16-3555

IN THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

MATTHEW STEPHEN AKINS
Plaintiff/Appellant
v.
CITY OF COLUMBIA, et al.
Defendants/Appellees

Appeal from the United States District Court
Western District of Missouri, Central Division
The Honorable Nanette K. Laughrey, District Judge

APPELLEES' BRIEF

Respectfully Submitted,

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STATEMENT OF THE CASE

Officer Hughes Arrest of Mr. Akins

On May 9, 2010, Officer Eric Hughes stopped Mr. Akins at a routine DWI check point in the City of Columbia, Missouri ("Columbia"). Appx. 783. Officer Hughes smelled a strong odor of marijuana coming from inside Mr. Akins' vehicle, observed that Mr. Akins' eyes were bloodshot, and determined that Mr. Akins was acting nervously, including having shaking hands. Appx. 783-84. Based on his training and experience, Officer Hughes believed that Mr. Akins' actions were indicative of an individual who was using or possessing a controlled substance. Appx. 783-84.

Officer Hughes then asked Mr. Akins to exit his vehicle and conducted a protective patdown of Mr. Akins. Appx. 785. During the patdown, Officer Hughes felt a gun near Mr. Akins' waist. Appx. 785. Mr. Akins did not inform Officer Hughes of the presence of the gun prior to the patdown. Appx. 785. Officer Hughes located marijuana in Mr. Akins' jeans pocket. Appx. 320 at depo p. 56; 785. Marijuana was also located in a plastic bag under the front driver seat of Mr. Akins' vehicle. Appx. 785

Mr. Akins was arrested for possession of an illegal substance and unlawful use of a weapon. Appx. 785. Mr. Akins admitted that during the period when he was arrested by Officer Hughes, Mr. Akins was using marijuana and could have

had it on him at the time of the arrest. Appx. 785. Ultimately, Mr. Akins was charged with the Class D Felony of Unlawful Use of a Weapon. Appx. 508; 784.

Retention of Mr. Akins' Firearm from Officer Hughes Arrest

Mr. Akins' charges as a result of the May 9, 2010, arrest were dismissed by the Boone County Prosecuting Attorney's ("Prosecutor") office filing a *nolle prosequi* on November 16, 2010. Appx. 786.

The Prosecutor did not inform the Columbia Police Department ("CPD") that Mr. Akins' firearm was no longer needed until March 20, 2013. Appx. 787. Following the dismissal of the charges against Mr. Akins, Mr. Akins did not communicate with CPD about the firearm until October 24, 2012. Appx. 787.

The October 24, 2012 communication was initiated by the CPD evidence unit after it discovered it still had the firearm through a routine audit, and notified Mr. Akins on October 18, 2012, via a letter. Appx. 787. The letter informed Mr. Akins that he could not pick up the firearm himself, but that a third party could. Appx. 788. CPD could not release the firearm to Mr. Akins because Mr. Akins had been charged with a felony related to a separate incident. Appx. 788.

The evidence unit explained this to Mr. Akins over a phone call on October 24, 2012. Mr. Akins confirmed that he understood he could not pick up the firearm himself, but could have a third party pick up the firearm. Appx. 788-89 (Exhibit 8 in Appellees' Exhibit Supplement). Mr. Akins did not arrange for a third

party to come pick up the firearm and did not contact CPD again regarding the firearm until February 22, 2013. Appx. 599; 789.

Chief Ken Burton was first informed of Mr. Akins' request to have his firearm returned on February 22, 2013. Appx. 789. Chief Burton informed Mr. Akins that he was having someone look into the issue and assigned the matter to Captain Jill Schlude on February 27, 2013. Appx. 602; 789. Mr. Akins requested his firearm be returned from the Prosecutor on February 22, 2013 and received a response on March 1, 2013. Appx. 789-90.

Captain Schlude began investigating Mr. Akins' request to have his firearm returned to him and by March 26, 2013, had learned that Mr. Akins' no longer had a pending felony, and the evidence unit had obtained permission from the Prosecutor to release the firearm. Appx. 507; 790. Captain Schlude authorized the return of Mr. Akins' firearm directly to him, indicating "no longer pending felony-no felony convictions-release to Mr. Akins", and notified Mr. Akins that he could pick up the firearm. Appx. 507; 790.

On March 28, 2013, Michelle Heater sent Mr. Akins a letter indicating he could personally pick up his .380 Bersa handgun by appointment. Appx. 790. Mr. Akins did not pick up the firearm until April 15, 2013. Appx. 790.

Sergeant Schlude's June 6, 2010 stop of Mr. Akins

On June 6, 2010, Mr. Akins was stopped and issued a citation by Sergeant Roger Schlude for an illegal turn. Appx. 792. Mr. Akins had a firearm in the floorboard of his vehicle and told Sergeant Schlude about the firearm. Appx. 792. There were three individuals in Mr. Akins' vehicle, including an individual in the backseat in the area where Mr. Akins indicated a firearm was present. Appx. 792. Mr. Akins claims that Sergeant Schlude thought he saw ammunition in Mr. Akins' vehicle. Appx. 792. At the time of this stop, Mr. Akins had already been charged with a felony weapons violation. Appx. 792.

Sergeant Schlude was able to tell from the CAD notes regarding the incident that he made the stop on 6:50 p.m. and he would have been advised by Dispatch that at the time of traffic stop involving Mr. Akins, that Mr. Akins had a type-two indicator which means he was known to be armed and violent. Sergeant Schlude would have been advised by Dispatch that Mr. Akins' passengers, Mr. Brooks and Mr. Jones had a type-one indicator, which means they were known to be violent. Appx. 913; 990-999 (no response). Sergeant Schlude informed dispatch that there was a rifle in Mr. Akins' car. Appx. 913; 990-999 (no response). Sergeant Schlude was waiting for Officer Meyer to arrive on the scene as backup, but he is unable to determine how long it took. Appx. 913; 990-999 (no response).

Based on the CAD notes, Sergeant Schlude would have approached the interaction with Mr. Akins with caution as Mr. Akins was known to be armed and

violent and he was with two individuals known to be violent, and Mr. Akins had a rifle in his car. Appx. 913; 990-999 (no response). Based on the fact that Sergeant Schlude requested backup, he believes he would have been concerned for his safety. Appx. 914; 990-999 (no response).

Facebook

From 2011 until the spring of 2016, the CPD Facebook page stated:

> The purpose of this page is to provide an opportunity for the Columbia Police Department to supply information to the public about department events, crime alerts, and other important information. We encourage you to submit comments, but please note that this is not a public forum. Comments posted to this page will be monitored. The Columbia Police Department reserves the right to remove inappropriate comments.

Appx. 914; 990-999 (no response). Comments to the CPD Facebook page made in 2011-2012 which were not topically related to the post under which they were made, would have been removed as they would have been considered inappropriate as they were not related to the original post. Appx. 914; 990-999 (no response).

None of the CPD Facebook posts from 2011-2012 have anything to do with the Citizens for Justice videos that Mr. Akins claims were removed. Appx. 915; 990-999 (no response).

If Mr. Akins' Citizens for Justice Videos were deleted from the CPD Facebook page, and they were posted as comments to original CPD posts, they

were deleted because they would have been posted as non-topical comments and thus would have been inappropriate. Any deletion would have been as a result of the comment not relating to the original post, not the content of the comment. Appx. 915; 990-999 (no response).

If Mr. Akins allegedly posted these videos as an original post on the CPD Facebook page they would have been deleted, along with any other original posts not originated by CPD, as Columbia in 2011 began to consider adopting a city-wide social media policy. As Jill Schlude referenced in her interview with Mr. Akins (Plaintiffs Motion for Summary Judgment Exhibit 22), Columbia determined that, while it considered a city-wide social media policy, that Columbia social media sites were to only allow the City Department to make original posts. As a result, any post which was not originated by CPD would have been removed from its Facebook page. This would have been a blanket removal and not based on the specific content of the post. Appx. 915-16; 990-999 (no response).

Plaintiff's Motion for Summary Judgment Exhibit 6, a memo entitled Social Media Recommendations, dated August 2, 2011 was never adopted as a policy of Columbia. It was simply a memo of discussion points regarding a Columbia social media policy. Appx. 916; 990-999 (no response). A city-wide social media policy has not been adopted by Columbia. Consequently, any rules about posting on the

CPD Facebook page cannot violate a Columbia Policy. Appx. 916; 990-999 (no response).

Mr. Akins is not banned from the CPD Facebook page. However, since the summer of 2011 no one can post original links to videos on the CPD Facebook page. Further, no one can post comments which do not relate to the original post by CPD. Appx. 916; 990-999 (no response).

Filming in the Police Department Lobby

In 2011, the lobby of CPD was not intended for use by the public at large for assembly and speech. Appx. 918; 990-999 (no response). In 2011, the public was not allowed to use the lobby of CPD for assembly or speech. Appx. 919; 990-999 (no response). In 2011, the lobby of CPD was not open to the public for expressive activity. Appx. 919; 990-999 (no response). Prior to 2011, no individual had attempted to video interactions in the lobby of CPD. Appx. 919; 990-999 (no response).

Sometime in 2011, an individual wearing a Klu Klux Klan hood went to the CPD lobby window to obtain a complaint form. Appx. 897. This individual was being filmed by another individual, who Mr. Akins alleges was himself. Appx. 897. A Community Service Aid ("CSA") (a non-police officer employee) told the individual filming to stop filming. Akins ECF 92; Exhibit 34 in Akins' Video Supplement to Appendix.

July 27, 2011 Interaction with Officer Sanders

On July 27, 2011, Officer Rob Sanders was travelling North on Providence Street in Columbia, Missouri. He observed the vehicle in front of him behave differently once the driver of the vehicle noticed his patrol car. Appx. 793. Officer Sanders knew the vehicle had just come out of a high crime area. Appx. 793. The occupants of the vehicle began talking and gesturing animatedly. Appx. 794.

The driver of the vehicle in front of Officer Sanders began exhibiting what Officer Sanders interpreted as avoidance techniques, including changing lanes multiple times and turning into a parking lot. Appx. 340 at p. 133, line 1-3; 794.

Officer Sanders interpreted this behavior as consistent with someone trying to avoid contact with the police. Appx. 794. A month prior to the encounter with Mr. Akins, Officer Sanders had stopped a car during a robbery investigation and had ended up arresting the suspects for robbery. Appx. 606; 794. Officer Sanders noticed the driver of the vehicle exhibit similar reactions as the robbery suspects. Appx. 606; 794.

Officer Sanders radioed into dispatch, informed dispatch he was going to attempt a "check subject", and requested one police officer for backup. Appx. 795; Communication between Officer Sanders and CPD Dispatch, attached hereto as Exhibit 20, Contained in Appellees Exhibit Supplement, at :58-1:13) A "check

subject" is not an investigative stop and instead is an attempted consensual encounter where the Officer attempts to check the subject's identification. Appx. 796. Officer Sanders did not request a K-9 unit. Appx. 796; Exhibit 20, at :58-1:13. The dispatcher stated, is this a different call we had it designated as traffic stop? Officer Sanders replied no "it is not a car stop." Appx. 910; 990-99 (no response); Defendants' Response Exhibit A, radio traffic between Officer Sanders and joint communications regarding the July 27, 2011 interaction with Mr. Akins at: 00:00-00:35.

Officers Hedrick and Parsons, who were operating as a two-person unit while Officer Hedrick was training Officer Parsons and a new K-9, responded to Officer Sanders' request for backup. Appx. 796. Officer Sanders followed the vehicle into the parking lot. Appx. 796.

A portion of the encounter between Mr. Akins and Officer Sanders was recorded by Mr. Akins. Akins Video Supplement to Appendix, Contained in File Folder titled Akins SJ ECF 91 Exhibit #1 CFJ Raw Footage Sanders Taco Bell. This Folder on the video supplement contains three files labeled 206; 207; 208. (For the sake of brevity the files name will only be referred to below).

Mr. Akins drove through the drive-through of a Taco Bell. Appx. 797; File 206, at :57-1:04. Officer Sanders saw a light shine at him and had recently been trained that individuals will use phones or cameras to video police to try to deter

contact by the officers. Appx. 797. Officer Sanders initially followed Mr. Akins into the drive-through lane before exiting the drive-through lane and parking in the parking lot. Appx. 797; File 206 at 1:20-2:15. Mr. Akins, after receiving his burrito, also parked in the parking lot. Appx. 797; Exhibit 17, at 2:20-2:30.

Officer Sanders observed the vehicle park in the parking lot and the occupants begin to watch his patrol car. Appx. 797. After Mr. Akins had parked his vehicle, Officer Sanders approached the vehicle. Appx. 797; File 206, at 2:25-2:35.

Neither Officer Sanders' patrol car nor Officer Parson's patrol car was parked in a way that would have prevented Mr. Akins from leaving the parking lot. Appx. 797.

Officer Sanders' dash cam video shows the position of Mr. Akins's vehicle and Officer Sanders' patrol car. Appx. 796. Mr. Akins testified that he did not know if he was able to back out and did not try to back out because he did not believe that would "be a wise decision." Appx. 798.

Officer Sanders asked the occupants of Mr. Akins' vehicle if he could see their drivers' licenses. Appx. 798; File 206, at 2:35-2:40. Officer Sanders told Mr. Akins that he was not conducting a traffic stop. Appx. 798; File 206, at 2:45-2:50. Mr. Akins asked, "So you're just asking [for] identification?" Appx. 798; File 206, at 2:47-2:50. Officer Sanders responded, "Yeah." Appx. 799; File 206, at 2:47-

2:50. Subsequently, both occupants of Mr. Akins' vehicle consented to giving Officer Sanders their drivers' licenses. Appx. 799; File 206, at 2:45-2:55; Appx. 344 at 148:6-18.

After receiving the driver's licenses, Officer Sanders then left to check the occupants' drivers' licenses, and says, "Alright. Sit tight guys. I will be right back with you, okay?" Appx. 799; File 206, at 3:13-3:17. Both occupants agreed. Appx. 799; File 206, at 3:13-3:17. Officer Sanders did not know Mr. Akins was the driver of the vehicle until after he asked for Mr. Akins' identification. Appx. 799; Akins Video Supplement to Appendix, Exhibit 4 at 11:26-30 (Mr. Akins states the video of Officer Sanders was filmed weeks earlier). Mr. Akins was driving his mother's car that night. Appx. 800.

Officer Hedrick then approached the vehicle and asked Mr. Akins questions about Mr. Akins' camera. Appx. 263; 800; File 206, at 4:25-4:29. Officer Hedrick told Mr. Akins that Officer Sanders was "just checking you," that he and Officer Parsons "happened to be in the area" and it was "just safety issues." Appx. 800; File 206, 3:48-4:00.

At the same time, Officer Parsons was waiting by the Taco Bell sidewalk with his K9. Officer Parsons was not at Mr. Akins' car's rear bumper. Appx. 911; 990-99 (no response); File 206 at 4:16. Officer Sanders did not direct Officer Hedrick or Officer Parsons where to park their patrol car. Appx. 911; 990-99 (no

response). Officer Sanders did not direct Officer Parsons or Officer Hedrick once they arrived. Appx. 911; 990-99 (no response).

Officer Sanders did not direct Officer Hedrick to approach Mr. Akins' vehicle. Appx. 912; 990-99 (no response). Officer Hedrick, not Officer Sanders, directed Officer Parsons to get his K-9 unit out of the patrol car to allow the K-9 a training opportunity, but instructed Officer Parsons to keep his K-9 back. Appx. 912; 990-99 (no response). Officer Parson's K-9 did not approach Mr. Akins' vehicle, and the K-9 remained quiet during the encounter with Mr. Akins. Appx. 912; 990-99 (no response).

Officer Sanders returned to Mr. Akins' vehicle, gave the occupants their drivers' licenses back, and thanked them for their cooperation. Appx. 800; File 207, at :04-:08. Officer Sanders noticed an open beer bottle in Mr. Akins' vehicle. Appx. 800, File 207 at :14-:16. Mr. Akins told Officer Sanders the open beer bottle in the car was his mother's. File 207, at :20-:27. Officer Sanders volunteered to throw the bottle away for Mr. Akins. Appx. 800; File 207, at :27-:36.

Mr. Akins did not leave the parking lot until after Officer Sanders had left. Appx. 801; File 208.

According to Mr. Akins, the incident was no longer than one minute and thirty seconds. Appx. 800; File 206, at 3:15-4:30; File 207, at :00-:05; Appx. 346

at p. 159:4-12. Officer Sanders never activated his lights or sirens. (Appx. 800) No officer drew a firearm. Appx. 800. Officer Sanders did not harass Mr. Akins. Appx. 801; File 206, 207. Officer Sanders did not mention Citizens for Justice during the stop. Appx. 801; File 206, 207.

SUMMARY OF THE ARGUMENT

Mr. Akins has failed to plead his Facebook claim. He has failed to identify any defendant that took any alleged action in regard to his unpled Facebook claim. Columbia cannot be liable for the Facebook claim under a respondent superior theory. Even if it could, Columbia does not have an unconstitutional Facebook policy.

CPD's Facebook Page is a nonpublic forum because CPD did not intentionally open the Facebook Page for use as a public forum. In the alternative, the CPD Facebook page is a limited public forum because at most it is a forum limited to the discussion of certain subjects. Under either standard, the non-party which removed the alleged videos by Mr. Akins acted constitutionally because the removal was reasonable and content neutral.

Mr. Akins' claim regarding allegedly being prevented by a CSA to film a complaint being filed fails. The CPD lobby is a nonpublic forum. No individual defendant was involved in this occurrence, and the City cannot be held liable under a respondeat superior theory. Mr. Akins unpled supervisory claim against Chief Burton also fails because: 1) there was no underlying constitutional violation; 2) Chief Burton was not involved; and 3) there is no record Chief Burton trained or supervised the CSA. Further, this Court has held that there is no right to video tape governmental proceedings that are open to the public.

Officer Hughes had probable cause to arrest Mr. Akins for possession of marijuana. Officer Hughes also had probable cause to arrest Mr. Akins for the possession of the gun. Further, Officer Hughes is entitled to qualified immunity as his actions were reasonable pursuant to clearly established law.

Sergeant Schlude did not violate Mr. Akins rights by securing the occupants of the vehicle, doing a pat down search of the vehicles' occupants, and searching the passenger compartment of the vehicle. Mr. Akins had made an improper turn, which initiated the stop. Sergeant Schlude was informed by dispatch that Mr. Akins was known to be armed and violent, his two passengers were known to be violent and there was a rifle on the floorboard in the rear of the vehicle where one of the occupants was sitting. The incident lasted 24 minutes. Additionally, Sergeant Schlude is entitled to qualified immunity because his actions were reasonable in light of clearly established law.

Mr. Akins' claim that Sergeant Schlude's alleged statements to him after the stop regarding the gun were irrelevant because the search was objectively permissible. Additionally, no reasonable jury would believe Sergeant Schlude's alleged statements were a threat to Mr. Akins. Mr. Akins' unpled First Amendment retaliation claim involving Sergeant Schlude's alleged statements also fails because this encounter occurred before Mr. Akins began his Citizens for Justice Website.

Mr. Akins remaining First Amendment retaliation claims fail. The claims include the posting of a poster of Mr. Akins, the alleged spotlighting of Mr. Akins, alleged unlawful stops of Mr. Akins, and the alleged prohibition on Mr. Akins of filming the filing of a complaint in the CPD lobby. These claims have been waived on appeal. Additionally, the creator of the poster is unknown and the City cannot be held liable on a respondeat superior claim. All stops of Mr. Akins were for valid law enforcement purposes. The alleged spotlighting of Mr. Akins was for a valid law enforcement purpose, which was crowd control after the bars shut down in downtown Columbia. Further, none of the Officers in this case were alleged to have done the spotlighting.

The seizure of Mr. Akins' pistol did not violate his rights. Officer Palmer had probable cause to arrest Mr. Akins for unlawful use of a weapon. The pistol was evidence of this charge.

Mr. Akins' claims regarding the retention of the pistol fail. None of the Officers were involved in the retention of the pistol. Columbia is the only possible defendant but it cannot be held liable pursuant to a respondeat superior theory. Additionally, Mr. Akins has not presented any evidence of an allegedly unconstitutional policy regarding the retention of firearms. Further, even if a defendant had been identified as responsible for the retention of the pistol, Mr.

Akins' claim would still fail as CPD was not informed the Prosecutor's office did not need the gun until March 20, 2013.

Mr. Akins attempts to make a claim under the Missouri Criminal Activity Forfeiture Act, but there is no evidence any of his property was subject to a forfeiture proceeding.

Mr. Akins' claims regarding the seizure and retention of his butterfly knife fail. Mr. Akins has failed to adequately raise a claim against Officer Palmer for the retention of his knife. Further, Officer Palmer's arrest of Mr. Akins for driving while revoked was valid. Officer Palmer did not violate Mr. Akins' rights by seizing the knife. The knife's blade was longer than four inches meaning it was not an ordinary pocket knife which would be carried on the person, and it operated by means of centrifugal force, which qualified it as a switch blade under Missouri law. Additionally, Officer Palmer is entitled to qualified immunity because his seizure of the knife was reasonable under clearly established law.

Mr. Akins' failure to train claims against Columbia fail. Columbia cannot be liable for a failure to train or supervise unless there is an underlying Constitutional violation. The District Court correctly concluded that there is no underlying constitutional violation. Additionally, Mr. Akins has failed to show Columbia's training practices were inadequate, Columbia was deliberately

indifferent to the right of others by adopting them, and this caused Mr. Akins injury.

The Columbia Appellees incorporate the Boone County Appellees' argument by reference regarding the disqualification of Judge Laughrey.

Mr. Akins' claims regarding Officer Sanders fail. Mr. Akins waived his argument on appeal. Officer Sanders had reasonable suspicion to perform an investigatory stop regarding Mr. Akins. In the alternative, Officers Sanders encounter with Mr. Akins was consensual. Further, Officer Sanders is entitled to qualified immunity as his actions were reasonable under clearly established law.

ARGUMENT

1. Standard of Review

This Court reviews the grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party and drawing all justifiable inferences in favor of the nonmoving party. *Putman v. Unity Health Sys.*, 348 F.3d 732, 733 (8th Cir. 2003). To survive a motion for summary judgment, the nonmoving party must "substantiate his allegations with sufficient probative evidence [that] would permit a finding in [his] favor based on more than mere speculation, conjecture, or fantasy." *Id*. (*citing Wilson v. Int'l Bus. Machs. Corp.*, 62 F.3d 237, 241 (8th Cir. 1995)).

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (internal citations omitted). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof

concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id*. at 322-323.

2. Qualified Immunity Standard

Appellees are entitled to qualified immunity unless Mr. Akins can establish that the officers' conduct violated a constitutional right and that the constitutional right was so "clearly established" at the time of the alleged violation that a reasonable officer would have known that his conduct was unlawful. *Rohrbough v. Hall*, 586 F.3d 582, 585 (8th. Cir. 2009) (*citing Saucier v. Katz*, 533 U.S. 194, 201 (2001)). The Court has discretion to choose which of the two to address first. *Pearson v. Callahan*, 553 U.S. 223, 239 (2009). Once the facts are established, "a court should always be able to determine as a matter of law whether or not an officer is eligible for qualified immunity – that is, whether or not the officer acted reasonably under settled law given the particular set of facts." *Rohrbough*, 586 F.3d at 586 (*citing Pace v. City of Des Moines*, 201 F.3d 1050, 1056 (8th Cir. 2000)).

Personal involvement is required in order for an individual to be liable under § 1983. *Beck v. Lafleur*, 257 F.3d 764 (8th Cir. 2001). "Liability for damages for a federal constitutional tort is personal, so each defendant's conduct must be independently assessed." *Burton v. St. Louis Bd. of Police Comm'rs*, 2012 U.S.

Dist. LEXIS 73717, *58 (E.D. Mo. 2012) (citing *Wilson v. Northcutt*, 441 F.3d 586, 597 (8th Cir. 2006)).

3. CPD Facebook Page

Mr. Akins argues in Point I the District Court erred by failing to apply a forum analysis to determine the level of scrutiny (if any) applied to Mr. Akins' claims. Appellant's Brief, at 40-44.

a) Mr. Akins' Claims are Not Cognizable Claims

First, the Facebook claim is un-pled. "[W]hile [this Court] recognize['s] that the pleading requirements under the Federal Rules are relatively permissive, they do not entitle parties to manufacture claims, which were not pled, late into the litigation for the purpose of avoiding summary judgment." *N. States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1057 (8th Cir. 2004).

It appears that the CPD Facebook page ("Facebook Page") claim is against Columbia, as he does not allege any of the individual defendants were involved. However, Columbia cannot be held liable in a §1983 case under a *respondeat superior* theory. See *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978); App. 1099. The District Court also found that it was undisputed that the City did not have a social media policy. App. 1081.

Further, there are no facts in the record that any of the individual defendants undertook any action regarding the Facebook Page. Therefore the District Court's Judgment should be affirmed.

b) The CPD Facebook Page is a Nonpublic Forum

Even if Mr. Akins had brought a cognizable claim against the City or an unnamed individual defendant, his claim would still fail, as Mr. Akins did not suffer a constitutional violation. The District Court found that individuals do not have a constitutional right to unlimited posting on a social media platform. App. 1100.

Mr. Akins argues that the Facebook Page is a designated public forum. While not specifically addressed, it appears an Illinois District Court determined that a government entity run social media page is either a limited public forum or a nonpublic forum. *See TinleySparks, Inc. v. Vill. Of Tinley Park*, 2015 U.S. Dist. LEXIS 61088 (N.D. Ill. May 11, 2015). Since the District Court in this case engaged in a viewpoint discrimination analysis and cited to *TinleySparks* in support of its findings, assumedly, the District Court similarly found that the Facebook Page is either a limited public forum or a nonpublic forum. App. 1100.

The Facebook Page is a nonpublic forum. "A designated public forum is a nonpublic forum the government intentionally opens to expressive activity for a limited purpose such as use by certain groups or use for discussion of certain

subjects." *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006) (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). "The government does not create a designated public forum by inaction or **by permitting limited discourse,** but only by **intentionally** opening a nontraditional public forum for public discourse." *Id*. (internal citations omitted) (emphasis added). A nonpublic forum is "government property which is not classified [as] a traditional public forum or designated public forum." *Id*. In performing a forum analysis, courts should look to the purpose of the creation of the forum and whether the purpose was to "provide a forum for expressive activity" by the public. *See United States v. Am. Library Ass'n*, 539 U.S. 194 (2003); and *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788 (1985).

It is undisputed the Facebook Page specifically states "this is not a public forum." App. 1080; App. 947, at ¶ 5. As a result, the non-party running the Facebook Page was not intentionally opening up government property for use as a public forum. Further, the Facebook Page states, "The purpose of this page is to provide an opportunity for [CPD] to supply information to the public about department events, crime alerts, and other important information." App. 1080; App. 947, at ¶ 5. CPD did not create the forum for expressive activity by the public, but instead as a means to inform about CPD. Finally, the Facebook Page states, "[CPD] reserves the right to remove inappropriate comments." App. 1080;

App. 947, at ¶ 5. CPD was informing the public that the Facebook Page was not a place for expressive activity and would be monitored to insure any comments were related to the original post.

In the alternative, the Facebook Page was at most a limited public forum. This type of designated public forum is created when "the government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects." *Bowman*, 444 F.3d at 976. Since the Facebook Page was reserved for CPD information, it is at most is a limited public forum.

c) The Non-party's Conduct was Reasonable and Content-Neutral

The designation of the forum is irrelevant since the non-party's conduct met both possible standards. In a nonpublic forum, the government may restrict speech "as long as the restrictions are reasonable and are not an effort to suppress expression merely because the public officials oppose a speaker's view." *Bowman*, 444 F.3d at 976. In a limited public forum, "restrictions on speech not within the type of expression allowed in a limited public forum must only be reasonable and viewpoint neutral." *Id*.

The District Court found that it was undisputed that all posts by individuals other than CPD were removed, regardless of the posts' content. App. 1080; App. 947, at ¶ 5, ¶ 10. This action was reasonable, as it allowed CPD to insure the public

was informed of information relevant to the CPD without having to search through other pieces of irrelevant information. This irrelevant information could be distributed in various other ways (i.e., Mr. Akins distributed his videos through his Citizens for Justice website and could have created his own Facebook page related to alleged CPD misconduct). Further, this action was viewpoint neutral, since all posts, regardless of content, by outside individuals were removed.

The District Court further found it was undisputed that no individual could post comments that did not relate to the original post by CPD and comments that were not related to the topic of the post were removed. App. 1081; App. 947, at ¶ 6. The Court found that it was undisputed that this procedure was true for all users. App. 1081. The Court found that none of the postings from 2011-2012 (the time period Mr. Akins complains about) related to the subjects or Mr. Akins' Citizens for Justice videos. App. 1081; App. 947, at ¶ 8. This action by the non-party was reasonable because it allowed CPD to efficiently address any related questions or concerns to information being posted. Further, any removal of comments was not because of the content but because the comment did not relate to the original post.

Thus, no matter the forum designation, Mr. Akins' links were removed reasonably and on a content-neutral basis. *See also, TinleySparks, Inc. v. Vill. of Tinley Park*, 2015 U.S. Dist. LEXIS 61088, *29-30 (N.D. Ill. May 11, 2015)

"Defendants could, consistent with the First Amendment, prohibit political messages on the Downtown Tinley website and Facebook page to preserve their intended purpose as small business forums so long as they refrained from engaging in viewpoint discrimination.").

Even if this Court found that the Facebook page was at some point a designated public forum (which Appellees deny), the nature of the Facebook page would have been changed when individuals other than CPD were no longer allowed to post to the page. The Supreme Court has stated that a State is not required to indefinitely retain the open character of the facility. *Perry Educ. Ass'n*, 460 U.S. at 47. The non-party did not violate Mr. Akins' rights by removing his posts and/or comments because all posts other than CPD posts were removed regardless of content. Similarly, all off-topic comments were removed regardless of content. Mr. Akins does not complain of any conduct prior to the change in the functionality of the Facebook Page. Therefore, the District Court's Judgment should be affirmed.

4. CPD Lobby

Mr. Akins argues the District Court erred by finding that he did not have a constitutional right to videotape in the CPD lobby. Appellant's Brief at 44.

a) The CPD Lobby is a Nonpublic Forum

First, Mr. Akins, without authority, argues that the CPD lobby is a traditional public forum. The CPD lobby is not a traditional public forum. It is a nonpublic forum. Traditional public forums are "streets and parks which have immemorially been held in trust for use of the public and…have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n*, 460 U.S. at 45. The CPD lobby is neither a street nor a park and has never been used by the public for purposes of assembly, speech, or expressive activity. App. 600, at ¶¶ 4-5. Therefore, the lobby is not a traditional public forum.

Further, the lobby is not a designated public forum since CPD has not intentionally opened up the building for expressive activity (App. 600, at ¶¶ 4-5*; see also, Perry Educ. Ass'n*, 460 U.S. at 46), and the forum was not created to provide a forum for expressive activity by the public (*see United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) *and Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788 (1985)). Therefore, the lobby is a nonpublic forum.

Mr. Akins' claims that because the lobby was open 24 hours a day, was the designated point where citizens were to file an alleged misconduct complaints/petition the government for a redress of grievances, contained a "media advisory" book on 24 hour arrest reports, had information displays and handouts

for the public, and contained a memorial to Officer Molly Bowden, it had been transformed into a traditional public forum.

"[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (internal citations omitted). "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id*. (internal citations omitted). "Selective access does not transform government property into a public forum." *Id*. at 47. CPD limited the purpose of the lobby, which it is allowed to do under *Perry*. App. 600, at ¶¶ 4-5. Therefore, allowing selective access to the lobby did not transform the lobby into a public forum.

b) Chief Burton is Not Liable as a Supervisory Official

As noted above, none of the individual defendants participated in this incident and therefore cannot be liable; Columbia cannot be liable on a *respondeat superior* theory; and Mr. Akins did not identify an unconstitutional policy or custom. *See Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978); App. 1099. For the first time on appeal, Mr. Akins argues an unpled claim against Chief Kenneth Burton for an alleged unconstitutional policy. Mr. Akins claims, without citation to the record, that a CSA was acting pursuant to Chief Burton's policy that the CPD lobby was not a traditional public forum and that not

permitting filming was "insufficient to change the nature of this traditional public forum into something else" and thus Chief Burton violated Mr. Akins' First Amendment rights.

In order for Chief Burton to be liable as a supervisory official, there must be an underlying constitutional violation. *See Brockinton v. City of Sherwood*, 503 F.3d 667, 673 (8th Cir. 2007). Further, Chief Burton would have had to directly participate in the alleged constitutional violation or fail to train or supervise the subordinate who cased the alleged violation. *Id*. "The standard of liability for failure to train is deliberate indifference." *Id*. The District Court found that Mr. Akins did not suffer a constitutional violation as neither individuals nor the public has a First Amendment right to videotape government proceedings that are by law open to the public. App. 1099. Further, there is no evidence in the record that Chief Burton had a policy that individuals could not videotape in the lobby or failed to properly train the CSA. Thus, Mr. Akins' argument fails.

Mr. Akins argues that individuals have a First Amendment right to videotape public officials. Appellant's Brief, at 47. However, this Court has previously held that "neither the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public." *Rice v. Kempker*, 374 F.3d 675, 678 (8th Cir. 2004). Mr.

Akins cites to *Iacobucci v. Boulter* and *Houchins v. KQED, Inc.* in support of his argument.[1] These cases are distinguishable.

In *Iacobucci*, the plaintiff had a right under Massachusetts state law, to videotape "all meetings of a government body … open to the public." *Iacobucci v. Bouter*, 193 F.3d 14, 24 (1st Cir. 1999) (*citing* Mass. Gen. Laws c. 39, § 23B). In *Houchins v. KQED, Inc.*, the Supreme Court stated, "This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." 438 U.S. 1, 9 (1978).

Even if this Court decided to overrule *Rice* and find that Mr. Akins did have a right to generally videotape the lobby and Chief Burton was involved in that decision, the CSA's refusal to allow Mr. Akins to videotape was reasonable and therefore Mr. Akins still did not suffer a constitutional violation. In a nonpublic forum, the government may restrict speech "as long as the restrictions are reasonable and are not an effort to suppress expression merely because the public officials oppose a speaker's view." *Bowman*, 444 F.3d at 976. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of

[1] Mr. Akins cited to numerous other cases, however, all the other cases cited by Mr. Akins dealt with traditional public forums (streets or parks) and ae inapposite.

limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n*, 460 U.S. at 49. It was a reasonable restriction, as to allow videotaping may discourage reporting of complaints and/or crimes. Consequently, the District Court's Judgment should be affirmed.

5. Mr. Akins' Claims against Boone County Prosecutors

In Point III, Mr. Akins claims the District Court erred by granting the Prosecutors' Motion to Dismiss. Appellant's Brief, at 50-51. Appellees do not respond to the allegations in Point III as it is not directed against them. To the extent that Point III can be read as arguing that Officer Hughes did not have probable cause to arrest Mr. Akins, Appellees argument in Section 6 is incorporated herein.

6. Mr. Akins' May 9, 2010 Arrest

Mr. Akins claims in Point IV the District Court erred by finding Officer Hughes had probable cause to arrest Mr. Akins for possession of marijuana. Appellant's Brief, at 54.

a) Officer Hughes had Probable Cause to Arrest Mr. Akins for Possession of Marijuana

The District Court found the undisputed facts were that Officer Hughes stopped Mr. Akins at a routine DWI check point. App. 1083; App. 319, at 51:10-25. Officer Hughes smelled what he believed was the odor of marijuana coming from Mr. Akins' car and observed that Mr. Akins' eyes were bloodshot, his hands were shaking, and he was acting nervously. App. 1083; App. 588, at ¶¶ 9-10; App. 495, at ¶ 2; App. 499. Officer Hughes observed Mr. Akins make a quick movement as Mr. Akins got out of the car and place an unknown item in his right front pants pocket. App. 1083; App. 588, at ¶ 14. Based on his training, Officer Hughes believed Mr. Akins' actions were indicative of an individual who was using or possessing a controlled substance and who may have placed a weapon in his pocket. App. 1083; App. 588, at ¶¶ 11, 15.

Officer Hughes performed a search and felt what he believed was marijuana leaves, stems, and seeds wrapped in a paper towel in Mr. Akins' pocket, and a search of the Mr. Akins' vehicle turned up a baggie of what Officer Hughes believed to be marijuana. App. 1083; App. 588-589, at ¶¶ 16, 24. Mr. Akins admitted in his deposition that the material may have been his marijuana. App. 1083; App. 320 at 56:22-24; App. 324, at 71:2-6. Based on these undisputed facts,

the District Court found that Officer Hughes had probable cause to arrest Mr. Akins for drug possession. App. 1083-4.

Mr. Akins argues in his Appellate Brief, "Under Columbia City Ordinance [Officer Hughes] was prohibited from making an arrest for a misdemeanor amount of … [marijuana]." Appellant's Brief, at 54. Mr. Akins raised this argument for the first time in his Reply brief to his Motion for Summary Judgment. This Court has stated it will not "consider arguments first raised in a reply brief." *United States v. Shirley*, 720 F.3d 659, ft. 3 (8th Cir. 2013).

The District Court held that this argument failed under *United States v. Winarske* because "the mere probability or substantial chance of criminal activity…is all that is required." 715 F.3d 1063, 1067 (8th Cir. 2013) (internal citations omitted). Further, the Columbia City Ordinance would not apply to Mr. Akins, as he was also arrested for possession of a concealed firearm in violation of RSMo. § 571.030. *See* App. 855, at § 16-255.2(c). Finally, to the extent that a municipal ordinance conflicts with a state statute, the ordinance is void. *See City of St. Peters v. Roeder*, 466 S.W.3d 538, 543 (Mo. banc 2015).

Mr. Akins disputes whether there "was the smell of … [marijuana] in the vehicle or upon the occupants…." Appellant's Brief, at 54. However, the District Court specifically found that Mr. Akins did not create a genuine dispute of material fact concerning Officer Hughes' belief. App. 1067, at footnote 2. Further, the

District Court found that whether or not marijuana was the substance found in Mr. Akins' car was irrelevant, since it was undisputed that Officer Hughes believed the substance found in both Mr. Akins' pocket and car was marijuana. App. 1084. A "police officer can have probable cause to seize what appears to be a controlled substance that is later determined to be something else." *New v. Denver*, 787 F.3d 895, 899 (8th Cir. 2015).

Mr. Akins' demeanor and the smell coming from his car gave Officer Hughes probable cause to search Mr. Akins and his car. The Supreme Court has held the police can search a vehicle and the containers within it where they have probable cause to believe contraband or evidence is contained. *Cal. v. Acevedo*, 500 U.S. 565, 580 (1991). In such circumstances, the police may search every part of the car and its contents that may conceal the object of the search or evidence of a crime. *United States v. Payne*, 119 F.3d 637, 643 (8th Cir. 1997). The smell of an illegal drug is highly probative to establish probable cause. *United States v. Caves*, 890 F.2d 87 (8th Cir. 1989). As a result of the search of Mr. Akins' and his vehicle, marijuana was found on Mr. Akins' person and in his vehicle, giving Officer Hughes probable cause to arrest Mr. Akins for possession.

Since Officer Hughes had probable cause to arrest Mr. Akins for possession, whether there was probable cause to arrest Mr. Akins under RSMo. § 571.030 is irrelevant. "[A]n officer need only demonstrate probable cause to carry out an

arrest for any offense arising out of an incident. That the officer may have had a mistaken belief that she had probable cause to arrest for other offenses is immaterial so long as probable cause existed for the one offense." *Smithson v. Aldrich*, 235 F.3d 1058, 1062 (8th Cir. 2000). Nevertheless, Officer Hughes also had probable cause to arrest Mr. Akins for a violation of RSMo. § 571.030.

After smelling marijuana and observing Mr. Akins' behavior, Officer Hughes asked Mr. Akins to exit his vehicle (App. 319, at 51:10-23) and conducted a protective patdown of Mr. Akins (App. 499). During the patdown, Officer Hughes felt a gun near Mr. Akins' waist. App. 1068; App. 319, at 52:17-20; App. 499. Mr. Akins did not inform Officer Hughes of the presence of the gun prior to the patdown. App. 1068; App. 499. The gun was loaded and readily capable of lethal use. App. 1083-4; App. 499.

Mr. Akins argues that under § 571.030.3 RSMo. he could legally carry a concealed firearm on his person while he was within a motor vehicle. Appellant's Brief, at 54-55; *see* § 571.030.3, RSMo. ("Subdivisions (1) … do not apply when the actor is … transporting a concealable firearm in the passenger compartment of a motor vehicle, so long as such concealable firearm is otherwise lawfully possessed…"). However, Mr. Akins' reading of § 571.030.3, RSMo. is incorrect and does not apply to his situation as Mr. Akins was not in his motor vehicle when the gun was discovered. App. 1067. Thus the firearm was not "in the passenger

compartment of a motor vehicle" and the exception of carrying a concealed weapon without a permit did not apply. Further, it is undisputed that Mr. Akins did not inform Officer Hughes that he was carrying a concealed weapon before Mr. Akins exited his vehicle, thus eliminating a justification defense by Mr. Akins. App. 1068; App. 589, at ¶ 20.

Even if the motor vehicle exception had applied when Mr. Akins stepped out of his vehicle, the exception only applies "so long as such concealable firearm is **otherwise lawfully possessed**." RSMo. 571.030.3 (2009) (emphasis added). As discussed below, Officer Hughes had probable cause to believe Mr. Akins' firearm was not otherwise lawfully possessed.

Officer Hughes had probable cause to believe that Mr. Akins violated § 571.030.(5) RSMo. (2009) because Officer Hughes had probable cause to believe that Mr. Akins was intoxicated based on the smell of marijuana, Mr. Akins' behavior, and possession of a firearm. App. 1083; App. 588, at ¶¶ 9-10; App. 495, at ¶ 2; App. 499. *See State v. Dvorak*, 295 S.W.3d 493, 503 (Mo. App. E.D. 2009) ("Because Defendant did not dispute that he knowingly possessed a loaded firearm, the State, to obtain a conviction under Section 571.030.1(5), was only required to prove that Defendant was intoxicated. Under Section 571.010, the term 'intoxicated' is defined as 'substantially impaired mental or physical capacity resulting from introduction of any substance into the body.'").

Additionally, Officer Hughes had probable cause to believe Mr. Akins violated federal law. Under 18 U.S.C. § 922(g)(3), it is unlawful for "any person … who is an unlawful user of or addicted to any controlled substance …to possess … any firearm or ammunition…." The Eighth Circuit has held that to establish that a defendant was an unlawful user of marijuana while possessing a firearm, § 922(g)(3) does not require proof of contemporaneous use of a controlled substance and possession of a firearm. *United States v. Johnson*, 572 F.3d 449, 453 (8th Cir. 2009) (*citing United States v. Mack*, 343 F. 929, 933 (8th Cir. 2003)). The Eighth Circuit has found that a small amount of marijuana in an individual's possession supports the inference that the individual was a user of marijuana. *Id*. Here, Mr. Akins possessed marijuana and had multiple arrests for drug violations. Appx 808. Therefore Officer Hughes had probable cause to believe Mr. Akins was not lawfully possessing his firearm.

Mr. Akins may attempt to argue that Officer Hughes had no authority to enforce federal law and thus could not rely on a federal violation to support his probable cause for Mr. Akins' arrest. However, such is not the case. *See Arizona v. United States*, 132 S. Ct. 2492, 2528 (2012) (*Justice Alito concurrence* "It is well established that state and local officers generally have authority to make stops and arrests for violations of federal criminal laws." (*citing Miller v. United States*, 357 U.S 301, 305 (1958) *and United States v. Di Re*, 332 U.S. 581, 589 (1948))).

Therefore, Officer Hughes had probable cause to arrest Mr. Akins, and the District Court's Judgment should be affirmed.

b) Officer Hughes is Entitled to Qualified Immunity

Mr. Akins argues that Officer Hughes "possessed all of the necessary information to know that [Mr.] Akins' conduct was legal" and therefore is not entitled to qualified immunity. Appellant's Brief, at 58.

First, Officer Hughes is entitled to qualified immunity since Mr. Akins did not suffer a constitutional violation. To defeat a claim of qualified immunity, a plaintiff must show both that the officer's conduct violated a constitutional right and that the constitutional right was so "clearly established" at the time of the alleged violation that a reasonable officer would have known that his conduct was unlawful. *Rohrbough v.* Hall, 586 F. 3d 582, 585 (8th Cir. 2009). There was probable cause for Mr. Akins' arrest. *See Section 6.a.* Even if Mr. Akins did suffer a constitutional violation, which Appellees deny, Officer Hughes would still be entitled to qualified immunity as there is no case that discusses whether the concealed carry exception is applicable when the individual concealing the firearm steps out of his vehicle at the request of a police officer without informing the police officer of the presence of the concealed firearm.

The burden is on the plaintiff to demonstrate that the law was clearly established at the time of the alleged constitutional violation. *Sparr v. Ward*, 306

F.3d 589, 593 (8th Cir. 2002). The plaintiff must show relevant authority in the jurisdiction at the time of the incident that should have put the officer on notice that his or her conduct was unlawful. *Saylor v. Nebraska*, 812 F.3d 637, 643 (8th Cir. 2016). Mr. Akins has not this burden. Appellees have found no authority that explains the motor vehicle exception in this context.

Mr. Akins' cites to *Painter v. Robertson* and *Estate of Dietrich v. Burrows* are inapplicable to this case. Neither case discussed the Missouri concealed carry law and exceptions. Further, both cases discuss provisions of other states' concealed carry laws that are different to Missouri's motor vehicle exception, and thus, do not provide evidence was to what the clearly established law was in this situation. *See Painter v. Robertson*, 185 F.3d 557, 567-68 (6th Cir. 1999); *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1011 (6th Cir. 1999).

Additionally, even if Mr. Akins had informed Officer Hughes of his concealed pistol, the clearly established law in May of 2010 would not have required Officer Hughes to mentally litigate Mr. Akins' potential statutory defenses at the DWI checkpoint. Counsel is also unaware of any case indicating that a person could not be charged with a violation of § 571.030, RSMo. (2009) for possessing a firearm while being under the influence of marijuana. Likewise, Counsel is unaware of any case which would indicate that in May of 2010, Mr. Akins could not be charged with a violation of 18 U.S.C. § 922(g)(3). Therefore

the contours of Mr. Akins' right would not be so clearly established that a reasonable officer would have known that Officer Hughes alleged conduct violated Mr. Akins' rights. Additionally, Officer Hughes arrest of Mr. Akins for possession of marijuana was reasonable under clearly established law. Therefore, Officer Hughes is entitled to qualified immunity.

7. Mr. Akins' June 6, 2010 Encounter with Sergeant Schlude

Mr. Akins argues in his Point V that the District Court erred in finding the search by Officer Schlude was objectively permissible and in his Point VI that the District Court erred in finding that the alleged officer Schlude threat was not a violation of Mr. Akins' rights.

a) Officer Schlude was Justified in Securing the Occupants of Mr. Akins' Vehicle, Performing a Protective Patdown, and Performing a Search of the Vehicle.

The District Court found the undisputed facts regarding the Sergeant Schlude stop were as follows: Sergeant Schlude stopped Mr. Akins after Mr. Akins made an illegal U-turn while driving. App. 1070. Mr. Akins had two passengers with him, including one in the back seat. App. 1070. Sergeant Schlude asked Mr. Akins whether there were any illegal drugs or weapons in the car, and Mr. Akins said there was a rifle on the rear floorboard. App. 1070. Public Safety Joint Communications told Sergeant Schlude that Mr. Akins was known to be

armed and violent, both passengers were known to be violent, and Mr. Akins had a felony weapons charge. App. 1070. Sergeant Schlude reported back to Joint Communications that there was a rifle in the car and requested backup. App. 1070.

Sergeant Schlude ordered Mr. Akins and the other two passengers out of the car. App. 1070. A second officer arrived at the scene, handcuffed the three individuals, and performed a protective patdown. App. 1070. Sergeant Schlude searched Mr. Akins' vehicle. App. 1070. The search took 20-30 minutes. App. 1070. Mr. Akins did not consent to the search. App. 1070. Sergeant Schlude issued Mr. Akins a citation for the illegal turn. App. 1070.

The Supreme Court found, and the District Court properly noted, a police officer may order persons out of an automobile during a stop for a traffic violation. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The Supreme Court has specifically recognized that "investigative detentions involving suspects in vehicles are especially fraught with danger to police officers" and "that suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed." *Mich. v. Long*, 463 U.S. 1032, 1047-8 (1983). The Supreme Court held that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable believe based on 'specific and articulable facts which, taken together with the rational inferences from those

facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id*. at 1049.

Further, the Supreme Court has held that, during a routine traffic stop, police officers "may order out of a vehicle both the driver… and any passengers; perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous…." *Knowles v. Iowa*, 525 U.S. 113, 118 (1998). The District Court noted that even if handcuffing an individual during a traffic stop is not the norm, "[p]olice officers engaged in an otherwise lawful stop must be permitted to take measures—including the use of handcuffs—they believe reasonably necessary to protect themselves from harm, or to safeguard the security of others." *United States v. Harvey*, 2015 WL 1197918, at *5 (W.D. Mo. Mar. 16, 2015) (citing *United States v. Acosta–Colon*, 157 F.3d 9, 18 (1st Cir. 1998); *United States v. Bailey*, 468 F.Supp.2d 373, 385 (E.D.N.Y. 2006); *United States v. Sanchez*, 2005 WL 2001510, at *5 (C.D. Ill. July 19, 2005)).

Mr. Akins admits that he was validly stopped by Sergeant Schlude for an illegal turn. App. 258; App. 792. Mr. Akins also admits that he had a firearm in the floorboard of his vehicle and had told Sergeant Schlude about the firearm. App. 258; App. 792. Sergeant Schlude had thought he had seen ammunition in Mr. Akins' vehicle. App. 258; App. 792. There were three individuals in Mr. Akins' vehicle, including an individual in the backseat in the area where Mr.

Akins' indicated a firearm was present. App. 258; App. 792. Mr. Akins had already been charged with a felony weapons violation. App. 258; App. 792. Dispatch told Sergeant Schlude that Mr. Akins was known to be armed and violent, both passengers were known to be violent, and Mr. Akins had a felony weapons charge. App. 913; App. 990-999 (no response). The District Court properly found that Sergeant Schlude was justified in asking Mr. Akins to exit his vehicle and performing a protective search of Mr. Akins, his passengers, and the car, and securing the three individuals during the search. App. 1089. Therefore, Mr. Akins did not suffer a constitutional violation and Sergeant Schlude is entitled to qualified immunity.

Mr. Akins claims the search took 24 minutes and appears to argue that 24 minutes is an unreasonable amount of time to be handcuffed. Appellant's Brief, at 18-19. However, the Supreme Court held that a two-to-three hour detention in handcuffs does not outweigh the government's continuing safety interests and is therefore not unreasonable, when two officers had detained four individuals during a search of a gang house for dangerous weapons. *Meuhler v. Mena*, 544 U.S 93 (2005). This case is similar to *Meuhler* in that two officers were attempting to detain three individuals and search a vehicle in which a dangerous weapon had already been identified. "Danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." *Md.*

v. Wilson, 519 U.S. 408 (1997). Therefore, the alleged 24 minutes was not an unreasonable amount of time for Mr. Akins to be handcuffed and the District Court's Judgment should be affirmed.

Even if Mr. Akins did suffer a constitutional violation, the contours of Mr. Akins' right was not so clearly established that a reasonable officer would have known that Sergeant Schlude's alleged conduct violated Mr. Akins' rights. Mr. Akins has not met his burden of proving that any allegedly violated right was so clearly established in that Sergeant Schlude should have known that his conduct was unlawful. Mr. Akins' cite to *Rodriguez v. United States* is misplaced. In *Rodriguez*, the Supreme Court discussed a case dealing only with a traffic violation, not with a traffic violation and the need to conduct a protective search. *Rodriguez v. United States*, 135 S.Ct. 1609 (2015).

Further, Mr. Akins' cite to *Arizona v. Gant* is also misplaced. "Roadside encounters between police and suspects are especially hazardous . . . the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect is dangerous and the suspect may gain immediate control of weapons." *United States v. Stewart*, 631 F.3d 453, 457 (8th Cir. 2011) (citing *Michigan v. Long*, 463 U.S. 1032, 1048 (U.S. 1983)). This Court has explained, "In reexamining the search incident to arrest exception to the

warrant requirement, *Gant* left the holding in *Long* untouched." *Id*. (citing *Arizona v. Gant*, 556 U.S. 332, 356 (2009). This Court has further held that "Where an officer has temporarily removed a suspect from his vehicle, but is not planning to arrest him, the officer is permitted to conduct a limited protective search of the vehicle before releasing a suspect to ensure he will not be able to gain immediate control of a weapon." *United States v. Stewart*, 631 F.3d 453, 459 (8th Cir. 2011). In this case, there is no allegation that Sergeant Schlude did not efficiently perform the protective search and issue the citation to Mr. Akins. Therefore, Sergeant Schlude is entitled to qualified immunity and the District Court's Judgment should be affirmed.

b) Mr. Akins' Retaliation Claim against Sergeant Schlude is Precluded

After Sergeant Schlude issued Mr. Akins the citation, Mr. Akins alleges that he asked Sergeant Schlude whether he had "done anything wrong" with the gun and what "the protocol" was for this situation. App. 1071. Mr. Akins says that Sergeant Schlude responded that it depended on the officer, i.e., some would see the gun in the car, pull their own gun and shoot him dead, then testify that they had feared for their life and the charge would be dismissed. App. 1071. The District Court found that Mr. Akins argued he "felt intimidated by his conversation with Schlude at the end of the encounter." App. 1089. The District Court held "to the extent Akins suggests Schlude had an improper motive in conducting the search,

the search was objectively permissible as discussed above, so an inquiry into his motive is precluded." App. 1089 (citing *Smithson v. Aldrich*, 235 F.3d 1058 (8th Cir. 2000)).

Mr. Akins argues on appeal that Sergeant Schlude "has no right to threaten Akins with summary execution or exercising that right." However, not only did Sergeant Schlude not threaten Mr. Akins and no reasonable jury would believe Sergeant Schlude's alleged words were a threat, but also Mr. Akins has failed to show how Sergeant Schlude's alleged words were a constitutional violation under the Second Amendment. Sergeant Schlude did not confiscate Mr. Akins' gun or prevent him from lawfully using it.

Next, Mr. Akins argues for the first time that this conversation was made in retaliation against Mr. Akins for exercising his First Amendment rights. Appellants' Brief, at 65. Mr. Akins cites to a Sixth Circuit case in support of his retaliation claim. The District Court did not analyze this contention since Mr. Akins did not allege or argue it in his Summary Judgment pleadings.

"To prevail in an action for First Amendment retaliation, 'plaintiff must show a causal connection between a defendant's retaliatory animus and [plaintiff's] subsequent injury.'" *Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010). "Retaliation need not have been the sole motive, but it must have been a 'substantial factor' in" the decision to arrest. *Id*. Furthermore, the

plaintiffs must show that the retaliatory motive was a "but-for" cause of the arrest--i.e., that the plaintiffs were "singled out" because of their exercise of constitutional rights. *Id*. Finally, the plaintiffs must show that the officers' "adverse action caused [them] to suffer an injury that would 'chill a person of ordinary firmness' from continuing in the protected activity.'" *Id*. "Specific proof of improper motivation is required in order for plaintiff to survive summary judgment on a First Amendment retaliation claim." *Williams*, 2006 U.S.Dist.LEXIS 24127 at *34. The Eighth Circuit has found that when probable cause could constitute the "other basis" to justify an arrest, the inquiry into the officer's arresting motive is precluded. *Smithson v. Aldrich*, 235 F.3d 1058 (8th Cir. 2000).

Mr. Akins alleges on appeal that he was in development of his website, Citizens for Justice, and that Sergeant Schlude's alleged words were made "in retaliation against him for exercising his 1st Amendment rights." However, this encounter occurred prior to Mr. Akins beginning his website. App. 409, at 250:4-11. Further, Mr. Akins alleges that the Columbia Police Officers Association, a non-party to this suit, did not become aware of the website until December 2010. App. 24.

Further, as the District Court found, the stop and search by Sergeant Schlude was objectively permissible. Thus, under *Smithson*, the inquiry into Sergeant Schlude's motive is precluded. Therefore, Mr. Akins' retaliation claim fails.

c) Mr. Akins' Remaining Retaliation Claims

Mr. Akins summarily states in his conclusion paragraph, "City Retaliations [sic] against Akins' employers, 'Wanted Poster', spotlighting, unlawful stops, prohibition from filming in traditional public forum of CPD Lobby were all in retaliation for his exercising his 1st Amendment rights through CFJ." Appellant's Brief, at 78. Mr. Akins appears to have waived these claims on appeal as he does not mention them in his argument section. See Appellant's Brief; FRAP 28(a)(8).

Should this Court decide to consider Mr. Akins' claims, Mr. Akins' claims fail as a matter of law. As to Mr. Akins' claim regarding the poster, the creator of the poster is unknown and Columbia cannot be liable for the poster, or any other allegedly retaliatory behavior, under § 1983 on a respondeat superior theory. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). As to the alleged retaliation against Mr. Akins' employers and spotlighting claims, neither is mentioned at any point in Mr. Akins' brief other than this one sentence in his conclusion paragraph. Mr. Akins does not identify any Officer allegedly involved in spotlighting him. Columbia cannot be held liable under a respondeat superior theory. Additionally, CPD was using spot lights as a crowd control mechanism once the bars shut down in downtown Columbia. Appx. 803. As to the stops, each stop was valid, as discussed in Sections 6, 7, 8.c, and 11. Finally, as to the videotaping claim, the lobby is not a traditional public forum and Mr. Akins' did

not suffer a constitutional violations. See Section 4. Therefore, any claim against the City or any other Appellee for retaliation fails.

8. Mr. Akins' Bersa Pistol

Mr. Akins alleges that the seizure of his Bersa pistol was unlawful under the Fourth Amendment and Fourteenth Amendment. Mr. Akins argues both the initial seizure and continued retention of the pistol was unlawful.

a) Officer Hughes' seizure of the Bersa Pistol

Mr. Akins argues for the first time on appeal that Officer Hughes unlawfully seized his Bersa Pistol. However, as noted above, Officer Hughes had probable cause to arrest Mr. Akins for a violation of § 571.030 RSMo (2009) and 18 U.S.C. § 922(g)(3). *See supra, Section 6.a.* Since the pistol was evidence of Mr. Akins' violation of § 571.030 RSMo (2009) and 18 U.S.C. § 922(g)(3), Officer Hughes legally seized the pistol. *See United States v. Malachesen*, 597 F.2d 1232, 1235 (8th Cir. 1979).

Even if Officer Hughes did not have probable cause to arrest Mr. Akins, Officer Hughes is entitled to qualified immunity for both the arrest and the seizure of the pistol. *See supra, Section 6.b*. Therefore, the District Court's ruling should be sustained.

b) CPD Retention of the Bersa Pistol

Mr. Akins also argues on appeal that the retention of the Bersa pistol from November 16, 2010 until April 15, 2013 was unlawful. Appellant's Brief, at 67. Mr. Akins does not allege who allegedly wrongfully held his firearm, instead only stating it was "maintained by the [CPD]." App. 21, at ¶ 23. The District Court found that since CPD is not a defendant in this case, and is not a suable entity (*see Catlett v. Jefferson County*, 299 F.Supp.2d 967 (E.D. Mo. 2004) (*citing American Fire Alarm Co. v. Vd. Of Police Comm'rs of Kansas City*, 227 S.W. 114, 116 (Mo. 1920))), the only possible defendant Mr. Akins is attempting to bring this claim against Columbia. However, as found by the District Court, Columbia cannot be liable under § 1983 on a *respondeat superior* theory. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Further, Mr. Akins has not alleged that Columbia adopted a policy that lead to the allegedly wrongful holding of Mr. Akins' firearm and has not identified any policy that would support this allegation. Therefore, the District Court's ruling should be sustained.

Even if Mr. Akins could bring this claim against Columbia, Mr. Akins did not suffer a constitutional violation. Mr. Akins states he "made demands for the return of his pistol without response." Appellant's Brief, at 67. However, Mr. Akins does not support his claim with citation to the record. Even if, as alleged by Mr. Akins, after an alleged second demand for the pistol, the Prosecutor had said

the release "should be OK," there is no evidence in the record that this information was relayed to CPD. App. 1069.

Further, Mr. Akins' charges were dismissed *nolle prosequi*. App. 508; *State v. Buchli*, 152 S.W.3d 289, 307 (Mo. App. W.D. 2004). A *nolle prosequi* results in a dismissal without prejudice. *State v. Buchli*, 152 S.W.3d 289, 307 (Mo. App. W.D. 2004). Mr. Akins was charged with a Class D Felony, which had a statute of limitations of three years. App. 508; RSMo § 556.036.2(1). Thus, Mr. Akins could have been recharged until May 9, 2013.

"When seizing property for criminal investigatory purposes, compliance with the Fourth Amendment satisfies pre-deprivation procedural due process as well." *Rodgers v. Knight*, 781 F.3d 932, 941 (8th Cir. 2015) (*citing Walters v. Wolf*, 660 F.3d 307, 314 (8th Cir. 2011)). "Where retention of evidence is justified by pending charges or an arrest warrant, no further process is required." *Id*. "Likewise, if evidence is 'needed for an ongoing or proposed specific investigation,' law enforcement authorities are entitled to retain it." *Id*. (*citing Sovereign News Co. v. United* States, 690 F.2d 569, 578 (6th Cir. 1982)). Consequently, CPD could have reasonably believed the firearm could have been needed for an ongoing investigation. Further, Mr. Akins admits CPD maintained the firearm "pursuant to the recommendations of the [Prosecutor]." App. 21, at ¶ 23. The Prosecutor did not inform CPD that the firearm was no longer needed

until March 20, 2013. App. 507;App. 599, at ¶ 11. Therefore, the seizure and continued possession of the property was not a constitutional violation.

Additionally, following the dismissal of the charges against Mr. Akins, Mr. Akins did not communicate with CPD until October 24, 2012, regarding the return of his firearm. Appellees' Exhibit 8. This was only after CPD discovered it still had the firearm, through a routine audit, and notified Mr. Akins on October 18, 2012, via a letter. App. 505-06; App. 456, at 438:21-23; App. 598, at ¶ 3. The letter informed Mr. Akins that he could not pick up the firearm himself, due to him being charged with a felony in a separate incident, but that a third party could pick up the firearm. App. 505-06; App. 598, at ¶ 5; *see infra* Section 8.c. This was explained to Mr. Akins over a phone call on October 24, 2012. Appellees' Exhibit 8. Mr. Akins confirmed that he understood he could have a third party pick up the firearm. *Id*. Mr. Akins never arranged for the pick up the firearm and did not contact CPD again regarding the firearm until February 22, 2013. App. 599, at ¶¶ 9-10; App. 510.

Mr. Akins' cites to various cases are irrelevant. As noted above, Mr. Akins' Bersa pistol was seized for criminal investigatory purposes. Since the seizure was valid under the Fourth Amendment, the seizure satisfied procedural due process. *Rodgers v. Knight*, 781 F.3d 932, 941 (8th Cir. 2015). "If evidence is 'needed for an ongoing or proposed specific investigation,' law enforcement authorities are

entitled to retain it" and no further process is required. *Id*. Since the Prosecutor did not inform CPD the firearm was no longer needed until March 20, 2013, CPD reasonably believed the firearm could have been needed for an ongoing investigation until that time. App. 507; App. 599, at ¶ 11. Further, CPD offered to return the pistol to a third party (since Mr. Akins had a pending felony charge), but Mr. Akins did not arrange for a third party to pick up the gun. App. 1087. Therefore, Mr. Akins did not suffer a constitutional violation.

Mr. Akins also cites to the Missouri Criminal Activity Forfeiture Act ("CAFA"). However, he does not explain or make any argument regarding how CAFA is relevant. Section 513.607, RSMo., states that "all property of every kind used or intended for use in the course of, derive from, or realized criminal activity is subject to criminal forfeiture. Civil forfeiture shall be had by a civil proceeding known as a CAFA forfeiture proceeding." Mr. Akins has set forth no facts which indicate the Columbia Defendants ever initiated any Civil Asset Forfeiture action pursuant to the Act, therefore it does not apply.

In his brief, Mr. Akins makes cursory mention of his butterfly knife. Mr. Akins claims the Prosecutor did not have probable cause to charge Mr. Akins for possession of a prohibited weapon or probable cause to maintain the seizure or approve of the destruction of the knife after charges were dismissed. The retention and destruction claims are unpled, and further, no Officer is alleged to have

retained or destroyed the knife. as required by FRAP 28(a)(8)(A). Instead, in his Conclusion section, Mr. Akins states "Also well-established law that Akins was lawfully permitted to carry a butterfly style pocket knife with locking latch and blade less than four inches . . . . The seizures [CPD] Officers … Palmer were in violation of Akins 4th Amendment Rights." Appellant's Brief, at 77. This is insufficient argument to preserve a claim against Officer Palmer on appeal for any alleged violation of Mr. Akins' rights. There are no facts, no law, and no argument provided by Mr. Akins for this Court to look to analyze Mr. Akins' claim.

Even if Mr. Akins had preserved a cognizable claim against Officer Palmer for the seizure of the butterfly knife (which Appellees deny), that claim would fail. The District Court found Officer Palmer stopped Akins because Palmer was driving through an intersection and Akins entered it, failing to yield the right of way. App. 1093; App. 523; App. 610, at ¶ 4; App. 356, at 198:15-199:13. Mr. Akins did not have a driver license. *Id*. He told Officer Palmer that he was driving to a Citizens-for-Justice-related event and was therefore covered to drive under his limited driving privilege. *Id*. However, when Officer Palmer ran Mr. Akins' name through MULES, Mr. Akins' driving privilege was reported as revoked without any limited privileges. *Id*. Mr. Akins could not provide proof of insurance. *Id*. Officer Palmer arrested Mr. Akins for driving while revoked. *Id*. Officer Palmer conducted a search incident to the arrest of Mr. Akins. App. 523-4; App. 611, at ¶

12; App. 357, at 201:5-7. During the search, a butterfly knife was found in Mr. Akins' right-front pants pocket. App. 523-4; App. 611, at ¶ 12; App. 357, at 203:17-21. The District Court concluded Officer Palmer had probable cause to stop Mr. Akins and arrest him for driving while revoked. App. 1095. It does not appear that Mr. Akins' is appealing this part of the holding, as it is not mentioned at any point in Mr. Akins' brief.

If this Court finds that Mr. Akins is appealing the District Court's ruling, it can only be the portion of the District Court's finding that Officer Palmer is entitled to qualified immunity for the seizure of the knife. App. 1095. The District Court found that the knife Mr. Akins was carrying was arguably a "switchblade knife" under § 571.010(20) RSMo. App. 1095. The District Court also found that at the very least, a reasonable officer could have concluded the knife was a switchblade knife and illegal under the statute, satisfying the qualified immunity standard.

Under § 571.010(12), a "knife" is "any dagger, dirk, stiletto, or bladed hand instrument that is readily capable of inflicting serious physical injury or death by cutting or stabbing a person. For purposes of this chapter, 'knife' does not include any ordinary pocketknife with no blade more than four inches in length." Under § 571.010(20), a "switchblade knife" is "any knife which has a blade that folds or

closes into the handle or sheath, and: … (b) That opens or released from the handle or sheath by the force of gravity or by the application of centrifugal force."

Prior to submitting the probable cause statement, Officer Palmer checked with a supervisor about the butterfly knife. The supervisor told Officer Palmer the knife was illegal. Officer Palmer wrote in the probable cause statement that the knife was designed to be opened from the handle by gravity or by the application of centrifugal force, making the knife a switchblade. Mr. Akins argued to the District Court that the blade of his butterfly knife measured less than four inches. App. 995. However, the District Court correctly found that it is not clearly established under Missouri law what constitutes the "blade" of a knife, and it was reasonable for Office Palmer to conclude that the butterfly knife's blade was at least four inches. App. 1096. Mr. Akins' butterfly knife, if measured from the beginning of the metal making up the blade (which begins near the two circle hinges), measures in excess of four inches. See App. 529. Therefore, it was reasonable for Officer Palmer to conclude that the butterfly knife was a "switchblade knife," which is illegal to carry concealed under § 571.010, and seize the knife. The District Court's Judgment should be affirmed.

9. Claims against Columbia

Mr. Akins argues on appeal that "the inadequate training in firearms law that the [CPD] officers and the Boone Prosecutors received 'amounts to deliberate

indifference to the rights of persons with whom they come into contact.'" Appellants' Brief, at 72. In its Judgment, the District Court noted that a municipality cannot be liable under § 1983 for failure to train or supervise its police officers if the police officers did not commit a constitutional violation. App. 1100 (citing *Gibson v. Cook*, 2014 WL 4085821, at *6 (8th Cir. Aug. 20, 2014) and *Moore v. City of Desloge*, 647 F.3d 841, 849 (8th Cir. 2011)).

The District Court correctly concluded that since each Officer had probable cause to seize or search Mr. Akins during each incident and since Mr. Akins could not demonstrate his constitutional rights were violated in connection with the return of his gun, the seizure of his butterfly knife, or his reporting activities, his failure to train claim must fail. App. 1100-1101. *See also*, supra Sections 3-4, 6-8.

Even if each Officer did not have probable cause to search or seize Mr. Akins (which Appellees deny), all the Officers are entitled to qualified immunity as none of the alleged violations would have been so clearly established as to put Officers on notice that their alleged conduct would have violated Mr. Akins rights. Because the alleged violations were not clearly established, the City cannot be held liable for "deliberate indifference" as a result of not training on specific scenarios which were not clearly established law.

Finally, even if the Officers were not entitled to qualified immunity (which Appellees deny) Mr. Akins' claim would still fail. To support a failure to train

claim against a municipality under § 1983, the plaintiff must show "(1) the [city's] . . . training practices [were] inadequate; (2) the [city] was deliberately indifferent to the rights of others in adopting them, such that the 'failure to train reflects a deliberate or conscious choice by [the city]'; and (3) an alleged deficiency in the . . . training procedures actually caused the plaintiff's injury." *Parrish v. Ball*, 594 F.3d 993 (8th Cir. 2010) (citing *Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir. 1996) and *City of Canton v. Harris*, 489 U.S. 378,389 (1989)). Mr. Akins has not provided any information about what training the City provided each Officer nor has he shown that any unalleged deficiency in the training provided caused his alleged injury. Therefore, Mr. Akins' claim fails and the District Court's order should be sustained.

10. Mr. Akins' Motions to Disqualifying the Honorable Judge Laughrey

Appellees incorporate by reference Appellees Knight, Berry, Nelson, and Boone County's response to Mr. Akins' argument (designated by the Boone County Appellees as Issue 2). FRAP 28(i).

11. Mr. Akins' Claim Regarding the Encounter with Officer Sanders

Mr. Akins states in his "Statement of Issues Presented" that the District Court erred in finding that the encounter with Officer Sanders was not an unlawful seizure. However, Mr. Akins failed to discuss in his argument section any aspect of the encounter with Officer Sanders, including any contentions, citations to any

authorities, or parts of the record which he relies, as required by FRAP 28(a)(8)(A). This severely prejudices Appellees, as Appellees have to attempt to piece together Mr. Akins' argument among his statement of the case, statement of the issues, and conclusion instead of simply referring to his argument section. Further, Appellees must use a portion of their word limit to address arguments that have not been adequately raised on appeal. *See also* sections 7.b and 8.c.

However, in the event this Court determines this claim was sufficiently raised, Mr. Akins' claim fails. Mr. Akins argued to the District Court that he was seized without probable cause by Officer Sanders. App. 21, at ¶ 26. The District Court correctly concluded that only a reasonable suspicion is necessary to perform an investigative stop. App. 1090-1091 (citing *U.S. v. Smith*, 648 F.3d 654, 658 (8th Cir. 2011), *Graham v. Connor*, 490 U.S. 386, 3912-93 (1989), *United States v. Cortez*, 449 U.S. 411, 418 (1981), *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), and *Hoover v. Walsh*, 682 F.3d 481, 495-496 (6th Cir. 2012)).

The District Court concluded the objective facts taken as a whole reasonably warranted a suspicion of criminal activity and at a minimum Officer Sanders had qualified immunity since a reasonable office would not have known under the circumstances that his conduct was unlawful. App. 1091-1092. The District Court relied on the following facts to support its conclusions: Mr. Akins' car pulled out of a high crime neighborhood. Officer Sanders began following the car and

observed the driver begin acting in what he believed to be an unusual manner, according to his training and experience. The driver changed lanes more than once and then turned into a parking lot, which signified to Officer Sanders that the driver was trying to avoid police contact. The occupants become animated as Officer Sanders was following. In the parking lot, Officer Sanders saw an occupant shining a light at him from the rear window, and he had recently been trained that individuals will use phones or cameras to video police to try to deter contact by the officers. When the driver parked, Officer Sanders observed that the occupants were watching his car. Officer Sanders spoke with the occupants, checked their identification, and returned it. The interaction lasted less than two minutes. Sanders never drew his weapon or activated his lights or sirens. He contacted dispatch, said he was performing a subject check, and got information on the car plates, the driver, and the occupant. App. 1091.

In the alternative, Officer Sanders encounter with Mr. Akins was consensual under the facts outlined above.

The above facts demonstrate that Officer Sanders at the very least is entitled to qualified immunity. Therefore, the District Court's Judgment should be affirmed.

CONCLUSION

Therefore, for the reasons stated above, Appellees request this Court affirm the District Court's Judgment and for such other and further relief as this Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28A this Brief has been scanned by VIPRE program and is virus free. Further, this Brief contains 14,150 words pursuant to FRAP 32.