IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JEFF HULBERT, et al	*	
Plaintiffs	*	
v.	*	**Case No. 1:18-cv-00461-GLR**
SGT. BRIAN T. POPE, et al	*	
Defendants	*	

DEFENDANTS' REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

The argument of Plaintiffs' Opposition to Defendant's Motion to Dismiss (the "Opposition") that the Defendants are not entitled to qualified immunity fails because it fails to show allegations of the Complaint states a cause of action against the Defendants for violations of constitutional rights under the U.S. Constitution and the Maryland Constitution, Declaration of Rights, have committed state tort actions for false arrest and false imprisonment or that they are not entitled to qualified immunity or state tort immunity. Further, the Plaintiffs failed to show that they are entitled to declaratory or injunctive relief.

Further, the Plaintiffs argue that the Defendants' motion to dismiss fails at this stage of the proceeding because the arguments are based on disputed material facts and presentation of matters outside of the pleadings. The matters that were technically presented outside of the pleadings were the copies of the citations mentioned in the Plaintiffs' complaint attached as exhibits. In considering a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), the Fourth Circuit has said that "[w]e may also consider documents attached to the complaint, *see* Fed.R.Civ.P.

10(c), as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic." *Philips v. Pitts County Memorial Hospital,* 572 F. 3d 176, 180 (4th Cir. 2009)(quorum opinion). The Plaintiff has not challenged the authenticity of the exhibits attached to the Defendants Motion to Dismiss so their authenticity is not in dispute. The citations attached as exhibits to the Motion to Dismiss were directly mentioned and were a material part of allegations in the Complaint. (See ECF 1, ¶¶ 4, 37, 38, 42, 43,44, 45, 50, 51, 52, 53, 54, 55, 57, 58, 85 and 86). The citations attached to the Motion to Dismiss, therefore, were integral to the Complaint and may be considered by the Court without the necessity of converting the Motion to Dismiss to a Motion for Summary Judgment under Fed. R. Civ. P. 56.

The following are the Defendants' replies to the arguments made in the Opposition.

A. Allegations Are Insufficient to Plead Violation of Plaintiffs' First Amendment Rights and Retaliation.

1. Plaintiff Failed to Allege Sufficient Facts Showing that Order to Move Several Feet Was Violation of First Amendment Rights. As argued in the Memorandum In Support of Motion to Dismiss, ECF 11.1, pgs. 8 and 9, from the reading of the allegations in the Complaint, the Plaintiffs' First Amendment rights of speech were not violated by being ordered to move several feet back from the sidewalk. The Opposition opens with a general recitation that freedom of speech is a fundamental right of citizens protected by the First Amendment. (ECF 14, pg. 6). The Opposition continues in broad sweep dismissing the State statutory authority of the Maryland Capitol Police ("MCP") as "irrelevant" citing *United States v. Grace,* 461 U.S. 171 (1983) and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983), *Schneider v. State of New Jersey, Town of Irvington,* 308 U.S. 147 (1939), and *Tobey v. Jones,* 706 F.3d 379 (4th Cir. 2013) in each instance quoting general statements from each of these decisions that

support the premise that sidewalks have been considered traditional public forums for the exercise of First Amendment protected speech (ECF 14, pgs 7 and 8). The quotes made in Opposition are general statements of principle without providing factual context within each case and leaving out parts of these decisions that affirm that a government may enforce reasonable time, place and manner regulations which are content neutral. In the *Perry* decision, the Supreme Court clearly stated that in relation to traditional public forums "the state may also enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n,* at U.S. 45. In the *Grace* decision, concerning an outright ban of demonstrations on the sidewalks of the Supreme Court building, the Supreme Court, adopting the above-quoted language from *Perry*, also said that a government may enact and enforce time, place and manner regulations on traditional public forums which are content neutral. *Grace,* at U.S. at 177. In *Schneider,* the Supreme Court clearly stated that "[a]lthough a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." *Schneider,* at U.S. 150.

Nowhere in the Complaint is there an allegation as to how the regulation or the enforcement of the regulation is not content neutral other than by conjectural and conclusory statements that is was aimed at suppressing the Plaintiffs' speech rights. Instead, the Plaintiff interjects facts in its Opposition to attack officer's request to move back as not being a reasonable time, place or manner restriction. The argument is misplaced.

First, the Department of General Services has jurisdiction over the Capitol Building Complex through State Fin. & Proc. Art., §6-101 which provides in pertinent part:

> The Department has jurisdiction over and *full police authority for the enforcement of the criminal laws and the parking and motor vehicle laws as to the operation, maintenance, and protection* of:
> (1) buildings and grounds that, on June 30, 1984, were administered by the Office of Annapolis Public Buildings and Grounds, and extending to the surrounding area that encompasses 1,000 feet in any direction from the boundary of those buildings and grounds (emphasis supplied);

Further, §4-604 provides in pertinent part:

> For all improvements, grounds, and multiservice centers under the jurisdiction of the Department (of General Services), the responsibilities of the Department include:
> (6) *protecting persons and property*, including dispersing any assemblage that is unlawful, is dangerous, or obstructs free passage;
> (7) *preserving and protecting the public peace, health, and safety*; and
> (8) *controlling pedestrian and vehicular traffic*, including establishing speed limits and parking and impoundment regulations for parking garages, surface parking lots, roads, and *sidewalks that are owned or leased by the State and that are within the improvements, grounds, and multiservice centers*. (emphasis supplied).

Under §4-605, the MCP is established and authorized as follows:

> (a) *In general* (1) In accordance with the provisions of the State Personnel and Pensions Article, the Secretary may establish a police and security force, known as the Maryland Capitol Police of the Department of General Services, to protect people and property on or about improvements, grounds, and multiservice centers under the jurisdiction of the Department, and in the surrounding areas of the buildings and grounds in Annapolis and Baltimore City as described in § 4-601(1), (2), and (3) of this subtitle.
> (2) The Maryland Capitol Police of the Department of General Services may include sworn police officers. (Italics in original)

Second, from the face of the Complaint, Sergeant Pope ordered the Plaintiffs to move back several feet from where they were standing on the sidewalk (ECF 1, ¶¶ 27, 29,) Sergeant

Pope gave the order to move back in furtherance of MCP's duty to protect persons on or about the building and grounds of the Capitol Building Complex where the demonstrators were located. The fact that Pope merely ordered the Plaintiffs to move back a few feet from the sidewalk away from the curb rather than ordering the Plaintiffs to leave the area would infer that he was trying to ensure the safety of both the Plaintiffs as well as motorists passing by that evening. It certainly would not infer an intent to violate the Plaintiffs' exercise of free speech. Such an order is reasonable beyond doubt and in keeping with Maryland law and regulation for the protection and safety of government facilities. Any argument that such an order was a pretense is absurd since it would have been obvious to all if Sergeant Pope ordered the Plaintiffs to go into Lawyers' Mall and then turn around and arrest them for being in the Mall without a permit, as the Plaintiffs argue in their Opposition.

The Plaintiff seeks to make the argument that even the Defendants Memorandum of Law, ECF 11.1, pg 8 acknowledges that the demonstrators were on a public sidewalk, when the reference to sidewalk in ECF 11.1 pg 8 is used in to describe the geographic distinction between the sidewalk where the Plaintiffs initially stood and Lawyers Mall a few feet away where the Plaintiffs were ordered to move. It is beside the point that the Plaintiffs were on a sidewalk because as has already been discussed, the Supreme Court and the Fourth Circuit have been clear that a government may enforce content neutral time, place and manner regulations on traditional public forums such as streets. Plaintiff argues in ECF 14, pg 8 that the order to move to Lawyers' Mall was a content-based time, place and manner restriction because:

(1) other demonstrators on the public sidewalks have not been asked to relocate – *a fact not pleaded in the Complaint, ECF 1;*

(2) the request was that the Plaintiffs relocate to an area (Lawyers' Mall) that required a permit which the Plaintiffs did not have – an irrelevant consideration because the Complaint alleges that Sergeant Pope told them that they should go into Lawyers' Mall thereby giving them permission to move there (see ECF 1, ¶¶ 27, 32).

(3) there was no urgency or need to relocate into Lawyers' Mall because the Plaintiffs deemed that there was no impediment to pedestrian or vehicular traffic. The last contention is beside the point since the Plaintiffs were not ordered to move away from the location but to move back from the sidewalk near the street. It is the MCP's responsibility to protect persons in the Capitol Building Complex, not the responsibility of the Plaintiffs. The argument that ordering the Plaintiffs to move several feet back from a street is a violation of First Amendment constitutional rights is specious.

The Plaintiffs further argue as the more plausible view that the Sergeant Pope's order to relocate was a set up for harassment. The "unavoidable inference" that Sergeant Pope's alleged statement of a "changed policy" was a contrivance and used as a pretext to make arrests that followed was not alleged in the Complaint and requires speculation not supported by the facts pled or inferable from the allegations of the Complaint. Such speculation does not comport with the pleading requirements of *Twomby,* supra, and *Iqbal,* supra. Under *Twomby,* for a complaint to survive a motion to dismiss for failure to state a claim upon which relief can be granted, factual allegations must be enough to raise to relief above the speculative level, on the assumption that all allegations in the complaint are true even if doubtful in fact. *Twomby,* at U.S. 555. "The plausibility standard is not akin to a 'probability standard', but it asks for more than sheer possibility that a defendant has acted unlawfully." *Iqbal,* at U.S. 680.

Likewise, the Plaintiffs' attempt to link an alleged statement of Sergeant Pope with the allegation Chief Wilson was previously employed by the Senate President and that the Senate President was instrumental in Chief Wilson obtaining his current job with the MCP (see ECF 14, pgs. 8 and 9) is also conjectural and requires speculation to conclude that Chief Wilson was retaliating against protests against the Senate President therefore was acting under the influence or direction of the Senate President.

2. The Arrest Was for Failure to Obey Order to Move Rather Than Filming.

Plaintiff recites statements made in several decisions to support their contention that audio-visual recording by camera of police officers in the line of duty is protected by the First Amendment (ECF 14, pg.10).

The Complaint, ECF 1, alleges that Kevin Hulbert was told by Sergeant Pope that "I am advising you that you have to be in the Lawyer's [sic] Mall" (ECF 1, ¶ 27). When the other members of the group joining the Hulbert's arrived, they were given the order to move back from the sidewalk into Lawyers' Mall and in fact certain members began to follow the order to move to Lawyers' Mall (ECF 1, ¶ 32). Jeff Hulbert was present and in the words of the Complaint "in respectful disobedience" remained on the sidewalk (ECF 1, ¶ 33). Kevin Hulbert was also on the sidewalk when he was standing by filming the events taking place because as said in ECF 1, ¶ 28, the Plaintiffs and other members consciously avoided the Lawyers' Mall area. Kevin Hulbert had been told directly by Sergeant Pope to move several feet to Lawyers' Mall and even though he was filming the event with his cell phone, he nevertheless refused to follow the order to move over into the Lawyers' Mall area given to him by Sergeant Pope. At that point, Sergeant Pope arrested Kevin Hulbert for the same reason he arrested Jeff Hulbert, that they both refused to follow a lawful order of Sergeant Pope. Thus, it is evident from the

allegations that Kevin Hulbert's arrest had nothing to do with his filming, but rather for his failure to obey Sergeant Pope's order to move into the Lawyers' Mall area.

The Opposition cites four cases at ECF14, pg 10 that enunciate that video recording of police activity is a protected speech right under the First Amendment and then recites what actually is ¶35, ECF 1[1] which says:

> "While not holding a sign and merely recording the incident on video and audio from a reasonable and lawful distance, Kevin Hulbert was placed under arrest as well at the direction of Defendant Pope. When he was arrested, Kevin Hulbert was not carrying a sign or otherwise engaged in a demonstration, but simply video and audio recording of the police response." ECF 14, pg. 11.

The allegations do not allege facts that point to the motivation for the arrest was because Kevin Hulbert was video recording the event, but merely states that he was recording the event at the time. This is insufficient to state a claim that Kevin Hulbert was arrested for video recording the event under *Twomby*. As demonstrated above, Kevin Hulbert was previously told to move back into the Lawyers' Mall area behind him which he refused to do and thus was arrested for failing to obey the order.

3. Plaintiff Failed to Sufficiently Allege Retaliation. Plaintiff begins with a general discussion about the right to be free of retaliation for exercising First Amendment free speech rights. No one disputes the general proposition that there exists the right of one to be free from retaliation for exercising a constitutional right. However, it begs the question of whether there was a retaliation sufficiently plead in ECF 1. The Opposition states that in order to plead a §1983 retaliation claim, a claimant has to allege: (1) that his speech was

[1] Plaintiffs' Opposition refers to the paragraph as ECF 1, Paragraph 38,.

protected, (2) that the alleged retaliatory action adversely affected the claimants constitutionally protected speech and (3) that a causal relationship exists between his speech and the retaliatory action. ECF 14, pgs. 11 and 12. The Plaintiffs however fail to sufficiently allege the third element. The Plaintiffs argue that ECF 1, ¶ 43 sufficiently alleges retaliation. The allegation itself is merely a conclusory statement. Preceding paragraphs 38 through 42 do not add anything further for clarification. Paragraph 38 alleges that Sergeant Pope wrote a citation charging Kevin Hulbert of failure to obey a lawful order, which when reading the Complaint carefully affirmatively answers the question of whether there was a lawful order. Paragraph 42, in musing about Sergeant Pope's supposed clairvoyance of knowing of a future disturbance of the public peace, is only argumentative text instead of pleaded facts and adds little to showing sufficient facts to establish a cause of action for retaliation. Yet, as discussed above, Sergeant Pope was within his authority to order the Plaintiffs to move back several feet for their own safety and the safety of motorists travelling by the location. A failure to move back several feet from the street could quite reasonably be viewed as a form of disturbance of the peace.

The Plaintiffs argue that the allegations in ECF 1, ¶ 44 sufficiently plead retaliation. The paragraph contains nothing more than conjectural statements that Chief Wilson ordered the citations because he was previously employed by the President of the Senate who was instrumental in Chief Wilson obtaining his current position and who was also a target of criticism by the Plaintiffs. The allegation requires one to make assumptions without facts that somehow Defendant Wilson ordered citations at the direction of the President of the Senate. Paragraphs 85, 86 and 87 of ECF 1 are no more than conclusory remarks that the

arrests were without probable cause when on the face of the Complaint, the Plaintiffs refused to obey a lawful order.

The Opposition asserts that the Defendants' issuance of the second citations were to correct errors in the first citations is "plainly false" because the second citations charged new and different misdemeanors. This assertion conveniently forgets that even in the Plaintiffs' Complaint at ECF 1, ¶ 38 the Plaintiffs inferred that the citations were incomplete in that they only give CJIS code cites. The facts were materially the same between the first citations and the second citations. The Plaintiffs insert more conjecture that was not included in the Complaint that the Defendants were "doubling down" on new charges because they knew that the arrests were made without probable cause when the whole time, when reading their Complaint, they were arrested for failing to obey a simple lawful order to move back several feet from the sidewalk where they could continue to their demonstration.

B. The Complaint Fails to Allege Sufficient Facts to Show Defendants Made Unlawful Arrest and Used Excessive Force in Violation of the Fourth Amendment.

1. Probable Cause for the Arrests. The Plaintiffs recite cases which define the perimeters of "probable cause" (see ECF 14, pg 15). The Defendants do not dispute the Plaintiffs' general explanation of probable cause on page 15 of their Opposition. The point where the parties disagree is with the Plaintiffs' position that because the Plaintiffs and Defendant Pope had prior discussions in which the Plaintiffs chose to ignore alleged prior orders to move by Pope thereby excused them from obeying Pope's order to move the several foot distance from the sidewalk to within Lawyers's Mall on February 5, 2018. The fact that the Plaintiffs ignored previous orders to move, even if true, is immaterial. As previously discussed, Sergeant Pope's order for the Plaintiffs to move back several feet from

the sidewalk to continue their demonstration was made in furtherance of Sergeant Pope's duty to protect those on government property including the Plaintiffs themselves and vehicles driving by. The order was lawful. The Plaintiffs, Jeff and Kevin Hulbert chose to disobey the lawful order. Consequently, there was probable cause for their arrest.

In *Ross v. Early,* 746 F.3d 546 (4th Cir. 2014), a police officer's arrest was challenged on Fourth Amendment grounds as part of a challenge to the officer's claim for qualified immunity in a §1983 action. The arrestee was a protester at what was then known at the time as the First Mariner Arena in downtown Baltimore. A circus was performing at the Arena and the protester (Appellant) protested the treatment of animals by the circus company through the handing out leaflets on the sidewalk by the Arena. The Mayor and City Council of Baltimore and the Baltimore City Police Department had previously enacted a policy that called for designated protest areas around the Arena where protesters were allowed to stage protests without interfering with pedestrian traffic during Arena events. The Fourth Circuit opinion would refer to this as the "Policy". The police officer found the protester handing out leaflets outside the designated area and ordered him to relocate to one of the designated areas. The protester refused after being ordered several times and the officer arrested him.

In addressing the Appellant's contention that the arrest was unlawful, the Fourth Circuit said,

> "[t]he circumstances of the arrests are straightforward: Officer Early repeatedly ordered the Appellant to move the location of his leaflet activity in conformance with the Policy, and the Appellant repeatedly refused. Ultimately, after issuing multiple warnings, Officer Early arrested the Appellant – twice – for the

misdemeanor crime of "willfully failing to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance of the peace. *Md. Code Ann., Crim. L §10-201(c)(3).* The district court, relying on these undisputed facts, concluded that Officer Early had probable cause to effectuate the challenged arrests 'sufficient to vitiate any claim of §1983 liability." *Id.* at F.3d 561.

The Plaintiffs argue that *Early* is distinguishable because the policy in that case delineated a place on the sidewalk for protesters to demonstrate and not in this case. Such distinction is without substance because *Early* clearly supports the principle that an officer who orders an individual to do or not do something pursuant to a valid law and the individual refuses to obey the order serves as probable cause for an arrest.

The Complaint alleges that Sergeant Pope told the Plaintiffs to move on at least two occasions: first, to Kevin Hulbert (ECF 1, ¶27) and second when he ordered the Plaintiffs in general (ECF 1, ¶ 32, 33). As in *Early* where Officer Early gave the order to enforce the policy of the Mayor and City Council of Baltimore and the Baltimore City Police Department, so Sergeant Pope gave his order to the Plaintiffs to move several feet back from the sidewalk to Lawyers' Mall in furtherance of MCP's duty to protect persons on or about the building and grounds of the Capitol Building Complex as mentioned in this Reply at page 4.

Md. Code Anno. Crim. L Art. §10-201(c)(3) provides that "a person may not willfully fail to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance of the public peace." As has been argued above, the purpose of Sergeant Pope's order to move back several feet would have been to preserve the safety

of the Plaintiffs as well as passing motorists, which obviously is part of the public peace. Therefore, the order to move was lawful. Jeff Hulbert "in respectful disobedience" refused to comply with the order as did Kevin Hulbert. Based upon the allegations of the Complaint under *Early*, Sergeant Pope had probable cause to arrest the two men.

2. Since There Was Probable Cause for the Arrests, Plaintiffs' Arguments That Any Force Used Was Excessive Necessarily Fails. The Plaintiffs' argue that because there was no probable cause for the arrests of Kevin and Jeff Hulbert, any force exercised by Sergeant Pope was excessive. Plaintiffs cite *Jones v. Buchanan*, 325 F.3d 520 (4th Cir. 2003) and *Park v. Shiflett,* 250 F.3d 848 (4th Cir. 2001). Both cases are distinguishable in that neither case involved facts where the law enforcement officers gave lawful orders to the claimants in which the claimants directly disobeyed. The claimant in *Jones* had turned himself in to the Sheriff's Department in order to sober up whereupon a member of the police force brutalized him without provocation. The claimants in *Park* had called 911 to report that they accidentally set off an alarm at a convenience store and waited for the deputies to arrive. The deputies after arriving at the scene began to brutally mistreat the couple and restrained them from leaving. In both cases, the courts found excessive force since the facts pointed to a lack of evidence rising to probable cause and the force in each case rose to the level of brutality in which the claimants suffered injuries.

In this case, as argued above, Sergeant Pope had probable cause to arrest when the Plaintiffs refused to obey his order to move back into Lawyers' Mall. Sergeant Pope placed handcuffs on the Plaintiffs in the ordinary course of an arrest. The Plaintiffs did not allege that they suffered injury when they were arrested, therefore, no claim has been properly pleaded to maintain an action for Fourth Amendment excessive force. See *Neague v.*

Cynkar, 258 F.3d 504 (6th Cir 2001). Because the allegations in the Complaint point to Sergeant Pope having probable cause under Fourth Circuit authority, the Plaintiffs' assertion that, therefore, any force was excessive force necessarily fails.

D. The Facts Alleged in the Complaint Fail to State Claims of False Arrest and False Imprisonment.

The elements of a claim of false arrest or false imprisonment are (1) the defendant deprived the plaintiff of his or her liberty (2) without the plaintiff's consent and (3) without legal justification. *Okwa v. Harper*, 360 Md. 161 (2000). "Under Maryland law, the existence of 'legal justification' is judged according to the principles derived from the law of arrest." *Cooper v. Dyke*, 814 F.2d 941, 946 (4th Cir. 1987). In the case of police officers, a warrantless arrest is justified only if (a) a misdemeanor or felony was committed in their presence…or (b) if the officers have probable cause to believe that a felony has been or about to be committed. *Id.* (quoting in part from 2 Maryland. Law Encyclopedia, "Arrest", § 4 (1960 & Supp. 1986).

First, officers like Sergeant Pope have the legal authority to make arrests. The police powers of the MCP are found in State Fin. & Proc Art., §4-605(c) which provides: "A member of the Maryland Capitol Police of the Department of General Services has the same powers as a sheriff or police officer under §2-101 of the Criminal Procedure Article only if the member (1) meets the legal requirements set forth by the Maryland Police Training Commission; and (2) is designated by the Department as a police officer." A "police officer" under Crim. P. Art. § 2-101(c) "means a person who in an official capacity is authorized by law to make arrests and is: (9) a member of the Department of General Services security force."

In the Complaint, ECF 1, ¶ 18, it states "Defendant Pope and Wilson are, and at all times relevant to the occurrence complained of herein were, employed by the state of Maryland Capitol Police [sic], and at all times relevant hereto were acting under the authority and color of law." Thus, it is not in dispute that Sergeant Pope had the legal authority to make arrests. The question remains whether there was legal justification in the form of probable cause. As the Defendants have shown, Sergeant Pope gave a lawful order to the Plaintiffs to move from the sidewalk several feet into Lawyers' Mall that the two Hulbert brothers directly disobeyed and for which, at least under Fourth Circuit precedent, there was probable cause for an arrest.

The *Okwa* and *Cooper* cases cited by the Plaintiff are readily distinguishable. In *Okwa,* the claimant under affidavit in response to the defendants' motion to dismiss or for summary judgment, claimed that he was at the ticket counter at BWI arguing with the desk clerk about boarding a flight. When the police officers arrived, he began to explain his problem with the airline when the officers placed him in handcuffs. Likewise, in *Cooper,* the claimant after being shot at a skate rink was stopped by police as he and a friend drove away. The claimant told police that he was shot. The police did not order him to do or not do anything nor placed him under arrest, but put them in handcuffs and drove him to the police barracks where he was detained for a few hours before taking him to the hospital. Here, the Complaint alleges that the Hulbert brothers were both advised of the order to move several feet back into Lawyers' Mall and both refused to obey in front of Officer Pope (ECF 1, ¶¶ 27, 28, 29, 32, 33 and 35). In that the allegations show that Sergeant Pope had probable cause to make the arrest, the Plaintiffs have failed to sufficiently allege that the arrest was without legal justification.

D. The Complaint Fails to Establish that Chief Wilson Is Subject to Supervisory Liability.

Supervisory liability under § 1983 must be supported with evidence that: (1) the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) the supervisor's response to the knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and (3) there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. *Barnes v. Wilson*, 110 F. Supp. 3d 624, 630 (D. Md. 2015). The Complaint, ECF 1, ¶ 27, merely alleges that Sergeant Pope made a statement that there was a change in policy coming from Chief Wilson. It does not allege how Chief Wilson actually or constructively knew of any effort by Pope to deprive the Plaintiffs of their constitutional rights on the evening of February 5, 2018 beyond opaque assertion. As to the argument that Chief Wilson is subject to supervisory liability for the issuance of the second set of citations, the Defendants have argued that the citations speak for themselves, that the second citations clearly were intended to correct the first. It begs the question that the original citations were based on the facts that the Plaintiffs' refused to obey a simple lawful order to move a matter of feet back from the sidewalk into Lawyers' Mall. As already established, there was not a deprivation of constitutional rights either in the order or in the arrest. Further, there is no allegation that an arrest was made the following day when the second set of citations were served and the issuance of citations are not deemed an arrest for Fourth Amendment purposes. *See Martinez v Carr*, 479 F.3d 1292 (10th Cir. 2007); *DiBella v. Borough of Beachwood*, 407 F.3d 599 (3d

Cir. 2005). Therefore, Chief Wilson could not be subject to supervisory liability for a wrong never committed. All claims of supervisory liability against Defendant Wilson should be dismissed.

E. Immunity

1. The Allegations of Defendants' Conduct Do Not Rise to Level of Gross Negligence or Malice to Disqualify Them from Immunity Under the Maryland Tort Claims Act ("MTCA"). The Plaintiffs recitation of case law on what constitutes gross negligence or malice to disqualify an official from tort claim immunity under the MTCA, while a good, general discussion, misses the mark. Their argument is premised on the notion that the Defendants deprived them of their constitutional rights under the First and Fourth Amendments and Articles 40, 24 and 26 of the Maryland Constitution, Declaration of Rights because the Plaintiffs were ordered to move only a few feet back from where they were standing on the sidewalk in front of Lawyers' Mall to ensure public safety and were arrested when they refused to move. As already discussed above, the Plaintiffs' speech rights were not deprived since they were free to continue their demonstration and having refused to obey a lawful order to move, there was probable cause for their being arrested. The Defendant's conduct was lawful, and therefore there was nothing grossly negligent, reckless or malicious on the part of either Defendant. Their conduct was clearly within the scope of their duty as police officers of MCP. Hence, there is nothing for a jury to decide. Consequently, both Defendants are immune from State tort liability under the MTCA.

2. The Facts Alleged in Complaint Do Not Rise to a Level to Deny Defendants Qualified Immunity. Again, the Plaintiffs build their argument on the foundation that

the Plaintiffs constitutional rights were violated by the Defendants when they were ordered to move several feet back from the sidewalk to Lawyers' Mall. It has already been demonstrated that even within the allegations of the Complaint, no such thing happened. Plaintiffs' attempt to paint a picture that what occurred in front of Lawyers' Mall on February 5, 2018 was an outright prohibition of the Plaintiffs speech rights when the allegations in their own Complaint point to the contrary.

The Plaintiffs further argue that the facts related in the Defendants' Memorandum (ECF 11.1) is a "grossly distorted summary of the facts" and in support of that contention say that the Defendants had no right to issue the relocation order and baldly assert that the order was a "pretext" to retaliate against the Plaintiffs', something not even mentioned in their Complaint. Plaintiffs argue that COMAR 04.05.01.02 and 04.05.01.03 did not give the Defendants the authority to regulate the activity on the sidewalk by Lawyers' Mall and distinguish the use of the term "walks" as not to include sidewalks. However, the COMAR sections are not the only governing law regarding Department of General Service's and MCP's jurisdiction. As demonstrated above (pages 4 and 5 herein), there is ample statutory authority that MCP has jurisdiction over the related sidewalks to buildings like the Capitol Building Complex. There has been no constitutional challenge to these statutes. On their face, they are content neutral. The order of Sergeant Pope to the Plaintiffs to move back from the sidewalk several feet was a reasonable order within the perimeters of the statutes which the Plaintiffs are unable to articulate how the order deprived them of their right to free speech beyond making a bald assertion that it did.

Further, neither of the Defendants could reasonably be required to understand what "settled" constitutional principles were violated within the contours of their immediate

situation. Throughout the Plaintiffs' discussion of qualified immunity in its Opposition (ECF 14, pgs. 25-31), much citation of general propositions of law from cases have been made. There has been little to no analysis of how the cited cases relate to the facts of this case. However, certainly in the context of qualified immunity, broadly stated propositions do not suffice to show that a defendant is not entitled to qualified immunity. "In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. While this Court's case law 'does not require a case directly on point' for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate'. In other words, immunity protects 'all but the plainly incompetent or those who knowingly violate the law'" *White v. Pauly,* 137 S. Ct. 548 (2017)(per curiam)(citations omitted). "Today, it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality'. As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. Otherwise, 'plaintiffs would be able to convert the rule of qualified immunity…into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* (citations omitted). The Plaintiff having not demonstrated where there is settled constitutional authority that fits the contours of this case, they have not shown beyond bare allegations why the Defendants should not be entitled to qualified immunity.

F. Injunctive Relief.

The Defendants argue that because there has not been any violation of their constitutional rights under either the First Fourth or Fourteenth Amendment to the U.S.

Constitution or Articles 24, 26 and 40 of the Maryland Constitution, Declaration of Rights, the Plaintiffs are not entitled to declaratory or injunctive relief.

G. Discovery.

The Defendants have already shown that they have not presented matters outside of the pleadings (pgs. 2 and 3 herein), so a motion for summary judgment has not been sought. The Defendants argue that since the Plaintiffs have failed to state a claim upon which relief can be granted under Fed. R. Civ. P 12(b)(6), there will be no need for discovery.

Conclusion.

For the foregoing reasons, the Defendant's Motion to Dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May, 2018, a copy of this Reply to Plaintiff's Opposition to Motion to Dismiss were served by the Court's electronic case filing system pursuant to Fed. R. Civ. P. 5(d)(3) and Local Rule 102.1(c) and (d) to Cary Johnson Hansel, III, Esquire; Erienne Sutherell, Esquire; and Justin Stefanson, Esquire, attorneys for the Plaintiffs, with a paper copy mailed to the Honorable George L. Russell, III.

/s/
Robert A. McFarland, Esquire