Higgins argues that if Main Event had conducted a background check on Laterza, it would have discovered Laterza's "past involvement in a lawsuit arising from the use of excessive force" and that Laterza had a "history of prescription drug abuse (with the corresponding criminal charge and Internal Affairs Investigation) that could have affected Deputy Laterza's work performance, judgment and temperament on the night in question." (*Id.*)

Defendants reply that Laterza "has never been accused of using excessive force" and that Higgins "fails to inform the Court that the 2008 internal affairs investigation concerning prescription medications was "held 'unfounded.'" (Doc. 128 at 9-10.) Defendants argue that Plaintiff has presented no evidence from a competent source (such as an expert) that anything in Laterza's MCSO history disqualified him from working security at Main Event, that Main Event "was supposed to implement different 'policies' or 'practices' concerning how a POST-certified peace officer used force in effecting an arrest," or that Main Event should have implemented different hiring, training, or supervising practices as related to Deputy Laterza, and such different practices would have prevented [Higgins'] harm." (Doc. 128 at 9.)

The Court agrees with Defendants that Higgins' response consists largely of speculation as to what policies or practices Main Event could have followed in hiring and training its security guards. There is no evidence in the record bearing on Main Event's decision to hire Laterza or his training. Higgins' evidence consists primarily of the excessive force lawsuit that Laterza was involved in and use of prescription medications. But Defendants have presented evidence that the excessive force claim was against a

different deputy and not Laterza and that the prescription medication issue was determined to be "unfounded." The record evidence, then, is insufficient to establish that Main Event was negligent in its hiring, training, and supervision of Laterza and the Court will grant summary judgment to Defendants on Count Nine.

IT IS ORDERED:

(1) The reference to the Magistrate Judge is withdrawn as to Defendant Laterza's Motion for Summary Judgment (Doc. 113) and Defendants Main Event Entertainment, LP and Josh Bynum's Motion for Summary Judgment (Doc. 115).

(2) Pursuant to Federal Rule of Civil Procedure 41(a)(2), the following claims are **dismissed without prejudice**:

(a) Plaintiff's Fourteenth Amendment claim against Laterza in Count One;

(b) Plaintiff's state law claims against Laterza in Counts Two, Five, and Eight;

(c) Plaintiff's official capacity claim against Laterza;

(d) Plaintiff's federal claims against Main Event and Bynum in Counts One, Two and Three;

(e) Plaintiff's state law claims against Bynum in Counts Six and Ten.

(3) Counts Six, Seven and Ten against Laterza are **dismissed without prejudice** for failure to comply with Arizona Revised Statutes § 12-821.01(A).

(4) Defendant Laterza's Motion for Summary Judgment (Doc. 113) is **granted in part and denied in part**. The Motion is **granted** as to Count Three and **denied** as to Plaintiff's Fourth Amendment excessive force claim in Count One.

(5) Defendants Main Event Entertainment, LP and Josh Bynum's Motion for Summary Judgment (Doc. 115) is **granted in part and denied in part** as follows:

(a) The Motion is **granted** as to Counts Four, Five, Nine, and Ten and those claims are **dismissed with prejudice** and Defendant Bynum is **dismissed** from this action;

1 (b) The Motion is **denied** as to Plaintiff's claims against Main Event in
2 Counts Six and Seven.
3 (6) The remaining claims are Plaintiff's Fourth Amendment excessive force
4 claim in Count One against Laterza and Plaintiff's vicarious liability claims against Main
5 Event in Counts Six (Assault) and Seven (Battery).
6 (7) This action is referred to Magistrate Judge Michelle H. Burns to conduct a
7 settlement conference.
8 (8) Counsel shall arrange for the relevant parties to jointly call Magistrate Judge
9 Burns' chambers at (602) 322-7610 within 14 days to schedule a date for the settlement
10 conference.
11 Dated this 13th day of March, 2019.
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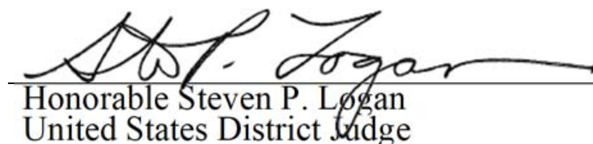

Honorable Steven P. Logan
United States District Judge