UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DAVID PIKE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 97-402-P-C***
	)	
OFFICER MARY-ELLEN	***)***	
HANSON, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

David Pike has sued the Town of Kennebunk, its police department and three of its police officers for injuries arising from what he asserts was a groundless arrest, effectuated and followed by unprovoked beatings, on the evening of August 9, 1996. Complaint ¶¶ 10-15, 31-34. These actions, he contends in Count VI of his Complaint, violated his due-process rights, including those of (i) freedom from illegal confinement, (ii) freedom from physical abuse, coercion and intimidation and (iii) receipt of necessary medical aid.[1] *Id*. ¶ 51. He also brings claims, in Counts I through V,

[1]Pike predicates his federal causes of action upon the due-process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, as well as 42 U.S.C. §§ 1983 and 1985(3) and 18 U.S.C. § 245. Complaint ¶¶ 46, 52. The defendants correctly observe, for the reasons stated in their brief, that (i) 18 U.S.C. § 245 affords no private cause of action; (ii) Pike fails to make out a claim under 42 U.S.C. § 1985(3) in that he alleges no "racial or other class-based animus," (iii) Pike's (continued...)

for assault, battery, negligence, false imprisonment and intentional infliction of emotional distress. *Id*. ¶¶ 10-44. He finally asserts, in Count VII, that the municipal defendants' negligent supervision renders them liable for the three officers' acts. *Id*. ¶¶ 57-60. He seeks both compensatory and, as against the individual defendants only, punitive damages. *Id*. at 5, 15.

The three defendant officers, Mary Ellen Hanson, Zachary Harmon and JoAnne Fisk, as well as the Town of Kennebunk and its police department, move for summary judgment as to all claims against them. *See generally* Motion. For the reasons that follow, I recommend that the motion be granted in part and denied in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "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." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the

[1](...continued)
citation of the due-process clause of the Fifth Amendment is inapposite in that it applies only to the actions of federal, not municipal, agents and employees, and (iv) Pike's claims of arrest without probable cause and with excessive force actually are cognizable under the Fourth Amendment. Defendants' Motion for Summary Judgment, etc. ("Motion") (Docket No. 7) at 10-11, 16, 24.

court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

The Local Rules of this court require a party seeking summary judgment to provide "a separate, short and concise statement of material facts, supported by appropriate record citations, as to which the moving party contends there is no genuine issue to be tried." Loc. R. 56. The non-moving party must file a corresponding statement, "supported by appropriate record citations, as to which it is contended that there exist[s] a genuine issue to be tried." *Id.* The rule warns that all properly supported material facts asserted in the moving party's factual statement "will be deemed to be admitted unless properly controverted by the statement required to be served by the opposing party." *See also Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995) ("The parties are bound by their [Local Rule 56] Statements of Fact and cannot challenge the court's summary judgment decision based on facts not properly presented therein.")

Both Pike and the defendants filed a separate statement of material facts, as required by Local Rule 56; however, a number of Pike's statements are unsupported by record citations. *See generally* Plaintiff's Material Statement of Facts in Support of His Objection to Defendant's [sic] Motion for Summary Judgment (Docket No. 16). As is made clear in Local Rule 56 and *Pew*, such unsupported statements cannot be considered as part of a summary-judgment record. They accordingly are disregarded.

II. Factual Context

In light of the foregoing, the summary judgment record reveals the following:

At approximately 7:40 p.m. on August 9, 1996 patrol officer Mary Ellen Hanson received a report from the Kennebunk Police Department dispatcher of a possible drunk driver. Incident report # 96-3509 ("Hanson Report"), attached as Exh. A to Affidavit of Mary Ellen Hanson ("Hanson Aff.") (Docket No. 10), at [1]. The report originated from an eyewitness who was following a pickup truck north on Route 1 from Wells to Kennebunk. *Id*. The pickup truck, according to the eyewitness, had crossed the center line and had dropped junk parts out of its bed.[2] *Id*. Hanson pulled up behind the pickup at a stop light and observed the operator yell something at persons standing on the side of the road. *Id*. She followed the vehicle through another set of stop lights before activating first her cruiser lights and then her siren. *Id*. The pickup moved to the side of the road, and its driver motioned Hanson to pass. *Id*. When she did not, the pickup regained the travel lane and continued on Route 1. *Id*. Perceiving that the vehicle was failing to stop, Hanson requested backup. *Id*. The pickup proceeded an additional three-quarters of a mile down Route 1, pulled into a gas-station parking lot, appeared to stop, then moved slowly into an adjoining shopping-center parking lot. *Id*. at [1-2]. It ended up parked at an angle across the lot lines. *Id*. at [2]. Pike explains that he continued on to the shopping center before stopping because he felt he could not come to a safe stop on the shoulder off of Route 1. Pike Dep. at 74-76.

Once the pickup stopped, Hanson requested the driver's license and registration, which he produced. Hanson Report at [2]. She learned from his license that his name is David R. Pike. *Id*. She questioned Pike as to the operation of his vehicle and the stability of the load in the back of the pickup. *Id*. She noted that the load in the back of Pike's pickup shifted when he attempted to

[2]At his deposition, Pike admitted that he was having a problem steering, which he attributed to a leaky power steering pump. Deposition of David R. Pike ("Pike Dep.") at 71-72.

demonstrate that it was secure. *Id*. She also observed that Pike appeared unable to focus his eyes, which looked slightly bloodshot and glassy. *Id*. at [2-3]. She noticed a strong odor of liquor emanating from his body and on his breath. *Id*. at [3]. Pike admitted that he had consumed a sixteen-ounce beer and a quarter-pint of brandy earlier that day. Pike Dep. at 82. Hanson conducted field sobriety tests on Pike. Hanson Report at [3]. Pike avers that these were performed satisfactorily. Pike Dep. at 84-86. Hanson observed Pike to be having difficulty following instructions and completing the tests. Hanson Report at [3]. She decided to arrest him for operating under the influence. *Id*.

Officer Zachary Harmon and Sergeant JoAnne Fisk, who had arrived as backup, assisted in handcuffing Pike. *Id*. at [1-3]. The parties sharply dispute the manner in which this was accomplished. Pike claims that, without provocation and after being handcuffed, he was placed face-down on the pavement and kneed in the back by Harmon. Pike Dep. at 88-94. He also claims that, without provocation or justification, Hanson then grabbed his hair and "smashed" his face into the pavement. *Id*. at 94-95. These actions, he states, caused pain in his lower back, damaged his teeth, bruised his lip and scraped his chin. *Id*. at 94-96. The officers' contemporaneous accounts simply record that Pike was handcuffed and placed in Harmon's cruiser. Hanson Report at [3]; Supplemental Narrative Report David R. Pike Arrest ("Harmon Report"), attached as Exh. A to Affidavit of Zachary Harmon ("Harmon Aff.") (Docket No. 9), at [1].

After Pike was placed in the cruiser, he developed a plan to escape. Pike Dep. at 98-99. He pulled his handcuffs under his legs and around his feet until they were in front of his body. *Id*. at 99-100. He then attempted to open the cruiser door to run away. *Id*. at 99. Harmon and Fisk removed Pike from the cruiser, placed him face-down on the ground and reapplied the handcuffs to place

Pike's hands behind his back. Harmon Report at [1]. He then was placed in the cruiser and seatbelted. *Id*. It is standard operating procedure to transport a suspect with his or her hands cuffed behind his or her back. Harmon Aff. ¶ 6. A suspect with hands cuffed in front presents a greater risk of harm to the suspect and to an officer because it is easier for the suspect to use his or her hands to escape or gain access to a weapon, such as an officer's sidearm. *Id*.

Harmon transported Pike to the Kennebunk police station. Harmon Report at [1]. Upon arrival, Pike was escorted into the booking room. Hanson Report at [4]. Hanson read Pike an informed consent pertinent to an intoxilyzer breath test, which he agreed to take. *Id*. The officers reported that they were not able to obtain a reliable breath sample, which they attributed to Pike's intentional failure to blow into the machine as instructed. Hanson Report at [4]; Harmon Report at [1]. Pike denies any such intentional failure and claims that the machine registered three readings of .04, 0.3 and either .03 or .04. Pike Dep. at 109-12. Hanson wrote on the intoxilyzer test form that Pike refused to complete the test. Hanson Report at [4]. She processed Pike on charges of operating under the influence, carrying an unsafe load and failing to provide proof of insurance. *Id*. at [5].

The officers' reports indicate that, throughout their encounter with Pike, he repeatedly failed to cooperate and was intermittently hostile and verbally abusive. Hanson Report at [2-5]; Harmon Report at [1-2]. As a result of Pike's failure to cooperate, Fisk decided that he should be transported to the York County sheriff's department. Supplemental Report ("Fisk Report"), attached as Exh. A to Affidavit of JoAnne Fisk ("Fisk Aff.") (Docket No. 11), at [2]. Pike avers that at all times he cooperated with the police and never yelled at them. Pike Dep. at 119-20.

Harmon and Fisk placed Pike in the backseat of Harmon's cruiser for transport to the York County jail. Fisk Report at [3]. Pike proceeded to pull his handcuffs under his legs and around his

feet until they were in front of his body. *Id*. The officers removed him from the vehicle and laid him on the ground. *Id*. They reattached the handcuffs with his hands behind him. *Id*. In order to prevent him from bringing the handcuffs to the front of his body, the officers decided to place ankle restraints on him and connect the handcuffs and ankle cuffs with a rope designed for that purpose. *Id*. By his own admission, Pike straightened his body, thereby preventing the officers from attaching the connecting rope. Pike Dep. at 124-26. The officers eventually abandoned their efforts to connect the rope and placed Pike face-down on the backseat of the cruiser, securing him in place with a seatbelt. Fisk Report at [3]. Pike contends that, during their attempt to attach the rope, the officers repeatedly kicked and punched him and attempted to break him "in half." Pike Dep. at 120-24. Fisk's report contains no indication of kicking or punching, but does note that Pike continually resisted the officers' efforts to secure him. Fisk Report at [3].

Upon arrival at the York County jail, Pike was escorted to the booking room by one of the jail's correction officers. Pike Dep. at 138-40. He did not have any further contact with the Kennebunk police officers that evening. *Id*. at 144. At no time while at the Kennebunk police station did Pike request medical attention. *Id*. at 136. Nor did he request medical attention at York County Jail or indicate to jail corrections officers that he had been injured by the Kennebunk officers. *Id*. at 143-44.

Pike twice sought treatment on August 10, 1996 at the Southern Maine Medical Center emergency room for complaints that he attributed to beatings by the Kennebunk officers. Dictated reports of Sarah Moore, M.D., Southern Maine Medical Center Department of Emergency Medicine, for visits by Pike on 8/10/96 at 13:36 and 8/10/96 at 21:56 ("SMMC Reports"), attached as Exh. G to Plaintiff's Objections to Defendants [sic] Interrogatories and Request for Production. During the

first visit, Dr. Moore noted a small chip in one front tooth, some tenderness in the back of Pike's neck, some pain in Pike's shoulders when his arms were extended behind him, slightly abraded marks around Pike's wrists and ankles, bruises on his knees, some tenderness in his upper back and left parasternal muscles, and numbness on the back of his left thumb proximally and distally and the mid-portion of the back of his right thumb. *Id.* She stated that she would "expect all of these injuries and their symptoms to resolve within the next seven to ten days with strong anti-inflammatory medication." *Id.* During Pike's second visit that day, he complained of a sore bump on his head. *Id.* Dr. Moore noted a one-centimeter abrasion on the top of his head with some induration. *Id.* She provided Ibuprofen and stated that she expected "his injuries to heal up completely in seven to ten days, with no lasting disability." *Id.* She noted that he should follow up with another physician in two weeks if his thumb was still numb. *Id.*

Pike later pleaded guilty to the Class D crime of operating under the influence of alcohol or with an excessive blood-alcohol level. Criminal Complaint for Violation of 29-A M.R.S.A. § 2411(1)(5A)(3d), attached as Exh. A to Affidavit of John J. Wall, III (Docket No. 13). His guilty plea acknowledged that he operated a vehicle on August 9, 1996 while intoxicated or with a blood-alcohol content of .08 percent or greater and that he refused to submit to a chemical test to determine his blood-alcohol level. *Id.*

The Town of Kennebunk, through its Police Department, has promulgated rules for officer conduct as part of its standard operating procedures. Affidavit of Douglas Sharlow ("Sharlow Aff.") (Docket No. 12) ¶¶ 4, 5 & 7 and Exhs. A-C thereto. In part, these procedures require that all officers receive a minimum of forty hours of training a year to further their education as law enforcement officers. Sharlow Aff. ¶ 5 and Exh. A thereto. Developments in the area of law enforcement are

posted in the Police Department, and officers are required to keep apprised of them. Sharlow Aff. ¶ 6. The procedures provide standards for arrest, use of nondeadly force, transportation of arrestees and access to necessary medical assistance. *Id*. ¶ 7 and Exhs. B-C thereto. The town's Police Department does not encourage or allow violation of arrestees' constitutional rights. *Id*. ¶ 8. Its policy is to investigate all formal complaints lodged against its officers. *Id*. ¶ 9.

III. Discussion

A. Probable Cause

In the first of a trilogy of alleged constitutional violations, Pike contends that he was arrested and detained on the evening of August 9, 1996 without probable cause. Complaint ¶¶ 31, 51. The defendants counter that he is estopped from so claiming as the result of his own admission of guilt to charges of operating under the influence. Motion at 11-12. Regardless, they assert, the record reveals ample probable cause for Pike's arrest. *Id*. at 12-13.

A defendant in a section 1983 action may raise the shield of collateral estoppel to prevent a plaintiff from relitigating issues resolved in a state-court criminal proceeding. *Allen v. McCurry*, 449 U.S. 90, 105 (1980). Federal courts in section 1983 actions "must accord the same preclusive effect to state court judgments — both as to claims and issues previously adjudicated — as would be given in the state court system in which the federal court sits." *Willhauck v. Halpin*, 953 F.2d 689, 704 (1st Cir. 1991) (citation omitted). In Maine, a non-party to a prior action may seek to estop relitigation of an identical issue to the extent "that the party estopped had a fair opportunity and incentive to litigate the issue in the prior proceeding." *State Mut. Ins. Co. v. Bragg*, 589 A.2d 35, 37 (Me. 1991). A guilty plea entered in a prior criminal proceeding may form the basis for such non-mutual

collateral estoppel. *Id*. at 37-38. Pike asserts, however, that application of collateral estoppel in his case would be fundamentally unfair in that he entered his guilty plea without benefit of counsel. Plaintiff's Objection to Defendant's [sic] Motion for Summary Judgment, etc. ("Objection") (Docket No. 15) at 9. Inasmuch as appears, the Law Court has had no occasion to consider the question whether a party may be collaterally estopped from relitigating an issue based upon a guilty plea entered without benefit of counsel. It is unnecessary to blaze this trail, however, in that it is clear in this case that the arresting officers possessed probable cause to believe that Pike was operating under the influence.

In probable-cause analysis, a police officer's on-the-spot determination is not to be judged in the light of hindsight, but rather by whether he or she possessed "reasonably trustworthy information [sufficient] to warrant a prudent [person] in believing" that the defendant "had committed or was committing a [criminal] offense." *Hegarty v. Somerset County*, 53 F.3d 1367, 1374 (1st Cir. 1995) (citation and internal quotation marks omitted) (additions in original). "As the Supreme Court has explained, '[i]n dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Id*. (citation omitted).

Pike asserts that, in his case, the Kennebunk police lacked probable cause to arrest because of his satisfactory performance of a field sobriety test — notwithstanding his admitted consumption of alcohol. Objection at 10. Even assuming, as I must for purposes of this motion, that Pike did perform his field sobriety test satisfactorily, sufficient uncontroverted evidence remains to have warranted any prudent officer in detaining him under suspicion of operating under the influence.

The Kennebunk Police Department received a report from an eyewitness that a pickup truck had crossed the center line. Hanson observed its operator yelling at pedestrians. He then refused to pull over immediately in response to her flashing lights and sirens, continuing for another three-quarters of a mile. He left his vehicle parked at an odd angle. When he emerged from the pickup, he appeared unable to focus his eyes, which officer Hanson perceived as slightly glassy and bloodshot. His breath and body smelled strongly of liquor, and he admitted having drunk a sixteen-ounce beer and a quarter-pint of brandy earlier in the day. Such indicia of inebriation — particularly in view of the eyewitness report of erratic driving — sufficed for Hanson to err on the side of arresting Pike and removing him from the road, for his own safety as well as that of the public.[3] *See, e.g., United States v. Bizier*, 111 F.3d 214, 218-19 (1st Cir. 1997) (fact that driver took longer than usual to pull over, coupled with glassy eyes, heavy eyelids, pinpoint pupils, swaying and telling of inconsistent stories, created probable cause to arrest for driving under influence). In that, on these facts, no reasonable jury could conclude that the officers lacked probable cause to arrest Pike, there is no triable issue as to this claim.

B. Excessive Force

In the second of his constitutional claims, Pike states that he was arrested and detained with excessive force. Complaint ¶¶ 13-15, 51. Incidents of unprovoked brutality, he claims, included his initial arrest, when he was kneed in the back and his face was smashed into the ground. The defendants submit that this claim is dismissable without need of fact-finding in view of the objective evidence of the slightness of Pike's injuries and his own admissions that, at various points, he

[3]There is no evidence that Pike informed Hanson that his steering difficulties were mechanical in nature. Even had he done so, however, she could justifiably have chosen at that moment not to believe him in view of the other indicia of inebriation.

resisted the officers' attempts at control. Motion at 16, 19-20.

While the record does indeed reflect that Pike's injuries were minor, this does not inexorably lead to the conclusion that the police used no excessive force. *See, e.g., Alexis v. McDonald's Restaurants of Mass., Inc.*, 67 F.3d 341, 353 n.11 (1st Cir. 1995) ("a trialworthy 'excessive force' claim is not precluded merely because only minor injuries were inflicted by the seizure") (citation omitted). The question whether the use of force was objectively reasonable depends entirely on the "facts and circumstances confronting" the officer at the time. *Id*. at 352. The record is to be viewed through the lens of three criteria: (i) "the severity of the crime at issue," (ii) "whether the suspect poses an immediate threat to the safety of the officers or others," and (iii) "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 352-53 (citation and internal quotation marks omitted) (addition in original).

So viewed, Pike's version of his story presents a trialworthy issue of material fact. The crime for which he was arrested, operating under the influence, is a Class D crime under Maine law. 29-A M.R.S.A. § 2411(1). Class D crimes are the equivalent of misdemeanors. *See, e.g., State v. Cook,* 706 A.2d 603, 605 (Me. 1998). Operating under the influence is not inherently a crime of violence. As Pike tells it, he posed no threat whatsoever to the officers and did not resist arrest. Pike does admit that, at certain points, he schemed his escape and resisted the officers' efforts at control. There is no such admission, however, with respect to the initial episode of which he complains, when the officers allegedly beat him with no provocation. And, even though he admits stiffening his body to avoid placement of the rope prior to his transport to the York County jail, his story that the officers at that point kicked and punched him raises a genuine issue as to the excessiveness of force then employed. *See, e.g., Alexis,* 67 F.3d at 353 (allegation that police pulled non-threatening woman

from restaurant booth on suspicion of commission of misdemeanor with sufficient force to bruise her legs posed trialworthy issue of excessive force).

The same triable issues of fact preclude a finding of qualified immunity as to this claim. If the officers did indeed behave in the manner contended, they violated clearly established rights of which a reasonable officer should have known. *See, e.g., Hall v. Ochs*, 817 F.2d 920, 925-26 (1st Cir. 1987) (upholding refusal to grant qualified immunity as to excessive-force claim in which facts sharply disputed). Summary judgment with respect to this claim is accordingly inappropriate.

C. Denial of Medical Treatment

In his final constitutional claim, Pike alleges that the defendants failed to provide necessary and appropriate medical treatment. Complaint ¶ 51. The defendants counter that the relative insignificance of Pike's injuries, combined with his failure to request medical attention, entitle them to summary judgment as a matter of law as to this claim. Motion at 15.

The severity of injury — in this context — is critical to the survival of the claim. A pretrial detainee has a constitutional right to receive attention for "serious medical needs." *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 208 (1st Cir. 1990) (citation and internal quotation marks omitted). A medical need is considered serious, in turn, "if it is one that has been diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Id*. (citations omitted). Pike, like Gaudreault, was found upon examination to have been "bruised but unbroken." *Id*. There is no evidence that Pike displayed any serious medical needs while in the care of the Kennebunk Police Department; indeed Pike, unlike Gaudreault, did not even request medical attention. As was the case in *Gaudreault*, there is no evidence suggesting that Pike's injuries were exacerbated by the delay in treatment. *Id*.

at 208-09. The defendants hence are entitled to summary judgment as a matter of law on this claim.

D. Pendent State Claims

Pike alleges five pendent state-law claims: assault, battery, negligence, false imprisonment and intentional infliction of emotional distress. Complaint ¶¶ 10-44. As to these, the defendant officers invoke the shield of personal immunity pursuant to the Maine Tort Claims Act, 14 M.R.S.A. §§ 8101-18 (the "Act"). Motion at 25-26. Section 8111 of the Act affords absolute immunity to municipal employees, *inter alia*, for:

> C. Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid;
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> ***
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> E. Any intentional act or omission within the course and scope of employment; provided that such immunity shall not exist in any case in which an employee's actions are found to have been in bad faith.

The Maine Law Court has indicated that a police officer's effectuation of a warrantless arrest qualifies as a "discretionary function" for purposes of the Act. *Leach v. Betters*, 599 A.2d 424, 426 (Me. 1991). The Court nonetheless assumed, though it did not decide, that the execution of such an arrest in a wanton or oppressive manner would vitiate the protections of Section 8111(C) of the Act. *Id*. This court accordingly has declined, in a summary-judgment context, to grant absolute immunity as to state-law causes of action related to a plaintiff's triable claim of arrest with excessive force. *McLain v. Milligan*, 847 F. Supp. 970, 977-78 (D. Me. 1994). The type of excessive force complained of by McLain, moreover, is remarkably similar to that alleged by Pike. *Id*. at 976 (throwing plaintiff to ground, kneeing back, smashing face onto pavement). For the same reasons, the beatings of which Pike complains cannot be said as a matter of law to have been devoid of "bad

faith" for purposes of immunity under Section 8111(E) of the Act. A triable issue exists as to whether the officers needlessly and gratuitously beat a suspect — the type of conduct that inherently connotes "bad faith."

Because all of Pike's tort claims hinge, at least in part, on the alleged use of excessive force, none fall within the ambit of absolute personal immunity.[4] Nor, because of the existence of disputed material facts, are three of the tort claims susceptible of summary judgment on the merits. A police officer's use of excessive force in making an arrest can form the predicate for claims of assault, battery and false imprisonment. See, e.g., *Nadeau*, 395 A.2d at 116 (false imprisonment); *Bale v. Ryder*, 290 A.2d 359, 361 (Me. 1972) (assault and battery).

The remaining two claims are, however, flawed as a matter of law. As the defendants note, Pike identifies intentional conduct as the basis for his claim of the officers' negligence. Motion at 29; *see also* Complaint ¶ 26 ("their negligent conduct, more specifically, while placing the Plaintiff under arrest did intentionally inflict harmful and offensive contact"). In so doing, Pike fails to plead conduct the hallmark of which is carelessness, as opposed to willful wrongdoing. *See, e.g., Blanchard v. Bass*, 139 A.2d 359, 361 (Me. 1958). The negligence claim thus is defective on its face.[5]

Turning to the final tort claim, intentional infliction of emotional distress, the Law Court has

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[4]Pike's claim of false imprisonment incorporates an element of excessive force as well as that of arrest without probable cause. Complaint ¶¶ 36-37. The use of excessive force, under Maine law, can form the predicate for a claim for false imprisonment. *Nadeau v. State*, 395 A.2d 107, 116 (Me. 1978).

[5]In his opposition, Pike suggests that the negligence claim applies to the town and the police department rather than to the individual officers. Objection at 14. This is not, however, how the claim is pleaded in his Complaint. Even were this count applicable to the town and the police department, it would not survive summary judgment for the reasons discussed herein.

described its elements as follows:

> (1) intentional or reckless conduct which inflicts severe emotional suffering or would be substantially certain to result in such suffering; (2) conduct so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable; (3) the defendant's conduct must cause the plaintiff emotional suffering; and (4) the plaintiff's emotional suffering must be severe so that no reasonable person could be expected to endure it.

Latremore v. Latremore, 584 A.2d 626, 631 (Me. 1990) (citations omitted). The summary-judgment record in this case is devoid of properly supported evidence of an essential element of the claim — the suffering of severe emotional distress. It thus fails as a matter of law.

E. Municipal Liability

In Counts VI and VII of his Complaint, Pike seeks finally to hold the Town of Kennebunk and its police department liable for the actions of the three officers on a theories of intentional or negligent supervision and failure to train.[6] Complaint ¶¶ 54-60.

A municipality in a section 1983 case may not be held liable for the acts of its employees on a *respondeat superior* basis. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978). Rather, it may be held liable for such isolated acts only to the extent they are tantamount to a "custom" or "policy" of the municipality. *Id*. at 694. This may be proved by a showing that (i) the acts were carried out pursuant to established policy or were reflective of a governmental custom, or (ii) were taken or ratified by a final policymaker for the municipality or someone to whom final policymaking authority clearly was delegated. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121, 123, 126-27 (1988).

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[6]To the extent that Pike seeks to hold the town and its police department liable on tort, rather than constitutional, grounds, the Maine Tort Claims Act confers immunity to municipalities for the type of conduct of which Pike complains. *See* 14 M.R.S.A. §§ 8103(1), 8104-A & 8104-B(3).

The summary-judgment record cannot support a finding of municipal liability on any of the above theories. There is no evidence of an official policy condoning the use of excessive force, arrest without probable cause or failure to attend to serious medical needs. Rather, the record reveals the opposite — that the Kennebunk Police Department has implemented policies designed to prevent the occurrence of any of these violations. Nor is there evidence that the beatings of which Pike complains were reflective of any widespread custom. Pike presents evidence only of his own treatment at the hands of the Kennebunk police. The existence of a municipal policy or custom generally is not inferable from one incident. *See, e.g., Swain v. Spinney*, 117 F.3d 1, 11 (1st Cir. 1997). Finally, there is no evidence of knowledge, let alone ratification, of the alleged conduct of officers Hanson, Harmon and Fisk by anyone with final policymaking authority for the Town of Kennebunk or its police department.

Summary judgment with respect to the town and its police department therefore is appropriate.

F. Punitive Damages

Pike demands punitive as well as compensatory damages from the individual officers. Complaint at 5. A defendant in a section 1983 action may be subject to such damages for conduct "shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983).

Under Maine law, "[p]unitive damages are available if the plaintiff can establish by clear and convincing evidence that the defendant's conduct was motivated by actual ill will or was so outrageous that malice is implied." *Palleschi v. Palleschi*, 704 A.2d 383, 385-86 (Me. 1998).

It is possible that, were a trier of fact to credit Pike's version of events, it could discern

reckless indifference to his federally protected rights and/or conduct so outrageous as to imply malice. Pike's claim for punitive damages therefore should be reserved to the trier of fact. *See, e.g., Lyons v. City of Lewiston*, 666 A.2d 95, 102 (Me. 1995) (fact issue existed as to whether defendants acted with reckless indifference to demonstrator's federally protected rights, precluding summary judgment as to punitive-damages claim).

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' summary judgment motion be **GRANTED** as to the Town of Kennebunk and the Kennebunk Police Department with respect to all claims, **GRANTED** as to officers Hanson, Harmon and Fisk with respect to Counts III (negligence), that portion of Count IV (false imprisonment) that relates to alleged arrest without probable cause, Count V (intentional infliction of emotional distress) and those portions of Count VI that relate to alleged arrest without probable cause, failure to provide medical assistance and violation of 42 U.S.C. § 1985 and 18 U.S.C. § 245, and in all other respects **DENIED**. Assuming that this recommendation is adopted, the only issues remaining for trial, as against the three defendant police officers, will be Count I (assault), Count II (battery), Count IV (false imprisonment) solely as premised upon the use of excessive force, and Count VI solely as premised upon the use of excessive force and grounded in 42 U.S.C. § 1983.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 29th day of October, 1998.

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David M. Cohen
United States Magistrate Judge